BEING PROPORTIONAL ABOUT PROPORTIONALITY

THE ULTIMATE RULE OF LAW. By David M. Beatty.[1] New York: Oxford University Press. 2004. Pp. 193 + xvii. $80.00

Vicki C. Jackson[2]

"Proportionality" analysis is becoming a term of art in constitutional law. If you have not heard of it, that is because the concept has received far more elaboration and evaluation outside of the United States. One of the leading proponents of proportionality analysis in constitutional law is the Canadian legal scholar, David M. Beatty. For the last decade, Beatty has pursued a vision of comparative constitutional study as revealing "timeless" or "universal" ideals of proportionality and rationality in constitutional adjudication around the world.[3] In his latest book, *The Ultimate Rule of Law*, he advances the argument that constitutional courts around the world are, and should be, turning away from a focus on "interpretation" and instead concen-

---

1. J. Robert, S. Prichard, and Ann E. Wilson Chair in Law and Public Policy, University of Toronto.

2. Professor of Law, Georgetown University. With thanks to Jason Cohen, Amber Dolman, James Caputo, and Soraya Kelly for research assistance and, for helpful comments and conversations, to Bob Taylor, Mark Tushnet, John Mikhail, Carrie Menkel-Meadow, Dan Tarullo, Mike Seidman, Gerry Spann, Kathy Zeiler, Richard Diamond, Emma Jordan, John Echeverria, Julie Cohen, John Jackson, Tim Westmoreland, David Beatty, and Judith Resnik. My special thanks to Professor Beatty for his generosity in reviewing an earlier draft and for his many contributions to comparative constitutional understanding. Special thanks are due to Marylin Raisch and Mabel Shaw, international reference librarians at Georgetown. This review was written in 2004.

3. *See, e.g.*, DAVID M. BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 103–05 (1995) [hereinafter BEATTY, CONSTITUTIONAL LAW]; *cf.* Donald P. Kommers, *The Value of Comparative Constitutional Law*, 9 J. MARSHALL J. PRAC. & PROC. 685 (1976) (comparative constitutional study as search for "principles of justice and political obligation that transcend the culture bound opinions and conventions of a particular political community"). In earlier work, Beatty characterized constitutional interpretation as having two stages—interpretation and justification—and as employing two dominant modes of analysis—rationality (or necessity) and proportionality (or consistency). *See* BEATTY, CONSTITUTIONAL LAW, *supra*, at 107; *see also* David M. Beatty, *Review Essays: Law and Politics*, 44 AM. J. COMP. L. 131, 136–40 (1996).

trate on applying the principle of proportionality to measure the constitutionality of challenged government actions.

As Beatty shows, in Canada, Germany, the European Court of Human Rights, India, Ireland, South Africa, and on occasion even in the United States, courts or tribunals invoke the basic concept of proportionality not only to review the propriety of sanctions, but also to measure the legality of a wide range of government conduct through some form of means-ends analyses. In a number of countries, proportionality analysis is treated as a general principle of public law, applicable not only to constitutional law, but also to administrative and even to international law questions.[4] Although means-end analyses are found in a wide swathe of constitutional doctrine in many tribunals, a distinguishing feature of proportionality analysis is its eschewal of doctrinal sub-categories, its commitment to returning to foundational questions of constitutional purpose in structuring analyses of challenges to government action, and its requirement that the government come forward with justifications for statutes that infringe on protected rights.[5]

Canada has played a particularly influential role in the transnational development of proportionality testing in constitutional law. In Canada, the 1982 Charter of Rights introduced a number of innovations, including a "salvage" clause, into constitutional analysis. Canadian constitutional analysis proceeds in two stages. First, the court considers whether there has been an infringement of a right specified in the Charter, such as rights of freedom of expression, freedom of religion, or equality. If an infringement is found, and if the government action has been authorized by law, the Court then decides whether the challenged act can be "salvaged" or saved through analysis under Section 1 of the Charter. Section 1 provides that: "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 soci-

4. *See, e.g.*, Beit Sourik Vill. Council v. Gov't of Israel, [2004] 43 ILM 1099 (S.Ct. Isr.) (President A. Barak) (treating proportionality as a principle of both domestic and international public law, supporting judicial review of military operations to prevent disproportionate harm to civilian populations).

5. *See* R. v. Oakes, [1986] 1 S.C.R. 103, 136 (S. Ct. Canada) ("Inclusion of these words ['free and democratic society'] as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society . . . .").

ety." Under *R. v. Oakes*,[6] statutes that are found to violate Charter rights may nonetheless be upheld under Section 1 if (1) their purpose is one consistent with a "free and democratic society" and "of sufficient importance to warrant overriding a constitutionally protected right or freedom," and (2) the statutory limits "are reasonable and demonstrably justified in a free and democratic society," a standard designed to "ensure[] that the legislative means are proportional to the legislative ends."[7]

The means-ends proportionality analysis has been further elaborated in Canadian caselaw, caselaw that is widely cited by constitutional courts around the world. In Canada:

> There are . . . three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. . . . Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".[8]

---

6. [1986] 1 S.C.R. 103.

7. R. v. Morgentaler, [1988] S.C.R. 30, 73 (paraphrasing *Oakes* and quoting R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 285, 352); *see id.* (referring to Section 1 as a "salvage" clause). The *Oakes* test and Canada's Section 1 jurisprudence has influenced constitution drafters and/or courts in South Africa, Hong Kong, India, Namibia, New Zealand and the U.K.. *See* Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 186–87 (1998); Richard Cullen, *Media Freedom in Chinese Hong Kong*, 11 TRANSNAT'L LAW. 383, 400 (1998); Om Kumar v. Union of India, [2001] 4 LRI 1049, ¶ 34 (2000), (2001) 2 S.C.C. 386 (India); Kauesa v. Minister of Home Affairs, 1995 SACLR LEXIS 273, *20–*24, (1995) 11 BCLR 1540 (S.Ct. Namibia); R. (on the application of Royden) v. Borough of Wirral, 2002 WL 31523290, ¶83 (QBD (Admin. Ct.)), [2002] EWHC 2484 (Admin), ¶83; R. (on the application of Pearson) v. Sec. of State for the Home Dept., 2001 WL 272951 (QBD (Admin. Ct.)), [2001] EWHC Admin 239; Northern Reg'l Health Auth. v. Human Rights Comm'n, [1998] 2 NZLR 218 (H.C.).

8. *Oakes*, [1986] 1 S.C.R. at 139. The second test, of "minimal impairment," could have been treated like the American "least restrictive means" test. But as the *Oakes* statement of the test suggests, the rigor of the fit required may vary depending on both the severity of the infringement and the importance of the government objective. *See id.* ("A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society."). Later caselaw softens the demands of "minimal impairment." *See, e.g.*, R.

The third criterion is sometimes referred to as proportionality in the "strict" sense.[9] Recall that in Canada, proportionality analysis under Section 1 only happens after the Court has found an infringement of a Charter-protected constitutional right; if there is no such infringement, the issue under Section 1 does not arise.[10] As the *Oakes* opinion explains this third criterion of proportionality in the strict sense, it contemplates a highly contextualized analysis of the deleterious effects measured against the importance of the government's purpose[11] and, in some versions, the likelihood of achieving that purpose through the chosen means.

Although the *Oakes* test is widely referred to, there are other versions of proportionality in use in constitutional courts around the world. Sometimes, the last part of the proportionality test is articulated more directly in terms of costs and benefits, e.g., "the act must be proportionate strictly speaking (*verhaltnismassig*), which means that its costs must remain less than the benefits secured by its ends."[12] There are significant differences

v. Keegstra, [1990] 3 S.C.R. 697, 784–85 (suggesting that the "minimal impairment" test does not necessarily require a non-penal approach to hate speech).

9. *See* Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?*, 78 IND. L.J. 567, 582 (2003). This idea is also referred to as "proportionality in the narrow sense". *See, e.g.*, Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact of Administrative Law*, 3 U. PA. J. CONST. L. 581, 638 n.285 (2001), *quoting* HCJ 3477/95 Ben-Atiya v. Minister of Educ., Culture & Sport, [49(5) P.D. 1, 12–13] (Barak, J.) (means are improper "if the injury to the individual is disproportionate to the benefit which it achieves in implementing the purpose . . . [a] test of the proportional means (or the proportionality in the 'narrow sense')").

10. As might be predicted, however, the Canadian Court has tended towards broad reading of the scope of protected rights, particularly of freedom of expression, under the Charter, leading to a number of cases in which the question is whether a statute, found to infringe on a protected right, nonetheless is constitutional because it meets the criteria of Section 1.

11. From *Oakes*, [1986] 1 S.C.R. at 140:

> Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

12. Zoller, *supra* note 9, at 582. The quoted material is embedded in a longer description of proportionality in Germany as a test of the validity of government action:

> The principle of proportionality is considered to be satisfied if three conditions are met: (1) the act must be appropriate . . ., which implies a choice of means tailored to the achievement of the ends (as the idiomatic expression goes: "one has to cut the coat according to the cloth"); (2) the act must be necessary . . ., which would not be the case if the ends could be achieved with less restrictive or burdensome means; and (3) the act must be proportionate strictly speaking . . ., which means that its costs must remain less than the benefits secured by its ends.

in these formulations—judicial review that turns on an evaluation of the importance of the objective measured against its infringing effects on protected rights is likely to be somewhat more deferential than judicial review that is, in addition, based on an evaluation of whether the means chosen will produce proportionally greater results towards the government objective than harm to the protected right. In the United States, the language of proportionality is used only in limited areas,[13] while in others, there are different degrees of means-end relationships (or degrees of "proportionality") required, depending on the importance of the right in question through categorical doctrinal inquiries (*e.g.*, "rationality" review for economic classifications, "compelling interest" review for racial classifications).

Beatty is primarily concerned with versions of proportionality analysis which, like the Canadian or German approaches, consider not only rationality and availability of other alternatives, but proportionality in the "strict sense" of some degree of fit between the harm that some endure, or the intrusions some suffer, in order to create a legitimate benefit for others. Beatty is quite persuasive as to the pervasiveness of the phenomena of such proportionality analysis, both the Canadian version and others used by the European Court of Human Rights, the Indian Supreme Court, the German Federal Constitutional Court, and a number of other influential constitutional tribunals. He provides examples in three major areas of constitutional law—religious liberty, gender and racial equality, and positive welfare rights—to illustrate courts' concerns for the proportionality of government actions that impose special burdens on some and, increasingly, for the proportionality, or fairness, of government efforts to provide assistance or opportunities.

But Beatty's ambitions are not merely descriptive. First, in the course of description Beatty develops what one might call a "best practices" approach to proportionality analysis. For Beatty,

---

Id.

13. In evaluating the constitutionality of punishment the test of "gross disproportionality" is concerned only with very substantial disparities between burdens imposed and legitimate objectives advanced. *See, e.g.*, Ewing v. California, 538 U.S. 11, 23 (2003) ("'The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime.'" (citation omitted)). In addition, proportionality plays a role in determining the scope of congressional power to enact legislation pursuant to Section 5 of the Fourteenth Amendment, see City of Boerne v. Flores, 521 U.S. 507 (1997), in determining the constitutionality of regulatory conditions for property development, see Dolan v. City of Tigard, 512 U.S. 374, 391 (1994), and in limiting punitive damages awarded in civil cases. *See* BMW of N. America v. Gore, 517 U.S. 559, 581 (1996).

the best version of proportionality analysis is one that relies on pragmatic, empirically contextualized reasoning. It seeks to view legal issues through the perspectives of those most benefitted and most burdened by challenged action, while generally accepting a wide range of legitimate government ends. These are the tools of proportionality analysis, "properly enforced" (p. 166). Adherence to these practices, he argues, means that proportionality analysis meets criteria for neutrality and objectivity in constitutional adjudication.

Second, Beatty argues that such proportionality analysis, rather than interpretation of constitutional texts, should be seen as the fundamental tool of normatively responsible judicial review in self-governing democratic polities.[14] Much of the hard work of constitutional adjudication, he argues, turns on the question of government justification of its actions, an inquiry best guided by the norms of proportionality analysis. Moreover, proportionality analysis would yield a more determinate and impartial form of constitutionalism than a focus on interpretation of constitutional provisions under any of the leading schools of interpretation. Rather than focusing on interpreting a constitution within its historic traditions, or considering questions of institutional role or deference, constitutional judges should carefully scrutinize the facts to determine whether, in light of the governmental purposes intended to be served, the challenged act or action appropriately accommodates the interests of those most affected or concerned. In so arguing, Beatty dispenses not only with "interpretation" but (at times) with "rights" (p. 171).[15] Jus-

14. The normative claim for proportionality is set up in the first chapter and continues throughout the book. Proportionality, Beatty says, is the best theory for constitutional interpretation that "reconcile[s] the practice of judicial review with the sovereignty of people to govern themselves," through which "courts do not resolve conflict and judge the way those in government exercise the powers of the state on the basis of their own personal opinions of what is right and wrong [but rather based on] a theory... that tells [judges] how they can distinguish laws that are a legitimate expression of the coercive powers of the state from those that are not without being influenced by their own biases and personal points of view" (p. 5).

