

## INDEX

- activist courts, 8, 9
- Adams, John, 13
- advertising, 132
- Alexy, Robert, 45–47
- Alexy's weight formula, 45–47, 184
- Andrews* decision (Canada), 100–01
- apex courts, 8, 156
  - minority protection and, 36
- appeals, 142–43
- balancing test. *See also* implicit
  - balancing; non-balancing
  - arguments; proportionality test
  - absence of in South African Constitutional Court, 81–83, 86, 116, 158, 184, 186
  - ad-hoc balancing and legal certainty and, 9, 54–57
  - Alexy's weight formula as defense of, 45–47, 184
  - avoidance of in Canadian Supreme Court, 116, 158, 184
  - balancing and legislative review in South African Constitutional Court, 109–10
  - balancing arguments and, 73
  - Canadian Supreme Court's use of, 83
  - categorical arguments and, 77, 150–53, 155
  - COD decision of German Federal Constitutional Court and, 90–91
  - consistency or coherency arguments and, 75–76
  - as cost-benefit analysis, 2
  - in criminal and criminal procedure cases in Canadian Supreme Court, 161–62, 181
  - in criminal and criminal procedure cases in German Federal Constitutional Court, 92–95, 162–63, 181
  - in criminal and criminal procedure cases in South African Constitutional Court, 158–60, 181
  - Crucifix decision (Germany) and, 5, 178–79
  - determinacy considerations in, 78
  - difficulties with less restrictive means test and, 132–33
  - Engel's defense of, 48–49
  - Ex parte Minister of Safety and Security* case (South Africa) and, 109
  - factors influencing courts use of, 10
  - as global, 6
  - incommensurable values critique and, 4, 9, 39–45
  - institutional constraints on, 59
  - institutional strength of German Federal Constitutional Court and, 95–98
  - judicial legitimacy and, 67–68
  - judicial self-empowerment and, 53–54, 57–58, 182
  - legitimate expectations test and, 77, 148–49
  - less restrictive means test as alternative to, 50–52
  - as more transparent than categorical argumentation, 57
  - Nash's* solution to incomparable values problem, 47–49
  - in *Oakes* decision of Canadian Supreme Court, 98–100

- balancing test (*cont.*)
  - outlier cases of Canadian Supreme Court, 179–81
  - outlier cases of German Federal Constitutional Court, 178–79
  - pre-balancing period of German Federal Constitutional Court, 89–91
  - precarious institutional position of South African Constitutional Court and, 112–13
  - as predominant argumentative framework of German Federal Constitutional Court, 91–92, 158, 184
  - procedural considerations in, 78
  - rareness of in first 25 years of German Federal Constitutional Court, 91
  - reduced form of as alternative to, 40
  - in review of civil decisions of German Federal Constitutional Court, 92–95
  - review of common law in South African Constitutional Court and, 110–12
  - as review of legislative rationality vs. judicial activism in German Federal Constitutional Court, 175–77
  - as review of rationality of legislative decision-making, 158, 182
  - role of constitutional courts in a democratic society and, 8
  - in same-sex marriage (Germany), 92
  - South African Constitutional Court's use of, 86
  - in status of transsexuals (Germany), 92
  - as unsuitable instrument to hide judicial activism, 9, 156, 181, 183
  - use of in Canadian Supreme Court vs. other means, 102–06
- Bedford* decision (Canada), 161–62, 164
- Bhe v. Khayelitsha Magistrate* (South Africa), 118
- Black Administration Act of 1927 (South Africa), 118
- Brümmer* case (South Africa), 136
- Bryde, Justice Brun-Otto, 139
- burden of proof, in court decisions, 122–27
- Canadian Supreme Court, 10, 116
  - Andrews* decision of, 100–01
  - balancing arguments in jurisprudence of, 73
  - balancing in *Hutterian Brethren* decision, 102–04
  - balancing in *Sharpe* decision (Canada), 101, 161, 162
  - balancing test in criminal and criminal procedure cases of, 161–62, 181
  - Bedford* decision of, 161–62, 164
  - Chaoulli* decision in, 6–8, 11, 124–25, 128, 129, 134
  - classification of judicial arguments of case studies of, 71–73, 83
  - confirmation of judicial review in Canadian Charter, 14
  - consistency or coherency arguments in jurisprudence of, 75–76, 135–36
  - critique of proportionality test, 190
  - determinacy considerations and, 116, 147–48
  - empirical analysis of proportionality test in, 83
  - Harper* decision of, 126
  - Health Services Bargaining Association* case of, 144–45
  - implicit balancing by, 131–32, 186
  - internal consistency in *Charkaoui* judgment of, 135–36
  - Irwin Toy* decision of, 125
  - judicial activism and, 188, 190
  - judicial prognoses in court decisions of, 127–29
  - lack of use of first stage of proportionality test by, 119
  - legislative deference and burden of proof in decisions of, 122–27
  - less restrictive means test in, 80–82, 83, 99–102, 120, 186
  - Logan* decision of, 101, 161, 162
  - Malmo-Levine* decision of, 125

