

## Introduction

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### I LATIN AMERICAN VIEW ON THE GLOBALIZATION OF PROPORTIONALITY

This book explores and critically assesses how proportionality analysis has been understood and used in Latin America over the course of three decades of democratic life. As the different contributions foreground, proportionality has indeed become a key organizing concept in the constitutional law of a region where constitutions with openly transformative aims coexist with appalling degrees of social inequality.

This basic fact then partially supports conventional narratives about the emergence and expansion of a global constitutional grammar that features proportionality (together with the amplification of rights catalogs, direct applicability and horizontal effect) among its core components.<sup>1</sup> Available accounts about the origins and migrations of proportionality regularly document how it becomes an important methodology in European judicial review after World War II, globally spreads with the democratic transitions around the world in the late 1980s and the early 1990s, and takes global hold with the new century.<sup>2</sup> As some scholars have remarked,

<sup>1</sup> David S. Law, “Generic Constitutional Law” (2005) 89 *Minnesota Law Review* 652; Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

<sup>2</sup> Aharon Barak, *Proportionality: Constitutional Rights and Their Limitation* (Cambridge University Press 2012); David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004); Vicki Jackson and Mark Tushnet (eds.), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017); Mordechai Kremnitzer, Talya Steiner and Andrei Lang (eds.), *Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice* (Cambridge University Press 2020); Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge University Press 2017); Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012); Alex Stone Sweet and Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press 2019); Alex Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47 *Columbia Journal of Transnational Law* 68.

however, this standard reconstruction is actually based on the experience of a handful “usual suspect” countries, whose public language is English.<sup>3</sup> While this body of literature regularly refers to its spread in Latin America, the amount of information it actually provides about proportionality-related developments in the region is negligible. In any case, Latin America does not appear in its context as offering an original paradigm on the theory and practice of proportionality but as illustrating the application of the original European version to regional problems and contexts, performing legal and political roles analogous to those it performs in the democracies of the North.

A minimally comprehensive appraisal has not been attempted by regional scholars either – neither in English nor in Spanish. There certainly exists a body of work (mostly in Spanish) focusing on novel aspects of proportionality theory, like the work on disproportionality by omission or defect, or on networks of balancing-derived rules, still poorly known in the international academic sphere.<sup>4</sup> There is also commentary on specific instances of proportionality practice in courts.<sup>5</sup> Yet the project of more intensively and systematically trying to reconstruct and evaluate what proportionality has meant in the different countries, and – more importantly – how it has interacted with the broader legal and political processes that these countries have traversed, or how it fares when viewed from lenses interested in assessing emancipatory and equalitarian dynamics, has not been attempted.

<sup>3</sup> Virgílio Afonso da Silva, “How Global Is Global Constitutionalism? Comments on Kai Möller’s The Global Model of Constitutional Rights” (2014) 10 (1) *Jerusalem Review of Legal Studies* 175; Vanessa MacDonnell, “The Reductionism of Global Models of Constitutional Rights” (2018) 12 (1) *Law and Ethics of Human Rights* 73.

<sup>4</sup> Rodolfo Arango, *El concepto de derechos sociales fundamentales* (Legis 2005); Rodolfo Arango, “La prohibición de retroceso en Colombia” in Christian Cortis (ed.), *Ni un paso atrás. La prohibición de regresividad en materia de derechos sociales* (Editores del Puerto 2006) 153–171; Gustavo Beade and Laura Clérico (eds.), *Desafíos a la ponderación* (Universidad Externado de Colombia 2011); Laura Clérico, *El examen de proporcionalidad en el derecho constitucional* (Eudeba 2009); Laura Clérico, *Derechos y proporcionalidad: Violaciones por acción, por insuficiencia y por regresión. Miradas locales, interamericanas y comparadas* (Instituto de Estudios Constitucionales del Estado de Querétaro 2018); Federico De Fazio, *Teoría principialista de los derechos sociales* (Marcial Pons 2019); Gloria Patricia Lopera Mesa, “Proporcionalidad de las penas y principio de proporcionalidad en derecho penal” in Federico De Fazio (ed.), *Principios y proporcionalidad revisitados* (Instituto de Estudios Constitucionales del Estado de Querétaro 2021). Adopting a critical stance, Francisco Urbina, *A Critique of Proportionality and Balancing* (Cambridge University Press 2017).