15. Beatty writes (at p. 171, emphasis added):

> *[W]hen judges rely on the principle of proportionality to structure their thinking the concept of rights disappears.* Proportionality transforms the meaning of rights from assertions of eternal truths into what human rights advocate Michael Ignatieff has called 'a discourse for the adjudication of conflict.' In law, they are just 'common ... reference points ... that can assist parties in conflict to deliberate together.' When rights are factored into an analysis organized around the principle of proportionality they have no special force as trumps. They are really just rhetorical flourish."

tification of challenged government action becomes the focus of analysis.[16]

Readers already inclined to functional or consequentialist interpretation, and those who believe that universal human rights should be implemented through the interpretation of national constitutions, will find much of appeal. Readers new to the field may benefit particularly from Professor Beatty's elegant and concise summaries of debates over constitutional interpretation in Chapter I and over positive and negative constitutional rights in Chapter IV. But aspects of Beatty's normative arguments for proportionality raise more complex problems than he allows. For those who, like myself, agree that proportionality is an important tool in constitutional interpretation, Beatty's certainty that it is the only and best tool can at times be frustrating, for it prevents him from fully meeting objections to proportionality analysis. For reasons developed below, Beatty's positive descriptions of the centrality of proportionality to constitutional analysis require significant qualification, and his normative claims for the greater determinacy and objectivity of proportionality analysis are less than fully persuasive.

Better justifications for reliance on proportionality as a principle of constitutional analysis, I argue below, include: (1) its transparency in framing concerns of fairness likely to be relevant in a significant swathe of constitutional decisionmaking; (2) its capacity for encouraging participatory deliberation through structured inquiries into the effects of and justification for challenged action; and (3) its flexibility as a tool for protecting rights and maintaining constitutional law as an effective legal constraint on government over time. But proportionality also has a darker side—both in what it may permit governments to do and what it may permit courts to prohibit or require of governments. Both formal categorical rules and institutionalism's concern for the allocation of responsibilities among courts and political organs have more to offer on questions of interpretive methodologies than this book acknowledges. Proportionality analysis,

16. *See also* Matthew Adler, *Rights against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998) (arguing that we have rights against rules, not rights to engage in conduct or be left alone, with a focus on the moral justification for the rules); *see also* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms and Constitutionalism*, 27 J. LEG. STUD. 725, 727–32 (1998). For a challenge to Adler's description, see Richard Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000). For Adler's reply, see Matthew Adler, *Rights, Rules and the Structure of Constitutional Adjudication: A Response to Professor Fallon*, 113 HARV. L. REV. 1371 (2000).

moreover, often co-exists with attention to historically specific aspects of national constitutions and cannot serve as the exclusive tool of national constitutional interpretation without ignoring the role of national constitutions as instruments of national self-expression.

Part I below discusses Beatty's principal claims for the dominance and normative superiority of proportionality analysis. It suggests that his positive claims must be qualified by the continued attention to specific constitutional text found in some of the very decisions Beatty relies on and that his normative claims for the superior impartiality and determinacy of proportionality analysis are unconvincing. Part II elaborates difficulties in the normative argument reflected in tensions between proportionality's neutrality and its value commitments to equality. Part III takes up the positive normative case for proportionality as I see it, advancing alternative justifications for its use as one method of constitutional interpretation. Part IV considers proportionality's complexity, its "dark side," and its applicability in the United States. In closing, I note tensions between Beatty's universalism and the demands of democratic self-government in particular national polities and urge a more proportionate use of proportionality in response.

I.

Proportionality, Beatty argues, is the "only conceptual apparatus judges have . . . to harmonize the autonomy of each person with the general will of the community. . . " (p. 116).[17] Whatever the claim, the question should be whether a law passes a rigorous evaluation of its ends, its means and its effects against a principle of proportionality that connects all three (p. 116). In earlier work, Beatty suggests that the "two basic principles, justice and equality," are what the method of constitutional law is about.[18] Proportionality seems to embrace both (p. 158).[19]

---

17. *See also* p. 176 ("Proportionality has priority over all of its rivals because it is able to reconcile both democracy and rights in a way that optimizes each. Proportionality alone has the capacity to ensure constitutions are the best they can possibly be.").

18. BEATTY, CONSTITUTIONAL LAW, *supra* note 3, at 159.

19. Beatty claims that once the principle of proportionality is properly understood, "liberty, equality and fraternity all mean the same thing. Ensuring everyone who is authorized to exercise the powers of the state always acts moderately and with respect for others is the one and only function judges are authorized and competent to perform" (p. 158). Beatty also equates proportionality with "toleration" (pp. 59–60), and "mutual respect" (p. 163). And in his concluding chapter, Beatty writes that judges around the world have "constructed a working model of judicial review that relies, almost entirely,

The method of proportionality, Beatty says, "requires judges to assess the legitimacy of whatever law or regulation or ruling is before them from the perspective of those who reap its greatest benefits and those who stand to lose the most." (p. 160). In so doing, courts are not to rely on their personal views, but rather on the evaluation of those who are parties to the litigation,[20] measured by objective indicia that permit impartial evaluations of whether the parties' claims should be accepted.[21] These objective indicia are, for challengers, factors that go to how important to their "larger life stories" the complained of acts are, as compared with their benefits in the lives of others (p. 73),[22] and for governmental justifications, objective facts that go to the rigor with which the particular means chosen has been enforced, or are being applied by other polities committed to similar goals.[23]

Existing schools of interpretation, he argues, fail to meet standards of determinacy, neutrality, and judicial competency. Contract theory (including textualism and originalism) yields multiple understandings of original intention or meaning (p. 10), and is not scrupulously adhered to by its proponents in hard cases (p. 14). Process theory, he argues, is "radically indeterminate" (p. 17) absent a neutral rule to distinguish process failure

---

on the principle of proportionality to tell them when the elected representatives of the people and their officials are acting properly and when they are not" (pp. 159–60). Proportionality, here, then, stands for many virtues of governance: liberty, equality, fraternity, moderation, tolerance, and propriety. *But cf.* Lorraine Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, *in* DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW (Vicki Jackson & Mark Tushnet eds., 2002) (proportionality as a method of protecting equal human dignity).

20. Thus, he writes: "Rather than acting as an expositor of text, or a philosopher king, the job of the judge is critically to evaluate all the evidence that is brought to his or her attention in order to get the most accurate assessment of what the parties really think" (p. 116).

21. *See, e.g.*, p. 187 ("By directing judges to the evidence that best describes the parties' own evaluations of the situation, proportionality encourages judges who find themselves leaning to one side of a case to listen more carefully to the other. Proportionality permits pragmatic judges to attain a level of objectivity and impartiality beyond anything they have achieved so far.").

22. Thus, for example, he commends the German Constitutional Court for upholding prayer in public schools, provided that children who do not wish to pray can opt out. Denying the majority this right of public worship would be disproportionate to the interests of the few children who do not wish to pray (pp. 46–48, 52, 54).

23. Thus, for example, he condemns the European Court of Human Rights for failing to uphold claims by parents that they have a right to withhold their children from sex education in the public schools; the fact that private schools in the country were not required by law to teach the same objectionable (to-the-parents-material) suggested that the governmental interest in such instruction was not strong enough to override the parents' objection to sex education in the public school (pp. 66–67).

from ordinary democratic politics.[24] The very different views of, on the one hand, Sunstein and Monahan, and, on the other hand, Habermas, concerning courts' enforcement of positive rights shows the failure of process theory to meet standards of determinacy and neutrality: "The fact that a process model of judicial review can support two completely contradictory conclusions, on issues as important as these, undercuts any claim of neutrality that may be made on its behalf" (p. 24). As for moral reasoning (like that proposed by Dworkin), Beatty notes that it takes for itself not "neutrality" but "integrity" as the standard. But in so doing, he argues, it invites judges to engage in forms of reasoning for which they are not trained and in which a large area of indeterminacy is present: "Whether fit or value, precedent or philosophy, is to be given priority in any case remains wholly within the discretion of each judge"(p. 30).[25] This approach allows too much discretion for judges—allowing them to decide on the permissibility of abortion or euthanasia "constitutes a massive derogation from the authority of each person and the sovereignty of the people as a whole to decide the great questions of life and death for themselves"(p. 33). Moreover, the method of moral reasoning fails to fit judges' "self-understanding of their craft" (p. 32). Finding these schools of interpretation inadequate, Beatty proposes to "tr[y] to work out a theory of constitutional review as common lawyers," based on what constitutional court judges are actually doing (p. 34).

Beatty thus invites readers to judge his interpretive theory—of proportionality as the necessary and sufficient tool of constitutional adjudication—by the standards of neutrality, determinacy and "fit" with existing interpretive practices. "Making proportionality the critical test . . . separates the powers of the judiciary and the elected branches of government in a way that provides a solution to the paradox" of judicial review and democracy. It is, in Professor Wechsler's terms, a "'neutral principle,'" meeting Dworkin's criteria of "fit" and "value" (pp. 160-61). Embracing some of Judge Bork's elaboration of the idea of neutral principles, Beatty suggests that proportionality can be applied even-handedly, and is "neutrally derived" and "neutrally

24. Beatty is quoting Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (criticizing JOHN HART ELY, DEMOCRACY AND DISTRUST (1980)).

25. Beatty also notes, however, that "[f]it and value may be necessary conditions for an adequate theory of judicial review," but, he says, "without an overarching principle that dictates how they should be reconciled they are plainly not enough" (p. 30).

defined" (p. 161). The fact that every major court with power to engage in judicial review has employed proportionality analysis "attests to the integrity of its derivation" (p. 162). Proportionality is a "universal criterion of constitutionality," constitutive of the structure of a constitution that subordinates government to the rule of law (pp . 162-63).

Taking up Beatty's implicit invitation to evaluate theories against criteria of existing practice, neutrality and determinacy, however, suggests that proportionality's significance and neutrality may be much more in the eyes of the beholder than Beatty allows.

Existing Practice: Beatty argues, first, that proportionality is neutrally derived because it is found in the reasoning of many courts. Beatty is surely correct to argue that concern for proportionality and rationality are pervasive themes in constitutional review, suggesting that they are a necessary part of the interpretive tool box for modern constitutional courts, at least under some conditions. For evidence of the growth of proportionality analysis in constitutional courts analysis around the world, one could look to the recent decision of the Israeli High Court holding that both Israeli and international public law require government conduct towards citizens of the West Bank to be "proportional," and ordering the relocation of portions of the already-erected "separation fence."[26] The Court found that the purpose of the fence was legitimate, but that the burden its locations imposed on local farmers was disproportionate to the added security it would provide: Israel would have to move the wall, enduring somewhat less security, in order to afford proportional and just treatment to the civilians whose farming life was otherwise massively disrupted.[27] Although few constitutional courts exercise powers of review over military decisions of their governments, many do apply the idea of proportionality in a wide range of cases. Indeed, it is hard to imagine how some means-ends testing between the classification and the purpose of the statute would not be used in any system that took seriously the idea of equality as a substantive norm.[28]

26. Beit Sourik Vill. Council v. Gov't of Israel, HCJ 2056/04 [2004] 43 ILM 1099, 1113–19 (S.Ct. Isr.).

27. *Id.* at 1120–22.

28. For differing perspectives on the role of proportionality analysis in equality cases in Germany, compare Susanne Baer, *Constitutional Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 261–62 (1999) (describing heightened standard of review for equality claims, requiring that differences in treatment not merely be not irrational but justified, as form of "proportionality" review) with Alex-

Beatty seeks to bolster the normative force of practice by minimizing courts' reliance on constitutional text and precedent. His observation that constitutional text is rarely "the critical or determining factor" in cases involving positive rights finds much confirmation in decided cases (p. 137). Indeed, the resemblance between the U.S. decision in *Dandrige v. Williams*[29] and the Japanese constitutional decision in *Asahi v Japan*[30] is noteworthy. Both reject claims that welfare allowances are too small for the measure they are supposed to cover, even though the Japanese constitution has a seemingly absolute constitutional right to support and the U.S. constitution does not.[31]

But Beatty appears to understate the role of constitutional text in some of the other cases discussed.[32] For example, he implies that the Indian Supreme Court creates positive rights without specific constitutional text, drawing from the constitutional right to "life" the positive right to state support for a livelihood.[33] But the Indian case on which he relies involved a more complicated question of the effect of nonjusticable constitutional provisions in determining the contours of justiciable individual rights.[34] Notwithstanding their purportedly nonjusticiable status,

ander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Revew*, 1 U. PA. J. CONST. L. 284 (1998) (arguing that apparent significance of proportionality review in German equality cases is overstated).

29. 397 U.S. 471 (1970)

30. 21 Minshū 5 (Sup. Ct. Japan, 1967), *in* THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS, 1961-70 (Hiroshi Itoh & Lawrence Ward Beer eds. & trans., 1978).

31. *See* VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 1440-47 (1999).

32. Whether these texts matter only because they are written or because they represent a sociolegal set of commitments that are only reflected in the constitution is another question.

33. Beatty introduces his discussion of this case by asserting that the fact that a constitution is silent on positive rights "need never be fatal to a case" (p. 138).