- minimal impairment test of, 106
- Morales* case of, 147
- Mounted Police Association of Ontario* case of, 105
- outlier balancing test cases of, 179–81
- overbreadth argument in jurisprudence of, 75
- procedural arguments in criminal cases by, 142
- procedural arguments preserving impartiality of decision-making process, 144
- procedural arguments targeting statute drafting process by, 144–45
- proportionality in *Oakes* decision of, 98–100, 122, 190
- proportionality in *Vriend v. Alberta* (Canada), 119
- proportionality tests of as case studies, 69–71
- Provincial Court Judges* case of, 144
- rational connection test in, 119, 186
- RJR-MacDonald* decision of, 51–52, 123–24, 127
- Tse* case of, 142
- United Food and Commercial Workers* case and overturning of PIPA, 179–81
- use of balancing test vs. other means, 102–06
- Whaling* decision of, 105
- Wholesale Travel* decision by, 131–32
- Carolene Products* decision (U.S. Supreme Court), 23
- Casino* decision (Germany), 136–37
- categorical arguments, 77, 150–53, 155, 157
  - legal certainty and, 150
- Chaoulli* decision (Canada), 6–8, 11, 124–25, 128, 129, 134
- Charkaoui* judgment (Canada), 135–36
- Chaskalson, Albert, 106–09
- child pornography, 101, 161, 182
- coalition building
  - as protector of minorities, 22
- coherency tests, 75–76
- collusion
  - judicial review as corrector of, 28–30
- competency disputes
  - constitutional courts as arbitrators in, 19–20
- conscientious objectors, 127
- consistency tests, 75–76, 134–35
  - external consistency arguments, 136
  - historical consistency arguments, 136–37
  - illicit motives and, 138–40
  - internal consistency, 135–36
  - Makwanyane* decision (South Africa) and, 106–09
  - rationalising of balancing by German Federal Constitutional Court and, 172–73
  - as tool increasing legislative rationality, 137–38, 140
- constitutional courts
  - as arbitrators in competency disputes, 19–20
  - criticism of, 189
  - role of in a democratic society, 8
- criminal and criminal procedure law, 146, 147
  - balancing tests of Canadian Supreme Court and, 161–62, 181
  - balancing tests of German Federal Constitutional Court and, 92–95, 162–63, 181
  - balancing tests of South African Constitutional Court and, 158–60, 181
- procedural arguments and, 141–43
- underrepresentation in political process and, 164
- Crucifix* decision (Germany), 1, 5, 178–79
  - as judicial activism, 187–88
- data protection, 148
- De Vos* decision (South Africa), 160
- death penalty, 74, 107, 113, 181
- debt and debtors, 130
- deductive reasoning, 153–56, 157, 189
- deference, in court decisions, 122–27

