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Proportionality Balancing and Constitutional Governance
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Chapter 2:
Proportionality and Constitutional Governance

Modern constitutions prioritize charters of rights, establishing positive requirements of legality binding on all branches of government; and they create trustee courts, institutionalizing modes of judicial supremacy to enforce them. Going forward, we argued, the primary measure of effectiveness of any system of constitutional justice will be the impact of the court's jurisprudence on the policy-making decisions of all other state officials. Constitutional judges will govern insofar as their rulings serve to coordinate, as interdependent causal processes, the evolution of constitutional law and public policy (Chapter 1).

In this chapter, we consider why judicial enforcement of the proportionality principle has become the central procedural component of constitutional governance in the world today. Our approach to this question blends doctrinal (legal) and strategic (political) logics. First, we argue that proportionality analysis (PA) provides judges with a coherent, trans-substantive, and well-tested methodology for adjudicating qualified rights. Second, in adopting PA, constitutional judges also acquire a stable means of managing the legitimacy dilemmas that afflict lawmaking courts, which are accentuated under conditions of judicial supremacy. The duty of a constitutional court is to maximize the effectiveness of the charter of rights, not to comfort legislative majorities, and PA helps them perform this task in a principled manner.

We should clear away a potential misunderstanding at the outset. PA provides the most defensible approach to adjudicating qualified rights that is currently available. But it does not dictate "correct" legal solutions to conflicts between (i) a rights claim and (ii) a statute that would limit the scope of a right under a limitation clause. PA does not camouflage judicial lawmaking. Rather, when properly employed, it requires courts to acknowledge and defend – honestly and openly – the policy choices they make. Proportionality is not a magic wand that judges can wave to make the legal and political dilemmas of rights review vanish. Indeed, waving it will expose rights adjudication for what it is: constitutional lawmaking issuing from the commitment to protecting rights. Nonetheless, adopting PA can help judges rationalize rights adjudication and – as important – to ground dialogic interactions with the public officials whose decisions they supervise.

In Chapter 3, we trace the process through which virtually all of the world's most powerful apex courts embraced PA, making it a constituent component of global constitutionalism more broadly. Here we focus on the logics that have sustained this process. In Part I, we argue that PA, with its sequence of subtests culminating in balancing, neatly fits the structure of qualified rights, providing a comprehensive analytical framework for adjudicating them. Part II directs attention to the various ways in which proportionality enables judges to manage legitimacy issues associated with judicial lawmaking and supremacy. In Part III, we sketch a simple model of constitutional governance, with rights and PA at its core, and respond to objections and alternatives.

I Rights, Justification, Constitutional Legality

At the heart of every system of constitutional justice (SCJ) is a justiciable charter of rights. In modern charters, only a very small number of rights are expressed in absolute terms.[1] In some influential systems, including the German, human dignity possesses a special, inviolable status providing a normative foundation for all other rights.[2] But most rights provisions are qualified by a limitation clause, which permits government officials to infringe upon freedoms for some sufficiently important public purpose. As a matter of constitutional theory, the constitutional legislator – the People – not only established qualified rights, but conferred broad enforcement powers on constitutional judges. Yet, the drafters of new constitutions, relying on relational contracting or copying the product of those who had done the same, gave little or no any practical guidance on how to adjudicate limitation clauses (Chapter 2). A range of methodological options were available. Judges could have adopted a posture of deference to the legislature, invalidating a statute only when found to be manifestly irrational, for example, or to

[1] The prohibition of torture, slavery, and inhumane treatment are typically expressed in absolute terms, and treated as absolutes, as are rights to due process and access to justice. The fact that a right is expressed in absolute terms does not mean that balancing never has a role to play in its adjudication. To take two examples from a jurisdiction often thought hostile to balancing – the United States – how much "process" a person is "due" depends on a weighing of the interests at stake, and whether a punishment counts as "cruel and unusual" depends on the gravity of the crime. United States Supreme Court (1962; 1976).

[2] Barak (2015); Weinrib (2016).

have been taken for an unlawful purpose. Instead, even newly minted courts gravitated to a highly intrusive standard of review: PA. Doing so exposed virtually every aspect of the decision making of government officials to judicial scrutiny (Chapter 3).

If rights comprise positive requirements of constitutional legality, and if constitutional courts use PA to adjudicate limitation clauses, then the domain of proportionality will be as extensive as the powers of state organs to make and enforce law, and of judges to review these acts. To understand why this is so, we need to examine in greater detail the structure of qualified rights, and why PA neatly fits this structure.

Qualified Rights

Limitation clauses are a structural property of modern rights provisions. Some theorists understand qualified rights to comprise a single norm that pre-authorizes the right's curtailment for legitimate constitutional reasons.[3] Others consider rights and limitation clauses to be separate but interdependent norms; they operate as reciprocal constraints on the process of delimiting rights and governmental powers.[4] Proponents of both perspectives are in agreement with respect to the three features of qualified rights of greatest significance.

First, the scope of qualified rights – and, hence, the charter as a whole – is extensive, covering virtually any condition or activities individuals might choose for themselves in some systems. Some charters express as much through a general liberty clause, the most influential of which is Article 2.1 of the German Basic Law (1949):[5]

> Every person shall have the right to the free development of [her] personality in so far as [she] does not violate the rights of others, or offend the constitutional order or moral code.

Under this formulation, German officials possess implied powers to curtail liberties, for the reasons stated.[6] Provisions establishing specific rights (to speech and assembly, conscience and religion, to work and property, and so on) are also understood in expansive terms, not least, since their scope may be curtailed under the limitation clause. Moreover, as we will see, reliance on PA makes a generous approach to qualified rights both plausible and viable.[7]

Second, limitation clauses possess the same rank and status as the rights they qualify. As Barak puts it, both "draw their authority and content from the same source": the constitution. Nonetheless, rights are core constitutional norms, and they take primacy over statutes, being sub-constitutional norms.[8] A legislature may reduce a right's scope, but only through a limitation clause. Some clauses specify the

[3] Webber (2009).
[4] Barak (2012a: chapter 6).
[5] Germany's Federal Constitutional Court adopted a broad construction of Article 2.1's scope in an influential early opinion; German Federal Constitutional Court (1956).
[6] Many later constitutions have clauses resembling Germany's. Article 16 of Colombia's Constitution (1991), for instance, provides that: "All individuals are entitled to the unrestricted development of their identity without limitations other than those imposed by the rights of others and the legal order." Of course, there are variations. In South Korea (1987), Article 10 combines dignity and a general liberty clause: "All citizens are assured of human worth and dignity, and have the right to pursue happiness. It is the duty of the State to confirm and guarantee the fundamental and inviolable human rights of individuals."
[7] Kumm (2010); Möller (2012).
[8] Barak (2012a: chapter 6) for analysis of issues of hierarchy raised by the structure of qualified rights.

headings under which government may lawfully act.[9] Other charters, including the Canadian, contain a general limitation clause covering all qualified rights.[10]

Third, modern charters do not merely constrain the making and enforcement of law. They also place public officials under a duty to protect rights, and to enhance their effectiveness on an ongoing basis.[11] The legislature does so when it acts to reduce conflicts between contending rights claims, for example. The right to free speech will regularly come into tension with the right of personal honor (subsuming a right not to be defamed); and the scope of a woman's right to control her reproductive life (under a right to privacy or free development of personality) and the right to life of an embryo stand in an inverse relation to each other. Lawmakers are expected to create the legal arrangements within which conflicting claims can be resolved. Moreover, most modern constitutions lay down a set of more specific "positive rights," which require government to create and maintain the conditions necessary for their availability and use. Thus, it would be a serious error to understand a limitation clause as a mere "loophole," "escape hatch," or a legal license for public officials to derogate from charters. On the contrary, qualified rights enlist all branches of government in a common mission to protect rights in light of the public good. It is through limitation clauses that a democratic polity draws lines between individual liberties and the public interest, and seeks to strike a stable balance among contending values of constitutional importance.[12] Most powerful trustee courts use PA to guide this process, which proceeds through the resolution of individual legal disputes, one at a time.

