Proportionality and Stare Decisis: Proposal for a New Structure

Vlad Perju

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This chapter explores how a change in the formal structure of proportionality analysis could increase the chance of proportionality’s successful transplant into American constitutional law. The change takes the form of an additional and new last step to the existing multi-prong inquiry, which would require judges to assess the outcome of the legal analysis at the previous stages against the disruption that outcome would cause to settled constitutional doctrine. The greater the departure from constitutional precedent, the stronger must be the reasons that justify it. By analogy to Robert Alexy’s “weight” analysis at the balancing stage\(^1\), I label this new step the “disruption” analysis.

The new step formalizes into proportionality analysis the so-called “presumption of stability” in American constitutional law.\(^2\) Disruption analysis requires “special


\(^2\) Richard Fallon, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. Rev. 570, 584 (2001) (discussing the presumption of stability). Professor Fallon introduces the presumption in the typical legal positivist terms, with concerns that “it would overwhelm Court and country alike to require the Justices to rethink every constitutional question in every case on the bare, unmediated
justification – over and above the belief that ‘the precedent was wrongly decided’—” whenever courts contemplate overruling precedent as a result of applying proportionality analysis. The demand for special justification addresses a risk involved in the transition to proportionality analysis. By empowering judges to revisit doctrines that, for good or ill, have long been deemed settled, proportionality can bringing about fundamental, systemic, and relatively sudden changes to American constitutional doctrine. The demand, internal to proportionality analysis, for a special justification preserves the normative core of the stare decisis doctrine. Even defenders of proportionality for whom large-scale doctrinal upheaval is part of proportionality’s appeal should see why the prospects of a successful transplant would diminish if these risks were left uncontained. The new disruption analysis speaks to these concerns by directing judges to seek the means least disruptive to constitutional doctrine that are consistent with their duty to justify judicial decisions.

authority of constitutional text, structure, and original history”, at 585. See also Frederick Schauer, Constitutional Positivism, 25 Conn. L. Rev. 797 (1993). Less ceremoniously, Karl Llewellyn calls precedent “a somewhat dignified name for the practice of the officer or of the office” of not reopening problems that have already been solved. See Karl Llewellyn, The Bramble Bush 65 (1951) (italics in the original).

3 Kimble v. Marvel Enterprises, Inc. 135 S.Ct. 1697 (2015) (Slip opinion, at 8) (“it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require what we have termed a ‘special justification’ – over and above the belief that ‘the precedent was wrongly decided.’”). On the demand for ‘special justification’, see also Dickerson v. US, 530 US 428, 443 (2000).

4 My concern here is with areas in which proportionality would replace categorical analysis. It is of course possible that there would be areas of constitutional doctrine where proportionality would replace balancing. But those situations are arguably fewer and, more importantly, would not involve the presumption of stability with the same urgency as doctrinal areas that have been shaped by categorical analysis.

5 It is no coincidence that David Beatty’s early and sustained case in favor of proportionality as the “ultimate rule of law” includes a blistering critique of precedent David Beatty, The Ultimate Rule of Law 87-91 (2005).
My approach can be contrasted with one that takes for granted the general template of the proportionality review, as it is currently deployed by courts around the world, and identifies areas of American constitutional doctrine to which traditional proportionality would be well suited. In a recent article, Professor Vicki Jackson distinguishes between the principle of proportionality and proportionality as a legal doctrine and argues that the principle of proportionality is sometimes met by the adoption of legal doctrines other than proportionality. The task, then, is to identify areas of constitutional law where doctrine and principle overlap and that could benefit, in light of standards of evaluation internal to American constitutional law, from proportionality analysis. The assumption is that proportionality’s versatility makes it eminently well suited for such usage. My approach is different, though compatible with Jackson’s. Rather than seeking to fit a set template, I ask how proportionality could enhance its transplantability into American constitutional law. Since, I argue, the current structure of proportionality analysis cannot address satisfactorily the concerns about doctrinal stability that pervade American constitutional law, the adaptation of proportionality to its new host environment requires the formalization of disruption analysis in a stand-alone step. Not only does this new, last step increase the appeal of proportionality analysis, but it can also elevate traditional stare decisis. Disruption analysis presents an opportunity to bring structure to the largely haphazard protection of constitutional precedent through the stare decisis doctrine. Furthermore, as one step of proportionality’s multi-prong inquiry,

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7 I treat proportionality as a complete package and assume on that basis that the method in its entirety, rather than disaggregated in bits and pieces, is yet to migrate to American constitutional law in ways comparable to its migration to other constitutional systems.
disruption analysis is integral, rather than exogenous, to constitutional method and as such can mitigate the tension between “correctness” and “stability” that underpins the jurisprudential foundations of *stare decisis*.\(^8\)

The legal transplants debate in comparative law is a useful vantage point for approaching experiments with proportionality’s format. That debate, which I introduce in the first section, offers a conceptual framework for understanding how legal institutions and ideas change as they travel across jurisdictions and must adapt to new ‘host environments.’ The second section argues that American constitutional law is such an environment and identifies the presumption of doctrinal stability as one of its salient features. I am concerned throughout this paper with overruling precedent, rather than the related but distinct matter whether and why precedent should be binding.\(^9\) The third section uses an example – the First Amendment protection of speech on public matters – to illustrate the concerns about the impact of proportionality to constitutional doctrine. I then discuss the factors that enter the new disruption analysis through which judges assess the impact of the departure from precedent against the strength of the reasons that support it. Finally, I identify some of the interim costs and trade-offs of adding a new step to proportionality analysis. The conclusion looks beyond the moment of the initial encounter between proportionality and American constitutional law and into proportionality’s longer term impact on constitutional stability.

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\(^8\) *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) ("Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.").