- detention of foreign citizens, 135–36, 143
- determinacy considerations, 78, 116, 147–48, 156
- discrimination, court rulings and, 119
- Ely, John Hart, 16
- empirical into analytical questions, court decisions and, 129
- Engel, Christoph, 48–49
- equal protection guarantees, 77
- Ex parte Minister of Safety and Security* case (South Africa), 109, 160
- external consistency arguments, 136
- external effects, judicial review as corrector of, 30–32
- false stereotypes, 118, 181
- Friedman, Barry, 188
- German Federal Constitutional Court, 10, 116
  - balancing and institutional strength of, 95–98
  - balancing arguments in jurisprudence of, 73
  - balancing as predominant argumentative framework in, 91–92, 158, 184
  - balancing as review of legislative rationality vs. judicial activism, 175–77
  - balancing in COD decision of, 90–91
  - balancing in *Lüth* judgment of, 93–94, 97
  - balancing in pharmacy decision of, 86–89, 129
  - balancing in review of civil and criminal decisions, 92–95
  - balancing in same-sex marriage decision, 92
  - balancing in status of transsexuals decision, 92, 170–71
  - balancing test in criminal and criminal procedure cases of, 162–63, 181
  - categorical arguments in defense of human dignity by, 150–53, 155
  - classification of judicial arguments of case studies of, 71–73, 83
  - confirmation of judicial review in German constitution, 14
  - consistency or coherency arguments in jurisprudence of, 75–76, 136–37, 138–40, 172–73
  - consistency test in smoking ban case of, 138–40
  - critique of proportionality test, 190
  - Crucifix decision of, 1, 5, 178–79, 187–88
  - deductive style of argumentation in jurisprudence of, 77, 153–56, 189
  - determinacy considerations and, 116, 147–48
  - empirical analysis of proportionality test in, 80–83
  - equality considerations in jurisprudence of, 77
  - failed resistance against, 62
  - historical consistency arguments in *Casino* decision of, 136–37
  - hoof care decision of, 169–70
  - implicit balancing via less restrictive means test of, 130–31, 133
  - institutional constraints on application of proportionality test, 191
  - judicial activism and, 157, 187–88, 190
  - judicial prognoses in court decisions of, 127–29
  - lack of use of first stage of proportionality test by, 119
  - legislative deference and burden of proof and, 126–27
  - legitimacy crisis in, 2
  - legitimate expectations test in jurisprudence of, 77, 148–49
  - less restrictive means test and, 121, 168–70
  - outlier balancing test cases of, 178–79
  - overbreadth argument in jurisprudence of, 170–71
  - pre-balancing period of, 89–91
  - procedural arguments in criminal cases by, 141–42

- procedural arguments regarding the legislative procedure, 145–46
- procedural arguments to avoid conflicts of interest, 144
- proportionality tests of as case studies, 69–71
- rareness of balancing decisions in first twenty-five years of, 91
- rational connection test and, 121, 168–70
- rationalising of balancing by correcting cases of individual hardship, 173–75, 184, 186
- rationalising of balancing test by, 165, 182
- rationalising of balancing test by shifting financial burdens, 165–68, 184, 186
- rationalising of balancing test through insufficient fit between measure and purpose, 168–71, 184, 186
- rationalising of balancing through consistency tests by, 172–73, 184, 186
- rulings on marriage by, 118
- telecommunications surveillance case of, 141–42, 162–63
- Harper* (Canada), 126
- health insurance, 124–25, 128, 129, 130, 134
- Health Services Bargaining Association* (Canada), 144–45
- historical consistency arguments, 136–37
- hoof care decision (Germany), 169–70
- human dignity, 150–53, 155
- Hutterian Brethren* (Canada), 102–04
- Immigration and Refugee Protection Act (IRPA, Canada), 135
- implicit balancing, 11, 116, 122, 156, 186
  - less restrictive means test and, 130–32
  - as review of legislative rationality vs. judicial activism, 133–34
- incommensurable values, critique of balancing test and, 4, 9, 39–45
  - Alexy's defense of balancing, 45–47
  - Engel's defense of balancing, 48–49
  - Nash* bargaining solution to, 47–49
- information access, 136
- institutional constraints, 8
  - on application of proportionality test, 191
  - on balancing tests, 59
  - on judicial decision-making, 183
- internal consistency arguments, 135–36
- Irwin Toy* (Canada), 125
- Jefferson, Thomas, 13
- judges
  - independence of, 34
  - judicial independence cases, 144
  - judicial power and judicial legitimacy and, 61–66
  - judicial prognoses in court decisions, 127–29
  - judicial self-empowerment in balancing test and, 53–54, 57–58, 182
- judicial activism
  - analytical openness of doctrinal instrument and, 189
  - balancing as review of legislative rationality vs. judicial activism in German Federal Constitutional Court, 175–77
  - balancing as unable to hide, 9, 156, 181, 183
  - based on on alternative forms of reasoning vs. proportionality test, 157
  - in Canadian Supreme Court, 188
  - Crucifix decision (Germany) and, 187–88
  - defined, 8, 185
  - implicit balancing and, 133–34
  - proportionality as non-primary means of, 156
  - proportionality test as instrument of, 187–89
  - proportionality test as review of legislative rationality vs. judicial activism, 156, 184–87
  - public scrutiny and, 188, 189