34. In Olga Tellis v. Bombay Municipal Corp., (1986) A.I.R. (S.C.) 180, a case brought by "pavement dwellers" to forestall their eviction from the sidewalks, the Indian Supreme Court famously concluded that the right to life guaranteed by article 21 of the Indian Constitution includes the right to a livelihood. In so ruling, however, the Court referred to portions of the so-called "Directive Principles" of the Indian constitution—principles that impose positive duties on the government but are declared nonjusticiable. The Court referred to articles 39(a) (which indicates that the state take steps towards securing a right to an adequate livelihood) and 41 (which says that the state shall make provision for securing the right to work), both as Directive Principles. After noting articles 39(a) and 41, the Court wrote:

> If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. *The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood*

the Indian Supreme Court appeared to rely on directive principles concerning a right to a livelihood and read that concept into the justiciable "right to life" provisions. Although Beatty claims the case shows that constitutional silence is no barrier to the implication of positive rights, perhaps all that the case stands for is that the silence of one provision need not be fatal, if other aspects of the Constitution (and culture) support a positive understanding of the state's obligations to the poor.[35]

A striking example of Beatty's somewhat selective analysis is his discussion of an Indian Supreme Court decision articulating the right of all children to receive a primary school education up to age fourteen.[36] Beatty treats the case as developing from proportionality principles the requirement that the children receive a primary education. It is true, as Beatty notes (p. 142), that the decision refers to India as having allocated a disproportionate share of what it spent on education for secondary and tertiary learning, rather than primary education. But it does so in the context of discussing Article 45 of the Constitution of India. That provision states:

> The State shall endeavour to provide, within a period of 10 years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Recognizing that Article 45 was in the nonjusticiable, "directive principles" portion of the Constitution, Judge Jeevan Reddy also noted that the ten year period referred to in Article 45 had expired; thus, he reasoned, the state now owed a more definite duty. The Jeevan Reddy judgment concluded that Arti-

---

> *except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Art. 21.*

Olga Tellis, (1986) A.I.R. at 194, ¶ 33 (emphasis added).

35. For another example of the significance vel non of constitutional text, consider that both India and the United States have constitutionalized forms of affirmative action; the U.S. Constitution's text is silent on the subject while the Indian constitution affirmatively authorizes affirmative action (or 'positive discrimination') on behalf of members of the scheduled castes and tribes through reservation of seats in legislatures and posts in government. Yet the contours of what is permissible differ rather dramatically between these two countries. *Compare* Indra Sawhney v. Union of India, (1993) A.I.R. (S.C.) 477 (limiting reservation of seats to no more than 49% of those available and requiring that the "creamy layer" of any disadvantaged group be excluded from the reservations) *with* Grutter v. Bollinger, 539 U.S. 306, 334 (2003) (permitting only "individualized" consideration of race, in a non-quota setting, without articulating any requirement that economically advantaged members of minority races be excluded from such consideration). For discussion, see Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes with Reference to Affirmative Action*, 36 CONN. L. REV. 649, 655–62 (2004).

36. Unni Krishnan v. State of Andhra Pradesh, (1993) A.I.R. (S.C.) 2178.

cle 21 (a very general provision protecting life and liberty) embraced a right to education, a right which, the judgment said should be "construed in the light of the directive principles."[37] Thus, his judgment read into the enforceable provisions of Article 21, the Article 45 duty of the government to provide free compulsory education for all children up to age fourteen. It is a far cry from a court's deducing such an obligation from explicit (albeit nonjusticiable) constitutional text to assert that a court has deduced such a specific obligation from general principles of proportionality.[38]

Likewise, in discussing differences between U.S. and German decisions on religious liberty, Beatty gives short shrift to the possibility that some of the differences relate, not to the interpretive method, but to differences in pre-existing political commitments, embodied in part in different constitutional texts. Beatty is quite critical of much of the U.S. caselaw, which he argues is characterized by a method that purports to be based on historic understandings of the U.S. text and the Court's own precedents.[39] He implies that the Court's methodology contributes to its substantive failures, which, in his view, include a failure to allow majoritarian freedom of worship by an unduly rigid "separation" doctrine (as in the ban on prayer at high school graduation) and a failure to accommodate the practices of religious minorities through a rigid insistence on categorical rules and insensitive failure to require accommodations (as in the rule that generally applicable laws may be applied without exceptions for religiously motivated behavior). The German caselaw on school prayer, he argues, better accommodates both the right of

37. *Id.* at 2231; *see also id.* at 2232.

38. The issue before the Court, moreover, had nothing to do with primary education or with children under fourteen, rather, it had to do with the admissions standards and fees for admission to private universities or colleges. Two of the five judges on the bench declined to join in the Jeevan Reddy discussion of an article 21 right to a free public education for those under fourteen. *See id.* at 2186–87 (Sharma, C.J.) (for present purposes "it is enough to state that there is no Fundamental Right to education for a professional degree that flows from Article 21"). For description of a constitutional amendment in response to this decision, see Vijayashri Sripati & Arun K. Thiruvengadam, *India: Constitutional amendment making the right to education a Fundamental Right*, 2 INT'L J. CONST. L. 148 (2004).

39. Thus, Beatty writes, the "interpretive approach has certainly not worked to the advantage of religiously minded people in the United States," because *Lee v. Weisman*, 505 U.S. 577 (1992) and *Oregon v. Smith*, 494 U.S. 872 (1990) "allow government to act in ways that radically restrict the freedom of people to practice their religion," neither protecting minority religious adherents from the application of general laws that "gratuitously interfere with the practice of their religion" nor allowing "spiritually minded people to express their beliefs publicly and collectively" (p. 50).

religious majorities to engage in "public collective" acts of worship, through prayer in the public schools (so long as children who do not wish to pray are not forced to pray), while the German decision banning the display of crucifixes in public classrooms was a proportionate response to the greater intrusion on those of other sects on the all-day presence of such a religious symbol (pp. 46-47).[40]

Beatty acknowledges the provisions of the German constitutional text that plainly contemplate a more active role for the state in promoting religious worship and thus markedly differ from those of the United States Constitution (pp. 50, 54),[41] but does not analyze how the different textual commitments in Germany may affect the respective courts' analyses. Although he attributes the different results in U.S. and German constitutional law of religious liberty and accommodation to an American predilection for "interpretivism" and the German commitment to proportionality, he does not consider the possibility that the differing results reflect, not interpretive methodologies, but rather a set of sociolegal understandings of the relationship between state and religion, which are themselves reflected in the constitutions being interpreted. For example, while the German Basic Law incorporates provisions of the Weimar Constitution that prohibit a "state church," other incorporated provisions contemplate a substantial role for churches in public life, including authorizations to churches to levy taxes (a power that many churches delegate to their state governments, which then pay the

40. For Beatty, the "objective facts" are that having to stand or leave the room briefly during voluntary prayer for a dissenting student is a small burden, compared to the larger loss of religious freedom the majority would suffer by having to refrain from "collective, public" prayer in school; the harm for those opting out of prayer is not great and allowing a single student to trump the rights of religious students to express their beliefs is out of proportion to the injury it prevents. But the cross display is different because the burden on a nonbeliever of having to be confronted with a cross for the entire school day is disproportional to the benefit of majoritarian religious expression. Each case is determined by "pragmatic and impartial assessment of the facts"(p. 47).

41. Beatty, as should be clear, is particularly critical of U.S. Establishment Clause cases restricting government acknowledgment or display of religion, which he attributes to the Court's "interpretive method" rather than to public constitutional choices reflected in the Establishment Clause itself:

> [T]he single most sweeping restriction that the interpretive method has imposed on the sovereignty of the American people to legislate their priorities and preferences into law is the rule (in the Establishment Clause) that makes practically all state support of religious institutions and events unconstitutional.... No matter how fundamental a community's spiritual beliefs are to its own self understanding, it is an inviolate rule that they can play no part in the enactment of any law (p. 54).

taxes over to the church),[42] which powers are wholly inconsistent with the "wall of separation" contemplated by Thomas Jefferson's metaphor for the U.S. Establishment Clause.[43] Moreover, as Beatty recognizes, the German Basic Law's provisions state that "[r]eligious instruction shall form part of the curriculum in state schools except non-denominational schools," and provide that "parents and guardians shall have the right to decide whether children receive religious instruction."[44] But such provisions cast in a very different light the German court's decision on school prayer in an interdenominational school: in holding that the school could offer voluntary prayer so long as dissenting students could opt out, the Court arguably followed the model laid down in the constitution for religious instruction in public schools.[45]

Current judicial practices, then, do not establish proportionality as a superior mode of constitutional analysis exclusive of other conventional tools of constitutional analysis. That many courts engage in proportionality reasoning is not sufficient to establish its "integrity" *over and above* that of other frequently used forms of "interpretive" reasoning, including reliance on constitutional text and precedent.[46] Although Beatty may well be right in describing the U.S. Supreme Court's decisions as notably dependent on precedent as compared to other constitutional courts that are more inclined to reason from basic normative principles,[47] one finds reliance on constitutional text in many

42. *See* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 444, 485 (2d ed. 1997).

43. This is not to say that the "wall" metaphor was the only one available within the U.S. tradition or that the text of the Constitution dictated its extension to the states, *see e.g.*, Philip Hamburger, *Separation and Interpretation*, 18 J. L. & POL. 7 (2002), but rather that the text of the Constitution represents and forms a focal point for interpretive traditions and understandings now instantiated in the caselaw as well.

44. Basic Law, Federal Republic of Germany [GG] Art. 7 (3), (2).

45. *See* KOMMERS, *supra* note 42, at 471. By contrast, in the United States, it is established that "[a] State may neither allow public-school students to receive religious instruction on public-school premises, [*Illinois ex rel. McCollum v. Bd. of Educ. of Champaign County*,] 333 U.S. 203 (1948), nor allow religious-school students to receive state-sponsored education in their religious schools. [*Sch. Dist. of Grand Rapids v. Ball*,] 473 U.S. 373 (1985)." County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 590 n. 40 (1989).

46. For a description of the methodology of proportionality that seems to locate it in existing doctrinal analysis, see Weinrib, *supra* note 19, at 19 (stating that proportionality analysis rests in part on "fidelity to prior doctrinal analysis unless departure is demonstrably warranted by constitutional principle," but emphasizing that the method does not strongly defer to tradition, practice or fact of democratic enactment in conducting its analysis).

47. Beatty makes this claim in particular in comparing the U.S. Supreme Court and the German constitutional court (pp. 44–46), but it is a difficult claim to evaluate without

other court decisions—indeed, in some of the decisions Beatty discusses one finds that courts distinguish U.S. jurisprudence on the grounds that the U.S. Constitution, unlike theirs, has a non-establishment clause.[48]

Neutrality, Objectivity, Determinacy: Beatty argues that proportionality, by definition, is a neutral tool of analysis. Proportionality includes "rationality (suitability)," and "necessity," which mark out illegitimate reasons, or the complete absence of legitimate reasons of any kind (p. 163). Moreover, "proportionality tells governments and their officials that they have to have stronger and more compelling reasons for decisions that inflict heavy burdens and disadvantages on people than when the infringements of rights and liberties are not as serious or painful" (p. 164).[49] I agree with Beatty that proportionality can be given a neutral definition—such as that more compelling reasons are required to justify the infliction of more serious burdens. But proportionality's neutrality as a definitional matter undermines its neutrality in the sense which for Beatty seems most important, that is, in its being a relatively determinate tool.[50]

Beatty claims that "proportionality offers judges a clear and objective test to distinguish coercive action by the state that is

---

reading German. Beatty relies on several translations from Donald Kommers' authoritative work; Kommers himself notes that he has edited out numerous citations to the German Court's own decisions in preparing the translations. *See* KOMMERS, *supra* note 42, at xviii.

48. For example, Professor Beatty praises (pp. 62–63) the dissenting views of South African Constitutional Court Justice O'Regan in *Solberg v. State*, 1997 SACLR LEXIS 30 (1997); her dissent, though, distinguishes the text of the U.S. Constitution's Establishment Clause from the South African Constitution's provision concerning religious freedom, stating that " [i]t is clear from [provisions of the South African constitution] that the strict approach of the United States Supreme Court to the provisions of the First Amendment of the Constitution of the United States of America in relation to the separation between the State and religious bodies has been avoided." Id. at ¶¶ 116, 118.

49. For this reason as well, he asserts, proportionality solves the problem of the extension of the constitution to private law—courts use the same principle, with differences in application arising from differences between public and private contexts.

50. On the pliability of proportionality, see Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, *in* YEARBOOK OF EUROPEAN LAW 1993 (A. Barav & D.A. Wyatt eds., 1994), at 106–07, 110–13 (distinguishing proportionality review focused on economic efficiency and that focused on incursions into protected rights; describing variation with which proportionality review is applied by the European Court of Justice); Paul Craig, *Unreasonableness and Proportionality in UK Law*, *in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 100 (Evelyn Ellis ed., 1999) ("proportionality can itself be applied more or less intensely, depending upon the nature of the case."); NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 272 (1996) (noting ambiguity in whether proportionality principle prohibits measures whose costs exceed benefits or only those whose costs exceed their benefits 'too far').

legitimate from that which is not," because it focuses on "the perspectives of those who are most affected.... Judgments are based on findings of facts about the parties' own evaluation of the significance of whatever government initiative or decision is before the court" (p. 166).[51] Beatty argues that this party-based perspective reinforces the neutrality of judicial decisions: "Making the perspectives of the parties the vantage from which courts judge each case means no particular philosophy or moral vision is privileged over any other" (p. 168). But, he argues, because parties can get caught up in a case and may exaggerate their claims, the court must make its own evaluation of how significant the relevant law is for its detractors and defenders.

