Introduction

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It is unusual in the world of constitutional interpretation for a single doctrine to become both widely used and widely discussed by jurists working in different legal traditions. For example, the idea of originalism as an interpretive approach to constitutional law rose to prominence in the 1980s and occasioned considerable discussion – but that discussion was primarily limited to the United States. Proportionality, in contrast, has occasioned worldwide attention.

Proportionality is a doctrine in constitutional and public law that has its origins both in Germany and in Canada (in its post-Charter jurisprudence). The doctrine, with its multi-part formulation of rationality, necessity, and proportionality as such, has spread to many countries and courts engaged in the interpretation and enforcement of constitutional or other basic norms against states or other governmental entities. Yet the concept remains a contested one. It is contested geographically, because US constitutional jurisprudence is not (yet) broadly influenced by the doctrine. It is also contested conceptually. With respect to classic liberal rights, some commentators argue that proportionality analysis fails to treat rights as trumps. With respect to the positive rights typical of "second" and "third" generation constitutions, some argue that proportionality analysis fails to take adequate account of the complexity of the policy judgments that underlie legislative choices.

The leading theorist of proportionality in Europe is Robert Alexy, whose book *A Theory of Rights* (1985) laid out and justified the practice of the German Constitutional Court in testing laws claimed to intrude on rights for proportionality. In the English-speaking world, David Beatty's book *The Ultimate Rule of Law* (2004) is perhaps the leading work promoting scholarly discussion of proportionality as doctrine. Both of these influential authors are represented in this volume, along with a diverse group of scholars from around the world. Collectively, this volume may be seen as both a stock-taking and an effort to

understand next chapters in the rise – or fall – of proportionality analysis in constitutional law.

Part I of the book considers paradigms of proportionality. It opens with a chapter by Robert Alexy in which he explains and defends the rationality of proportionality as a method of interpretation. Jürgen Habermas had famously attacked proportionality as lacking in rationality. In his chapter, Alexy demonstrates the ability of the weighting approach to express in a structured form the elements of a well-ordered decision. His chapter goes beyond earlier work in adding an element reflecting agreement with Aharon Barak that in evaluating the extent of a constitutional rights limitation it is necessary to evaluate the importance of the right, a point that he elaborates in a new "weight formula" for part of the "law of balancing." In addition, Alexy clarifies that the weighting system reflected in his equations is not intended for judges to use but rather for scholars to use to understand an idealized process of judging. Judges have to evaluate normative and empirical arguments to reach conclusions about the relative weight of the different interests involved and they must do so through "ordinary language," rather than through direct application of formulas that are, like a microscope's view of organisms, able to give more precise and deeper understandings of the structure of law's application.

Frank I. Michelman considers proportionality outside of the courts – that is, in a system in which both courts and political decision-makers might be thought of as applying proportionality. He distinguishes between proportionality as "protocol, as ethical disposition, and as a logical structure of human or constitutional rights." He argues that while the ethic, or deep logic, of proportionality operates in what he calls the "tacit constitutional environment" of the legislature, the "protocol" of proportionality doctrine cannot do so because the protocol requires a particular discourse incompatible with a tacit constitution. In this part of his argument he focuses on an idealized version of the British political constitution in which the constitution consists of "behavioral vectors" that can only be tacit. He then turns to the idea of popular constitutionalism and concludes that "[p]opular constitutionalism and discursive regimentation simply do not mix." In short, he argues, the disciplined sequence of questions that courts, applying proportionality doctrine, ask are inconsistent both with the tacit understandings that underlie unwritten constitutions, as in the UK, and with the nature of truly political discourses, which would not remain political discourses if they were conducted only through judicialized inquiries.

Mattias Kumm offers an account of what constitutional courts do when they engage in proportionality review that seeks to resolve several paradoxes, the most significant of which is an expansive conception of rights, in which "any claim of injustice" can plausibly be asserted as a rights violation, with

the coexistence of democratic self-government. He reasons that this expansive conception of rights is connected to Enlightenment principles that the purpose of both law and politics should be understood as seeking justice among free and equal persons. This conception of rights also extends to understanding the institutions of liberal democracy – including free voting for public representatives – as themselves required by conceptions of human rights. Yet the expansive conception of rights can create situations of "human rights overkill," which allow too little room for self-determination and democratic decision-making. This can be avoided, he argues, when proportionality review is understood "as *policing the boundaries of the reasonable, not the boundaries of justice*," that would evince appropriate deference to decisions of political branches by focusing on the adequacy of justifications for imposing burdens on people without a "sufficiently plausible defence in terms of public reasons."