1. Proportionality as Legal Transplant

It seemed at first uncontroversial that, as Roscoe Pound wrote in *The Formative Era of American Law*, “the history of a system of law is largely a history of borrowing materials from other legal systems and of assimilation of materials from outside of the law.”\(^{10}\) And yet, a long and vibrant debate unfolded in comparative law during the twentieth century over whether the institutions of law can be transplanted across jurisdictions. A study of the reception of Roman law in Europe during the Middle Ages lead some scholars to argued that legal transplants represent “the most fertile source of legal development.”\(^{11}\) A different approach, the so-called “mirror theory of law”\(^{12}\), argued that legal meaning is “historically and culturally conditioned” and that legal transplants are not only undesirable but impossible because legal institutions change profoundly as they adapt to a new “host” environment.\(^{13}\) Other scholars saw the choice between ubiquity and impossibility of legal transplants as “too simple,” as Sacco put it.\(^{14}\) More moderate accounts sought to integrate functional and cultural dimensions.\(^{15}\) The debate was vastly enriched by later participants who emphasized the institutional role of

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“legal formants,”\textsuperscript{16} or by Günther Teubner’s work on “legal irritants” that identified normative self-reference and recursivity as reactions to the legal transplant of all social subsystems, not only of legal culture, in the host jurisdiction.\textsuperscript{17} As the dust began to settle on that debate, it seemed accepted that the framework of legal transplants, or the more capacious metaphors of “migration”, “transfer” or “borrowing”, would be helpful to understand not only the movement of legal institutions and ideas across borders but also the transformation they often undergo during that process.

Important for our purpose is that the original legal transplants debate was confined to private law. The distinction between private and public law remained formative for the scholars of comparative law, many of them European, who saw private law as sufficiently insulated from politics. Public law, by contrast, was perceived as inescapably political and therefore unfit for ‘scientific’ study.\textsuperscript{18}

Subsequent legal developments challenged these assumptions. For all the theoretical holdups of comparative law theory, the fast-paced constitutional developments of the second half of the twentieth century have shattered the insistence on different tracks for legal developments in private versus public law. As our era increasingly became one “of proportionality”\textsuperscript{19}, comparative law, as the traditional locus of reflection

\textsuperscript{19} Aharon Barak, Proportionality and Principled Balancing, 4 Law and Ethics of Human Rights 1, 14 (2010) (referring to our “era of proportionality”)
on how legal ideas and institutions move across borders, has been summoned to the constitutional field where cross-jurisdictional movement is “rapidly emerging as one of the central features of contemporary constitutional practice.”\textsuperscript{20} Proportionality analysis has become “the most successful legal transplants in the second half of the twentieth century.”\textsuperscript{21}

The lens of traditional comparative law structures the inquiry into how institutions such as proportionality adapt in response to new host legal systems. Striking in this context is that the method’s formal four-prong structure (purpose, suitability, necessity, and balancing) has changed relatively little as proportionality migrated across legal systems. This is not to deny important differences in how judges in different jurisdictions apply the successive steps. While a comprehensive study of these differences is yet to be written, scholars have documented the variance in how demanding courts are in assessing the legislative purpose at the first, or preliminary, step\textsuperscript{22}; in the various strategies for frontloading the analysis so as to avoid the balancing step of the proportionality review\textsuperscript{23};


\textsuperscript{22} Aharon Barak, Proportionality: Constitutional Rights and their Limitations 529 (2012).

in the usage of analytical devices such as the distinction of “core/periphery” or the “essence” of rights at the balancing step.  

And yet the formal structure of proportionality analysis has remained unchanged. Virtually everywhere, at least at the level of national courts, judges structure their analysis using the formal four-step structure. Theorists of proportionality have defended this framework. Defending the separation of the different prongs of proportionality analysis, Dieter Grimm warned that “a confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable.” The fear is that transgressions against proportionality’s formal structure would render the outcome arbitrary and undermine its legitimacy. The result, however, is a paradox: proportionality analysis is contextual in its application but rigid, in the sense of unresponsive to the historical and constitutional cultural context of each legal order, in form.

There are a number of possible explanations for the resilience of this particular multi-step review across legal systems. The first is that the current structure represents the definitive and most refined expression of the values that underpin the proportionality analysis. Proportionality places a non-purely deontological conception of rights within a categorical structure of formal legal analysis. Its integrative aim sets it apart from

24 See, e.g., S v Makwanyane and Another (CCT3/94) [1995] ZACC 3 (Constitutional Court of South Africa); Hevra Kadisha [Burial Society] of the Jerusalem Community v. Lionel Aryeh Kastenbaum, 294/91 (P.D. 46(2) 464) (Supreme Court of Israel) (Opinion of Judge Barak).
25 The case of supranational courts is different. For instance, the European Court of Justice shows little consistence in structuring its use of the proportionality method into different steps. See generally T.I. Harbo, The function of the proportionality principle in EU law, (2010) European Law Journal 158.
categorical analysis and from balancing. In practice, however, judicial technique often fails to live up to that integrative aim. Proportionality analysis, in its current form, often succumbs to centrifugal pressures from its context-sensitive and context-transcending elements. A second, more plausible explanation of proportionality’s resilient format is that this structure has proven sufficiently capacious that innovation can occur in the application of proportionality without the need to alter its formal structure. Variations in usage across jurisdictions speak to the method’s versatility. They show proportionality as eminently adaptable to the salient doctrinal, institutional and discursive features of its varied host environments.