- judicial decision-making
  - institutional constraints on, 8, 183
  - legal as well as non-legal factors in, 15–16
- judicial review
  - correction of political market failures by, 16, 18–19, 32, 35, 156, 181, 185
  - as corrector of collusion between political parties, 28–30
  - as corrector of external effects, 30–32
  - critique of mistakes made in, 35
  - democracy and, 16–18
  - legitimacy of, 15, 183, 185
  - minority protection and, 34–36, 185
  - political influence in, 8
  - as review of rationality of legislative decision-making, 186–87
  - in U.S., 13
- judicial review (Canada)
  - confirmation of in Canadian Charter of Rights and Freedoms, 14
- judicial review (Germany)
  - in German Constitution, 14
- judicial review (South Africa)
  - in South African Constitution, 14
- Khumalo case* (South Africa), 111
- labor unions and collective bargaining, 144–45
- last step of the proportionality test, 10
- Lawyers for Human Rights v. Minister of Home Affairs* (South Africa), 143
- legal certainty, 9
  - ad-hoc balancing tests and, 9, 54–57
  - categorical arguments and, 150
  - determinacy considerations and, 147–48
- legislation
  - balancing as review of legislative rationality vs. judicial activism, 133–34, 182, 186–87
  - balancing as review of legislative rationality vs. judicial activism in German Federal Constitutional Court, 175–77
  - consistency tests as tool increasing legislative rationality, 137–38, 140
  - deference and burden of proof in court decisions and, 122–27
  - legislative capture by lobbying groups, 26–28
  - legislative prognoses of courts, 122
  - procedural arguments relating to legislative procedure, 144–46
  - review of legislative procedure, 79
- legitimacy
  - balancing tests and judicial legitimacy, 67–68
  - of constitutional order through social contracts, 20
  - in German Federal Constitutional Court, 2
  - independence of judges and, 34
  - judicial power and judicial legitimacy and, 61–66
  - of judicial review, 15, 183, 185
  - of judicial review in U.S., 13
  - of U.S. Supreme Court, 16
- legitimate aim, 73–74, 116–19
- legitimate expectations test, 77, 148–49
- Lerche, Peter, 98
- less restrictive means test, 73–75, 99–102, 110, 119–22
  - as alternative to balancing test, 50–52
  - in Canadian Supreme Court, 80–82, 83, 186
  - difficulties with, 132–33
  - in German Federal Constitutional Court, 168–70
  - implicit balancing and, 130–32
  - as review of legislative rationality vs. judicial activism, 133–34
  - in South African Constitutional Court, 110, 186
- lobbying groups, 26–28, 138–40
- Logan decision* (Canada), 101, 161, 162
- Lüth judgment* (Germany), 93–94, 97
- Makwanyane decision* (South Africa), 106–09, 159
- Malachi* (South Africa), 130
- Malmo-Levine* (Canada), 125
- Manamela case* (South Africa), 81, 110, 128, 129
- Marbury v. Madison* (U.S.), 13