It is in distinguishing those party-based perspectives that should be accepted, from those that should not be, that this aspect of Beatty's argument runs aground in its claim of determinacy. For example, Beatty praises an opinion of Aharon Barak, President of the Israeli High Court, in a bitter dispute over whether to close a street in Jerusalem to traffic on the Jewish Sabbath. Barak's opinion concluded that a rule requiring street closure at the time of prayers was not an excessive burden on secular commuters residing outside the neighborhood, because there were alternative routes open, the street itself would be open during the Sabbath except during prayers, and the detour involved when the street was closed was no more than an extra two minutes.[52] For Beatty, it was obvious that maintaining si-

---

51. Beatty offers a highly idealized understanding of judging: "When they stick to the facts, the personal sympathies of the judges towards the parties in the case never come into play" (p. 166). Beatty also downplays judicial concern for the effects of decision on hypothetical cases not before the court. *See, e.g.*, *id.* at 171 ("Hypothetical arguments also play no role [in legal reasoning about human rights] because they assume rather than evaluate the really critical facts."); *id.* at 56 (criticizing U.S. Court for defending decisions in *Oregon v. Smith* and *Lee v. Weisman* "by hypothesizing potentially calamitous consequences that might transpire if it ruled the other way"). The combination of these positions seems to place great weight on the situation of the particular parties before the court, even if their factual showings of burdens and benefits are atypical of others also affected by the challenged rule. *But cf. id.* at 96 (suggesting that judges must "take the measure" of the significance of a rule both for the parties most directly affected and the public at large).

52. *See* Horev v. Minister of Transp., HCJ 5016/96 (Sup. Ct. Isr., 1997), available at Supreme Court of Israel Website, http://elyon1.court.gov.il/files_eng/96/160/050/a01/96050160.a01.pdf (last visited Nov. 18, 2005). The street closure issue arose out of the desire of the Orthodox community on Bar Ilan street—a main artery for traffic—to close the street for the entire Sabbath; the objections of secular commuters from outside the neighborhood to street closure as an impairment of their freedom of movement; and the further objections of secular residents of the neighborhood who, if the street stayed closed, would be unable to park their own cars near their homes if they wanted to drive out to visit others on the Sabbath. A majority of the judges, including Barak, held that it was legitimate to consider the religious concerns of the Sabbath observers who wanted

lence during prayers is more important than motorists having to take a "two minute[ ]" detour (p. 59). Although this intuition may be widely shared,[53] Beatty also seems to approve the "proportionality" of allowing commuters to pass through the religious community at other times during the Sabbath, notwithstanding objection of the religious residents of the street.[54] Yet given the brevity of the detour required, the balance between the interests of drivers and the interests of the Orthodox in the rest of the day may seem less obvious to others.

Beatty asserts that "it is possible to determine, as a matter of fact, whether . . . the mobility rights of motorists in Jerusalem were as serious as they claimed by looking at how the state's proposed course of action actually affected their larger life stories" (p. 73). Beatty's focus on facts leads him, as well, in his discussion of religious liberty, to treat both interests—interests in driving, interests in religious observance—as comparable. Yet, applying proportionality to measure the relative inconvenience of, for example, an entire day of no driving on a major road against the religious community's desire to preserve the quiet of the Sabbath, seems to me to defy ready resolution through proportionality without knowing answers to prior questions about the degree and tradition of legal protection accorded the different individual rights in play and about the institutional roles of nonjudicial decisionmakers; and even with this knowledge, it is not clear how commensurable are the interests in religious observance and in freedom to drive.

Beatty's views of the objectivity of facts depend on contestable assumptions that determining the role of a particular claim of right in a person's "larger life story" is a "fact" that has "cer-

---

the street closed and that an order requiring the street to be closed during the hours of prayer, but not all day, on the Sabbath appropriately accommodated the interests of the religiously observant with those of the commuters; but the court continued in effect a temporary order suspending the limited closure and remanded the issue to the government to more fully consider the position of the secular residents of the neighborhood.

53. For helpful reflections on intuition or "common sense," see DANIEL FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 57-58 (2002) (suggesting that what common sense "can best offer [is] not starting points for grand [constitutional] theory but a sense of reality").

54. *Compare* Beatty, p. 59 (suggesting some uncertainty about the "proportionality" of a decision to allow motorists during the Sabbath, by remarking that "[a]t least during the times when prayers were being said, the proportionalities—in the significance of the closing for the two communities—were clear.") *with id.* (apparently approving the decision not to close the street at other times during the Sabbath: "Toleration required orthodox Jews to show the same measure of respect for the life choices of their secular countrymen that the partial closing guaranteed for them").

tainty, predictability and reality" allowing "more precise measurement and analysis" (p. 73). Difficulties in this claim emerge from a comparison of his treatment of facts in different cases. In *Lee v. Weisman*, for example, Beatty criticizes the U.S. Supreme Court for inattention to the facts, including the "fact" that Deborah Weisman did not object to the reference to God in the Pledge of Allegiance which, Beatty says, suggested that the public prayer was not a significant intrusion on her beliefs; the rights of the majority to hear from a minister at graduation should not have been subordinated to her small interest in not having such a public expression of religion (p. 53). Beatty is also critical of the ECHR's decision in *Valsamis v. Greece*,[55] rejecting a pacifist family's challenge to their children's participation in a parade (p. 67). For Beatty, the Court erred in refusing to accept the family's perspective that the mandatory school parade celebrating "National Day" was offensive to their pacifist belief and substituted its own perception of the significance of the parade. In evaluating the family's claim that the children's participation in the parade was inconsistent with their pacifist commitments, the European Commission and Court took note of a distinction between school parades and military parades [56] In *Lee*, Beatty argues, a particular fact—the absence of Weisman's objection to the words "under God" in the Pledge—should have caused the Court to evaluate Weisman's claim more independently. Beatty does not explain his own different evaluation of the facts and willingness to disagree with the challengers' perspectives in one but not the other of these two cases.[57]

55. [1996] Eur. Ct. H.R. 27, (1997) 24 EHRR 294.

56. 24 EHRR at 305–06 (Commission, especially ¶¶ 39–40), *id.* at 314–18 (Court's judgment especially ¶¶ 23, 24, 31). The dissenters, by contrast, argued that the Valsamis' "perception of the symbolism of the school parade. . .has to be accepted by the Court unless it is obviously unfounded and unreasonable," which, in their view, it was not, *id.* at 321 (Vilhjalmsson, J. and Jambrek, J., dissenting). The national day commemorated the outbreak of war between Greece and Fascist Italy.

57. Perhaps Beatty would account for this difference by noting that in *Weisman*, he looked at the behavior of the challenger herself while the European court in *Valsamis* relied on a fact that was not about the pacifist family itself but about the nature of the march; but elsewhere Beatty has treated the nature of an activity, such as a short commute, as bearing on the relative significance of an objection. Alternatively he might say, along with the dissenters in *Valsamis*, that given the nature of the holiday the family's view was not "obviously unfounded and unreasonable," *supra* note 56; but by similar logic, factual distinctions between a clergy person's offering a prayer and a two-word reference to God in an otherwise secular pledge might make Weisman's objection to the former not "obviously unfounded and unreasonable," notwithstanding an asserted failure to object to the latter.

Beatty argues that it is by considering the facts from the vantage of those most affected that the impartiality of proportionality analysis is assured (p. 73).[58] He also asserts that "objective" facts permit the court independently to evaluate those vantage points,[59] which is necessary because the parties may incorrectly evaluate the significance of their own claims. The difficulty, as already noted, is in distinguishing what situations do and do not warrant rejection of the challengers' own evaluation.[60] Moreover, Beatty's own examples illustrate that courts may invoke proportionality analysis but come to a conclusion with which Beatty disagrees: for example, Beatty criticizes the South African Court in *President of the Republic of South Africa v. Hugo*,[61] for failing to accept the viewpoint of single fathers who challenged a presidential pardon releasing from prison only mothers of young children. But the opinions of the judges supporting the constitutionality of the President's pardon used concerns of proportionality to at least as great an extent as the lone dissent, which emphasized the inconsistency of the pardons with commitments to overcoming gender inequalities and the stereotypes on which they rest.[62]

---

58. Beatty's argument here is premised on the idea that facts are more objective than words to be interpreted and that the courts can act as impartial arbiters by focusing on the parties' accounts.

59. Although Beatty's general view is that in most cases "courts could rely on the parties' own evaluations of how significant the law was to them," (p. 74), in these religious liberty cases it seems evident—on Beatty's own description—that one cannot.

60. Another example: Beatty treats *Lynch v. Donnelly*, 465 U.S. 668 (1984), as correct, even though the Court apparently disagreed with the plaintiff's characterization of the effects of a public display of traditionally religious symbols. Indeed, Beatty praises the U.S. Court for its "meticulous" attention to facts in the public display of religious symbols cases, *Lynch* and *Allegheny County v. ACLU*, 492 U.S. 573 (p. 49). In *Lynch*, the Court rejected the plaintiffs' claim that public display of a Nativity scene appeared to be an endorsement of the religious element of the creche, creating fear in them that a dominant religious group would impose its views on others; the Court insisted on the secular character of the display. Both the Court's rejection of plaintiffs' own description of their interests and its willingness to ignore the Christian nature of the Nativity display are arguably in tension with Beatty's praise of the Court as giving "meticulous" attention to the facts. In *Allegheny County*, the Court likewise rejected the views of objectors that the display of a menorah near a Christmas tree involved a prohibited state endorsement of religion, again characterizing the display as secular, but concluded that a creche displayed on a staircase within City Hall was an establishment of religion, accepting in part and rejecting in part the harms claimed by the plaintiffs. Although Beatty might say that "objectively" a person's "life story" is not harmed by the public religious observances of others (even with government support), or is not harmed as much by such public observances of others as by restrictions on (or demands for) one's own religious worship, these arguments do not distinguish *Lynch* from *Allegheny*.

61. 1997 (4) SA 1 (CC) (S. Afr.).

62. The majority justices noted the far smaller proportion of single fathers who cared for young children compared to mothers, and the far larger number of male pris-

Beatty argues that it is when courts fail to apply proportionality analysis in an even-handed way that they tend to err in resolving important constitutional claims (pp. 87, 98, 112, 167).[63] He astutely points out that in challenges to gendered classifications that exclude women from opportunities available for men, many constitutional courts abandon "interpretivism" and rely on forms of proportionality analysis, in which a classification which excludes women entirely and thus substantially infringes their interests is undermined by close examination of the purported purposes and fit. By contrast, Beatty notes, many courts retreat to "interpretivism" when confronted with claims of gay or lesbians to equality of treatment.

Beatty's explanation for the lack of success of gays and lesbians in many constitutional challenges focuses on courts' failure to understand facts[64] and use of the wrong interpretive approaches.[65] But courts may use "interpretive" approaches when their own commitments to equality do not extend to gays and lesbians. In other words, Beatty treats the methodology (interpretivism vs. proportionality) as cause, rather than symptom, of the Courts' unwillingness to extend to gays and lesbians the same protections. But the degree of commitment to equality as a

---

oners than female prisoners, concluding that, if relief had to be extended to both single fathers and single mothers, it was unlikely that *any* parents of young children would be released, thus arguably taken into account the perspectives of both male and female parents. *Id.* at 25 (Goldstone, J.). For the one judge in the majority who found a violation of the equality provisions of the interim constitution, the measure was nonetheless found justified under the proportionality analysis mandated by Section 33. *Id.* at 42, 47 (Mokgoro, J.). Justice Kriegler's dissent focused on the centrality of gender equality to the South African constitution, concluding that the long-term harm to dispelling gender stereotypes about family care far outweighed the short term benefits to a small number of released women prisoners. *Id.* at 34–37 (Kriegler, J.). Neither proportionality nor pragmatism dictates where the balance is struck. Cf. Mark Kende, *Stereotypes in South African and American Constitutional Law: Achieving Gender Equality and Transformation*, 10 S. CAL. REV. L. & WOMEN'S STUD. 3, 5 (2000) (characterizing *Hugo* as embodying a "pragmatic interpretive philosophy"). Beatty acknowledges (p. 98), in the face of decisions ostensibly applying proportionality analysis but getting the answer wrong, that the principle of proportionality does not "provide judges with automatic, self-enforcing rules."

63. *See also* BEATTY, CONSTITUTIONAL LAW, *supra* note 3, at 57, 59.

64. "[F]acts that are critical to their cases are either misunderstood or ignored" (p. 102), because courts used interpretive approaches in resolving equality challenges brought by gays and lesbians focusing (in his view, incorrectly) on what the framers of a constitution would have intended, or prior judicial precedent, or on institutional modesty and deference to legislative decisions (p. 103).

65. The presence of cases rejecting gender equality claims, he indicates, does not suggest that "sex discrimination is not a matter of right or wrong," or that the law laid down by courts is not made up of principles; rather, "it is precisely when judges fail to apply the principles of proportionality even-handedly that rules" disadvantaging people because of their gender are found constitutional (p. 87).

principle may be the key determinant, rather than the choice of methodologies.[66] And if so, it is substantive values rather than commitments to proportionality as a neutral principle of decisionmaking that play the central role.[67]

II. "ULTIMATE" LAW, LEGITIMATE ENDS, PROPORTIONALITY AND EQUALITY: WHERE DO CONSTITUTIONAL VALUES COME FROM?

For Beatty it is important to deny that courts applying proportionality analysis are engaged in substantive value choices, for part of his claim is that the method is neutral and driven by facts. The neutrality of the method is part of his response to the tension between democratic self-governance and judicial review of government actions under the proportionality standard. Beatty argues that in addition to being more determinate, the neutrality and objectivity of the method—including judicial acceptance of government ends—helps reconcile proportionality review with self-governance. He says:

> Like scales of justice, judges have no say on the worth of what is put on each side of the balance. When reviewing the legitimacy of laws that make having an abortion a crime, for example, when life and death issues really are at stake, it tells judges they have no authority to second guess how a community thinks about the deep philosophical and spiritual meanings of life . . . (p. 167).