This second explanation highlights the importance of the host legal environment to which proportionality must adapt. I argued in previous work that an important aspect of proportionality’s appeal is enabling judges to mitigate the blunt effect of a binary (valid/invalid) decision of constitutional validity on the right-claimant’s own interpretative processes, and thus enhancing the responsiveness of courts, at least vis-à-vis the parties. But the demands of responsiveness vary across legal systems and constitutional cultures. It is perfectly possible that proportionality would encounter in its global migration a host legal system, such as, I argue, American constitutional law, whose doctrinal and jurisprudential makeup imposes new adaptability challenges that could not be met through the exercise of judicial creativity within proportionality’s existing structure. Since the proportionality’s distinctiveness and merits do not depend on the preservation of its current formal structure, but rather on the existence of a formal

28 Id.
structure, experimentation with proportionality’s multi-prong format is possible and necessary.

2. Encounter with American Constitutional Law

Using the encounter with American law to rethink the formula of the proportionality analysis might seem surprising at first. The demand for doctrinal stability in American constitutional law, as reflected in the stare decisis doctrine\(^{29}\), has been routinely described as only a presumption – “not an inexorable command.”\(^{30}\) The Supreme Court’s willingness to revisit precedent in a host of recent high-profile cases, ranging from same-sex marriage\(^{31}\) to constitutional criminal procedure\(^{32}\) and from the Establishment Clause\(^{33}\) to campaign finance\(^{34}\), confirms the presumptive nature of the commitment to leave doctrines as they stand.\(^{35}\) Each instance of overruling precedent

\(29\) *Stare decisis* is a doctrinal mechanism for stabilizing constitutional law. It should not obscure the existence of other types of stabilization mechanisms, ranging from the socialization of constitutional actors, especially judges, to the sharing of constitutional ideology.


\(35\) Studies have shown that the Supreme Court has overruled precedent at the average rate of slightly more than one per year over the past seven decades. See Brief of constitutional law scholars as *amicus curiae* in support of respondents in Friedrichs v. California Teachers Association (p. 10) (citing data from Supreme Court Decisions Overruled By Subsequent Decision, Gov’t Printing Office, perma.cc/QJ2N-WWJ8. Data was gathered by selecting all constitutional cases since 1940 expressly overruling prior decisions.) (available at http://www.scotusblog.com/wp-content/uploads/2015/11/14-915_amicus_resp_ConstitutionalLawScholars.authcheckdam.pdf).
invites the Justices and legal scholars to revisit and debate the fundamentals of *stare
decisis*.  

And yet, it would be mistaken to interpret these disputes, including the Court’s occasional overruling of precedent, as proof of the erosion of *stare decisis* in American constitutional law. They are, rather, only the latest round in the cyclical process of soul-searching of American constitutionalism whose needs of overall constitutional stability are unlikely to decrease in intensity in the future.  

The values that underpin judicial adherence to precedent—“consistency, coherence, fairness, equality, predictability, and efficiency” — are indispensable ingredients of the political project of self-government by law in its American instantiation. They are central to the case for the Constitution as an anchor for a shared collective identity that must be forged against a background of unrelenting disagreement. Not that such “corrosion by acidulous moral disagreement” does not encompass the task of “defining and delineating people’s rights” — that is, the Constitution’s own domain. But the difference — or, at least, the hope — is that law can keep such corrosion at bay. Henry Monaghan’s observation, that the claims of history are stronger “when settled expectations of the body politic have clustered around

37 See, e.g., Randy Kozel, Stare-Decisis in the Second-Best World, 103 Cal. L. Rev. 1139, 1141 (2015) (“Although judges continue to disagree over the proper application of stare decisis in individual cases, both the doctrinal structure and the animating tension between the legal continuity and legal correctness are familiar features of modern jurisprudence.”).  
38 Henry Paul Monaghan, Stare Decisis and Constitutional Adjudication, 88 Colum. L. Rev. 723 (1988)  
constitutional doctrine\textsuperscript{40}, captures this insight. What makes such claims stronger is the capacity of constitutional doctrine to stabilize parts of the country’s political and social settlement. The knowledge that not every aspect of that settlement is open to revision at any point in time creates the space in which the arduous process of collective self-government can be imagined and executed. The more intense societal disagreement and polarization become, the greater the need – perceived or real - for systemic stability.\textsuperscript{41}

\textit{Stare decisis} also has other doctrinal and structural implications. Precedent was an important ground for upholding the “essential holding”\textsuperscript{42} of \textit{Roe v. Wade} and the erosion of its authority might alter the constitutional right to privacy. Relatedly, long-standing debates about the legitimacy and utility of non-categorical approaches to constitutional rights in American constitutional law shape perceptions about proportionality’s transplant.\textsuperscript{43} Finally, at the structural level, stability demands doctrinal unity in a legal

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  \item \textsuperscript{40} Henry Monaghan, Taking the Supreme Court Opinions Seriously, 39 Md. L. Rev. 1, 7 (1979). I am indebted to Randy Kozel for this reference. See Randy Kozel, Stare Decisis in the Second-Best World, 103 Cal. L. Rev. 1139, 1166 (2015). See also Richard Fallon, Forward: Implementing the Constitution, 111 Harv. L. Rev. 54, 109 (1997) (arguing that reasonable disagreement is a reason for maintaining the principle of stare decisis).
  \item \textsuperscript{41} American constitutional theory abounds with normative reconstructions of the mindset of the constitutional interpreter who operates under the social circumstances of disagreement and the legal circumstances of relative systemic stability. For instance, Ronald Dworkin directs the judge to “test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole”, in Ronald Dworkin, Law’s Empire 245 (1986).
  \item \textsuperscript{42} Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding and reaffirming the “essential holding” of \textit{Roe v. Wade} 410 U.S. 113 (1973)).
  \item \textsuperscript{43} While proportionality and balancing are different, they nevertheless share a non-categorical approach to rights. For a doctrinal catalyst of debates about balancing, see Mathews v. Eldridge, 424 U.S. 319 (1976). For analysis and critique, see Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L. J. 943 (1987).
\end{itemize}
system such as the United States’ where judicial review is decentralized and the jurisdiction of the apex court is discretionary. Taken together, these factors show a heightened demand for stability in American law and suggest that proportionality’s successful transplant depends on its responsiveness to these demands.

However, the case for stability should not be exaggerated. Core doctrines of American law are dynamic, not static. They can change over time, including under stimuli such as, presumably, the incorporation of proportionality review. More importantly, proportionality’s worldwide success suggests that its current formula is neither inimical nor incompatible with a general need for doctrinal stability. A certain level of respect for past decisions seems inherent to law and legal thought. Normatively, and insofar as stare decisis is presupposed or at least supported by the ideal of the rule of law, it should not be surprising that all legal systems incorporate versions of the presumption of stability. Even in civil law systems, where the precedential force of judicial decisions is less formalized, courts – and especially constitutional courts - routinely follow their past decisions.  