Constitutions are bundles of secondary rules: meta-rules that govern the creation and enforcement of all other (sub-constitutional) legal norms (Chapter 1). Qualified rights tie together, as tightly interdependent, multiple types of secondary rules. Insofar as they authorize the legislature to pass legislation that restricts the scope of rights, limitation clauses are power-conferring rules. Rules of adjudication vest trustee courts with the jurisdiction to determine whether qualified rights have been violated – in other words, whether rights limitations are justifiable. Most centrally, rights impose criteria of validity: a sub-constitutional act that does not comport with rights is invalid. Taken together, these meta-norms are constitutive elements of an overarching principle of constitutional legality,[13] which is at the very core of any minimally effective system of constitutional justice more generally (Chapter 1).

In sum, modern charters of rights are predicated on the presumption that any important act of government will limit freedom in some sense. It is the responsibility of constitutional judges to determine whether officials have acted lawfully under the powers conferred on them by a limitation clause. The

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[9] Examples include:

- Mexico, Constitution of 1917, Art. 6: "The expression of ideas shall not be subject to any judicial or administrative investigation, unless it offends good morals, infringes the rights of others, incites to crime, or disturbs the public order."
- Spain, Constitution of 1978, Art. 33(1): the right to private property, while article 33(3) provides for the restriction of property rights for "public benefit," as determined by statute.
- The Czech Republic, Constitution of 1993, Art. 17: "Freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures essential in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morality."

[10] Sec. 1 of the Canadian Constitution Act of 1982: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[11] South Africa, Constitution of 1996, Art. 7(1)(2): "This Bill of Rights is a cornerstone of democracy … It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The state must respect, protect, promote and fulfil the rights in the Bill of Rights."

[12] Barak (2012a: 164–165).

[13] Weinrib (2016: chapter 2); also Barak (2012a: chapter 5).

centrality of qualified rights to constitutional governance thus directs attention to the crucial question: how should the constitutional judges adjudicate limitation clauses?

Step-by-Step

Proportionality operationalizes the principle of constitutional legality. Put somewhat differently, when judges adopt PA, they constitute a mode of governance comprised of the following elements:

- All public officials are under a duty to justify any act taken under a limitation clause that would abridge the scope of a qualified right.
- The constitutional court possesses the authority to assess these reasons. The court adjudicates qualified rights through the enforcement of the proportionality principle.
- The lawfulness of government acts taken under a limitation clause depends on its proportionality. An act that fails any subtest of proportionality is in conflict with the constitution, and is therefore unlawful.

When a trustee court embraces the proportionality principle, it becomes a criterion of validity, a part of the system's secondary rules. Elevated in this way to a meta-principle of governance, proportionality emerges as a fundamental element of constitutional legitimacy.

PA is an analytical procedure for determining whether an official act, taken under a limitation clause, is constitutionally justified. It proceeds through a sequence of subtests. In a *preliminary* stage, the court verifies that the government act under review has curtailed (or will curtail) the scope of a right. Most courts use this occasion to discuss and further develop the jurisprudential theories that underpin the pleaded right, as well as any prior rulings that bear upon the case at hand. Virtually no important claim is rejected at this stage, precisely because it is through the subtests of PA that will determine the outcome. As describe by former Chief Justice of the Supreme Court of Israel Aharon Barak:

> A limitation… occurs whenever a state action … prevents [a rights-holder] from exercising [the right] to its fullest scope. This is all that is required; accordingly, a limitation occurs whether [its] effect … is significant or marginal; whether the limitation is related to the right's core or to its penumbra; whether it is intentional or not; or whether it is carried out by an act or an omission … Indeed, every limitation is unconstitutional unless it is proportional. Only when the statutory provision limiting the constitutional right is proportional – when it fulfills all the requirements of the limitation clause – can we say that the limitation is valid. Only then can the constitutional right peacefully co-exist with its limitation.[14]

Proportionality review is triggered once it has been established that the scope of a qualified right has been limited, which places government under a justificatory burden.

PA provides judges with a comprehensive "checklist" of those "individually necessary and collectively sufficient criteria that [must] be met for [state acts] to be justified" in a constitutional democracy."[15] In its most developed form,[16] PA proceeds through a sequence of four subtests: (i)

[14] Barak (2012a: 102).
[15] Kumm (2010: 144).
[16] As detailed in Chapters 3, 5, and 6, there is substantial variation in how legal systems use PA. Among other things, some systems, including the German, consider the "proper purpose" of a law as preliminary to the deployment of a three-stage test; see Grimm (2007: 389).

"legitimacy," or "proper purpose"; (ii) "suitability" or "rational connection"; (iii) "necessity"; and (iv) "proportionality in the strict sense." A government measure that fails any subtest in this sequence is unlawful.

Consider the review of a statute challenged on the grounds that it unlawfully restricts a right holder's liberty. The first phase of PA mandates inquiry into the "legitimacy" of the statute's purpose: the judge confirms that the constitution authorizes the parliament to legislate in service of the chosen policy objective. If the constitution does not permit the state to pursue such a purpose, then the rights claimant must prevail. The analysis focuses on legislative ends, not on the means chosen to effectuate those ends. By definition, a legislative purpose that "can justify a limitation of a right" is proper, as when the legislature acts under powers granted by a limitation clause.

In the second step – "suitability" – lawmakers must show that a rational relationship exists between the *means chosen* and the *ends pursued*, such that the former is rationally related – suitable – to advancing the end. In most systems, few laws are invalidated on grounds that the stated official purpose is illicit (that is, *per se* illegitimate), or that the act is facially irrational or arbitrary (the means being unsuitable).[17]

The third phase – "necessity" – has far more bite. At its core is a least-restrictive means test, also called a requirement of "minimal impairment" (Canada). The court's task is to ensure that the measure under review does not impair the pleaded right more than is necessary for parliament to achieve its declared purpose. In practice, judges skilled in PA rarely censure a measure simply because they can imagine one less-restrictive alternative. Instead, necessity requires that policymakers consider a range of reasonably-available alternatives, and choose the option that burdens the right the least. As a pleading matter, judges also expect rights claimants to identify one or more less-restrictive alternatives. The subtest also constrains judges: it is inappropriate for a court to strike down a statute without explicit reference to a hypothetical alternative that would meet the standard of necessity.

It is important to stress that, within necessity analysis, the class of *bona fide* alternatives is restricted to those means that would fulfill the legislature's declared objectives. As Barak puts it:

> The necessity test is triggered … when the fulfillment of the purpose is possible through the use of several alternative rational means, each of which limits the constitutional right to a different extent. In this situation, the necessity test demands that the legislator choose the means which limit the constitutional right to the least extent.[18]

How the legislature characterizes the purpose of a statute – its goals – will heavily structure necessity review. If, for example, the legislature chooses to ban the sales of a dangerous drug in order to achieve the goal of protecting health, a labelling requirement (stating that abuse of the drug will endanger health) is not a genuine alternative, since its capacity to reduce harm is substantially lower compared to a ban. In this example, the ban passes the suitability subtest, in that it is rationally connected to the health protection, and it passes the necessity test insofar as no less restrictive means (on the liberty to obtain the drug) would enable the government to achieve its chosen (high) level of protection.

In the proportionality world, the analysis cannot end with necessity. If it did, a legislature could usually find ways to reduce less-restrictive alternatives to nil – thereby insulating a law from censure – by seeking the highest ideal level of protection. Further, measures that impose a heavy and perhaps

[17] Neither the first nor second subtest directs attention to the legislative effect on the scope of the pleaded right, which is the province of the third and fourth prongs.
[18] Barak (2012a: 321).

unjustifiable burden on the rights holder would automatically prevail, once the less-restrictive means test was satisfied. If rights are to be effective, a fourth and final stage is required: balancing, or "proportionality *stricto sensu*" ("in the strict sense").