Thus, for example, courts cannot decide that a fetus is or is not a life entitled to protection, but must go by what the community decides (p. 67).[68] Justice, he says, "is a local, not a universal ideal"—it differs from law in this way (p. 167). Depending on the

66. For example (pp. 84–85), Beatty notes the Israeli court's striking down of an exclusion of women from serving as military pilots, based on "facts" of women's service in other military departments. But considered in light of decisions such as *Sirdar v. Sec. of State for Defence,* [1999] E.C.R. I-7403 (upholding exclusion of women from British marine units as consistent with demands of proportionality because of the purported need for "interoperability" in combat readiness), perhaps the Israeli court's decision reflects a stronger moral commitment to gender equality more than a methodological commitment to proportionality analysis.

67. It may well be that in resolving claims under older constitutions, it is particularly important to be open to modes of interpretation that are not narrowly intentionalist in order to accommodate principled claims of equality for previously subordinated groups. *See, e.g.,* Vicki C. Jackson, *Holistic Interpretation, Comparative Constitutionalism and Fiss-ian Freedoms,* 58 U. MIAMI L. REV. 265, 270–81 (2003).

68. Beatty does not here explain on what principled basis to make the choice between the community's decision and an individual's decision. *See also* (p. 33).

prior moral choices of a society, the proportionalities can vary, and abortion could be either lawful or not (p. 168).[69]

This claim of objectivity for proportionality analysis raises a number of difficulties. First, Beatty provides only a scant framework to discriminate between those moral visions on which a community can decide, as it were, prior to proportionality analysis, and those "illegitimate" ends precluded to the body politic.[70] Beatty does say that morally legitimate ends must reflect the equal moral worth of each person, in the sense of providing opportunity for each person's views to be considered (p. 172).[71] Beatty also indicates that government action designed only to harm persons or to act inconsistent with "formal equality of ... autonomy" is illegitimate (pp. 174–75).[72] But the lack of clarity about the implications of these two positions is reflected in some contradictions within the book itself.

For example, in the course of critiquing Dworkin's moral reasoning approach to constitutional interpretation for its indeterminacy, Beatty says: "On gay rights, for example, *justice demands* that they be given the same level of protection against discrimination as every one else but the jurisprudence, at least in the United States, provides considerably less." (p. 29 (emphasis added)).[73] Later on, however, in his defense of the neutrality of

---

69. "When all the relevant interests are measured against the principle of proportionality, the results in both cases [upholding and rejecting women's rights to abortion] are right" (p. 168).

70. *Cf.* Christoph Engel, *The Constitutional Court—Applying the Proportionality Principle—as a Subsidiary Authority for the Assessment of Political Outcomes*, *in* LINKING POLITICS AND LAW 285, 308 (Christop Engel & Adrienne Heritier eds., 2003) ("the other three tests of the proportionality principle become pointless if the legislator is free to define the legitimate aim.").

71. He writes: "Proportionality ... [is not] value free. The principle assumes that all who participate in a debate about the legitimacy of some course of action carried out by or with the blessing of the state are, at least for purpose of the debate, each other's equal." Thus, the "normative conception of equality ... underlies the principle of proportionality"(p. 172).

72. He writes: "The only politics that proportionality prohibits is the politics of extremism and hate. Laws can't be passed that label some as inferior to others. The formal equality of each person's autonomy means everyone's rights are the same. States owe the same duty to each person who is subject to their rule. Except for that one constraint, proportionality leaves it entirely to the people to decide what their projects and priorities will be. Once it is established that a law doesn't directly challenge the equal moral authority each person possesses over his or her life, politicians can pursue just about any purpose they please" (pp. 174–75).

73. He goes on to note that under U.S. constitutional law, gays and lesbians (unlike women and racial minorities) "can only insist that governments act rationally, not that they also be fair. Precedent and principle hold out very different futures for lesbians and gays, and judges are, on Dworkin's theory, entirely unconstrained in deciding which tomorrow will see the dawn of another day" (p. 29).

proportionality analysis, he seems to suggest that what "justice" requires with respect to gay marriage may vary widely. Thus, he explains that in proportionality analysis:

> [e]ach point of view carries the same moral weight in the analysis. There is no universal, a priori answer to the question whether abortion is murder, or whether people of the same sex can marry each other that holds true all over the world. For the purpose of determining what rights foetuses, gays, and the poor can claim against the state, each ethical perspective that respects the equal standing of conflicting opinions is entitled to have its position evaluated fairly and according to the evidence that shows it in the best possible light (p. 172).

Perhaps Beatty would reconcile these statements by explaining his first comment as one based on what "justice" requires in the United States or Canada, and not as a universal claim: "Neutrality also entails recognizing that what is just, what is in proper proportion, in any case is particular to each community"(p. 167). But this explanation leads to the question of how courts determine what are the principles of justice in their own societies.[74]

Beatty does not develop how a court is to discern what the moral choices of society are—for example, whether to be governed by choices reflected in foundational documents (like constitutions) or in enforced statutes. It is possible that he would regard founding texts, such as the U.S. Constitution, the German Basic Law or the Israeli Declaration of Independence, as guideposts to the particularized "moral vision," that the proportionality test serves—but such a move would re-introduce textual interpretation (at least at the level of determining specific constitutional values) that Beatty seems reluctant to embrace.

Moreover, Beatty fails to distinguish between those conclusions about the meaning of life that must be secured to each individual's decision (something we might call a "right") and those appropriate for community decisionmaking.[75] Whether this is

74. Beatty's reference to the particularized views of particular communities raises broader and difficult questions, beyond this essay, about the relationship of law to conventional morality. For discussion of the classic debate between H.L.A. Hart and Lord Devlin, *see, e.g.*, Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L. J. 353, 358–59 (2004); Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 722–23 (1995).

75. Beatty criticizes Dworkin's moral reasoning approach because allowing judges to decide on abortion or euthanasia "constitutes a massive derogation from the authority of each person and the sovereignty of the people as a whole to decide the great questions of life and death for themselves" (p. 33). The formulation strikes me as odd, because so much of constitutional law involves deciding whether it is the person, or the community,

because Beatty does not believe in the idea of nontrumpable "rights," but only in "interests," as some passages in this book suggest (p. 171), or because Beatty believes in universal human rights (which do not extend to certain reproductive or life and death decisions), is unclear. As noted, Beatty does argue that law cannot "challenge the equal moral authority each person possesses over his or her life," because otherwise government could pursue anything it wanted, and thus, he says, the "principle of proportionality takes all *benign* purposes as given" (p. 175 (emphasis added)).[76] Beatty's argument here seems to require reliance on implicit theories of rights or universal principles, and yet these remain under-developed and indeed, at times, obscured by the language of proportionality.

For example, in his final chapter Beatty argues that proportionality provides a "neutral principle" for *Brown v. Board of Education* because telling black children that they cannot be educated in the same school as white children is "brutally offensive to their dignity and self-worth in a way that" forcing white children to share the classroom is not (p. 186). He goes on to recognize the problem of analysis based on "interests" alone, arguing that "[s]egregationists may be deeply offended by having to mix with people with whom they want no association, but their stature and status in the community is not diminished by their forced integration"(p. 186). But to the extent that whites' status in fact was relative, and dependent on their perceiving themselves as hierarchically superior to that of blacks, ending segregation may indeed have diminished their status.

What Beatty must mean, I think, is that their *legitimate* interests in status and stature, their *right* to be treated with "human dignity," is not impaired by integration. But such a statement cannot be drawn from an unadulterated principle of proportionality that accepts existing government's ends as legitimate. Nor can it be drawn by the parties' "own evaluation" of their interests. Rather, it requires a principled concept of the legal entitlements or endowments (or "rights") of human beings.[77]

---

which is "sovereign" over particular decisions. *Cf.* Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L. J. 1006 (1987) (theorizing judicial review as necessary to maintain shifting boundary between areas governed by universalist as opposed to particularist values).

76. Beatty's reliance on the principle of "equal moral authority" seems closely related to Dworkinian moral reasoning of a sort Beatty elsewhere rejects, *see supra* note 75.

77. In discussing the South African Court's decision in *Hugo*, Beatty says, the

Proportionality alone cannot provide us with the principled values on which its operational analysis must rest. Beatty's proportionality rests, as he acknowledges, on a foundational commitment to equality (and not, I think, just the formal equality of consideration of views, but a much more substantive version of equality). This commitment informs virtually all of Beatty's analysis. For those whose foundational commitments are to other values, or to other more formal conceptions of equality, proportionality analysis might yield very different results.

III. PROPORTIONALITY, TRANSPARENCY AND DETERMINACY

In this section, I advance some very tentative thoughts about the benefits of proportionality analysis in constitutional adjudication. I begin by agreeing with Beatty's implicit claim that proportionality captures a kind of common sense view of justice[78]—that greater harms should mean greater punishment, that greater burdens on individuals require greater justifications. Part of its attraction is the universality, at some level, of such conceptions of justice, and their correspondence to common understandings of the function of constitutionalism. Given these intuitions, proportionality analysis has a number of advantages. First, explicit attention to proportionality increases the transparency of judicial decision, framing a structure for exploring concerns likely to be relevant to judges and lawyers in a significant swathe of constitutional decision-making. Second, proportionality analysis, as it is practiced in countries like Canada, meets

---

judges "dismissed Hugo's own self-understanding as not worthy of the Court's respect. Rather than accepting the way Hugo and other single fathers perceived their treatment by the state, they became partisan players in the case" (p. 97). But I think Beatty would agree that the "self-understanding" of segregationists should not have been accepted by the *Brown* Court.

78. One of Beatty's implicit claims is that proportionality corresponds to important conceptions of justice: proportionality analysis helps discriminate between the "good" and the "bad" effects of government action, and prevents majoritarian "excess" and "abuse." (pp. 182–83, 3) Indeed, he argues:

> when judges test the decisions of politicians and their officials against the principle of proportionality, human rights are better protected and the sovereignty of the people more respected simultaneously. Proportionality establishes a metric to resolve conflicts between majorities and minorities that renders justice to both .... [By] evaluat[ing] the intensity of people's subjective preferences objectively, it can guarantee more freedom and equality than any rival theory has been able to provide (p. 172).

Despite the somewhat extravagant language, such passages suggest that proportionality corresponds with common sense notions of justice and fairness, while assuring that degree of objectivity and impartiality that must typify judicial, rather than political, decisionmaking.

some of the critiques of judicial balancing by its efforts to elicit attention not only to individual interests at stake, but also to specific, nonformulaic justifications from the government that address alternative mechanisms.[79] Third, proportionality's attention to particular facts helps make it a flexible tool both for protecting rights and maintaining constitutional law as an effective legal constraint on government over time.

Transparency and Constitutionalism. One of the purposes of constitutionalism itself is to provide for government that is both effective in governing and respectful of individual rights. Proportionality focuses on questions that seem to go directly to this purpose. Its attention to the individual parties' claims of injury or entitlement, the legitimate governmental purposes at stake, and the means available, and chosen, to satisfy those purposes, corresponds to widely-held conceptions of fairness and of how tensions between the individual and her government should be resolved.[80] Proportionality in one form or another is thus widely used in what Beatty's earlier work called the "justification" phase of constitutional adjudication of rights claims,[81] to test the relationship between legitimate purpose and means used and to screen out legislation that in fact has an impermissible purpose—that is, a purpose inconsistent with basic constitutional values.[82]

79. Whether commitments to proportionality require case-by-case adjudication rather than more formal rules, or should exclude concern for text, precedents, and institutional roles, is another matter, discussed *infra*, text accompanying notes 108–118.

80. Something akin to proportionality analysis is reflected in the U.S. Supreme Court's equal protection and substantive due process jurisprudence, requiring that substantial intrusions on highly important individual interests be justified only by the most compelling of government interests through means meeting "narrow tailoring" requirements, as well as in the formulation of procedural due process analysis found in *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *see also* Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 609 (1999). These analyses have analogues in public law adjudication around the world. *See, e.g.*, HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW 868–920 (4th ed. 2002) (discussing judicial review of administrative action in the U.K. under doctrines of ultra vires, unreasonableness, and proportionality); Itzhak Zamir, *Unreasonableness, Balance of Interests and Proportionality*, in PUBLIC LAW IN ISRAEL 327 (Itzhak Zamir & Allen Zysblat eds., 1996).

81. *See* BEATTY, CONSTITUTIONAL LAW, *supra* note 3, at 2.

82. Although proportionality cannot, by itself, determine what purposes are illicit, it can be used to help screen legislation for purposes that are deemed impermissible on other grounds. Thus, the "proportionality and congruence" test of *Boerne v. Flores*, 521 U.S. 507 (1997) has been viewed by some as a device to screen legislation for illicit constitutional purposes. See Jackson, *supra* note 80, at 628; see also Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1178–79, 1188 (2001). Proportionality analysis may also be invoked as a tool for mediating conflicts between two sets of constitutional rights or values, like freedom of expression and freedom from invidious discrimination. For a possible example, see R. v. Keegstra, [1990]

Because the concerns embraced under the idea of proportionality correspond with widely shared notions of fairness and with some of the larger purposes of constitutionalism, they are likely to be present in judges' thinking about the correct resolution of at least some cases (especially in relatively less settled areas of law) that come before them. To the extent that one believes that judges' written reasons should reflect what motivates their decision,[83] there are advantages to a doctrinal framework that allows them to put in writing their analyses of the proportionalities of the situation before them.[84] Writing, as we have all experienced, can have a salutary effect on the thinker and also has the benefit of permitting responses and challenge to analyses that may be motivating a decision.[85] Transparency and accountability of judicial decision-making (that accountability which comes from public and judicial reflection on and critique of the decisions) might thus be improved through more formalized written consideration of factors going to the fairness and justifiability of the intrusions on individual interests that are at the heart of proportionality analysis. Although the efficacy of reason-giving in promoting accountability and constraint can be contested, there are significant differences between decisional structures that strive for reasoned decision and those that do not,

---

3 S.C.R. 697.

83. *See* Frank M. Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16, 22–23 (1988) ("[W]hat a judge really does in his mind in reaching a decision should appear on paper. . . . Unless real reasons are laid on the table, there is no chance for a meaningful response or any useful dialogue."); David Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 737 (1987) (placing special weight on need for candor in judicial reason-giving to enable reasons given in precedents to have appropriate constraining effect); *cf.* Jeffrey Rosen, *Foreword, 1999 Survey of Books Relating to The Law*, 97 MICH. L. REV. 1323, 1337 (1999) ("The qualities of a great judicial opinion—transparency, candor in the face of uncertainty, and analytical depth—are precisely those qualities that are most conducive to public accountability.").