44 Anthony Kronman, Precedent and Tradition, 99 Yale L. J. 1029, 1032 (1990) (“Respect for past decisions, for precedent, is not a characteristic of certain legal systems only. It is rather a feature of law in general, and wherever there exists a set of practices and institutions that we believe are entitled to the name of law, the rule of precedent will be at work, influencing, to one degree or another, the conduct of those responsible for administering the practices and institutions in question.”).

45 See Michigan v. Bay Mills Indian Cnty. 134 S. Ct. 2024, 2036 (2014) (describing stare decisis as a “foundation stone of the rule of law.”). See also City of Akron v. Akron Center for Reproductive Health, Inc. 462 U.S. 416, 419-420 (1983) (“the doctrine of stare decisis, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.”)

46 See John Henry Merryman & Rogelio Perez-Perdomo, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America 47 (3d ed. 2007) ("Everybody knows that civil law courts do use precedents."). For a comprehensive study in the French civil law context, see Frederic Zenati, La Jurisprudence (1991). For a recent study, see Michael P. Van Alstine, Stare Decisis and Foreign Affairs, 61
But one should be cautious about proceeding at this level of generality. The rule-of-law tradition is important, but not monolithic. There are not one, but a number of different rule-of-law traditions, and each gives different weight to the value of stability. The American tradition has been described as closer to Montesquieu’s model of using law to protect individuals from the government rather than the Aristotelian tradition of securing a general climate for rationality within the exercise of public power, which characterizes some of the legal cultures in which proportionality has thrived.\(^{47}\) It is precisely this climate of rationality that explains why the animating spirit of proportionality has been described as one of openness, or, as Alexy calls it, of “precedentially established uncertainty.”\(^{48}\) Defenses of proportionality have often and unsurprisingly gone hand in hand with critiques of the authority of precedent.\(^{49}\)

These cautionary notes establish at least a prima facie case that traditional proportionality would deal inadequately with the specifically American demands for constitutional stability. Inadequacy is especially problematic at the moment of the initial encounter between the proportionality method and American constitutional law when sudden and doctrinally significant changes mandated by proportionality analysis, a foreign transplant, could engender even greater opposition in the name of preserving the “integrity” of the American constitutionalism.\(^{50}\) Proportionality should be modified to


\(^{49}\) See, e.g., David Beatty, supra note 5, at 87-91.

address such concerns, through the formalization of the disruption analysis in a stand-alone step of the overall multi-prong inquiry.

3. An Example: Free Speech

An example from First Amendment jurisprudence, a relatively settled area of constitutional jurisprudence that occupies a canonical place in the American constitutional and political self-understanding, helps to illustrate the perceived risks in the transition from categorical analysis to proportionality. The question before the Supreme Court in *Snyder v. Phelps*\(^{51}\) was whether the First Amendment shields from tort liability the members of a church congregation who picketed the funeral of a soldier killed in the line of duty in Iraq. The members of the Westboro Baptist Church carried signs with their message that God hates and punishes the U.S., and particularly the military, for its tolerance of homosexuality.\(^{52}\) The protest was held under police supervision on public land adjacent to public streets, behind a temporary fence and out of sight. The plaintiff, the deceased’s father, was aware about the existence of the protest – the funeral procession had to enter the church through a side door – but he saw the content of the placards on the day of the funeral only later from a television broadcast of the event. Some of the signs were general (“God Hates the USA/Thank God for 9/11”, “America is Doomed”), others were less general (“Thank God for Dead Soldiers”), and some other signs seemed even more specific and targeted to the context of the funeral (“You’re

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\(^{52}\) The church is listed by the Southern Poverty Law Center as one of six hate groups in Kansas and by the Anti-Defamation League as one of seventeen extremist groups in the United States.
Going to Hell”, “God Hates You”, “God Hates Fags”). One of the signs was a stylized image of two men engaging in sexual intercourse. Seeing the signs caused the plaintiff great emotional distress. He reported severe depression and the exacerbation of pre-existing health conditions. A jury found that Mr. Snyder had established the elements of the tort of intentional infliction of emotional distress, which requires that conduct be “so outrageous in character, and so extreme in degree, as to go beyond all possible bonds of human decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” The jury awarded millions of dollars in damages. The Court of Appeals reversed on First Amendment grounds, and the Supreme Court affirmed. The Justices held 8-1 that speaking on matters of public concern on public property, even when the speech is outrageous and harmful, is entitled to protection under the First Amendment.

The critical test under established First Amendment jurisprudence is whether the speech is of private or public concern. If it is of public concern, that is, if it relates to any political, social or otherwise community-wide concern or interest, then it fits within “the heart of the First Amendment protection” by virtue of the view that “profound commitment to debate on public issues should be uninhibited, robust and wide-open.” The determination that speech is of public concern requires an examination of the content, form and context of that speech as revealed by the whole record. The Court easily concluded that the speech of the members of the Westboro Baptist Church was ‘of public concern’. Most of the signs contained speech of public concern and the few that did not, such as those that could be interpreted to be about the deceased, a private person,

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53 See Brief of Petitioner for Writ of Certiorari, at 4.
were insufficient to alter the “overall thrust and dominant theme” of the broader public issues. And “speech concerning public affairs is more than self-expression; it is the essence of self-government.”\(^{56}\) However hurtful the content of the speech, the picketing was peaceful and it concerned public matters at a place near a public street, which is “the archetype of a traditional public forum.”\(^{57}\) The First Amendment protects the content and the viewpoint of the message itself: “if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”\(^{58}\)

Would that bedrock principle of the First Amendment remain protected if the Court used the proportionality method to decide this case? The answer is far from an obvious ‘yes’. The contextualism of proportionality analysis is of a different nature than the avowedly fact-intensive nature of the Court’s analysis in *Snyder*. In the latter case, the intensity of the analysis is high for the facts the doctrine selects as relevant. All other facts do not enter the judicial analysis. Thus, the question for the *Snyder* Court was strictly if the picket fit into the category of “speech of public concern.” If it did, then it is protected – a typical instance of categorical analysis.\(^{59}\) By contrast, proportionality mandates a broader factual analysis\(^{60}\), which brings into the balance the harm to the

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\(^{59}\) Breyer, J., concurring, points out the fighting words scenario, see Chaplinsky v. New Hampshire, 315 US 568 (1942). But recent First Amendment jurisprudence makes *Chaplinsky* a weak, almost vanishing, precedent. It is telling that no other Justice joined in Justice Breyer’s concurring opinion.