Balancing entails assessing, in light of the facts of the dispute and the policy context, the act's marginal addition to the realization of an important public purpose against the marginal injury incurred by infringement of the right.[19] One core function of balancing is to ensure that a comparatively small or even trivial addition to the public good does not curtail a right more than can be justified given the polity's deeper constitutional commitments. Judges who rely heavily on this stage also emphasize that balancing allows them to "complete" the analysis, in order to check that no factor of significance has been overlooked in previous stages.[20] After all, it is only after the government's own policy choices have survived scrutiny under the legitimacy, suitability, and necessity tests that the importance of the right, in the context of its limitation, becomes the focus of direct attention.

Balancing

In arriving at the balancing stage, trustee courts are necessarily implicated in a larger policy process. As guardians of the constitution, they will authoritatively determine the legality of the act under review. In Chapter 5, we examine the various ways in which the lawmaking of constitutional courts can be distinguished from that of other policymakers. As proportionality is institutionalized as an overarching principle of constitutional governance, the boundaries distinguishing what trustee courts and legislatures do, when they make law, will necessarily blur. If the parliament is placed under a duty to legislate proportionally, then it must balance appropriately. When judges supervise legislative balancing, their determinations are registered as an outcome of an overall policymaking process. In such situations, the attempt to strictly demarcate the respective domains of the legislature and the court makes little sense, either conceptually or as a description of what is actually going on.[21] PA subverts any separation of powers scheme that holds that the courts are prohibited from reviewing how a legislature has balanced among contending social interests.

Balancing is controversial in that it undermines traditional distinctions between lawmaking and adjudicating, at least when it comes to rights protection. Balancing exposes the court to the charge that it is arrogating to itself an inherently legislative function while adding little more than a second (and redundant) decision-making procedure to the policy process. But there is less to the charge than might appear at first blush. After all, the constitutional legislator, acting on behalf of the People, has entrusted the function of rights protection to the constitutional court, and relegated legislative authority to a lower echelon on the hierarchy of norms that constitutes the polity. Second, and just as importantly, it is up to a trustee court to determine how to resolve conflicts involving qualified rights, unless the constitution provides specific instructions, which almost none do. Proportionality review is an available option, and as we argue below, a reasonable one for courts to choose if they are to fulfill their fiduciary duties as trustees.

Contending normative assessments of balancing are dominated by the problem of *incommensurability*. By incommensurability, we mean the absence of a common metric to assess the relative importance of the values or interests that come into conflict in rights adjudication. In market relations, a common currency provides commensurability of goods and services, through a pricing mechanism. But there is no standardized way to measure the "weight" of the marginal "cost" to a right holder against the additional "benefit" to the common welfare of a statute or administrative rule. Instead,

[19] Barak (2012b: 744–747).
[20] Most prominently, members of the German Federal Constitutional Court and the Supreme Court of Israel.
[21] See Stone Sweet (2000: chs. 3, 4, 5).

in a PA-governed system, both legislatures and judges help to determine the limits of the state's powers to regulate under a limitation clause. Trusteeship means structural judicial supremacy, and the constitutional court's position on important questions will typically prevail (over that of, say, the legislative majority), insofar as the court delivers clear, well-justified decisions. Proponents of proportionality – in particular, judges and scholars – have labored to demonstrate that the constitutional lawmaking through balancing is neither unfettered nor "irrational," but disciplined by rules capable of constraining the balancer.

In this regard, the formulations of Robert Alexy[22] and Aharon Barak[23] are, today, integral components of the doctrinal construction of, and global discourse on, proportionality. Alexy, synthesizing the jurisprudence of the GFCC, has declared the *Law of Balancing*[24]:

> The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.

Defensible rulings in balancing are those that meet the demands laid down by this "law." For his part, Barak has elaborated the *Rule of Balancing*,[25] emphasizing (as we have) analysis of the *relative* harms and benefits to be expected from the act under review:

> As the importance of avoiding the marginal limitation on the constitutional right and the likelihood of the limitation [to harm the right holders] increase, so do the required importance of the marginal benefit of the public interest or the competing private right and the required likelihood of that benefit being realized.

Both formulations stress the duty of the judge to engage in relational analysis of the values in tension. They require the judge to give a reasoned answer to the dispositive question: does the law under review burden liberties too much, given our constitutional commitment to rights? In doing so, the judges will construct a jurisprudential understanding of the right and the limitation clause.

Both rest on a strong presumption: that it is possible to assess the relative harms and benefits of the state act under review. Barak:

> The weight that is attached to the side of the rights on the scale is derived not only from the importance of the right, but also from the extent of its limitation, its intensity, and its dimensions. A limitation nearing the margins of the right differs from a limitation nearing its core. A temporary limitation is less severe than a permanent one. Thus, [the] consequences of [any] limitation of a human right and its effect on those entitled to the right affect the weight of the right itself.[26]

Alexy stipulates that the law of balancing involves three stages of reasoning:

> The first stage involves establishing the degree of non-satisfaction of, or detriment to, a first principle [e.g., the scope of a right]. This is followed by a second stage in which the importance of satisfying the competing principle is established [e.g., the social benefit of a rights-limiting statute]. Finally, in the third stage, it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction

[22] Alexy (2002).
[23] Barak (2010; 2012b).
[24] Alexy (2005: 573; 2002: Postscript, 390–425).
[25] Barak (2012b: 746).
[26] Barak (2010: 10).

> of the former. If it were not possible to make rational judgments about, first, intensity of interference, secondly, degrees of importance, and, thirdly, their relationship to each other, [then it would be impossible to make "rational" and "objective" decisions]. Everything turns, then, on the possibility of making such judgments.[27]

Simplifying what is a highly formalized position, Alexy argues that judges – and, as important, the court's audience – are able to measure different degrees of satisfaction and detriment to the competing principles. A statutory limitation on the scope of a right may be classified as "light," "moderate," or "severe," for example. Under the law of balancing, the court must strike down a government law that effects a severe curtailment of a right while failing to provide a very important addition to the common good. On the other hand, if "the intensity of interference is established as minor, and the degree of importance of the reasons for the interference as high, then the outcome is "obvious": the government will prevail.[28]

In accepting the basics of these directives, Alexy and Barak insist, one is led to acknowledge that balancing under conditions of incommensurability does not inevitably reduce to a process through which judges merely enact their (ideological) preferences when they choose among the policy options on offer. Pushing further, balancing "bears little relation to cost–benefit analysis in a crude utilitarian sense."[29] As Barak puts it: "balancing" is only a metaphor for what judges do at this stage.[30] The subtest involves assessing the relationship between two of the most important requirements of the constitutional order: (i) individual liberty, embodied in the qualified right being pleaded, and (ii) the authority of state officials to govern in the public interest, while respecting rights. In our view, these competing requirements are not strictly incommensurable; rather, they set into motion a process of mutual re-equilibration, in which each must be assessed in light of the other. In balancing, judges make a holistic evaluation of whether, in light of circumstances and the polity's constitutional commitments, officials are justified in taking a measure, given their duty to create a system in which the interests of all right-holders, and of society more broadly, are protected. The "balancing" inquiry comprises a distinctive means of advancing sets of interdependent constitutional values, not a consequentialist operation of weighing contending interests against one another.[31]

Finally, it is worth noting that proportionality balancing has an uneasy, still unsettled, relationship with notions of precedent. Alexy portrays each instance of PA as if takes place on a blank slate, and this comports with the standard representation of PA. For each new case, the court marches through each of the subtests until a dispositive decision is reached, regardless of what has been decided in past rulings. The practice is defensible, not least, on the grounds that every case is meaningfully unique in some important respects, and that the same legal norm can be implemented in different ways by different officials. At the same time, balancing produces rules, some of which are rigid. In Germany, the legislature may never decriminalize abortion, for example; under the European Convention of Human Rights, states must provide a means for transsexuals to register a change in gender. Produced through balancing, these are constitutional directives; and they are formulated as rules, not standards or principles. As the rules produced by a court's balancing decisions accumulate, a picture of the court's view on the importance of different rights claims will typically emerge. Barak brings these considerations to be bear in his notions of "principled balancing,"[32] which requires the judge to be clear about the constitutional "reasons" that underlie the importance of a given right to the polity, and why the right must be protected