<sup>5</sup> Rodolfo Arango, “El derecho a la salud en la jurisprudencia constitucional colombiana” (2018) 2 (5) *Revista Brasileira De Direitos Fundamentais & Justiça* 13; Federico De Fazio and Celeste Novelli, “Una defensa de la sentencia Gonzáles Lluy con Ecuador dictada por la Corte Interamericana de Derechos Humanos” (2021) 17 (1) *Anuario de Derechos Humanos* 25; Roberto Niembro, *La argumentación constitucional de la Suprema Corte* (Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas and Instituto de Estudios Constitucionales del Estado de Querétaro 2021); Verónica Undurraga, “Proportionality in the Constitutional Review of Abortion Law” in Rebecca Cook, Joanna Erdman and Bernard Dickens (eds.), *Abortion in Transnational Perspective: Cases and Controversies* (University of Pennsylvania 2014) 77–97.

We launched the project of this book with a view on covering this gap. We wanted to enrich our shared knowledge about Latin American proportionality-related trends (and about differences among the various regional jurisdictions) but to additionally provide material to enrich the picture of global constitutional developments. Joining the still very limited number of studies about the use of proportionality in noncentral countries,<sup>6</sup> the volume would like to help build a new global more worthy of the name.

The chapters importantly complement and partially amend prevailing assumptions in the global study of proportionality. The “discovery” that proportionality was used in constitutional adjudication in some regional countries since the early twentieth century as well as its long-standing use in Colombia for the review of states of exception modify the assumption that proportionality spread horizontally over the globe from Germany after World War II. Evidence of its wide application in the domain of social rights and its role in the enforcement of nonretrogression mandates at the national, Inter-American and international levels amend the assumption that proportionality is a nondeferential methodology with scarce space in this domain.<sup>7</sup> The variety of methodological turns displayed by the judicial use of proportionality in the region and the way it has been applied by the Argentinian, Colombian and Inter-American courts to honor mandates of special protection for disadvantaged groups undermines the idea that there are two basic approaches (the American tiered approach and the German unified one). These findings not only enrich comparative constitutionalism in terms of epistemological accuracy, but have practical import as well. The 2020 pandemic has confirmed proportionality’s permanent centrality as an essential tool for power control and guarantee of basic fairness while making relevant, precisely, dimensions of the practice that have been distinctively developed in Latin America, such as its role in the control of states of

<sup>6</sup> Andrés Caixeta da Silva Mendes, “O STF e a proibição de insuficiência: A proporcionalidade a litigância dos direitos sociais,” <https://sbdp.org.br/student/andre-caixeta-da-silva-mendes/>; David Kenny, “Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland” (2018) 66 (3) *The American Journal of Comparative Law* 537; Afroditi Marketou, *Local Meanings of Proportionality: Judicial Review in France, England and Greece*, Ph.D. thesis, European University Institute (2018); Alberto Coddou McManus, *A Transformative Approach to Anti-discrimination Law in Latin America*, Ph.D thesis, University College London (2018); João Andrade Neto, *Borrowing Justification for Proportionality: On the Influence of the Principles Theory in Brazil* (Springer 2018); Carlos Bernal Pulido, “The Constitutional Protection of Economic and Social Rights in Latin America” in Rosalind Dixon and Tom Ginsburg (eds.), *Comparative Constitutional Law in Latin America* (Edward Elgar 2017) 325–342; Po Jen Yap (ed.), *Proportionality in Asia* (Cambridge University Press 2020).