\(^{60}\) Alec Stone Sweet and Jud Matthews, Proportionality Balancing and Global Constitutionalism, 47 Columbia J. Trans. L 74, 89 (2008) (mentioning that the move from balancing – by which the authors
privacy and dignity interests of the plaintiff. For the Snyder Court, the existence of the harm is entirely irrelevant to answering the question if the speech is of public concern. Not so for a court applying the proportionality analysis. The balancing stage of proportionality breaks open the shell that encases protected speech and opens it up to an analysis that places speech alongside the harm that it causes.61

Proportionality analysis takes the importance of the satisfaction of the right to free speech and balances it against a law establishing liability for the harm that was inflicted on the plaintiff. This is “a comparison between the margins”62, specifically between the marginal social importance of preventing the harm to the constitutional right caused by the limiting law and the marginal social importance of preventing the harm to the personal right protected by the limiting law. Regarding the latter, the plaintiff suffered “wounds that are truly severe and incapable of healing themselves.”63 Burying a child marks one’s life forever, and the funeral is reserved as the ritual of the final farewell. The plaintiff proved in the District Court that he had suffered severe emotional distress under the demanding requirements of that tort. By contrast, the marginal social importance of

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61 In the Snyder case, the broader factual analysis would pertain also to the analysis of facts, such as the video posted by the church members online, which the Snyder majority declined to take into consideration. Snyder v. Phelps, 562 U.S. 443, 449 (footnote 1) (2011). The video was addressed directly to the members of the Snyder family and was entitled “The Burden of Marine Lance Cpl. Matthew A. Snyder. The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots.” The video offers a key for interpreting the placards at the picketing that diminishes further their public content and accordingly the marginal social importance of preventing the harm to the constitutional right caused by the limiting law. See Snyder v. Phelps, 562 U.S. 443, 469-470 (2011) (Alito, J., dissenting).

62 Aharon Barak, Proportionality at 350.

the limitation of the picketers’ speech seems to be of comparative lower intensity. Their message would be limited, not entirely suppressed. They would only be deprived of the opportunity to magnify their message by attaching to a private context as a means of attracting publicity.64 The limitation of speech seems peripheral, thus leading the balance to incline in the direction of limiting that speech, an outcome disruptive of well-settled First Amendment doctrine.

This conclusion assumes that proportionality lacks the resources to correct for radical departures from settled constitutional doctrine.65 But one important distinction, between the constitutional status and the social importance of a right, suggests that such resources might be available. As Aharon Barak puts it it, “[r]ights that are of equal normative status are not necessarily rights of equal social importance.”66 The latter represents social hierarchy of constitutional rights as derived from that society’s history, culture and character. In the hierarchy of social importance of constitutional rights, the right to speak on matters of public concern is, alongside political speech, somewhere near the top. Under this model, even a low or moderate intensity limitation of a socially important right (political speech) might trump a more serious intensity limitation to interests that are ranked lower on the scale of social importance. Thus, the balancing step of proportionality can protect the constitutional right in equal measure as American-style, categorical analysis.

64 The church openly acknowledged that its choice of picketing this funeral, which is part of its modus operandi of picketing funerals of dead soldiers around the country, has to do with the heightened publicity. Snyder v. Phelps, 562 U.S. 443, 448 (2011).
65 But see, e.g., Robert Alexy, Constitutional Rights, Balancing and Rationality, in Ratio Juris 16(2): 131-140, 139 (listing precedent as only one among other considerations to argue for the rationality of balancing, against the critique of Jürgen Habermas).
66 Aharon Barak, supra note 62.
The argument from the social importance of a right seeks to bring categorical analysis – that conception of rights that Habermas calls “firewalls”\textsuperscript{67}, Dworkin “trumps”\textsuperscript{68}, an Nozick “side-constraints”\textsuperscript{69} – into the balancing step of proportionality through the back door. The problem, however, is that the balancing step is incompatible with such an attempt. Traditional First Amendment categorical analysis draws an immediate inference from a sign reading “Thank God for Dead Soldiers” to the “essence of self-government.” It does so by classifying picketing as constitutional “speech” and by holding all “speech in matters of public concern” as socially important. Can the balancing step of proportionality review reliably deliver the same conclusion?

The answer is no. Balancing and categorical analysis operate in different registers. Balancing places conflicting considerations side by side; it is premised on denying them consideration abstracted from one another. Categorical analysis marshals an entire arsenal of categories and distinctions to reach that conclusion: the public street – “a traditional forum of First Amendment protection”\textsuperscript{70} –, methods of subsumption, the incorruptibility of public elements of speech when placed alongside private speech and other such doctrines. By comparison, the emphasis on the “social importance” of the right in proportionality analysis has a circular quality to it: determining the social importance of a right is a function of how that right is defined and protected. The high social importance of political speech is a function of the fact that political speech has been a

\textsuperscript{67} Jürgen Habermas, Between Facts and Norms 255 (1996).


\textsuperscript{69} Robert Nozick, Anarchy, State and Utopia 29 (1974).