[27] Alexy (2005: 573–574), addressing objections by Habermas (1996: 259, 1998: 430).
[28] Alexy (2005: 575).
[29] Stone Sweet and Palmer (2017: 400).
[30] Barak (2012b: 745).
[31] Stone Sweet and Palmer (2017: 400–401; Möller (2012: 175); Weinrib (2016: 240–245).
[32] Barak (2010). The notion of "principled balancing" responds directly to certain theoretical issues involving constitutional structure that we will not discuss here.

from disproportionate intrusions. When judges engage in principled balancing, they are aware that they are involved in constitutional lawmaking – the construction of a constitutional jurisprudence that will have prospective effects on how they will balance in future cases. This jurisprudence can help policymakers and potential litigants assess in advance the probable weight to be given to the strain of a right being pleaded in a future case.

II Strategic Considerations

The process through which PA emerged as the global, best-practice standard of rights adjudication is enormously complex, involving thousands of discrete decisions taken by actors operating in very different political contexts and legal settings, across many decades. In the face of this complexity, we offer a relatively simple theory.[33] Distilled to basics, the theory "explains" important aspects of judicial behavior as responses to the quasi-permanent crisis of political legitimacy that will afflict any court as its influence on policy grows. This crisis is severely aggravated when judges make law under conditions of structural supremacy. The elaboration, by Alexy and Barak, of law-like directives governing balancing – which are grounded in the practices of powerful courts – is just one important strategic response to this crisis. As will become clear, we do not use the word "strategic" in a pejorative sense, nor do we ascribe to members of courts "partisan" or "non-judicial" motives when they behave strategically. To properly perform their tasks, trustee courts must routinely make strategic choices in law (Chapters 1, 5). Some successful choices, including the adoption of PA, are inscribed in a stable jurisprudence. After a brief summary of the theory's main features, we discuss the advantages PA gives to constitutional courts. Embracing PA, we argue, can help judges mitigate legitimacy dilemmas in specific ways.

Two-Against-One

We proceed from a reductive theory of third-party dispute resolution (TDR). At its core is an insight first made by anthropologists, namely, that the social demand for TDR is so intensive and universal that one finds no society that fails to supply it in one form or another.[34] When two parties in dispute ask a third party for assistance, they build, through a consensual act of delegation, a node of social authority, or mode of governance. By "mode of governance," we mean a stable mechanism through which the rule systems (norms, law) in place in any society are adapted and applied, on an ongoing basis, to the needs and purposes of those who live under them. The theory focuses on the dynamics and consequences of moving from a dyadic context (cooperation, conflict, dispute settlement between two parties) to a triadic one (mediation, adjudication) and moving from consensual TDR to compulsory TDR.[35]

Triadic governance contains a fundamental tension that threatens to destroy it. In consensual TDR, the triadic figure knows that her social legitimacy rests in part on the blessing of the parties, and thus on the perception that she is neutral *vis à vis* the parties and their dispute. Once constituted, the triadic entity faces a potentially intractable dilemma. On the one hand, her reputation for neutrality is crucial to her legitimacy. Disputants would be loath to delegate disputes if it were otherwise. Yet, in resolving disputes, the third party may compromise her reputation for neutrality by declaring one party the loser, thereby creating a 2-against-1 situation.[36] In such a situation, the dispute resolver's interest, her existential priority, is to settle conflicts without destroying the perception of neutrality with respect to

[33] Only basic (and relatively reductive) theoretical materials could be useful when it comes to an attempt to build a general approach to modern constitutional law; see Shapiro and Stone Sweet (2002: chapter 4).
[34] Shapiro (1981: chapter 1).
[35] Stone Sweet (1999), as applied to constitutional systems of justice in Stone Sweet (2000: chs. 1 and 7).
[36] See especially Shapiro (1981: chapter 1).

present and future disputants. Given this interest, she may well seek to mediate settlements, or to find an equitable solution, "splitting the difference" between the parties, for example.

If one party must win – and, under adversarial conditions, each party hopes to do so – the typical solution is to base the outcome on pre-existing social norms. By definition, a community's norms, whether informal or formalized as law, comprise ready-made standards of appropriate behavior, and thus facilitate both dyadic and triadic dispute settlement. In basing her ruling on norms, the triadic figure is, in effect, saying to the loser, "you have lost not because I prefer your opponent; you have lost because it is my responsibility to uphold what is right in our community, given the facts of the dispute, and the harm that has occurred." Her legitimacy now rests, in part, on the perceived authority of a third interest being brought to bear on the parties: the "social interest" embodied in the norms being applied. In any community, of course, the "perceived authority" of applicable norms, and therefore of TDR, will vary across time and contexts.

Old-fashioned anthropological[37] and new economic approaches to social norms[38] have shown that consensual TDR in close-knit societies typically operates to reassert pre-existing arrangements, or to evolve new ones only gradually. As communities grow in size and complexity, the functional demand for TDR will overlap with a growing need for rule adaptation (lawmaking). In such situations, consensual TDR, with its emphasis on settling conflict through (re)enactment of existing norms, is often insufficient. Robust commitment devices are all but required.

Lawmaking and Supremacy

The move to adjudication aggravates the 2-against-1 dilemma. The judge's authority, after all, is fixed by office and compulsory jurisdiction, backed by the state's enforcement capacities. Courts are still ritually portrayed as triadic dispute resolvers. They still seek to avoid or mitigate the effects of declaring a loser, through the development of settlement regimes, splitting the costs of a decision among the parties, processing appeals, and so on. But judges are part and parcel of the coercive apparatus of the state. Moreover, given a steady caseload and a duty to justify their decisions with reasons, adjudicators will make law. One can assume, as we do for present purposes, that this lawmaking behavior is primarily defensive. Judges develop a rhetoric of justification, in part, to counter the perception of bias. "It is for these reasons, these norms grounded in this social interest, that you have lost." Even so, norm-based justification will have prospective, regulatory effects, so long as some minimal notion of precedent exists in the system (Chapter 1). Viewed in this light, judges invoke precedent as a means of transforming judge-made norms into "pre-existing" law. Case law – a court's jurisprudence – is a record of these moves.

Judicial lawmaking thus raises a second-order legitimacy dilemma, rooted in the brute fact that the "content of the law governing the dispute could not have been ascertained by the parties at the time [it] erupted."[39] The applicable law is revealed through the court's ruling. How one should properly understand judicial lawmaking, and its political legitimacy, are questions that have haunted democratic and legal theory over centuries.

One major stream of positivist theory emphasizes that precedent-based lawmaking itself constrains judges. Hart implies that the extent of defensible lawmaking discretion in place at any point in the evolution of the law is proportional to the extent of the indeterminacy of that law. Judicial lawmaking is defensible insofar as it proceeds in light of received precedent and to the extent that it "renders" the

[37] Malinowski (1932); more recent discussions include Collier (1973).
[38] Ellickson (1991).
[39] Stone Sweet (1999: 157).

applicable law more determinate.[40] The argument is functional: if judges did not possess lawmaking discretion, they would not be able to resolve legal disputes properly, given normative indeterminacy and other uncertainties, such as changing social, political, and economic conditions. For MacCormick, a close student of Hart's, the primary objective of legal theory is the development of standards for evaluating a court's jurisprudence as "good or bad," and "rational or arbitrary."[41] Good decisions are arrived at through interpretation and analogical reasoning; and the good judge packages his lawmaking as a relatively redundant, self-evident, incremental extension of available legal materials.[42]

The simple TDR model, and the conception of the judge derived from it, approximate most closely the dynamics of a civil dispute between private parties. The role of the constitutional judge in modern systems of constitutional justice, however, differs in important respects. To be sure, constitutional judges are expected to make the law more determinate: charters of rights are paradigmatic examples of incomplete contracts, comprising a list of broadly indeterminate norms (rights provisions). But what count as appropriate methods for doing so can vary in different contexts. In proportionality systems at least, judges are expected to apply the subtests, assess justifications for limiting rights, and to consider the relative importance of contending values, not to wring new law out of textual interpretation and their prior rulings.