Grégoire Webber offers a critique of proportionality as a theory of rights and argues instead for a more absolute conception of what exactly is a right. While he finds it acceptable as an account that seeks to reconstruct what courts have done, he argues that as a normative theory proportionality approaches are inconsistent with the idea of a right as imposing a correlative duty. Webber uses the idea of absolute rights to illustrate this normative critique. He notes that some theorists of proportionality deny that any absolute rights can be ascertained except through applying proportionality analysis. Webber does not accept this account, arguing, for example, that the right not to be a slave depends not on the empirical inquiries of the standard multi-part proportionality analysis but on a set of independent normative arguments. Webber instead argues that the "special status awarded to rights in moral and political and legal thought . . . affirms the action-determining quality of rights." He urges resistance to an understanding of rights based only on interests and that divorces the determination of what is right from what is just. Instead, he argues for conceiving of rights as relational and holding true for all in the same situations, thereby embodying the "foundational equality of persons." He argues that it is helpful "to reformulate claims of right as claims of justice" in so far as justice claims "look both ways along a relationship between persons" and rejects arguments that the scope of a right can be understood independent of their limitations, as others, including Kai Möller and Aharon Barak, have argued. In Webber's view, rights "aspire to be absolute" – that is, their content should be sustainable in terms of correlative duties that do not depend upon the kinds of interest analyses called for by proportionality tests.

The next part of the book considers a territory that proportionality doctrine has not (at least not yet) taken over – the jurisprudence of the Constitution of the United States. Moshe Cohen-Eliya and Iddo Porat offer a historical

account to explain why proportionality analysis in constitutional law has been embraced by European courts but not by American courts. They argue that in Europe administrative law developed in much greater detail and complexity in the nineteenth century, long before administrative law was well developed in the United States. As part of their reviewing functions courts in Germany developed the antecedents to proportionality analysis in reviewing administrative and police action; "rights" were developed without a "rights"-based text, but as an elaboration of the idea of necessity or reasonableness of administrative action. In the United States, by contrast, they argue, constitutional law and doctrine developed in advance of administrative law and doctrine, and constitutional rights claims were always anchored by a constitutional text. This tended to drive constitutional adjudication towards questions of interpretation of the words in which the rights were embedded, rather than to focus as much on the justification for government action claimed to infringe on the rights.

In his chapter, Kai Möller argues that the principle of proportionality cannot simply be transplanted to US constitutional jurisprudence. Rather, he argues that proportionality is "part and parcel of a conception of rights that must be adopted or rejected as a whole." His account includes "rights inflation," as a necessary concomitant of proportionality – that is, a very generous interpretation of when the interests protected by a right are at stake and would include all liberty interests, even if seemingly trivial. In addition, he argues, proportionality requires a conception of rights that includes positive obligations on the part of the government as well as the fulfillment of socioeconomic rights. Finally, he argues that the conception of rights in which proportionality review is embedded necessarily contemplates that rights exist in a substantive way, such that private actors may have obligations to protect or advance rights through constitutional doctrines of horizontal effect. Without these elements of constitutional law, he argues, proportionality doctrine cannot be transferred to and applied in the United States.

Jacco Bomhoff's chapter suggests that a full account of US "exceptionalism" on proportionality must recognize multiple possible causes. Intriguingly, he argues that "thinking comparatively" about punitiveness and proportionality has considerable payoffs for constitutional understandings. Engaging in "*comparative*-comparative law," Bomhoff compares the fields of comparative constitutional law and comparative criminal law (fields that may overlap to greater or lesser degrees in different systems). In particular, he seeks to explore the possible relationships between US "exceptionalism" in constitutional law with respect to the failure to embrace proportionality doctrine as a general tool and the extraordinary harshness of American criminal justice. He draws attention to the neglected subject of the "intensity" of protections provided

by various doctrines, a point that has particular salience in the context of the harshness of American punishments. He notes the important challenge of identifying "the appropriate time frame for causal explanations of divergence" and the very different possible ways of integrating cultural contexts as an explanation. He suggests that the divergence in punitiveness between Europe and the United States is a relatively recent phenomenon, dating from the early 1970s. Deep issues of traditional culture cannot by themselves account for this. Likewise, perhaps, proportionality's development has been a child of the later twentieth century, despite its older roots. After considering other causes, he interestingly suggests an association of proportionality and more moderate punishment with relatively strong and secure states, raising the question whether the United States began to doubt its strength in the post-1970s period. And he observes that the United States has a "high[] tolerance for wrong answers," as an explanation for both of the exceptionalisms he considers. He suggests that in understanding these exceptionalisms, "the real action . . . lies beyond proportionality . . . in the way law embodies and shapes . . . our individual and collective responses when ideals and practice do not match."