<sup>7</sup> For an analysis of this question, see Katharine G. Young, “Proportionality, Reasonableness and Economic and Social Rights” in Jackson and Tushnet (n 2) 248–272 and Stephen Gardbaum, “Positive and Social Rights: Proportionality’s Next Frontier or a Bridge Too Far?” in Jackson and Tushnet (n 2) 221–247.

exception, insufficient state action, distribution of scarce resources, and inclusion of marginalized and discriminated against individuals and groups.<sup>8</sup>

The distinctiveness of Latin American proportionality theory and practice results from the roles that constitutional law has historically played in regional efforts to eradicate pervasive forms of public and private abuse: authoritarianism; violence and armed conflict; arbitrariness; structural inequality; and poverty. Yet proportionality is also a parameter for positive construction. Serious violations undermine for sure the idea of rights optimization, but rights optimization also aspires to structurally orientate the development of new legal and social frames of interaction in potentially all domains. The relation between proportionality and transformation is then multidimensional. This does not imply that the transformation postulated by Latin American egalitarian constitutions has been actually accomplished. Most of the chapters, including several of those with a more theoretical bind, provide elements to engage in critical assessments that should be continued elsewhere, on the way to progressively clarify accomplishments, failures and pending tasks. We will say some more about all of this before summarizing what the reader will find in the specific chapters.

## II PROPORTIONALITY BETWEEN THE FIGHTING OF ABUSE AND CONSTITUTION-BUILDING

In the cover of an important book on the matter, proportionality is allegorized with a picture of the spiral inner layer of a nautilus shell, usually associated with the Fibonacci sequence and its ideas of perfect proportion.<sup>9</sup> We agree with the editors of that book that the image is more evocative than the image of the scales (proverbially associated to balancing). It is also particularly appropriate to portray the current shape of Latin American proportionality theory and practice, marked by the coexistence and mutual communication and determination of different historical experiences in the use of this methodology to respond to different forms of public and private power abuse. Each of these experiences, like an individual chamber in the shell, can be separately described and conceptually fleshed out, but it is their conjunction that conforms the most relevant image. Its expanding scope is useful to signify that each of them leaves standards and traces that accumulate on the

<sup>8</sup> See IACHR Resolution No. 01/20 Pandemic and Human Rights in the Americas; I/A Court HR, Statement 1/20, April 9, 2020, Covid-19 and Human Rights: The Problems and Challenges Must Be Addressed from a Human Rights Perspective and with Respect for International Obligations; Francisca Pou Giménez (2020) “Proportionality, Exception, and Transformation in Times of Pandemics: Expanding the Spectrum of Constitutional Relevance,” <https://lawlog.blog.wzb.eu/2020/05/30/proportionality-exception-and-transformation-in-times-of-pandemics-expanding-the-spectrum-of-constitutional-relevance/>.

<sup>9</sup> See Jackson and Tushnet (n 2).

previous ones without disappearing, thus providing tools to more effectively deal with current preoccupations.

The first Latin American historical experiences with proportionality invite one to ponder on the role of constitutional norms to counteract state abuse represented by an excessive use of presidential emergency powers, states of exception and other forms of executive emergency powers. Although constitutions only authorize the use of these powers in extreme situations that allegedly require inverting the normal operation of checks and balances, the executives of several Latin American countries transformed the use of these powers into a regular form of confronting ordinary problems.<sup>10</sup> As Barreto Rozo and González-Jácome's chapter shows, some judiciaries in the region have tried to curb the abusive use of emergency powers by developing a number of original interpretive strategies where proportionality has played a key part. Yet control of exceptionality remains a contemporary need: As seen in the chapter on Ecuador (Chapter 2), courts continue to make proportionality review of states of exception contemporarily. Its crucial role in the review of Covid-related measures – both under formal emergency declarations and in scenarios where standard constitutional rules have been kept in place – attests to this.