In any event, as we move from (i) consensual TDR, to (ii) a judge interpreting a statute in order to enforce it, to (iii) a constitutional court contemplating the invalidation of a statute on the grounds that the legislative majority has violated the charter, the triadic figure is increasingly implicated in systemic governance. In context (iii) it is meaningful to speak of judicial governance. In important instances of rights adjudication, wherein both litigating parties will always represent wider social interests in tension, 2-against-1 and judicial lawmaking necessarily overlap. The stakes become much higher. A court that gives more weight to one constitutional value over another is also making law that favors one policy interest over another. Other things equal, the most acute form of this problem will appear under conditions of judicial supremacy. Modern constitutionalism is characterized by structural judicial supremacy, where trustee courts govern through their enforcement of charters of rights. In such a regime (Chapter 1), judges are only able to appeal to preexisting norms to the extent that they leave a coherent jurisprudence of rights in their wake.

Hans Kelsen, the founder of the modern constitutional court and of another important strain of positivist legal theory, made similar points, though in opposition to rights jurisdiction. After World War I, Kelsen labored to counter longstanding hostility on the part of executives and legislatures to constitutional judicial review. Most important, he distinguished what legislators and constitutional judges do when they make law. Parliaments are "positive legislators," since they make law freely, subject only to procedural constraints laid down by the constitution. Constitutional courts, on the other hand, are "negative legislators," whose legislative authority is restricted to the annulment of a statute when it conflicts with the constitution. Kelsen's distinction between the positive and the negative legislator rests entirely on the absence of enforceable rights within the constitution. He explicitly warned of the "dangers" of providing for rights of constitutional rank, whose indeterminacy he equated with "natural law." A court that sought to protect rights would obliterate the distinction between the "negative" and the "positive" legislator. Indeed, Kelsen argued, to the extent that constitutional judges would enforce rights, they would inevitably become super-legislators.[43]

The consolidation of rights-based constitutionalism after World War II has proven Kelsen correct.

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[40] Hart (1994: 124–141).
[41] MacCormick (1978: 67–68).
[42] Shapiro and Stone Sweet (2002: chapter 2).
[43] Kelsen (1928), discussed in Stone Sweet (2000: 34–37).

A rights-protecting, trustee court – by definition – is a positive legislator possessed of vast discretionary lawmaking powers (Chapter 1). But the ideological context for such arguments has radically shifted. Modern constitutional law, with its emphasis on rights, review, and entrenchment, fully secures the formal legitimacy of constitutional judges as rights protectors. Moreover, the salience of rights to policymaking will causally depend upon the court's lawmaking. No right – qualified or absolute – can be protected by a court without that court producing new law. Under this view, constitutional lawmaking is an expected outcome of delegating interpretive and enforcement powers to trustee courts, at worst, a predictable tax to pay for obtaining the desired social benefit: the enforcement of the charter.

Benefits

A court will embrace PA only if it considers that doing so will help it perform its duties in an appropriate manner. Put negatively, judges who reject the view that the charter of rights lays down criteria of constitutional legitimacy, or who believe that it is not the role of a court to require reviewable justifications from lawmakers, will have no use for proportionality. Any sophisticated court facing this choice knows that robust and routine enforcement of the proportionality principle will clearly expose it as a lawmaker. At the same time, PA can help judges blunt the legitimacy dilemmas of lawmaking and supremacy. Here we highlight four sets of significant strategic advantages that PA can provide to a rights-protecting court committed to building systemic effectiveness.

First, PA helps to mitigate the 2-against-1 problem by requiring the court to reduce the harm to the losing party as far as possible.

The point has been formalized by Alexy, who grounds it in "a structural theory of rights" developed with reference to the jurisprudence of the German Constitutional Court. Most important, Alexy distinguishes between "rules" and "principles," and then conceptualizes principles as "optimization requirements."[44] A rule is a legal norm that is either "fulfilled or not." A speeding limit is a rule: one is either within the limit or breaking the law. In contrast, principles – such as constitutional rights – are norms that "require that something be realized to the greatest extent possible given the legal and factual possibilities." The distinction makes a difference in adjudication. A conflict between two rules can be resolved through giving primacy, or establishing an "appropriate exception," to one of the rules. A conflict between two principles that both occupy the same constitutional rank, however, can only be settled through balancing. If rights are "optimization requirements" binding on the exercise of all public authority,[45] then rights adjudication, and therefore lawmaking under a limitation clause, requires a means of optimization, which PA supplies.

The role of optimization in alleviating 2-against-1 is easily grasped when we consider the effects of necessity review on the interests of a rights claimant. The command – if you find it necessary to legislate under a limitation clause, then you must do so with as little harm as possible to the rights holder – harnesses the legitimizing logics of Pareto optimality. A government measure that restricts a right more than is necessary to achieve a legitimate purpose can never be justified, since the right claimant could be made better off with no additional cost to the interests being pleaded by the government. Reducing the harm to the losing party is also basic to the balancing stage, as Barak's "rule of balancing" makes clear. Indeed, Barak suggests that the balancing court ought to engage in "relative balancing," which involves comparing the costs of various alternative means available to government in pursuit of its goals within the balancing stage. A government measure is disproportionate if it can be shown that an alternative would

[44] Alexy (2002: 44–61).
[45] Alexy (2002: 425): "Constitutions with constitutional rights are attempts simultaneously to organize collective action and secure individual rights."

result in (i) a relatively small decrease in societal benefit, while (ii) ensuring "a substantial reduction" in the harm to the rights-holder.[46] These logics also apply to conflicts between two rights provisions.

It should be obvious that rulings that can be portrayed as shifting outcomes along a Pareto frontier, or that conform to the rule of balancing, will be more palatable to losers than those that do not. Such rulings are a coherent means of dealing with any policy dispute between social interests likely to lose (or gain) the most from any new allocation of collective goods through the measure under review. The court can then credibly announce that it took every pain to minimize the negative consequences of its ruling for the losing party or interest: indeed, the importance of the right, interest, or value pleaded by the loser required as much. Moreover, the policy impact of the ruling can be packaged as an inevitable by-product of adjudicating a limitation clause, rather than outcome forced upon the polity by the judges' policy preferences. After all, it is the parties, not the court, that generated the dispute, the policy context, and the menu of options available.

Second, and relatedly, a court can deploy PA for the express purpose of blunting the effects of supremacy on legislatures and executives. It is worth repeating that PA does not make the problems of 2-against-1 or supremacy disappear. In any balancing situation, one interest will prevail against another, and the outcome will be enshrined in law. Yet, in a future case involving a conflict between the same two values, the other side may well claim victory; under changing circumstances, the court is always free to assess the interests in tension differently. PA maximizes the court's flexibility *vis-à-vis* all potential litigants in future cases.