- Mbatha* case (South Africa), 57  
 mental illness, 160  
 military service, 127  
 minimal impairment test, 106  
*Minister of Home Affairs v. National Institute of Crime Prevention* case (South Africa), 164  
 minority protection, 134, 181  
   apex courts and, 36  
   argument of commonalities with political community as, 21  
   argument of dynamics of political process as, 22  
   coalition building as, 22  
   danger of false stereotypes and, 24  
   danger of majority disregard of minority interests in decision-making process, 24  
   danger of political majority disregarding minority interests, 24  
   falsity of individual fundamental rights as, 24–26  
   freedom of religion and expression as, 25  
   infeasibility of protection of specific social group rights as, 23–24  
   judicial review and, 34–36, 185  
   from legislative capture by lobbying groups, 26–28  
   perception of as fundamental function of constitutional courts, 20  
   social contracts and, 20–21  
*Morales* (Canada), 147  
 morality considerations in court rulings, 116–19  
*Mounted Police Association of Ontario* (Canada), 105  
  
*Niemand* decision (South Africa), 159  
 non-balancing arguments, 116  
   categorical arguments as, 150–53, 155, 157  
   deductive reasoning as, 153–56, 157  
   implicit balancing and, 156  
  
*Oakes* decision (Canada), 98–100, 122, 190  
  
   parole scheme, 105  
   Personal Information Protection Act (PIPA, Canada), 179–81  
   Pharmacy decision of German Federal Constitutional Court, 86–89, 129  
   political market failures, correction of by judicial review, 16, 18–19, 32, 35, 156, 181, 185  
   procedural arguments and, 146  
   prisoner voting rights, 164  
   procedural arguments, 140–41, 146  
     as avoiding political market failures, 146  
     in criminal and criminal procedure law, 141–43  
     for preserving impartiality of decision making process, 143–44  
     relating to legislative procedure, 144–46  
   proportionality test. *See also* balancing test; implicit balancing; non-balancing arguments  
     balancing arguments and, 73  
     case studies of in three courts, 69–71  
     categorical arguments and, 77  
     *Chaoulli* decision (Canada) and, 6–8, 11, 124–25  
     classification of judicial arguments of case studies of, 71–73  
     critique of in Canada, 190  
     critique of in Germany, 190  
     critique of in South Africa, 190  
     *Crucifix* decision (Germany) and, 5, 178–79, 187–88  
     deductive style of argumentation and, 77  
     determinacy considerations in, 78  
     difficulties with less restrictive means test and, 132–33  
     empirical analysis of Canadian Supreme Court's use of, 83  
     empirical analysis of German Constitutional Court's use of, 80–83  
     empirical analysis of South African Constitutional Court's use of, 86  
     equality considerations and, 77  
     four steps of, 38