84. *Cf.* Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 34–35 (2001) (suggesting that reason-giving requirement in administrative law has been unsatisfactory because it excludes "discourses of justice and authenticity").

85. *Cf.* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 270–72 (2002) (arguing that more "literalist" approach "does not escape subjectivity," for language, history and tradition "provide little objective guidance in hardest cases" but instead will "produce a decision that is no less subjective but which is far less transparent than a decision that directly addresses consequences in constitutional terms"). It might nonetheless be argued that written opinions should refer only to more autonomous-seeming analyses of legal text, rules or precedents, even if judges are aware of other motivations for their own decisions, based on a pragmatic judgment that courts will better be able to carry out their functions in the long run if some aspects of their decisionmaking are not fully explained. Whether to believe in the value of such nondisclosure may depend on different legal cultures. But on the whole default rules of interpretation should favor candid evaluation of those factors motivating decision.

with reason-giving tending to promote both self-awareness and constraint.[86]

Structured Deliberation and the Critique of Balancing: Although Beatty has insisted at times on distinguishing proportionality from balancing (pp. 92-93), proportionality analysis shares certain characteristics of balancing approaches, as both may be distinguished from more categorical or conceptual forms of analysis.[87] Balancing has come under serious critique by constitutional scholars both for its tendency to erode the power of constitutional rights to constrain governments and for its inability to constrain judges from enacting personal views into law.[88] The purported scientism of the metaphor of balancing, it can be ar-

86. Consider Professor Mashaw's comment on the value of reason-giving in the administrative context:

> As [the] argument goes . . . Reasons really are small things to put in a jar. They are the pathetic coinage with which the powerful buy off the powerless in a legitimacy game that preserves the hegemony of the hegemons. There is some truth to these claims, of course, but they simultaneously prove too much and offer too little. They suggest at their most extravagant that there is no real difference between the administrative rationality of the U.S. Social Security administration and the administrative rationality of the Rwandan military police.

Mashaw, *supra* note 84, at 28–29. Reason-giving tends to produce more self-aware decisionmaking; the presence of a reasoned opinion provides more of a guide, and hence a constraint, to subsequent decisionmakers than an unreasoned judgment; and the procedural justice satisfaction for those subject to the courts' judgment of knowing they—in their individual contexts—have been heard is unfairly characterized as "pathetic coinage."

87. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 945 (1987) (distinguishing balancing from approaches like totality of circumstances tests designed to determine whether "some conception" of what constitutes the constitutionally protected or prohibited act has occurred); *see also* Kent Greenawalt, *Free Speech in the United States and Canada*, 55 LAW & CONTEMP. PROBS. 5, 6–7 (1992) (distinguishing "balancing" approaches in which "crucial factors" are openly weighed from "conceptual approaches" that use categorical analysis).

88. For thoughtful discussion, see Aleinikoff, *supra* note 87, at 986–91, 973–77. *See also* Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773, 781 (1990) (critiquing balancing and multi-factor approaches as inconsistent with having rules of law). A further critique is that judicial "balancing" ends up being review of reasonableness in which courts simply second-guess a properly legislative judgment. *See* Aleinikoff, *supra* note 87, at 984–85. But it is unclear whether legislatures always will, or can, consider the reasonableness of statutory schemes, especially as they may apply in particular circumstances, *see* Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 383–90 (discussing "limits of congressional foresight"), and thus judicial review may in such cases be the only safeguard. Morever, as Aleinikoff notes, what courts do in these cases can be understood not as replicating the legislature's function, but as using legislative judgments on social interests to inform the courts' special role of protecting constitutional rights. *See* Aleinikoff, *supra* note 87, at 986. Even where a legislative body has deliberated on the balance between social and individual interests, judicial review of the proportionality of its actions with respect to basic constitutional values can be undertaken with appropriate respect for legislative judgment as to the public interests at stake. *Cf.* Coffin, *supra* note 83, at 21 (referring to courts' historic "monitoring function under the Constitution").

gued, obscures the inevitability of judicial judgment about constitutional values.[89]

Proportionality's questions, as developed in Canadian and European jurisprudence, may help move analysis beyond the crude balancing of costs and benefits associated, unfavorably, with balancing in the U.S. tradition.[90] By requiring consideration of the government interest being promoted and the nature of the constitutional right or interest being infringed, as well as of the need—in comparison to other less restrictive alternatives—for the particular measures at stake, *Oakes*-like proportionality tests become multi-dimensional in a way that, if taken seriously, might move the decisional mind away from simple-minded comparison or "balance." The need to explore whether there are alternative means of protecting the interests by which the government justifies its actions with less sacrifice to the private right—before reaching the question whether the challenged measure is likely to confer a benefit proportional to the harm it causes to protected rights—also makes the justification requirement into something more qualitatively exacting than a crude "weighing" of values (that may be incommensurable in important respects).[91] Indeed, the very language of proportionality itself sug-

---

89. *Cf.* Aleinikoff, *supra* note 87, at 992–94 (discussing "scientific" balancing); *id.* at 1003–05 (need for new metaphors in place of "feigned mathematical precision").

90. *See generally* EMILIOU, *supra* note 50; Somek, *supra* note 28, at 302; KOMMERS, *supra* note 42, at 46 (comparing German proportionality analysis to U.S. "strict scrutiny"); THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE (Evelyn Ellis ed., 1999). For a description of German public law emphasizing the role of constitutional values in proportionality analysis of constitutional questions, see Zoller, *supra* note 9, at 581–83 ("Crucial for the determination of the appropriate character of the relationship between ends and means of parliamentary enactments are Articles 1-19 of the Constitution, which enumerate the fundamental rights of the German people, together with Article 20(1), which provides: 'The Federal Republic of Germany is a democratic and social federal state.'"). Thus, per Zoller, proportionality analysis "strictly speaking"occurs only after evaluations of rationality and necessity and within boundaries established by constitutional "values" of democracy, federalism, the social state and fundamental rights.

91. *See supra* notes 89, 90. For a recent application of the minimal impairment aspect of proportionality to invalidate a statute in Canada, see R. v. Demers, [2004] 2 S.C.R. 489 (invalidating law that prohibited absolute discharge of one accused of crime but mentally unfit to stand trial because of permanent mental disorder). Under such tests, much will depend on the level of generality or specificity with which governmental interests are formulated, which will in turn affect the degree of fit and availability of other alternatives to the end. *Compare, e.g.*, RJR-MacDonald Inc. v. Attorney General, [1995] 3 S.C.R. 199, 327–28, 339–49 (McLachlin, J.) (invalidating ban on tobacco advertising; concluding that goal of advertising ban was to decrease tobacco consumption motivated by advertising and concluding that goal might be served as well by ban on "lifestyle" advertising while allowing advertising to encourage customers to switch from one brand to another) *with id.* at 274–84, 306–19 (LaForest, J. dissenting) (purpose of ban is to decrease health detriments from smoking and rejecting argument that partial ban would be as effective as total ban in light of that purpose and experience of other coun-

gests that some more qualititative judgment is called for than the metaphor of weighing (with its implicit invocation of scales) conveys.[92]

Proportionality analysis under the *Oakes* standard, then, may produce more structured consideration of constitutional values. In so doing, it facilitates response, argument and review by judges.[93] Further, by requiring that justifications be advanced in terms of consistency with basic constitutional commitments, *e.g.*, to "a free and democratic society,"[94] proportionality analysis invites "participation in the reasoning process that sustains values that inform the rights-protecting instrument,"[95] thereby meeting concerns that balancing falsely ignores the social interest in the protection of individual rights.[96] While proportionality analysis may not always fulfill the promise its most ardent advocates envision, its doctrinal aspects offer some hope for more careful, and open, reasoning about constitutional values.[97]

---

tries).

92. *Cf.* RJR-MacDonald, [1995] 3 S.C.R. at 270 (LaForest, J., dissenting) (emphasizing that proportionality analysis is not a "test" but "an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement" in light of Charter Section 1's commitment to protecting Charter values in a "free and democratic society"); Pildes, *supra* note 16, at 734–36 (contrary to implications of "balancing,"constitutional adjudication is a qualitative, not quantitative, process, based on identifying reasons that are permissible bases for government action). Pildes' emphasis on "structural" rather than atomistic conceptions of rights corresponds in some ways with Canada's more "qualitative" conception of proportionality.

93. *See* Coffin, *supra* note 83, at 22–26.

94. Canadian Charter of Rights and Freedoms, § 1 (Part I of the Constitution Act, 1982 (being Sched. B to the Canada Act 1982, c. 11 (U.K.)).

95. Weinrib, *supra* note 19, at 17. *See also id.* at 21 ("Rights guarantees ... do not function as absolute counter-majoritarian negations of otherwise plenary state power. They intensify the democratic engagement by taking it beyond majority rule at the ballot box and in the legislative chamber."). Proportionality analysis, she suggests, produces "focused deliberation ... exemplify[ing] the appropriate coordination of judicial and political functions, both subservient to the constitutional requirement to respect human dignity." For an analogous claim about requiring administrative agencies to justify their rejection of alternatives, see Lisa Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 476 (2003) (justification requirement serves "critical role of facilitating participation as well as rationality ... ensur[ing] the consideration of party input").

96. *See, e.g.*, Aleinikoff, *supra* note 87, at 981.

97. Compare *Dennis v. United States* 341 U.S. 494 (1951), which openly adopted Learned Hand's balancing test. The plurality dwelt at length upon the legitimacy of government action to prevent violent overthrow, arguing, for example, that it need not wait until a *putsch* has already occurred, *id.* at 509, 520–21, but failed fully to consider whether the statutory prohibition of "advocacy" risked intruding on areas of protected rights—in part because the balancing of interests occurred prior to definition of whether a violation of right was entailed. Apart from a quick assertion that the statute does not penalize "discussion" but only "advocacy," the plurality did not explore the statute's potential harm to freedom of speech. By failing to acknowledge the difficulty of distinguishing these two

Proportionality, Indeterminacy and Formalism: Notwithstanding Beatty's arguments, proportionality analysis is unlikely to be more determinate, across the board, than other methods of constitutional analysis.[98] There are some core examples where claims of determinacy are persuasive.[99] For example, most will agree that a sentence of fifty years is more harsh than a sentence of ten years, and that the harsher sentence should be reserved for an offense, or an offender, who is in some respect "worse."[100]

---

forms of expressive activity, or the chilling effect suppression of the one has on the other, the plurality left First Amendment freedoms out in the cold while focusing energy on the gravity of the evil the statute sought to prevent. An analysis structured to focus judicial attention on the risks to basic rights might induce more caution in the determination of the proportional benefit of the challenged practices, reached only after these earlier inquiries.

It is important here to acknowledge that what may matter more to a judge's decision than whether she "balances" or engages in proportionality analysis is her underlying commitment to the constitutional value at stake, *see e.g.*, *supra* note 66, or the degree of deference given to other constitutional actors' decisions. *Cf.* Rt. Hon. Lord Hoffmann, *The Influence of the European Principle of Proportionality Upon UK Law*, *in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE, *supra* note 50, at 109–12 (arguing that the most important question about proportionality is who decides, not its internal doctrinal aspects). Justice Frankfurter's *Dennis* concurrence recognized petitioners' weighty "right to advocate a political theory ... [unless the] advocacy ... create[d] an immediate danger of obvious magnitude to the very existence of our present scheme of society." *Dennis*, 341 U.S. at 518–19, 520–21 (Frankfurter, J., concurring). But unlike Justice Douglas, Justice Frankfurter was willing to defer to the legislature rather than reach an independent judgment about the dangers posed by the Communist Party. *See Dennis*, 341 U.S. at 587–91 (Douglas, J., dissenting). Likewise, the principal opinions in *RJR-Macdonald*, discussed *supra* notes 91–92, disagreed on whether and how strongly to defer to Parliament's presumptive determinations of the empirical fact supporting the bans on tobacco advertising. *Compare RJR-Macdonald*, [1995] 3 S.C.R. at 276–79 (La-Forest, dissenting) (arguing for deference because Parliament was mediating between competing group claims rather than acting as a "singular antagonist" of individual) *with id.* at 330–33 (McLachlin, J.) (deference to Parliament does not relieve government of burden of demonstrably justifying infringements on free speech rights).

98. Beatty's critique of other methods of interpretation as indeterminate across some significant range of cases is on the whole compelling. For example, Beatty is particularly effective in arguing that adoption of broad language itself raises a doubt whether the intentions of framers was to limit to original intent (pp. 9–11). Moreover, analysis is further complicated if the intentions of any single generation must be read through the later intentions of amending generations. *See* Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259 (2001).