The second set of experiences is associated to the regional quest to affirm the basic principles of the rule of law before acts of state arbitrariness. While the most egregious rights violations fall under categorical prohibitions – forced disappearance, torture, and cruel or unusual punishment – other ills are addressed through proportionality analysis. For example, Clérico and De Fazio show in their chapter (Chapter 1) that by the early 1920s, judges in Argentina were already struggling to keep state power at bay through reasonableness standards. Later on, military dictatorships (Argentina, Chile and Brazil), authoritarian governments that in spite of having being democratically elected produced massive violations of human rights (Perú), and scenarios of internal armed conflict (Guatemala, El Salvador and Colombia) were followed by transitions to democracy and the rule of law. In most cases, important processes of constitution-making or reform marked the transition, and reformed or newly created apex courts were tasked with protecting the constitutional democratic order through judicial review. Since the mid-1980s, Latin America has thus been experimenting with varied and highly idiosyncratic forms of judicial activity – very much based on proportionality standards, as seen in several chapters – seeking to enforce and implement constitutional rights. In the first years of democratic life, some of the instances of proportionality-based adjudication involved low-profile, daily topics – see the modest reach of the initial litigation in countries like Perú, Mexico, Chile or Ecuador. Yet, as the chapters equally

<sup>10</sup> See, for example, Antonio Barreto, *La generación del estado de sitio: El juicio a la anomalía institucional en la Asamblea Nacional Constituyente de 1991* (Ediciones Uniandes 2011); Jorge González-Jácome, *Estados de excepción y democracia liberal en América del Sur: Argentina, Chile y Colombia (1930–1990)* (Universidad Javeriana 2015).

illustrate, with the partial exception of Chile, these cases began a process of setting limits to public and private power that over time crucially enabled a process of stronger constitutionalization.

And third, Latin America has now an already important record in confronting poverty, entrenched forms of income maldistribution and other sorts of inequality through constitutional law. A set of distinctive experiences with proportionality theory and practice spring from experiments pursued by courts, litigators and social groups in their quest to address this form of abuse. Proportionality has been a centerpiece in these debates because of its preponderant role in judicial tests devised to review state action that creates inequality. As several chapters illustrate, constitutional and supreme courts in Latin America, as well as the Inter-American Court of Human Rights, have devised distinctive equality tests where the traditional European approach to proportionality is modified to be more responsive to the demands of substantive equality and the region's structural problems. Moreover, the region's many forms of poverty, concentration of wealth and poor access to basic social rights have deep gender and race components – the social groups most affected by structural inequality are women, children, indigenous groups, Afro-descendent communities and migrants.<sup>11</sup> As various chapters attest, equality doctrines struggle to adapt traditional proportionality-based scrutiny to the challenges posed by these forms of injustice.

Developments in the equality domain have worked in tandem with those associated to the judicial enforcement of economic, social and cultural rights. Here, the region has importantly contributed to comparative constitutional law through decisive developments on the role of judges in the distribution of scarce resources, judicial interventions in public policies, the dialogical nature of the principle of separation of powers,<sup>12</sup> and the notions of human vulnerability and resilience, among other topics.<sup>13</sup> In the region, neoliberal capitalism is now widely understood to operate by immunizing the decision of economic and social policies from public

<sup>11</sup> See Economic Commission for Latin America and the Caribbean (ECLAC), *Social Panorama of Latin America*, 2020 (LC/PUB.2021/2-P/Rev. 1) 13, 59–62.

<sup>12</sup> Roberto Gargarella (ed.), *Por una justicia dialógica. El poder judicial como promotor de la deliberación democrática* (Siglo Veintiuno Editores 2014); Leticia Morales *Derechos sociales constitucionales y democracia* (Marcial Pons 2015) Jorge Roa Roa, *Control de constitucionalidad deliberativo* (Universidad Externado de Colombia 2019).