Turning our attention to cases in which the government loses, we see that PA makes ample room for the court to pay its respects to lawmakers in each of the subtests prior to the move to balancing. A powerful strategic advantage of treating the legitimacy and suitability stages as relatively *pro forma* threshold inquiries is that the court is then able to say to lawmakers: "It is clear that the law under review is an appropriate instrument for pursuing an important objective in the public interest, under powers clearly granted to you under the constitution." A rights-prioritizing court must show that it takes the necessity stage more seriously. After all, why should it ever be acceptable for the government to infringe upon a right more than is necessary to achieve a declared objective? It is also indisputable that testing for less-restrictive means pushes judges into a policymaking mode, in that the analysis requires the counterfactual considerations of the relative harms and benefits of alternative measures. At the same time, skilled judges routinely use necessity analysis to recognize and create policy space for officials. Lawmakers are entitled to determine their own goals, and to choose the means for achieving them. Even when a court annuls a statute on necessity grounds, it may leave it to the legislature to choose from the alternatives that remain available. In doing so, the court creates a policy space – a "zone of proportionality" – within which the parliament is free to legislate.[47]

The delineation of the zone of proportionality is, we will argue, crucial for the construction of dialogic constitutional governance (Chapter 5). The balancing stage, too, gives the court opportunities to initiate dialogue with the various branches of government. Consider a case wherein the court has determined that a legislative measure under review (x) has passed the necessity test: x severely curtails a right (y) but is judged to be necessary, since only a severe curtailment of y could yield the legislature's goals. In the balancing stage, the court will focus on the harm to be visited on rights holders, not merely on the legislature's reasons for choosing x. If it moves to "relative balancing," the judges will evaluate alternatives to x that are capable of reducing the harm to y (say, from "severe" to "light") without a drastic marginal reduction of the social benefits sought by parliament. If the court strikes down x on these grounds, it is saying to the legislature: "you can pursue this objective but only by choosing means that are

[46] Chief Justice Barak's ruling in *Beit Sourik*; Supreme Court of Israel (2004).
[47] Barak (2012a: chapter 14).

more rights protective." It will then be left to parliament to respond, if under guidelines laid down by the court.

It is worth repeating that the balancing stage is a structured form of constitutional lawmaking. PA does not give a unique, correct answer to complex legal questions that can only be resolved through balancing. The procedure does not, in itself, tell judges what weight to give the interests and values in tension. At best, when judges take on board Alexy or Barak's prescriptions, PA will guide and constrain how a court balances; but it is the court's task to establish the relative importance of the contending values, given the factual context of the dispute at bar. To repeat, balancing will always require some background notions – theories – of the significance of any right being pleaded, and of the proper role of the state in the society, economy, or private life, and so on, given factual circumstances. These considerations are at the heart of what Barak calls "principled balancing." PA does not supply these theories, although it helps courts to accrete them in a jurisprudential form.

Third, PA provides a trustee court with a relatively complete operating system. It lays down a fixed, determinate procedure for arriving at decisions in a domain – rights adjudication – that is *substantively* indeterminate. The incompleteness of rights provisions helps us understand why the founders gave extensive powers to trustees. But, we argued, these powers come in tandem with duties of a fiduciary nature (Chapter 1), at a minimum:

- to work faithfully to protect rights (loyalty to the values and liberties placed in trust in the charter);
- to give reasons in justification of decisions (accountability to the polity); and
- to consider carefully the interests of those who are vulnerable to the court's decisions (deliberative engagement).

It should be evident that, insofar as a court deploys PA in good faith, it will perform these duties naturally and transparently.

While PA disciplines the internal deliberations of courts, it also helps constitutional judges manage potentially chaotic and explosive political environments. PA is a trans-substantive doctrinal framework: it applies to all qualified rights; and it is easy to teach, learn, and use. Once in place, the court will know, in advance, how pleadings will proceed; and the parties will know how the court will sequence the deliberations. A court's fidelity to PA will entrench a specific mode of constitutional argumentation, thereby consolidating the proportionality principle as the operational core of the criterion of legal validity. Because arguing outside of the framework will become ineffectual, skilled legal actors will adapt to PA, thereby reproducing and legitimizing it, enabling the court to reinforce, on a continuous basis, the salience of rights-based deliberation within the greater political system.

Fourth, to the extent that PA has been adopted by a set of powerful courts and has proved its managerial worth, additional courts will be drawn to it as means of underwriting their own *bona fides* as rights protectors. The recognition of PA as a "best-practice standard" of global constitutional law is the outcome of an ongoing macro process of diffusion and legitimation that has occurred on a global scale. As we show in Chapter 3, this process has all the hallmarks of what institutional sociology calls "institutional isomorphism," in that PA's diffusion has become subject to logics of mimesis and increasing returns (bandwagon effects). Faced with similar problems, judges copy what they take to be the emerging, high-prestige standard, thereby ensuring the result. For new constitutional courts – or for old courts charged with protecting a new charter of rights – embracing PA is a low-cost move, compared to the costs of developing an untested alternative on their own. It bears repeating that PA is a simple but comprehensive doctrinal structure. Judges, lawyers, officials, and law students can learn the basics

quickly and deploy the framework with ease, which facilitates diffusion and benefits trustee courts in obvious ways.

In our view, the available alternatives to balancing are far more likely than PA to exacerbate 2-against-1 and supremacy concerns. A court could seek to declare that rights possess an inalienable, "absolute" quality, taking primacy over any other public interest – as "trumps." Relatedly, judges could seek to avoid balancing by restricting their attention to the question of whether the public purpose being pursued by lawmakers is proper (in PA terms, constitutionally legitimate). And, in a dispute involving two rights claims, the court could declare right *x* to be presumptively more important than right *y*. These strategies, and categorical approaches more generally, run a high risk of constitutionalizing winners and losers, and of radically reducing policy space prospectively. PA does not "freeze" outcomes into place. As circumstances change, the PA court may "rebalance" values and interests without having to replace one relatively rigid hierarchy with another.

III Constitutional Governance

Proportionality's more fervent advocates argue that PA inheres in modern constitutional law, as an structural component of rights, constitutional democracy and, hence, of the rule of law itself.[48] Recognizing the reasons that trustee courts have to adopt the framework, however, does not entail accepting this claim. Its plausibility, after all, heavily depends on PA's successful adoption and deployment by apex courts. What is undeniable is that the global diffusion of proportionality has altered the constitutional landscape in ways that pose fundamental challenges to both normative constitutional theory and empirical comparative research. Today, one observes an emerging consensus on the basic tenets of a general, structural model of modern constitutional law. Here we focus on the importance of rights adjudication and proportionality to such a model, and discuss alternative views.

Charters as Blueprints

We have argued that modern charters of rights, trustee courts with extensive powers of review, and the adoption of PA combine to instantiate a distinctive system of constitutional governance.[49] Rights establish the criteria of validity for all sub-constitutional law; trustee courts are responsible for ensuring that these conditions are met by all state officials who make and enforce the law; and PA provides a methodology for doing so. Limitation clauses are an integral component of the system: they authorize officials to make law, for any proper purpose, so long as that law respects the proportionality principle; and they place officials under a duty to legislate the arrangements under which rights may be enjoyed. In adopting PA, judges consecrate the proportionality principle as the primary criterion of validity and legitimacy. The more *complete* the system (Chapter 1), the more the constitution as a whole can be defensibly analyzed as an extended bill of rights. As Kumm puts it, rights, constitutional courts, and PA are the structural basics of a "total constitution."[50]

It should by now be obvious that a justiciable charter of rights that lays down positive requirements of legality comprises a general blueprint for the making of public policy, that is, for constitutional governance. In such a system, the more rights are adjudicated, the more central to policy will be the trustee court. And the more litigants challenge the constitutionality of legislative acts taken under the cover of a limitation clause – which will reduce to a challenge to a statute's proportionality – the more PA will develop as a stable, discursive interface between the court and the legislature. In adopting PA, courts exclude formal deference doctrines that classify an issue as *per se* non-justiciable (a

[48] Alexy (2005); Barak (2012a: 211–234; 381–383); Beatty (2004).
[49] On secondary rules as "plans" for building legal systems, see Shapiro (2013).
[50] Kumm (2006); see also Möller (2012).

"political question doctrine," for example), or that place a burden on the claimant that is so high as to make the routine and robust review of state acts all but impossible (e.g., under a so-called "*Wednesbury* unreasonableness" or "rational basis" test). When a trustee court embraces PA, they place all policymaking, and its implementation, in the shadow of proportionality review, thereby positioning adjudication to be the "normal," primary mechanism of constitutional governance and change (Chapter 1).