99. As is true for other theories: For example, Professor Ely's representation reinforcing political process theory, which Beatty criticizes for its indeterminacy and lack of neutrality (p. 24), seems both persuasive and determinate in supporting judicial condemnation of gross political malapportionment, like that at issue in *Baker v. Carr*, 369 U.S. 186 (1962).

100. Within a given legal culture, jurists and lawyers might also agree that a loss of parental rights is more severe than loss of a day's vacation. But many comparisons will not yield such relatively determinate comparative evaluations. More important, there are likely to be fairly wide differences in how intrusions are weighed in the face of asserted government interests. So while proportionality may be no more subject to indeterminacy

With substantial agreement on this evaluation, one could say, some questions of proportionality are quite determinate. But as Pam Karlan has recently demonstrated, comparing criminal punishments is no easy or determinate matter given a metric of proportionality, because of the different ways in which people would weigh the severity of the crime against the blameworthiness of the offender.[101] And many of the settings in which proportionality review is invoked involve even more complex groupings of interest, issues, means and goals, than is the case in criminal punishment. While the choice to focus on the parties' "own understandings" might be derived from a clear, principled commitment of equal respect for the moral worth of each individual, it does not necessarily provide a determinate solution to how to "count," weigh, or consider the interests asserted on behalf of the aggregate of individuals that constitute the "public" and those of the burdened individuals or groups that bring a challenge.[102]

Indeed, for many the question is whether proportionality analysis will be more indeterminate, less constraining, on judicial decisions than other available interpretive approaches. Case-by-case application of proportionality analysis, it might be argued, virtually invites ad hoc exercises of the judge's own intuitions. Strong versions of either interpretive or doctrinal formalism, *e.g.*, through intentionalism reinforced by strong stare decisis, or through the articulation of categorical rules, might be viewed as

---

than other methods of interpretation on plausibly open questions within a legal discourse, a positive case has not been made that it is likely to be more determinate and predictable a basis for decisionmaking than other methods.

101. *See* Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Capital Punishment*, 88 MINN. L. REV. 880 (2004).

102. Beatty's view of the determinacy of proportionality analysis differs markedly from other proponents of pragmatic attention to facts and consequences in constitutional adjudication. Justice Stephen Breyer, for example, argues that it is "the relevant [constitutional] values" that "constrain subjectivity" by "limiting interpretive possibilities and guiding interpretation," as well as the "individual constitutional judge's need for consistency over time." Breyer, *supra* note 85, at 270. Breyer's claim for determinacy is thus far weaker than Beatty's, acknowledging that different judges may reach a range of different reasonable conclusions, among the available interpretive possibilities. Judge Richard Posner goes even farther, acknowledging that the method of pragmatism may be subject to indeterminacy (though possibly no more so than other methods). *See* Richard Posner, *Past-Dependency, Pragmatism and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 596 (2000); Richard Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 9-13 (1996) [hereafter *Pragmatic Adjudication*]. Posner's response to indeterminacy concerns about judges making pragmatic decisions about what is best for now and the future, rather than primarily "interpretive" decisions about what is consistent with the past, is to argue that the selection process for federal judges is likely to produce "wise elders." *Id.* at 11-12.

desirable because they affirmatively work to suppress the judges' own views about the justice or fairness of the situation before him or her. On this account, inviting judges to think about the benefits of a statute, or how much it intrudes on ordinarily protected areas, is too broad an invitation to unbridled discretion; to direct the judges to determine what category the challenged conduct falls into under a "rule,"[103] or what precedent is most closely on point,[104] or what the "original meaning" of particular words was, have the advantage, so it is argued, of directing the judge away from her intuitions about fairness.[105] Constraints on unbridled judicial discretion can arise, however, from disciplined resort to the multiple traditional sources of judicial decision, within which interpretations that are more consistent with understandings of constitutional norms (or "values") of fair, non-arbitrary and consistent treatment ought to control.[106] Con-

---

103. For a classic exposition of rules and standards in U.S. constitutional law, see Kathleen Sullivan, *Foreword: The Justices of Rules and Standards,* 106 HARV. L. REV. 22, 27 (1992) ("[R]ules reflect the rationalist and positivist spirit of the codifiers and standards the pragmatic spirit of the common law judges."). *See also, e.g.*, Louis Kaplow, *Rules v. Standards: An Economic Analysis,* 42 DUKE L. J. 557 (1992) (associating rules with ex ante decisionmaking and standards with ex post decisionmaking, and arguing that, due to efficiencies in information gathering and dissemination, rules are more efficient to govern frequently occurring events while standards are preferred for less frequently occurring events); Larry Alexander, *Constitutional Rules, Constitutional Standards, and Constitutional Settlement:* Marbury v. Madison *and the Case for Judicial Supremacy,* 20 CONST. COMMENT. 369, 374–75 (2003) (distinguishing between parts of the Constitution's text that were intended to establish rules, and those intended to establish standards); *cf.* Frederick Schauer, *The Convergence of Rules and Standards,* 2003 N.Z. LAW. REV. 303, 312 (arguing that "adaptive behavior" of participants will tend to push rules in the direction of standards and to push standards in the direction of rules).

104. For a sampling from the vast literature on stare decisis and constitutional adjudication *see, e.g.*, Christopher J. Peters, *Foolish Consistency: On Equality, Integrity and Justice,* 96 YALE L.J. 2031 (1996); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication,* 88 COLUM. L. REV. 723, 754 (1988); *see also* Jill E. Fisch, *The Implications of Transition Theory for Stare Decisis,* 13 J. CONTEMP. L. ISSUES 93 (2003).

105. *See e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. CHI. L. REV. 1175, 1185 (1989); Easterbrook, *supra* note 88, at 781 (in the absence of "'rules' the tug of fair treatment is especially strong" and "personal idiosyncrasies or ideologies" may be freely indulged).

106. *See generally* Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation,* 100 HARV. L. REV. 1189 (1987); David A. Strauss, *Common Law Constitutional Interpretation,* 63 U. CHI. L. REV. 877 (1996). As Fallon notes, especially in harder cases "value arguments" are likely to have an important effect in influencing judgments as to other sources of decision, including text, intent and precedent. *See* Fallon, *supra*, at 1194. For Strauss, it is an essential feature of constitutional adjudication to reconcile past practice with "evolving moral understandings": "[W]ithin the boundaries set by the text and precedent, judgments of fairness and policy are appropriate." Strauss, *supra*, at 900–01. And as both emphasize, constitutional adjudication's legitimacy is grounded in its being constrained, *e.g.*, by text and precedent. *See* Strauss, *supra*, at 900–01; Fallon, *supra*, at 1265 (referring to the "partial autonomy of constitutional law from politics and morals").

straints on judging arise, as well, from the knowledge that decisions once made are precedents in future cases.[107]

Jurisprudential commitments to proportionality, moreover, may have very complex relationships with particular doctrinal approaches. Although Beatty's version of proportionality appears to entail individualized, case-by-case determinations, the questions put by proportionality analysis might also be understood as interpretive tools for the production of (arguably) more constraining and categorical rules.[108] For Professor Beatty, the relevant facts are those concerning the effects of a challenged rule on the parties to the case—the interests asserted to be injured by those challenging government action, and the reasons for (and strength of reasons for) the government actions. Beatty's approach, then, is to treat proportionality as the "standard" to be applied by courts in evaluating the legality of a challenged government action. "Standards" are widely regarded as somewhat less determinate, at least insofar as lower court applications, than "rules."[109] But proportionality analysis, if focused on a broader array of facts and institutional contexts, might lead either to the adoption of a more formal rule or a more contextualized standard.

Beatty also dismisses arguments for judicial "modesty" based on deference to other institutions (pp. 156-57),[110] yet their existence and responses to judicial rulings make up an important

---

107. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 589 (1987).

108. *Cf.* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 511 n.210 (1994) (referring to "rule utilitarianism, according to which the 'ultimate justification' of a legal principle lies in its consequences, but under which a judge will achieve the best overall consequences by ignoring consideration of consequences and considering only 'the theory and philosophy of law.'").

109. *See* Sullivan, *supra* note 103, at 57–58.

110. He writes: "The logic of constitutions being the supreme law in a legal system means all laws and activities of government must be subject to the same standard of review. No person, nor any law, can be exempt. There is no historical, doctrinal or institutional arrangement that can challenge or override its supremacy. . . . [P]rinciples that employ weaker, more deferential tests are premised on a misunderstanding of the way the idea of fair shares and the principle of proportionality actually work." (pp. 156–57) In a related move, Professor Beatty at times also seems to assume a correspondence between judicial rulings and facts on the ground. Thus, for example, he asserts that there is more "religious liberty" in Germany than in the United States because he believes that the substantive rulings in Germany on religious freedom issues are better than those in the United States (p. 52). But statements about the actual condition of human freedom need to take into account more than judicial rulings. *See, e.g.*, Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910). And in understanding the condition of human freedom, some attention must be given to the way in which court rulings are received, understood, and reacted to by private and institutionally distinct public actors alike.

part of the world of fact in which courts operate. Courts' understandings of the severity of a problem, or the need or justification for a particular remedy, might be influenced by legislative (or, perhaps to a different degree, executive) processes and outcomes. Likewise, judicial evaluation of the best solution to a constitutional problem among those plausibly available might be influenced by the expected reactions and the capacities of other branches (and levels of courts) and concern for whether those will yield a situation closer or further from that consistent with the Constitution on the issue at hand.[111] Courts might also be concerned with the effects more generally on legislative attention to constitutional concerns through what Mark Tushnet has called "democratic debilitation."[112] And attention to the institutional norms of judicial practice may raise concerns for a single minded focus on the proportionalities of particular factual settings to the exclusion of more "interpretive" strategies.

Consider here the approaches of two U.S. jurists who have defended proportionality as a tool of legal analysis. Justice Stephen Breyer argues that constitutional interpretation should consider what he calls the "real-world consequences of a particular interpretive decision, valued in terms of basic constitutional purposes."[113] Although he endorses "proportionality" as a valuable tool for resolving cases in which there are constitutional interest on both sides, his approach differs from Beatty's in beginning with identifying the constitutional values or purposes to be derived from the document as a whole and its treatment of proportionality as one tool to be considered in addition to the constitution's "language, history, tradition, and precedent."[114] Breyer also argues for a form of "judicial modesty," of "not being 'too sure' of oneself," with implications for institutional deference that Beatty rejects.[115]

---

111. *See generally* Cass Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV 885 (2003).

112. *See* Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995).

113. *See* Breyer, *supra* note 85, at 249.

114. *Id.* at 253, 249.

115. *Id.* at 254, 250. Thus Breyer argues that courts should "defer to the legislature's own answers insofar as these answers reflect empirical matters about which the legislature is comparatively expert, for example, the extent of the campaign finance problem. . . .;" the Court should not defer, though, in reviewing claims that "reform legislation will defeat the very objective of participatory self-government," for Breyer, one of the Constitution's principal values. *Id.* at 254. His example suggests that institutional deference is particularly unwarranted where the self-interest of incumbents might lead them to adopt limits designed to insulate themselves from effective challenge, that is, where the self-interest of the legislators is at odds with a capacity for impartial expert factfinding.

Judge Richard Posner emphasizes a form of "pragmatism" in judging, including the idea that government responses should be proportionate, but one that would take account of more general social and economic facts apart from those embodying the parties' viewpoints.[116] Posner, whose writing suggests a more single-minded devotion to pragmatism and consequentialism in judging than does Justice Breyer's, nevertheless argues that pragmatic concern for consequences may require consideration of text, history and precedent.[117] For Posner, these traditional forms of legal decisionmaking are relevant only to the extent that, going forward, resort to those sources makes the most sense; the past has no normative claim except to the extent that maintaining continuity produces better consequential results for the future. For Justice Breyer, the past (text, history, precedent) has a normative demand on the present by virtue of judicial practice. He incorporates past and present into a more seamless web of interpretative practices designed to draw on traditional legal sources and an informed understanding of the consequences of different interpretative approaches to implement the values immanent in the constitution overall.

A pragmatic focus on facts, then, may not always require case-by-case determinations (or "standards" rather than "rules") and may not always exclude concern for precedent and text. A judge might conclude that, all things considered, more good—in terms of both protection of individual rights and maintaining an effective set of governmental institutions—will be produced through articulation and application of a categorical rule than a more contextualized standard, or through deference to a legislature than not. For example, a U.S.-style ban on criminal prohibition of hate speech was defended by dissenting Justices in Canada under an overt standard of proportionality, on the grounds that the likely benefits to society of deterring hateful speech were relatively small and might, given the possibilities for publicizing those who are prosecuted, be nonexistent, compared with the potential for misapplication of such a statute to discourage, chill or punish expression deserving protection.[118]

Facts, Social Understandings and Constitutional Change: Yet, to suggest that courts should always be open and attentive to the concrete factual claims of litigants before them, as Beatty

116. *See* Posner, *Pragmatic Adjudication*, *supra* note 102, at 4–8.
117. *Id.* at 5.
118. R. v. Keegstra, [1990] 3 S.C.R. 697, 848–65 (McLachlin, J. dissenting).

does, seems basically right. First, it is easier to know what has happened in a single case than to be accurate in making predictions about longer term and farther reaching facts. Institutional modesty, especially where statutes are challenged, may be reinforced by epistemic modesty about the accuracy of any body's ability to make accurate longer-term predictions.[119]

Second, it is often by exposure to particularized and concrete facts that a decisionmaker has capacity to benefit from the hypothetically detached and independent power of judging. Facts do have a kind of power. Even under categorical rules, as social senses of facts shift, lawyers and clients can present claims to courts including "irrelevant" facts in order to test the limits of and in some cases to change the scope of categorical rules and make relevant what was formerly invisible or irrelevant.[120] Facts (or rather, our confrontations and engagements with them) may open eyes to how concepts like liberty or equality should be understood to apply, or reveal that forms of behavior once accepted as "natural" are in fact discriminatory. A common law process of constitutional adjudication can "interpenetrate[] law with society in both directions, cohering changing social standards and shaping precedents that exist into new law in response to new or newly perceived facts."[121] Willingness to hear and consider facts can open the mind to different understandings, unsettle long held beliefs, or reveal unconscious (and incorrect) assumptions about the world. For all these reasons, attentiveness to facts can improve constitutional adjudication.