<sup>13</sup> See Víctor Abramovich and Christian Courtis (eds.), *Los derechos sociales como derechos exigibles* (Trotta 2003); Víctor Abramovich and Laura Pautassi (eds.), *La revisión judicial de las políticas sociales. Estudio de casos* (Editores del Puerto 2009); Mariela Morales Antoniazzi, Liliana Ronconi and Laura Clérico, *Interamericanización de los DESCAs* (Instituto de Estudios Constitucionales del Estado de Querétaro Max Planck Institute 2020); Christina Binder, Jane A. Hofbauer and Flávia Piovesan (eds.), *Research Handbook on International Law and Social Rights* (Edward Elgar Publishing 2020); César Rodríguez-Garavito and Diana Rodríguez-Franco, *Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the Global South* (Cambridge University Press 2015); Liliana Ronconi, *Derecho a la educación e igualdad como no sometimiento* (Universidad Externado 2018).

deliberation and managing the lives (and the deaths) of the most vulnerable populations through forms that are no longer based on the production of commodities but on their massive consumption and the financial indebtedness of precarious citizens.<sup>14</sup> As several chapters suggest, the distinctive use of proportionality in the adjudication of economic, social and cultural rights has been an important force in counteracting these tendencies and reinstall democratic deliberation on economic and social policies. The tradition of social constitutionalism inaugurated by the Mexican constitution of 1917 persists, but is now advanced by means that accord greater space to the judiciary. The use of proportionality in the domain of social rights and equality, together with other tools and strategies, progressively assembles what some have called a “constitutionalism of poverty” whose reconstruction and evaluation is a most relevant intellectual endeavor.<sup>15</sup>

Yet it is important to see that in Latin America proportionality displays a forward-looking, creative dimension, not only a reactive, corrective one. Last wave constitutions contain long bills that include social, economic, cultural and environmental rights, nontraditional rights holders, and advanced principles of adjudication and interpretation (direct enforcement, *pro persona*, horizontal efficacy, and state duties to respect, protect and fulfill, among others). These constitutions incorporate international human rights law through schemes that generate systems of multilevel protection, and include substantive and institutional solutions that are distinctive in the comparative scenario.<sup>16</sup> Within this strong framework of higher normativity,

<sup>14</sup> For theoretical elaborations of this characterization of Latin American neoliberalism, see, among others, Helena Alviar García, “Neoliberalism as a Form of Authoritarian Constitutionalism” in Helena Alviar García and Günter Frankenberg (eds.), *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Edward Elgar 2019) 37–56; Helena Alviar García, *Legal Experiments for Development in Latin America: Modernization, Revolution and Social Justice* (Routledge 2021); Jean Comaroff and John L. Comaroff, “Millennial Capitalism: First Thoughts on a Second Coming” (2000) 12 (2) *Public Culture* 291; Verónica Gago, *Neoliberalism from Below: Popular Pragmatics and Baroque Economies* (Duke University Press 2017); Saskia Sassen *Expulsions Brutality and Complexity in the Global Economy* (Harvard University Press 2014); Rocío Zambrana, *Colonial Debts: The Case of Puerto Rico* (Duke University Press 2021). See also Rosa Cañete Alonso, *Captured Democracies: A Government for the Few: How Elites Capture Fiscal Policy, and Its Impacts on Inequality in Latin America and the Caribbean (1990–2017)* (Oxfam Clacso 2018).

<sup>15</sup> See, for example, Eduardo Cifuentes Muñoz, “El constitucionalismo de la pobreza” (1995) 4 *Direito* 53.