- proportionality test (*cont.*)  
   institutional constraints on  
     application of, 191  
   as instrument for judicial activism,  
     8, 187–89  
   legislative deference and burden of  
     proof in Canadian Supreme Court  
     decisions, 122–27  
   legitimate aim argument  
     classification and, 73–74, 116–19  
   legitimate expectations test and, 77  
   less restrictive means test in  
     Canadian Supreme Court, 80–82,  
     83, 99–102, 119  
   *Makwanyane* decision (South Africa)  
     and, 106–09, 159  
   in *Mbatha* case (South Africa), 57  
   morality considerations in court  
     rulings and, 116–19  
   as non-primary instrument for  
     judicial activism, 156, 175–77  
   in *Oakes* decision of Canadian  
     Supreme Court, 98–100, 122, 190  
   overbreadth argument and,  
     75, 170–71  
   procedural considerations in, 78  
   rational connection and less  
     restrictive means argument  
     classification and, 73–75,  
     119–22, 168–70  
   reduced form of without the  
     balancing stage, 40  
   review of legislative procedure in, 79  
   as review of rationality of legislative  
     decision-making, 8, 156, 158,  
     175–77, 184–87  
   role of constitutional courts in a  
     democratic society and, 8  
   variations in application of by  
     courts, 80  
   prostitution, 162, 164, 181  
   *Provincial Court Judges* case  
     (Canada), 144
- rational connection test, 73–75, 99–102,  
 119–22, 168–70, 186  
   as review of legislative rationality vs.  
     judicial activism, 133–34
- religious freedom  
   Crucifix decision (Germany) and, 1,  
     5, 178–79, 187–88  
   minority protection and, 25  
   rent control, 169  
   research design, 68  
   *RJR-MacDonald* (Canadian Supreme  
     Court case), 51–52, 123–24, 127  
   Rogers, James, 174  
   Roosevelt, Franklin D., 61
- same-sex marriage, 92  
 Scalia, Anthony, 46  
 Schlink, Bernhard, 36, 40, 52–53, 190  
 selection process for university  
   students, 148  
*Sharpe* decision (Canada), 101, 161, 162  
 social contracts, 20–21  
 sodomy, 119  
 South African Constitutional Court  
   absence of balancing in, 10, 81–83,  
     86, 116, 158, 184, 186  
   balancing and legislative review  
     in, 109–10  
   balancing and precarious institutional  
     position of, 112–13, 190  
   balancing and review of common law  
     in, 110–12  
   balancing arguments in  
     jurisprudence of, 73  
   balancing in *Ex parte Minister of  
     Safety and Security* case, 109, 160  
   balancing test in criminal and  
     criminal procedure cases of,  
     158–60, 181  
   *Bhe v. Khayelitsha Magistrate* and, 118  
   Black Administration Act of 1927  
     and, 118  
   classification of judicial arguments of  
     case studies of, 71–73, 86  
   confirmation of judicial review in  
     South African Constitution, 14  
   consistency or coherency arguments  
     in jurisprudence of, 75–76,  
     106–09, 136  
   *De Vos* decision of, 160  
   empirical analysis of proportionality  
     test in, 86



- external consistency in *Brümmer* case of, 136
- judicial prognoses in court decisions of, 127–29
- Khumalo* case of, 111
- Lawyers for Human Rights v. Minister of Home Affairs* case of, 143
- less restrictive means test and, 110, 120, 186
- Malachi* decision of, 130
- Manamela* case of, 81, 110, 128, 129
- Minister of Home Affairs v. National Institute of Crime Prevention* case of, 164
- Niemand* decision of, 159
- opinion of failure to protect individual rights by, 190
- overbreadth argument in jurisprudence of, 75
- procedural arguments in criminal and public security cases, 142–43
- proportionality in *Makwanyane* decision and, 106–09, 159
- proportionality test in *Mbatha* case, 57
- proportionality tests of as case studies, 69–71
- rational connection test and, 120, 186
- ruling on sodomy of, 119
- Steyn* case of, 142–43
- Steyn* case (South Africa), 142–43
- telecommunications surveillance, 141–42, 162–63
- Theory of Constitutional Rights* (Alexy), 45
- tobacco, 123–24
  - smoking ban case in Germany, 138–40
- transsexuals, status of, 92, 170–71
- Tse* case (Canada), 142
- U.S. Supreme Court, 15, 96, 188
  - court-packing plan of FDR and, 61
  - judicial review and, 13
  - Marbury v. Madison*, 13
- unemployment benefits, 170
- United Food and Commercial Workers* (Canada), 179–81
- university students, selection process for, 148
- vaccines, 129
- Veel, Paul-Erik, 47–49
- Vermeule, Adrian, 54
- voting rights, 164
- Vriend v. Alberta* (Canada), 119
- welfare benefits, 156, 189
- Whaling* decision (Canada), 105
- Wholesale Travel* (Canada), 131–32