Next Vicki C. Jackson considers the application of proportionality doctrine to equality cases. Drawing on both Canadian and US case law, she argues that proportionality has distinctive benefits for equality analysis, not only in testing for improper motives but also for interrogating judges' perhaps unconscious sense of what is "natural" and for accounting for the administrative costs of alternatives relevant to analysis under both proportionality doctrine and US strict scrutiny. At the same time, she argues that proportionality doctrine as such is not well designed to provide assistance in some of the difficult normative questions that are typical of equality cases, including what third-party interests may legitimately be considered. She urges that the principle of proportionality ought to inform how judicial review of equality challenges in the United States is performed – moving towards a less highly differentiated categorical doctrine based on tiers of review and a greater willingness to test the justifications for all claimed discriminations.

An alternative approach to the question of proportionality being adopted in the United States is advanced in Vlad Perju's chapter. Perju argues that the question of the relationship of proportionality doctrine to stare decisis must be considered to make it easier for common law systems to adopt proportionality doctrine. In contrast to the argument briefly made in Professor Beatty's 2004 book – that precedent is not relevant to application of proportionality – Perju seeks to explore "how a change in the formal structure of proportionality analysis would increase the chance of proportionality's successful transplant into American constitutional law." His proposal in essence would be to add an

additional step to the existing sequence of questions that would "require judges to assess the outcome of the legal analysis at the previous stages against the disruption that outcome would cause to settle the constitutional doctrine. The greater the departure from constitutional precedent, the stronger must be the reasons that justify it." Perju offers a number of reasons for this additional step, which he refers to as "disruption analysis." For example, he argues that "channeling all considerations of precedent and history to a distinct step . . . rather than allowing them to infiltrate diffusely" will enhance transparency. And he suggests that by disaggregating the disruption question from other elements of the weighing analysis in the stage of "proportionality as such," his proposal would reduce the risks of confusion.

Part III of the book includes chapters on the possible extension of proportionality to some of the newer arenas of thinking about constitutional law and justice. Stephen Gardbaum's chapter takes up the application of proportionality to issues involving positive rights as against the state or involving the horizontal application of rights to the actions of private parties. He provocatively suggests that there are "internal limits" to the extension of proportionality and that "the further growth of the newer types of rights and proportionality may be inversely, and not positively, related." Gardbaum's careful study of cases from the European Court of Human Rights and the German Constitutional Court suggests that in dealing with positive rights claims, "the court focuses almost exclusively on first stage issues of determining the content and scope of the right, and whether it has been infringed," rather than on the issues of justification to which proportionality doctrine is addressed. In this respect there is a substantial difference in the treatment of "negative" and positive right cases. With respect to horizontal effect, Gardbaum finds that if courts were applying proportionality analysis they "did not do so in the straightforward, even formulaic way that is standard in ordinary vertical/negative rights cases." More generally, he suggests that to treat positive rights in the same way as negative rights would be inconsistent with the ideal of human dignity that prompts their recognition in the first place: to treat infringements on those rights as justifiable is, arguably, inconsistent with their very recognition as necessary to the minimal conditions for life with human dignity.