\textsuperscript{70} Perry Educ. Ass’n v. Perry Educators, 460 U.S. 37 (1983)
successful trump card against attempts of limitation. Had previous attempts to limit the right been more successful, the social importance of the right would have been less significant. The invocation of the social importance of a right, at the balancing stage of proportionality, cannot be the functional equivalent of categorical factors in traditional First Amendment jurisprudence. That is why an additional step, one that makes the continuity of doctrine internal to legal analysis, rather than appealing to outside considerations such as social importance, is necessary.

4. The Disruption Analysis

The proposed last step of proportionality analysis requires judges to take into consideration the authority of constitutional precedent and the need for legal stability. The greater the disruption to settled constitutional doctrine, the stronger must be the reasons that support it. This section presents one of a number of possible approaches to how judges can conduct the new disruption analysis. Given my focus on proportionality’s transplant into American constitutional law, some the factors are familiar from traditional

stare decisis analysis: the workability of a precedent, the reliance expectations,

71 I interpret “settled constitutional doctrine” capaciously, and disruptions include not only situations when the overruling of a specific precedent is under consideration but also deviations from a line of cases that settle constitutional doctrine. Since the Supreme Court’s doctrine of stare decisis already deploys a capacious view of precedential scope, there is no need to belabor this point. Randy Kozel, Stare Decisis in the Second-Best World, 103 Cal. L. Rev. 1139, 1150 (2015) (arguing that the Supreme Court’s precedential scope is broad and includes doctrinal frameworks, such as the incorporation of the Bill of Rights via the Fourteenth Amendment, as well as requirements that sweep beyond precedent. Professor Kozel connects approaches to precedential scope are connected to interpretative theories, as well as to views about the institutional role of the judiciary).
subsequent developments of the doctrine and the soundness of its factual premises.\footnote{Planned Parenthood v. Casey, 505 U.S. 833 (1992). Other factors occasionally mentioned by the Court include the age of the precedent, see Manjeto v. Louisiana 557 U.S. 778, 792-93 (2009), or the margins of the vote, see Payne v. Tennessee, 501 U.S. 808, 828-829 (1991) (mentioning voting margins and "spirited dissents"); Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 530 (1985) (noting that the decision the Court was overruling was decided “by a sharply divided vote”). The Court has also referred, somewhat opaquely, to an assessment of the soundness of the reasoning. See Manjeto v. Louisiana 557 US 778, 792-93 (2009). This could involve, for instance, the soundness of the historical analysis on which the reasoning rested. See Charles Barzun, Impeaching Precedent, 80 U. Chi. L. Rev. 1625 (2013).}

Assuming that traditional proportionality analysis favors the plaintiff in Snyder, the new last step requires judges to determine if the reasons that support the conclusion at the balancing stage are proportionate to the disruption to settled constitutional doctrine, in this case the categorical, content-centered and effect-disregarding protection of speech.

Judgments about disruption rely on a complex calculus about normative and doctrinal viability, including reliance and workability. Regarding reliance, we must distinguish between temporal and systemic dimensions. The temporal dimension refers to the degree of entrenchment over time of the relevant precedent. Absent special circumstances, the longer the life of the precedent, the greater its authority. The presumption of stability aims to minimize the surprise in having the government withdraw a protection or benefit whose existence shaped the activities or plans of the right-holder. To be sure, that expectation is not absolute as it would be unreasonable to expect that laws, including the Constitution, should remain immutable in a constitutional democracy that must be responsive to the demands of its sovereign, pluralist citizenry. Right-holders have, nevertheless, a reasonable expectation of general stability. That expectation must be discounted by the existence of a fair warning regarding possible change. Since the weight of reliance derives from the assumption of continuity, a fair
warning that such continuity might be called into question diminishes the weight of reliance. Fair warning can take a variety of forms such as a dicta signaling intention to change course, the demise of a precedent upon which the holding at issue rested, even a well reasoned separate opinion of a Justice. In the Snyder case, the temporal dimension of reliance is very strong and no fair warning of an impending change to the doctrine can be found in the existing precedent.\(^\text{73}\)

The systemic dimension of reliance is a function of a holding’s place within the larger doctrinal web. The greater its doctrinal ramifications, the broader the impact radius of the departure from precedent and thus the disruption of constitutional stability. Generally speaking, systemic reliance must be assessed neither at the narrowest level (where, except in situations of desuetude, overruling precedent is by definition highly disruptive) nor at the broadest, macro-systemic level (since there are very few precedents whose displacement would destabilize the entire constitutional order). For the purpose of proportionality analysis, disruption must be assessed at the mid-range, micro-systemic level, within the web of doctrines related to the holding or the line of precedent under consideration. That analysis is case-specific and it, as well as the overall disruption analysis, are matters of interpretation and contestation. In Snyder, the traditional protection of speech of public concern\(^\text{74}\) and the centrality First Amendment in the overall constitutional architecture suggest that withdrawing constitutional protection from the picketers would amount to severe disruption of doctrinal stability.

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\(^{74}\) See, e.g., Connick v. Myers, 461 U. S. 138, 145 (1983) (“speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”).
Another factor in calculating disruption is the workability of the precedent. Workability requires factual determination, if the mandated action or inaction is doable, as well as a doctrinal assessment of a precedent’s traction in subsequent case-law. When the formulation of the precedent is rule-like, workability is a function of the number and scope of exceptions that courts have had to carve out to correct for over- or under-inclusiveness, so as to bring the precedent into closer line with its background justification.\textsuperscript{75} When the precedent resembles a standard, its doctrinal traction will depend on the extent to which it holds the doctrine together, that is, to the degree of unity it brings to subsequent doctrinal developments. The precedents binding the \textit{Snyder} Court regarding the protection of speech in matters of public importance easily pass the workability threshold at both the factual and doctrinal levels. While the standards for identifying speech dealing with matters of public concern are stated as standards\textsuperscript{76}, thus seemingly directing the Court towards holistic analysis\textsuperscript{77}, in reality the Court has established something close to categorical, rule-like directions for how the standard must be applied.\textsuperscript{78} Those categorical directions, which are themselves interpreted to limit the

\begin{itemize}
\item \textsuperscript{75} See generally Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-based Decision Making in Law and in Life 31-34 (1991).
\item \textsuperscript{76} Such a determination requires analysis of “content, form, and context” of that speech, “as revealed by the whole record”, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc. 472 US 749, 761 (1985).
\item \textsuperscript{77} Bose Corp. v. Consumers Union of United States, Inc., 466 U. S. 485, 499 (1984) (the Court must “make an independent examination of the whole record”)
\item \textsuperscript{78} For a study of how perceptions of risk have moved the First Amendment jurisprudence from standards to categories, see Mark Tushnet, The First Amendment and Political Risk, Journal of Legal Analysis vol. 4 (1): 103-130 (2012).
\end{itemize}
number of available exceptions, make the doctrine behind Snyder eminently administrable.