<sup>16</sup> Rodrigo Uprimny, “The Recent Transformations of Constitutional Law in Latin America: Trends and Challenges” in César Rodríguez-Garavito (ed.), *Law and Society in Latin America: A New Map* (Routledge 2015) 93–111; Laurence Burgorgue-Larsen, “The Added Value of the Inter-American Human Rights System: Comparative Thoughts” in Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flávia Piovesan and Ximena Soley (eds.), *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford University Press 2017) 377–408; “Decompartmentalization: The Key Technique for Interpreting Regional Human Rights Treaties” (2018) 16 (1) *International Journal of Constitutional Law* 187; Alberto Coddou McManus, “A Critical Account of Ius Constitutionale Commune in Latin America: An Intellectual Map of Contemporary Latin



courts contribute to the development of the normative program in spaces marked by complexity, tensions and private or public omissions. As Jamal Greene remarks in the Epilogue, the judicial dynamism of the region influences approaches to interpretation and favors an approach to proportionality that is “juris-genetic,” in Cover’s terms.<sup>17</sup> Proportionality therefore becomes a technology of governance that regional courts have used with creativity, flexibility and adaptability, with varying results.

We can read in this light the contributions of courts to the development of regionally distinctive processes of transitional justice that rely strongly on law,<sup>18</sup> to the design of solutions and strategies for survival in the midst of socioeconomic precariousness, or to the development of rights-sensitive public policies in so many areas. While historically constitutional drafting and amendment have been privileged sites to confront and address the region’s most pressing problems – the constitution-making process now under way in Chile as a result of the 2019 protests demonstrates it once again – a longer time span of democratic survival makes adjudication more important. This positive, forward-looking but at the same time tentative constructive dimension of proportionality is nicely evoked by the picture on the book cover. The colored balls of yarn are transformed by hand into harmonic pieces of fabric, yet the process allows for a good deal of experimentation and, as suggested by the gravel surface on which they lie, protected by the patterned fabric, it typically advances in surroundings marked by extraordinary hardship and difficulty.

### III STRUCTURE OF THE BOOK AND OVERVIEW OF THE CHAPTERS

The book is organized into three parts. Contributions in Part I reconstruct and assess the role of proportionality-based adjudication in the processes of constitutionalization experienced by so many countries of the region over the past decades. Those in Part II explore how it has played out in an area that is crucial in the context of regional constitutionalism: equality and social rights. Part III provides elements that help situate proportionality-related developments within a wider frame of critical evaluation.

American Constitutionalism” (2022) 11 (1) *Global Constitutionalism* 110–138; Dixon and Ginsburg (n 6).

<sup>17</sup> Greene cites here the classic work by Robert M. Cover, “The Supreme Court, 1982 Term – Foreword: Nomos and Narrative” (1983) 97 *Harvard Law Review* 4.

<sup>18</sup> For classic versions of the role of law in Latin American political transitions, see Carlos S. Nino, “The Duty to Prosecute Past Abuses of Human Rights Put into Context: The Case of Argentina” (1991) 100 *Yale Law Journal* 2619; Diane Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” (1991) 100 *Yale Law Journal* 2537; Diane Orentlicher, “Settling Accounts’ Revisited: Reconciling Global Norms with Local Agency” (2007) 1 *International Journal of Transitional Justice* 10; Ruti Teitel, *Transitional Justice* (Oxford University Press 2002).



This division must be taken, however, as a loose scheme of organization that should not dilute the continuities and intersections between all parts of the book. There is information about country trajectories in all chapters; there is insight about the challenges of interpreting and implementing regional egalitarian constitutions in all chapters; and there are elements in all chapters to complexify and refine the analysis about the successes and failures of proportionality in attempts to transform contexts of structural injustice. Our goal was not to produce a systematic, comprehensive assessment of the status and uses of proportionality in the countries of the region, nor to generate a theoretical framework about its transformative potential and use it to evaluate country-based trajectories. We did not actually provide the authors a unified template to avoid confirmation bias and allow their analysis to reveal nuances, transversal topics and strands of analysis that do not emerge when people follow a script. This is a first volume about proportionality in Latin America but not the only possible conceptual and doctrinal take on the subject, and we hope it will be followed by many others.