Katharine G. Young's chapter explores the way in which a more general concept of "reasonableness" displaces the more detailed structure of proportionality in the adjudication of economic and social rights with a form of review that is more rigorous than deferential rational basis review. Like Gardbaum, she observes through close study of case law, especially in South Africa, that in cases involving the newer positive rights courts are less inclined to use the structured proportionality doctrine. While she argues that the absence of structured proportionality doctrine from social and economic

rights is surprising, she also argues that the principle of proportionality is in fact reflected in courts' decisions in this area. She identifies three differences between proportionality doctrine and reasonableness review: first, in defining the content of the claimed right, where, under traditional proportionality analysis, the right is given a generous scope, but under reasonableness review the task of defining the content of the right is not always clearly undertaken at the outset. Second, under reasonableness review deference is "bound up with the content inquiry," while under proportionality, deference is given through the margin of appreciation. Yet, she observes, the two approaches to deference may end up being equivalent. Third, she observes, the structure of proportionality is sequenced and more disciplined, whereas reasonableness is a more holistic inquiry. She suggests that "proportionality-inflected reasonableness" review may better protect social and economic rights than would the more structured proportionality review, if the latter were weakened by extensive application of the margin of appreciation. In contrast to Gardbaum's argument about the internal character of positive rights, Young's argument may rest on the contingent interpretive practices of the jurisdictions under review.

Finally, we include David Beatty's provocative chapter here, though it could well have been placed in the opening section, insofar as Beatty sketches how traditional proportionality doctrine works in a series of seemingly hard cases. In considering same-sex marriage, for example, he agrees with courts that have found the various government justifications for bans insufficient: as against the claims by same-sex partners of hurtful discrimination, there was "nothing of equivalent weight." Using same-sex marriage and the death penalty as examples, he argues that the appeal of proportionality is accounted for first, because it allows adherence to the "'positivist' tradition that the criteria that determine the validity of any law are purely formal." It responds, he argues, to the demand that the rule of law be consistent, prospective, public, and capable of being followed by those whom the law addresses; indeed, using proportionality as "the ultimate criterion of legality" is one that "ordinary people can understand." It also expresses ideals of moderation and even-handedness in government. Finally, he argues, balancing through proportionality provides a "mantle of impartiality," by making the weights that the parties ascribe to their own interests decisive. Beatty extends his analysis, then, to claims of religious freedom, motorcycle helmet safety laws, female priests, circumcision, veiling, and the killing of innocent civilians; in this last, for example, Beatty argues – in possible disagreement with the German Constitutional Court – that "killing 300 people on a plane who face certain death if the state does nothing, to save ten times that many, is a proportional and therefore legitimate use of force." But Beatty goes beyond cases, to suggest that the questions identified by proportionality doctrine provide good rules for "self-government" – including

the choices that each of us makes on a daily basis about what to eat. Here the discussion provides an interesting alternative to Michelman's treatment of proportionality in non-judicial settings.

The concluding section has two chapters, one by a skeptic about, the other by a proponent of, proportionality analysis. Mark Tushnet's chapter explores in depth reasons for skepticism about some claims made by proportionality proponents, including Beatty. Beatty entitled his chapter, "Making Hard Cases Easy;" Tushnet responds by titling his chapter, "Making Easy Cases Harder." And so he does.

If one conceives of most legislation as reflecting compromises, based not on reasoned justification but on power negotiations, Tushnet argues, it is much harder to approach the question of justification through the lens of legislative purpose. Moreover, he argues, in many cases the intrusions on rights and the reasons for the intrusion are at least arguably of the same weight, in which case, he further argues, there is little reason to disturb a legislative judgment. He notes a number of other problems, including the difficulty of determining when exceptions to a generally legitimate but occasionally disproportionate rule are required; in each case, administering a scheme to provide for the exception will bear certain costs, as compared with other alternatives. Since "money for administering the alternatives has to come from somewhere," he argues, the costs cannot be ignored in determining proportionality as such or in deciding what are equally effective alternatives. And he further suggests that legislation frequently "embodies a decision to achieve a permissible social goal with attendant intrusions on individual rights *at a financial cost* found acceptable when compared to other methods of achieving that goal (less effectively) with smaller intrusions on individual rights at a higher cost . . . [T]he cost level of the regulatory mechanism . . . is not susceptible to (non-arbitrary) evaluation by reviewing courts – except perhaps by a rather loosely administered rationality requirement . . . " He construes two Canadian cases as arguably recognizing that financial considerations, at least if of a substantial magnitude, could qualify as sufficiently import to warrant interference on rights. Expressing skepticism that one form of doctrine rather than another will have consistently better results (whether proportionality doctrine or US-style tiers of review) in the hands of "ordinary" judges, Tushnet concludes that what should be sought is not better doctrine, but judges who have good judgment.