The Right to Just Governance

With the consolidation of systems of constitutional justice, a diverse group of scholars has gradually developed consensus on a structural model of rights-based constitutionalism.[51] We use "model" here in a non-technical sense, as a simplified, relatively abstract representation of how a legal system should operate, given its essential properties. We sketched such a model in this and the first chapter, the nuts and bolts of which can be summarized as follows.[52] Through their representatives, in acts of constitution-making, the People place their most fundamental interests in trust, in the form of a charter of rights. The constitution also delegates to organs of governance and state officials the authority to construct and maintain the legal arrangements under which persons may exercise their rights, in light of other important constitutional values, including the public interest in reducing tensions between contending rights claims. The trustee court enforces the charter, supervising the rights-regarding acts of public officials, and invalidating them when they violate rights. The proportionality principle mediates the relationship between both (i) the citizenry and officials, and (ii) the trustee court and all other branches of governance. The crucial start-up mechanism for building effectiveness is a right to justification: individuals possess a right to challenge the proportionality of any official act that infringes upon their rights.[53]

Weinrib has mounted a compelling theoretical defense of the model on the basis of its unique capacity to resolve the "problem of accountability" that has bedeviled all other available constitutional forms.[54] A rights-based constitution, he argues, "exhaustively establishes the conditions for the valid exercise of all public authority," with rights at the core. Weinrib neatly expresses the implications of such a system as a set of interlocking principles. All individuals possess "a right to just governance,"[55] by virtue of the dignity that inheres in personhood, and which charters of rights express and "concretize."[56] Accordingly, the "right of rulers" to govern is "accompanied by the duty to respect and defend" the rights of the ruled. Under modern charters of rights, individuals "are free to 'determine and develop themselves'[57] in a manner compatible with the equal right of others to do the same"; and it is the obligation of state officials is to construct the charter-compatible arrangements within which this outcome is possible.[58]

To render the right to just governance real – that is, to ensure the accountability of officials – judicial review is required:

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[51] Weinrib (2016) give this "basic model" the title of "modern constitutional law," which Möller (2012) explicates as "the global model of constitutional rights."
[52] For a detailed elaboration, from the standpoint of Kantian constitutional theory, see Stone Sweet and Palmer (2017), and Stone Sweet and Ryan (2018; chapter 2). The approaches of Weinrib (2016) and Möller (2012) to rights and proportionality are also broadly Kantian.
[53] Möller (2012).
[54] Weinrib (2016: chapter 5).
[55] Weinrib (2016: chapter 2).
[56] Weinrib (2014: 183).
[57] German Federal Constitutional Court (1977); discussed in Weinrib (2014: 173).
[58] See also Möller (2012), who designates, as the basic value of the system, the "autonomy of free and equal citizens."

> [T]here must be an institution capable of assessing constitutional complaints on their merits, providing a public determination of the constitutionality of state action (or inaction), invalidating state action (or inaction) that violates constitutional standards and imparting remedies to those who have suffered public wrongs. Further, to perform this role, the relevant institution [must] possess legal expertise in constitutional interpretation and rights adjudication. Finally, this institution would have to be politically independent so that complaints would be considered on their legal merits rather than in reference to the preferences of the government of the day. The judiciary (or a specialized constitutional court) is uniquely suited for this role.[59]

Making a right to just governance justiciable fully reveals the problem of accountability which, in turn, justifies (indeed requires) supremacy.[60] Weinrib rejects as inadequate the so-called Commonwealth model of constitutionalism[61] (discussed in Chapter 1), which gives to legislatures the power to maintain statutes that a court has declared to be unconstitutional or incompatible with rights. Such systems – in particular, of the United Kingdom and New Zealand under statutory human rights acts – cannot resolve the problem of accountability, although such statutes may mitigate it. [62] Finally, Weinrib argues at length that PA has no doctrinal rival as a methodology for fulfilling "the basic right of each person to just governance," in that it requires the judge to consider each of the "justificatory conditions that government must satisfy" in order for the legitimacy of its law to be credited.[63]

Kumm has also developed a model that contains the building-blocks for the "development of the whole legal system."[64] The exercise of public authority is valid insofar as government acts are authorized by – and can be justified as an "implementation" of – the charter of rights. An unconditional "right to justification," held by every individual subject to the law, is therefore necessary, indeed primordial[65]; "proportionality based judicial review" serves both to "institutionalize" that right, and to undergird the legal system's broader legitimacy claims.[66] Kumm goes further than any other theorist in exploring how the systematic use of PA can generate better public policy, to the extent that its use helps to remedy various "pathologies" that afflict legislating in democratic states. Rational policymaking may be hindered by prejudices that are embedded in traditional (but often unexamined) ways of thinking, but which cannot be credited as legal reasons capable of justifying limitations on rights. Legislative and executives may be "captured" by rent-seeking firms or groups; if officials are unable to justify a contested measure, then they may well have designed it to favor unjustly one group at the expense of others or all. Officials may also seek to limit rights by exaggerating risks, and underplaying harms, as anti-terrorism measures taken around the world in the post-9/11 context illustrate. In the hands of skilled judges, PA will shine a bright light on unexamined presumptions, smoke out bad or corrupt motives, and rein in government when it

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[59] Weinrib (2014: 185).
[60] "[T]he legal and institutional structure of a modern constitutional state systematically addresses the problem of accountability. The integration of constitutional supremacy, constitutional rights, and judicial review enables each individual within the legal order to challenge the validity of an exercise of public authority on the grounds that it violates his or her right to just governance. Within this framework, the judiciary must answer neither to the many (which would regenerate the problem of accountability) nor to a higher authority … but solely to the supreme norms of the constitutional order"; Weinrib (2016: 156).
[61] A model best elaborated and defended by Gardbaum (2013).
[62] Weinrib (2016: 160–166).
[63] Weinrib (2016: 223; chapter 7).
[64] Kumm (2006: 344).
[65] "Every act of legislation that restricts an individual from doing what she pleases, as well as any legislative classification, requires constitutional justification"; Kumm (2006: 346).
[66] Kumm (2010: 143).

overreaches.[67] PA, far from being an inherently anti-democratic constraint on lawmaking, can thus help majoritarian organs of governance live up to their own ideals.

It is starkly evident that the enforcement of the proportionality principle, under conditions of judicial supremacy, exacerbates the so-called "counter-majoritarian difficulty." Proponents of the basic model, however, deny that the majoritarian elements of constitutional democracy – such as the direct election of the People's representatives to the legislature – are sufficient to assure systemic legitimacy. Under modern constitutions, all constitutional governance is delegated governance. The People have established a trustee court to enforce its will, ordaining that all state acts must respect rights or be invalidated, thereby rejecting legislative primacy. As Barak puts it:

> The same "We the People" who adopted the constitution also adopted the institution of judicial review. Considerations of "counter-majoritarian difficulty" or "lack of sufficient democratic foundation" should not affect the actual exercise of judicial review. Rather, judicial review should be exercised in a way that would allow the judges the full ability to inquire whether the other branches – who limited a constitutionally protected human right – have properly followed the requirements of proportionality as prescribed by the constitution's "we the people."[68]

For his part, Weinrib demonstrates that majoritarian-based systems (either of the traditional legislative sovereignty type or of the Commonwealth model variety) are structurally incapable of fulfilling the right to just governance, or of vindicating the principle of accountability. "A modern constitutional state is inherently accountable; a majoritarian democracy is not."[69] Kumm, no less than Weinrib, argues that "the right to contest acts of public authorities that impose burdens on the individual is as basic an institutional commitment underlying … constitutionalism as an equal right to vote."[70]

There is no way for a trustee court to deny its own supremacy when it enforces the proportionality principle while adjudicating the charter. But the deployment of PA, in the service of a right to just governance, can help to mitigate the 2-against-1 problem; Kumm:

> The outcome [of PA] must plausibly qualify as a *collective judgment of reason* about what the commitment to rights … translates into under the concrete circumstances addressed by the legislation. … Even those left worst off and most heavily burdened by legislation … must be able to interpret the legislative act as a reasonable attempt to specify what citizens – all citizens, including those on the losing side – owe to each other as free and equals. When courts apply the proportionality test, they are in fact assessing whether or not legislation can be justified in terms of public reasons, reasons of the kind that every citizen might reasonably accept, even if [they] actually [reject them].[71] [Emphases in original.]