Opening Part I, Laura Clérico and Federico De Fazio's analysis of Argentinian constitutional practice challenges prevailing academic narratives about the German origins of proportionality and its worldwide migrations. They identify a modality of proportionality analysis applied by the Argentinian Supreme Court from the beginnings of the 1920s, document the emergence in the 1940s of a two-prong "reasonability" test that includes suitability and proportionality in the narrow sense, and chart the emergence of an even stronger version in the 1980s whereby the Court makes strict scrutiny of the limitations of specially protected rights. The Court combines the reasonableness test with elements of stricter scrutiny when limitations on social rights affect persons in a situation of vulnerability. In showing that, in some places, "reasonability" means something different than in the Global North, and how often it is applied in an unstructured manner, this chapter is an antidote against essentialism and hasty comparativism. It also demonstrates that Argentinian constitutional practice is better explained under a narrative of interactions (with the US tiered tradition, the German variants, and international human rights sources) rather than one of migration.

In Chapter 2, Daniela Salazar Marín and Ramiro Ávila Santamaría focus on one of the most innovative constitutions of the region: the 2008 Constitution of Ecuador – a generous and detailed text with multiple provisions in tension with one another that has had to resort to proportionality analysis very often. In the great majority of cases, the Court uses only the fourth prong, treating "balancing" and "proportionality" as synonyms. The chapter shows how, over time, proportionality has indisputably become an element of the Ecuadorian legal landscape. In the context of a highly formalistic legal culture, it has been useful for a variety of ends, both regarding rights and the division of powers. It has helped police the exercise of state powers, materialize provisions that do not indicate their scope and effects in specific cases, and solve conflicts of rights both in the private and the public domain.

The authors contend that proportionality has strengthened the legal system in helping avoid arbitrariness in the resolution of complex legal issues. Its use in more transformative litigation is still modest but detectable in a same-sex marriage ruling that opens up paths for protection of traditionally discriminated-against groups and in free speech cases.

Arturo Bárcena Zubieta tracks in detail in Chapter 3 the “organic” emergence of proportionality analysis in the Mexican Supreme Court case law, in a first stage in equality cases under a syncretic and unstable methodology that mixes German structures with the US tradition of tiered scrutiny. In a second stage, following the 2011 human rights reform, it maintained its place in equality litigation, while entering the adjudication of other rights. The chapter singles out methodological constants (such as the scarce role of proportionality in the narrow sense and the abandonment of the idea that the goals that may justify rights limitations must be enshrined in the Constitution), methodological weaknesses (such as the evidentiary issues that come up at the suitability stage, and the complexity of comparisons at the necessity one) and suggest general lines of assessment. Bárcena observes that, even if proportionality-based adjudication is modest in terms of numbers, considering the enormity of the docket, it comprises some of the most emblematic rights cases. It has thus played a central role in the best decisions in terms of justification – those that make a difference in terms of changing historical practices.

In Chapter 4, Pedro Grández Castro surveys the use of proportionality in Peru during the transition years, under a constitution that is not fully aligned with regional trends and strongly protects economic liberties. The first uses of the methodology were largely in defense of economic freedoms, before the Constitutional Tribunal expanded its use to a variety of cases, from high-profile cases related to terrorism and corruption to the domain of equality and social rights like education or social security. Grández isolates methodologically distinctive features, such as the tendency to make exclusive use of the suitability and necessity prongs – even if there is a great amount of balancing in the course of the exam of alternatives – the effort to ground proportionality on an explicit constitutional clause, or the more recent emergence of the four-prong structure. He underlines that proportionality use has supported rights efficacy and democratic institutionalization but identifies dysfunctionalities as well. He specifically identifies its rhetoric use as an empty formula that seems to reedit traditional legal formalism, and the risks of overusing it in decentralized review, to the detriment of other interpretive strategies that could be more appropriate to ponder statutes that should not be so expeditiously declared unconstitutional.

The chapter by Verónica Undurraga and Pascual Cortés focuses also on a regionally atypical constitution: the problematic Chilean “Pinochet’s Constitution,” now under way to be replaced. The authors explore how the balance between state intervention and constitutional rights invited by proportionality has played a role in either blocking or channeling transformative policies. The use of