On this gradation scale, the factors that enter the analysis – large radius of impact, doctrinal traction and workability, reliance interests - suggest that withdrawing constitutional protection from the picketers in Snyder would qualify as serious disruption to constitutional doctrine. This does not conclude the analysis; it only reveals the threshold that the justification of disruption must meet. While all questions of weight are matters of interpretation and judgment, the disruption analysis demands that serious departures from constitutional precedent must be justified by proportionately strong reasons. Note that this is not another version of balancing. While the review here requires comparison, that comparative reasoning is unlike the balancing analysis. The point of the comparison is to check if the argument in favor of the doctrinal change has met its burden of proof.

Consider how this would play out in Snyder. The reason for justifying the departure from precedent is that the speech causes harm to the individuals it affects. Uncontested evidence of significant psychological and physiological harm translates, at a

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79 For an example of this approach and a justification of its application to categories of non-protected speech, see U.S. v. Stevens 559 U.S. 460 (2010).

80 “The burden of proof must properly rest upon him who seeks to overrule precedent, not upon him who intends to preserve it. Therefore, when the scales are balanced, precedent should be upheld. Only where the scales clearly lean toward overruling should that path be chosen.” Aharon Barak, Judicial Discretion 241 (1989). For example, in a “balanced scales” situation, the outcome of the balancing process would be unlikely to justify a significant disruption of settled constitutional doctrine. See Aharon Barak, Proportionality, at 365.

normative level, in the undermining of the dignity and standing of individuals affected as members of the political community. The question is if this harm outweighs the disruption of the First Amendment. The answer is that it does not. American law has consistently ranked, as a matter of constitutional – not social – importance, the value of political speech at a very high level. Unlike in other constitutional legal orders, such as Israel, Germany or South Africa, where dignity is afforded the highest degree of protection\textsuperscript{82}, American constitutional law does not offer comparable protection to individual dignity, at least in the dimension harmed by speech.\textsuperscript{83} It is thus important to be clear about why speech wins. It wins not because a court deciding a case such as \textit{Snyder} determines, on that occasion, that the harm caused to individuals is less important than harmful speech. If that were the case, and the court could make new law, the speech would be left unprotected. Rather, speech wins because previous cases have established a ranking hierarchy that places speech at the top, or in any case higher than the countervailing interests in the case at hand. That ranking carries the force of precedent and binds future judges.

\section*{5. Costs and Trade-Offs}

It is not cost-free to add an additional step to the multi-prong proportionality analysis. One cost is administrability. Disruption analysis increases the complexity of

\textsuperscript{82} See generally Aharon Barak, Human Dignity: The Constitutional Value and the Constitutional Right (2015).

\textsuperscript{83} This does not mean that dignity is entirely absent from American constitutional law. See Laurence Tribe, Equal Dignity: Speaking its Name, 129 Harv. L. Rev. F. 16, 21 (2015) (noting that “dignity is not some alien import with no place in our own constitutional tradition.”).
proportionality; it makes it more time-consuming, harder to apply and arguably also easier to manipulate. These costs are real, although one should not exaggerate them. The new step is no more difficult to administer than other steps of traditional proportionality analysis. In fact, it is considerably easier to administer than other parts of proportionality analysis, such as balancing. Furthermore, the cost is justified by the disruptive effects of the judicial holding. Even without this new step, judges would have to undergo a disruption calculus as part of traditional *stare decisis* analysis. And *stare decisis* is often applied in ways that have been criticized as haphazard, and arguably manipulatory.84 By contrast, as I have argued, the new step of proportionality, which replaces *stare decisis*85, makes the disruption calculus more systematic and it reduces the risk of manipulation. Finally, as American courts begin to experiment in practice with the format of proportionality, it cannot be ruled out that other steps of the method will be limited or eliminated.

Another set of costs can be labelled “redundancy” costs. Considerations from precedent are already present in how judges assess the intensity of the violation of the right at the balancing step of traditional proportionality.86 The “essence” or the “core” of a right as an analytical device for the balancing stage that is most convincing when it relies on precedent.87 The same is true, as we have seen, about determining the social

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85 This also suggest that the new proposed step does more than just shift and re-label a calculus of disruption that judges would undergo anyway as part of traditional *stare decisis* analysis. As part of the proportionality analysis, the distortion calculus is more systemic, transparent and predictable than *stare decisis*.
86 See Robert Alexy, supra note 65.
87 See supra note 24.
importance of a constitutional right.88 Thus, the proposed disruption analysis analysis seems duplicative. Now, much will depend on whether, in the long run, such analytical devices became central to how American courts deploy the proportionality analysis. Foreign courts have had mixed experiences with applying these tools.89 These redundancy costs are, at least for now, hypothetical. Even assuming that they become real, the formalization of precedential considerations into a separate step of the proportionality analysis might be an acceptable trade-off given the enhanced transparency that the formalization brings to the judicial process.

An important concern must be addressed separately. This is the concern that the introduction of the new step undermines the rationality of proportionality. This is a particularly sensitive matter since defenders of proportionality have spent much energy in explaining and defending the rationality of the legal analysis.90 The concern is that the disruption analysis undermines the rationality of proportionality in two ways. First, it interjects into proportionality considerations of pedigree that are extraneous to the reasoned consideration of the facts and context of each specific case. Second, the new step gives these considerations something close to a veto when overruling precedent is being contemplated. It allows judges to set aside correctness for the sake of the past and to superimpose obdurate legal doctrine upon fact-sensitive proportionality analysis.