Alternatives

Not everyone agrees, of course. Other approaches to the review of rights are possible, and PA's advance has not swept all alternatives from the field. Defenses of those other approaches, not

[67] Kumm (2010: 157–164).
[68] Barak (2012a: 382–383).
[69] Weinrib (2014: 188).
[70] Kumm (2010: 170). Alexy (2005) argues that constitutional review and PA create the conditions under which "argumentative representation," a complement of electoral representation, can take place.
[71] Kumm (2010: 168–169).

surprisingly, tend to go hand-in-hand with critiques of proportionality. We focus here on PA's chief rivals, and their defenders' main lines of argument against PA. It is worth emphasizing at the outset that many variants of the arguments surveyed here have been made in recent years.[72]

As mentioned above, one of the standard alternatives to PA is a categorical or absolutist conception of rights (see Chapter 4). As outlined by Dworkin in *Taking Rights Seriously* and elsewhere, the point of rights is to take certain, especially prized, values and interests out of the play of ordinary political processes entirely. To play this role, rights cannot be balanced against competing interests: they must take priority over them. The problem with proportionality, on this view, is that it does not take rights seriously enough. If rights are subject to balancing, then they can be balanced away. Different versions of this critique have been articulated by legal scholars as well as political philosophers, including Habermas.[73]

At the same time, some fault PA for not being deferential enough to the policy judgments of elected officials. Courts committed to proportionality are backseat drivers, second-guessing the legislature's choice of policy tools and ditching the balance struck by lawmakers between competing interests for their own. The problem on this view is that PA leads judges to take rights *too* seriously.[74] The alternative implicitly endorsed is some version of deferential review, such as *Wednesbury* reasonableness, or a "presumption of constitutionality" approach of the kind famously advocated in the nineteenth century by Thayer.[75]

Each line of critique contains an essential truth. PA necessarily involves courts in the kinds of judgments typically made by elected representatives: judgments about the impact and efficacy of different policy measures, as well as judgments that trade off one interest for another. And precisely because rulings turn on these kinds of contextual considerations in a PA jurisdiction, rights are not absolute. The more one regards these features as disqualifying, the more attractive one of the alternatives may appear. But it is equally important to remember that PA negotiates a tension that is common to all systems of constitutional justice, between rights and majoritarian self-rule. The alternatives must confront this tension as well, and should be assessed on how they cope with it.

Courts committed to strong deference doctrines manage the tension by abdicating their responsibility under a rights-based constitution. Against the backdrop of an older history in which charters either did not exist or were scarcely justiciable, such an approach might appear adequate. But it hardly seems equal to the demands of a modern system of constitutional justice, in which rights are expected to mean something, and indeed, few systems today still cling to a *Wednesbury* approach (Chapter 3).

A conception of rights as trumps offers vigorous rights protection within carefully maintained boundaries. The role of the court is to define and police the perimeter of those regions marked "no trespassing," in which rights hold sway and the state must stay out. Some may find this an attractive conception of rights. What is important to recognize is that (i) unless the charter itself defines the borders of rights with precision, it entails judicial lawmaking no less than PA does; and (ii) as incomplete contracts, rights charters never define the contours of rights with precision. Whether a court treats rights as trumps or uses PA, the court reaches a disposition: either the challenged measure survives, or the rights claimant prevails. Under PA, the court justifies that decision through an open and systematic engagement

[72] See Urbina (2017); Webber (2009); Miller and Webber, eds. (2014); Huscroft, Miller, and Webber, eds. (2014); Tsakyrakis (2009).
[73] Habermas (1996).
[74] Huscroft (2014).
[75] Thayer (1893).

with the contending values and interests at stake in the case. When rights are trumps, the court's analysis stops when once it determines the challenged measure disturbs a right. The court does not reach its decision by weighing the values and interests at stake openly, in the manner of PA.

Proponents of categorical approaches also find it difficult to do without balancing, not least, to define when rights are to be considered trumps (Chapter 4). Dworkin, too, has recognized that there are circumstances under which it would be inappropriate to apply rights with their full force. Rights might yield to the general good, for instance, in cases of emergency: "when the competing interests are grave and urgent, as they might be when large numbers of lives or the survival of the state is in question."[76] Weinrib has demonstrated that such exceptions, and Dworkin's (evolving) approach more generally, has more than a passing resemblance to proportionality.[77] The similarity should not be overstated, but it still stands as testimony to the draw that elements of proportionality exert on those who must decide how rights apply in concrete circumstances.

Criticism of PA dovetails with anxiety about incommensurability (discussed above). In its *stricto sensu* phase, PA requires courts to weigh marginal gains to the public interest against marginal harms to rights holders. But if it is not, in fact, possible to meaningfully weigh these against one another, then the judgment must come down to something like unreasoned intuition, or raw preferences. The coin of the realm in a proportionality-based system of constitutional justice is the scrutiny of justifications. If balancing judgments are not truly rationally justifiable, proportionality cannot deliver what it promises.[78] Some also take the view that balancing, if not necessarily inconsistent with reasoned decision making, is nonetheless incompatible with the kinds of moral reasoning that rights, properly understood, require.[79]

In their strongest forms, these lines of criticism either take an unduly narrow view of the practice of balancing, or imply standards of rationality that few doctrinal frameworks could meet. "Balancing" is a metaphor; of course, interests are not actually "weighed" against one another. Instead, judges engage in a comparative analysis of options, and make reasoned judgments about why a measure is or is not justifiable, considering its positive and negative impacts. As we stress above, rulings need not rest on naked consequentialist reasoning that is indifferent to the character of the interests protected by rights. PA can accommodate deontological reasoning about rights, in a variety of ways: by treating deontological restrictions as "side-constraints" on balancing, by filtering the kinds of reasons that can count in the analysis, and by placing a thumb on the scales as necessary to properly respect human dignity or other core values.[80] In any event, little in legal reasoning reduces to a syllogism; if the bar for what counts as rational justification is set that high, much in law will appear deficient. Given the indeterminacy of rights provisions, it is far more realistic to expect legal judgments to be supported by reasons, and judgments reached through PA will routinely meet that standard.

Conclusion

This chapter focuses on the various ways in which adopting the proportionality principle can help judges build the effectiveness of the systems of justice they oversee. PA sidelines formal deference doctrines, while providing a stable framework for argumentation and justification. It "takes rights seriously" by requiring officials to justify their rights-regarding decisions with reviewable reasons, and (in

[76] Dworkin (2013: 473).
[77] Weinrib (2017).
[78] On the other hand, Antaki (2016) has criticized proportionality on roughly the opposite ground: that it adheres to a "cult of rationality," when in fact constitutional adjudication cannot (or should not) be reduced to the operation of reason.
[79] See Urbina (2017).
[80] Kumm and Walen (2014).

trusteeship situations) through empowering the court to invalidate officials acts when they are found to be disproportionate. A trustee court that deploys PA consistently will routinely reveal its own lawmaking supremacy. Nonetheless, PA provides various means of blunting the court's *de jure* supremacy. It enables judges, for instance, (i) to avoid creating rigid hierarchies among rights and interests, (ii) to exploit the legitimizing logics of Pareto optimality, and (iii) to identify and respect the lawmaking prerogatives the legislators, executives, and ordinary judges rightly possess within a zone of proportionality (Chapter 5). In the next chapter, we trace the process through which proportionality emerged and diffused as a global principle of constitutional law.