In his concluding chapter, Aharon Barak, who has explored and used proportionality doctrine both as a scholar and as President of the Supreme Court of Israel, offers a legal-analytic perspective on what he calls "internal" and "external" models of proportionality analysis and sets forth an agenda for future research. Barak identifies a number of analytical differences between

his approach and that of Robert Alexy, for example, including the role of "purpose" inquiry. The internal mode, which he associates with Alexy's perspective, takes off from a prima facie understanding of the constitutional right; the external model, which is Barak's approach, takes off from viewing the limitation on the constitutional right as a prima facie violation. The prima facie character of either the right, or the violation, is then, in both models, removed at the next stage. But, he explains, other significant differences exist in the two models including the treatment of internal qualifiers to principle-shaped constitutional rights, the possibility of absolute rights, the applicability of proportionality analysis beyond constitutional rights questions (to issues of constitutional structure), and the application of horizontal rights. Among the issues he identifies for future research are how to treat laws that both extend benefits and impose limitations in determining whether a constitutional right has been limited at the first stage of analysis; how to define a proper purpose; whether proportionality applies to the choice of constitutional remedies or to constitutional amendments; the relationship of proportionality to common law limitations; and how proportionality proponents should learn from proportionality's critics.

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This rich collection reveals both commonalities and differences among the contributors. A number of the essays implicitly accept that the proportionality of government conduct is a metaprinciple of good governance, including adjudication, and question the capacity of particular doctrines to advance this goal. As Tushnet's chapter suggests, concerns for proportionality may inform the development of categorical rules; that is, proportionality as a principle may not always require case-by-case application of proportionality. In so arguing, however, the chapter seems to contemplate that proportionality of government action is, in principle, generally a good thing. Jackson's chapter argues that a proportionate approach to equality cases may be expressed through a more unified and flexible standard than existing tiers of review, without necessarily requiring embrace of the formal doctrine as practiced in other countries. Bomhoff's observations concerning the lack of connection between doctrine and the intensity of protection offered also may implicitly accept the benefit of valuing proportionality in government action, as does Michelman's attention to the idea of proportionality in legislative discourse. These and other chapters might be taken to suggest that doctrine may be constraining only to extent that the interpreters embrace a deeper ethic of proportionality as an element of justice.

At the same time, the collection illuminates a set of real differences among scholars. Tushnet, for example, views administrative costs as a legitimate basis for government action but not suited to proportionality analysis, while Jackson,

agreeing that costs are sometimes a legitimate factor, argues that proportionality doctrine may be useful in addressing such issues. Möller argues for the importance of treating all liberty interests as protected rights, while Webber argues that doing so is inconsistent with the deontological character of rights as involving correlative duties. Alexy and Barak disagree about the importance of a separate or threshold consideration of the importance of the government's goals. Disagreements also exist about the nature and causes of US "exceptionalism." Cohen-Eliya and Porat suggest the explanation lies in features of legal history going back to the nineteenth century, including the timing of the development of administrative law and the longstanding presence of a constitutional text providing for rights, while Bomhoff suggests that the time frame for understanding US exceptionalism may be at least in part an aspect of a much broader set of cultural features, not necessarily of longstanding but emerging in the late 1960s or early 1970s, that is, after or near the end of the Warren Court period. One topic not addressed as such in this volume but raised by some of these differences is whether a higher tolerance for wrong answers is related to a higher commitment to democratic voting as a decision rule.

The cover art of this book displays a shell, whose proportions embody the "golden ratio," the mathematical ratio that the numbers in the Fibonacci Sequence approach, and one believed by many to be aesthetically pleasing when applied to the design of art and architecture, as shown on the cover. Yet the idea of proportionality in law cannot approach the certitudes of a mathematical ratio. The idea of a "golden mean" or moderate, middle way, has its roots in many philosophical and religious traditions; yet the scale, whose image is sometimes associated with the balancing element of proportionality review, can be understood to suggest only a balanced compromise, or a balance of power, rather than a way of ascertaining the correct rule of law. Proportionality may be an element of legal justice, but the principle of proportionality does not itself provide definitive answers to the question of who or what institution should have final decisional authority on the many difficult issues of constitutional law – including allocations of powers, institutional authority and human rights – that frequently come before courts. Readers of these essays will thus have to evaluate for themselves whether proportionality as a doctrine or a principle helps or hinders courts and other constitutional actors in the performance of their public functions, and whether its use should be expanded to the new frontiers these essays consider.