To assess this risk, let us start by noting that, under my proposal, judges must decide if there are sufficient reasons to justify a departure from precedent. Disruption

88 See supra note 66.
89 The South African experience is instructive on this point. See S v Makwanyane and Another (CCT3/94) [1995] ZACC 3 (Constitutional Court of South Africa).
analysis does not circumvent reason-giving; in fact, it relies on it. It is true that this new step recognizes the authority of a certain type of reasons – reasons from precedent. But that cannot *eo ipso* undermine the rationality of proportionality since the authority of those reasons itself rests on strong and more general reasons as to why, in law, “history counts.” 91 And while it is true that the new step can lead to a bias in favor of the *status quo*, that bias is not arbitrary; rather, it is based on the values of integrity and coherence that rank high in a constitutional order centered around the presumption of stability. Furthermore, and importantly, the status-quo bias is itself reversible for good reasons. 92

Not only does the new step not undermine the rationality of proportionality but, in reality, it enhances it. It does so, as I have already noted, by channeling all considerations of precedent and history to a distinct step in the proportionality analysis rather than allowing them to infiltrate diffusely and often in an unacknowledged way into earlier steps. In its current articulation, such considerations sometimes play a role in balancing, for instance in how judges measure the intensity of the harm caused by the limitation of the constitutional right. 93 The creation of this additional, disruption step acts as a magnet that channels these considerations to the later step of the analysis. This analytical separation of reasons frees balancing and enhances transparency, which is itself a judicial virtue. 94

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92 This is in line with the standard understanding of precedent as binding “absent a showing of substantial countervailing considerations.” Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 757 (1988).
93 See supra note 65.
At a more fundamental level, the incorporation of disruption analysis into proportionality challenges the distinction and mitigates the tension between correctness and stability. This distinction has long been recognized at the jurisprudential foundation of *stare decisis*. As the Court has put it in one of the more recent iterations, “*stare decisis* has consequences only to the extent that it sustains incorrect decisions; correct judgments have no need for that principle to prop them up.” The assumption here is that considerations from precedent are exogenous to the so-called correctness analysis, as if outcomes about correctness could be cabined from institutional considerations about the doctrinal context in which they must fit. In its expanded form that includes the disruption analysis, proportionality does not perpetuate this distinction. By making reasoning from precedent internal to correctness, rather than external and superseding, the expanded proportionality pays proper due to the institutional dimension of legal analysis. My proposal integrates the two stages – “correctness” and stability – that the *stare decisis* doctrine keeps separate and occasionally in tension.

Finally, deciding a case on the basis of considerations about systemic stability does not necessarily challenge the rationality of the legal analysis. To see why, recall an argument over whether there can ever be an obligation to obey an unjust law. In *Summa Theologiae*, Aquinas argues that unjust laws are not laws in the full sense; they are “a perversion of law.” An unjust law has no force as law, since “a law has as much force as it has justice.” But while its unjust nature is a reason for change in the law, it is not

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95 See supra note 8.
97 Thomas Aquinas, *Summa Theologiae* Q. 96, a. 4, c.. See also Augustine, De Lib. Arb. I, 5 (“That which is not just seems to be no law at all.”).
always a justification for disobedience while the law remains in effect. The reason why one might still have a reason to obey an unjust law has to do with the impact of disobedience on the community. Considerations of timing or magnitude of the implications of disobedience are relevant to that calculus. The same is true for changing the law: “human law should not be changed unless the damage done thereby to the common welfare is compensated by some other benefit.” One can imagine that damage being so extensive that it cannot be fully compensated by the change in the law itself at a particular juncture. Similarly, it can be rational to set aside the outcome of the balancing analysis for the sake of doctrinal stability.

6. Conclusion

My concerns in this paper has been with the moment of the initial transplant or migration of proportionality into American constitutional law. The new, last step adapts proportionality to the specific demands of a host system that, in addition to its entrenched conceptualization of constitutional rights and categorical method of rights-interpretation, has a particularly high demand for constitutional stability. I have argued for a new structure of proportionality analysis whereby judges assess if departures from constitutional precedent are justified by proportionately strong reasons. The disruption analysis retains the normative core of the stare decisis doctrine without sacrificing effectiveness or administrability.

98 Id., Q. 97, a. 2, r. 3.
It remains an open, and important, question what effect the new structure of proportionality could have on American constitutional law in the long run. That answer depends on a number of variables, including how constitutional practice will develop in specific doctrinal areas, judges’ experience with the other steps of the proportionality analysis, the role of institutional considerations in judicial decisions, among others. It is possible that the new proportionality analysis would still weaken the authority of precedent. The cumulative effect of balancing outcomes that consistently point away from existing precedent can undermine past holdings whose authority rests on little beyond their own pedigree. Furthermore, the disruption analysis produces holdings that would themselves not become the kind of commending precedent that future courts engaged in a proportionality analysis could apply to equal effect.\footnote{For the distinction between past-looking and forward-looking dimensions of precedent, see Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 572-573 (1987) (“An argument from precedent seems at first to look backward. The traditional perspective on precedent … has therefore focused on the use of yesterday’s precedents in today’s decisions. But in an equally if not more important way, an argument from precedent looks forward as well, asking us to view today’s decision as a precedent for tomorrow’s decisionmakers. Today is not only yesterday’s tomorrow; it is also tomorrow’s yesterday.”). See also Jeremy Waldron, supra note 9.} Over time, expectations such as protection of reliance and legal certainty might diminish both doctrinally and culturally. It is, of course, a matter of debate if this trajectory would be beneficial to American constitutional law. Less debatable is that, were such developments to occur, they would occur gradually with plenty of opportunities to reflect on their significance and to set or reset their pace.