Attention to facts is important–and attention to major changes in the way social facts are understood is virtually inevitable. But this importance cannot be grounded on a claim of objectivity, given the mutability of our understandings of facts, but rather on the relationships of facts to meaning, and the impor-

---

119. For a classic discussion of the benefits of judicial "minimalism," see Cass R. Sunstein, *Foreword, Leaving Things Undecided*, 110 HARV. L. REV. 6, 32, 43 (1996) (noting possibility of error and limits on information as among the concerns that underlie both the rules-standards debate and judicial-minimalism-maximalism discussion.).

120. For recent discussions of the complexity and interpendence of human reasoning about facts and law, *see, e.g.*, Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 516 (2004) (arguing from research in cognitive psychology that "decisions are the product of a cognitive mechanism that operates bidirectionally", under the influence of a strong disposition for coherent mental models, such that premises influence understandings of facts and facts influence premises); Donald Langevoort, *Taking Myths Seriously: An Essay for Lawyers*, 74 CHI.-KENT L. REV. 1569, 1595–96 (2000).

121. Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 814 (2002).

tance of more rather than less inclusive understandings of facts from the perspectives of those who are subject to the court's decisions. Law or legal values help us to understand what facts mean, at least as much as facts help us to understand what the law should be.[122] And as judges begin to respond that the application of law to facts is disproportionate, this both signals and contributes to understandings that legal norms may be and need to be shifting. Proportionality review focused on the facts of particular litigant situations thus helps provide a needed degree of flexibility to constitutional interpretation over time.[123]

IV. PROPORTIONALITY IN U.S. CONSTITUTIONAL LAW: SOME TENTATIVE THOUGHTS

Although Beatty asserts proportionality to be the true basis of all constitutional decisionmaking, running to "all four corners of every constitutional text" (p. 163),[124] proportionality analysis is not a constitutional tool of universal meaning or significance. The practices of constitutional adjudication are in fact far more complex, with areas in which interpretivism's focus on text, or the existence of well-established precedent, cannot be ignored in the name of proportionality without affecting, and perhaps undermining, the legitimacy of judicial review as a legal institution. Proportionality is more likely to be a helpful question on some issues (for example, what is cruel and unusual punishment),[125]

122. *See* Simon, *supra* note 120, at 536–37 (describing how strong facts can cause "coherence shifts"); *id.* at 583 ("Decisions and inferences do not conform to models of rationalism inspired by logical forms of inference making, nor are they based on consciously disingenuous, biased, or backward reasoning. Complex decisions are solved rather by nuanced cognitive processes that progress bidirectionally between premises and facts on the one hand, and conclusions on the other."). For an interesting defense of judicial review of proportionality as a helpful form of "policy evaluation," see Engel, *supra* note 70, at 285–314 (arguing that constitutional proportionality review provides helpful assessment of policies because courts are disinterested and review legislation after it is implemented; courts are good at "detecting unexpected outcomes and atypical cases" since the court deals mainly with individual cases; and knowing this, individuals have strong incentives to bring cases before the court which can facilitate their assessment role).

123. *See also* Fallon, *supra* note 106, at 1262–67 (considerations of value will influence understandings of other sources and are necessary to "shap[e] constitutional doctrine to the exigencies of changing times").

124. Most examples in this book are of individual or group-based rights, asserted under broad and general constitutional language, rather than structural issues of government organization. In his earlier book Professor Beatty articulated a theory of proportionality in the Canadian federalism cases. *See* BEATTY, CONSTITUTIONAL LAW, *supra* note 3, at 25–60.

125. *Cf.* De Búrca, *supra* note 50, at 136 (noting greater willingness of European Court of Justice to apply aggressive forms of proportionality review of punishments, for-

than on others (for example, whether each state must have two Senators, or whether a grand jury indictment must precede a federal criminal prosecution). As these examples are intended to suggest, proportionality may have little or no role on constitutional issues generally regarded within the legal community as resolved by constitutional text itself.[126] The greater the clarity and singularity of the constitutional text, the less room most courts would allow for applying the concept of proportionality.

The "best practices" method Beatty argues for is likely to be less effective in the analysis of structural constitutional questions than as a tool for the analysis of individual rights. Proportionality analysis based on the perspectives of the parties has more limited application to structural issues of federalism, for reasons related to the limitations of concrete judicial review as exists in the United States. Moreover, there are important rule of law/separation of powers principles designed to require legislative decisionmaking on difficult issues, to which proportionality concerns are at best only a factor. Finally, proportionality as an analytical tool in Beatty's sense may have less to offer in more well-settled areas of constitutional law, and more to offer with respect to some claims of right than others. A more institutionally-oriented version of proportionality analysis might distinguish between those rights that are derogable, based on proportionality analysis in a more specific context, and those which should be regarded as nonderogable.

Federalism: Some aspects of federal systems may involve very specific compromises on which national commitments to union are deemed to rest. For example, in the United States the two Senators-per-state rule reflects a seemingly clear decision to impose a specific rule, one that might be regarded as wildly inconsistent with norms of proportionality and equality. Unless one is prepared to argue that the clarity of the constitutional text

---

feitures and the like: "Deciding on the proportionality of penal measures is a task which is generally accepted as an appropriate one for the judicial process, since it does not usually involve a discretionary choice amongst alternative policy options, but rather an individual decision in a particular set of circumstances.").

126. More generally, one might say, proportionality analysis may be more useful in those cases seen as "hard" than those seen as relatively easy, for what makes a case "easy" has to do with shared understandings of what has already been settled by text, meanings developed through political activity, by convention or judicial decision—all of which may elide any need to resort to weighing, balancing or proportionality. I do not think Beatty would disagree with this characterization, nor do I mean to suggest that the categories of hard, easy, or settled are themselves fixed. *Cf.* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004) (describing ways of challenging settled constitutional understandings).

must yield to later constitutional commitments,[127] it is difficult to see any role for proportionality. The founding compromises of federal systems, to the extent that they are emblazoned with clarity in constitutional text and confirmed by decades of practice, simply may not yield to any interpretive moves including arguments—before courts—based on proportionality.[128]

This is not to deny any role for some versions of proportionality in analyzing federalism questions. In Beatty's earlier work on Canadian federalism, "proportionality" meant a form of review of the reasonableness of federal legislation in not intruding "too far" into the realm of provincial authority, in an effort to sustain as much as possible the concurrent capacities of both levels of government, provincial and federal.[129] The proportionality of a measure to its purported purpose may be useful in analyzing federalism questions even without a judicial commitment to maximizing concurrent powers. Indeed, the U.S. Supreme Court's decisions in *Morrison* and *Lopez* advanced a more categorical (non-concurrent) approach to defining federal and state power at the same time as the Court articulated a test of proportionality as a measure of congressional power under Section 5 of the Fourteenth Amendment in *Boerne v. Flores*.[130] Rule of law concerns (notwithstanding Professor Beatty's a-textual conception of judicial review), call for some connection between government action and a legal source of authority. Where the means chosen are grossly disproportionate to the asserted goal, the disproportion may justify a finding that the measure is beyond the scope of national power.[131]

---

127. *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (treating Fourteenth Amendment as a sub silentio modification of the Eleventh Amendment).

128. Of course, it might be suggested, such issues are generally not brought to court, but related questions may be. *See, e.g.*, Adler v. Ontario, [1996] 3 S.C.R. 609 (S. Ct. Canada) (challenge, to province's failure to provide support for private schools for Jewish children, rejected, because founding compromise in Section 93 of 1867 Constitution Act was limited to the Catholic and Protestant denominational schools as then existed).

129. BEATTY, CONSTITUTIONAL LAW, *supra* note 3, at 25–27.

130. 521 U.S. 507 (1997); *see* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L. J. 619 (2001). If one conceives of state governments as "rights holders" vis-à-vis the federal government, one could apply some version of proportionality analysis analogous to that applied for individual rights claims. *See* Jackson, *Ambivalent Resistance, supra* note 80, at 626–27. But governmental powers can be concurrent or exclusive, subject to preemption or not, in ways that do not correspond closely to individual rights secured by bills of rights.

131. Proportionality review can be applied with greater and lesser degrees of rigor; history suggests that in the United States nondeferential review of the proportionality of national means would fail to allow adequate scope to the role of Congress. See Jackson, *Ambivalent Resistance, supra* note 80, at 630–32 (arguing that proportionality review should be applied with a high degree of deference to national legislation in evaluating

But proportionality under Beatty's approach in this new book will have more utility for constitutional analysis of individual rights issues than on structural issues of constitutionalism. His emphasis on the need to focus on "the perspectives of those who are most affected by whatever law or government action is under review" as parties before the court, may do less well in capturing the longer term structural interests that divisions of government powers are designed to advance than in capturing unfair burdens imposed on particular individuals. In cases such as *Lopez*, or *Morrison*, involving federalism-based challenges to national legislation, whether one's conduct is being regulated by a state or federal government is not likely to make that much of a difference to the private entity or person who challenges the law, even though they have a litigation interest in defeating the claim to power of the government under whose criminal statute they are prosecuted. And although governments may be able to participate in litigation through amicus filings, there are significant difficulties in relying on such measures—typically under the control of a handful of executive branch lawyers—for a stable account of a state government's "interest."[132] The constitutional interests at stake in federalism questions system may be thus, at least in some sense, not fully represented in litigation before a court.

Presidential/executive powers: On structural issues of separation of powers, proportionality analysis based on the interests articulated by the parties before the court may also have a rela-

Section 5 exercise of power).

132. States' capacities to develop and articulate the long-range interests of their governments in litigation may not be as well developed as that of the central government which, in the United States, is represented by the Solicitor General's office and its tradition of high quality lawyering that seeks to maintain some continuity of position on behalf of the federal government with some independence from the partisan positions of particular Administrations. *See* LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW (1987). Perhaps for this reason, as well as the obvious potential for conflicting positions among the states on federalism issues, courts may be more willing to reject state governments' characterizations of their own interests in federalism cases. Consider *Morrison*, where thirty-six states and the Commonwealth of Puerto Rico argued in favor of VAWA's constitutionality and only one state argued against it, *United States v. Morrison*, 529 U.S. 598, 654 (2000) (Souter, J. dissenting). Moreover, although both individual and governmental interests change over time, an individual litigant may be regarded as more likely to have a continuity of interests in the arguments made—or may be more justifiably regarded as accurately representing his or her own interests at the time they are made—than are particular members of executive branches (who are the litigators) of state governments. For related questions whether particular litigants asserting individual rights claims can adequately represent the interests that ought to be considered by a court that believes it is weighing factors for a balance, see Aleinikoff, *supra* note 87, at 978–79.

tively smaller role to play, in part for reasons already discussed about the possible disconnect between that methodology and proper resolution of structural questions.[133] But there are important distinctions from a constitutional point of view between challenges to executive and challenges to legislative action that Beatty's proportionality analysis would seemingly ignore (or dispute).

Executives or governments may be found to lack constitutional authority to take action without legislative authorization.[134] It may serve both democracy and basic rule of law purposes to require legislative authorization before action is taken, especially action that trenches on liberty. The U.S. Constitution's insistence on the role of law and its implication that federal law is made by Congress provide a constitutional basis for such a requirement.[135] As Professor Lorraine Weinrib has argued her vision of post-World War II constitutionalism:

> Postwar rights-protecting constitutions do not... authorize the judiciary to treat rights as absolute negations of otherwise plenary state authority. Nor do they simply transfer to the courts the political power or prerogatives of elected representatives. They presuppose limited government with separation

133. To the extent proportionality analysis is legitimated by its relation to the narratives of the parties, the constitutional interests in separating legislative and executive powers may not be well represented where private individuals or entities challenge laws or executive action. Consider *Clinton v. City of New York*, 524 U.S. 417 (1998) (rejecting the constitutionality of a line item veto). It is hard to know how an analysis of proportionality would be applied in any helpful way to understand the constitutional question there: identifying the actually injured parties in any concrete case will vary enormously depending on what the legislation is and what the vetoed portion is, and yet surely these should not be dispositive, since the constitutional questions affect a wider range of institutional and structural relationships. *Cf.* David M. Driesen, *Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication*, 89 CORNELL L. REV. 808, 809–13, 854–55 (2004) (noting disjuncture between standing requirements based on personal injury and abstract formalist reasoning in separation of powers cases as in the line item veto case).

134. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). *Cf.* United States v. Watkins, 354 U.S. 178, 205–06 (1957) (reversing conviction for contempt of Congress where authorization of committee inquiry was insufficiently clear).

135. One of the significant changes from the Articles of Confederation to the Constitution was the latter's insistence on the role of "law". *See, e.g.*, U.S. CONST., Art. I, §8 (Congress's power to make "all Laws" necessary and proper to carry out national government powers); Art. I, §9 (no money to be drawn from treasury except "in consequence of appropriations made by Law"); Art. II, §3 (President to "take care that the Laws be faithfully executed"); Art. III, §2 (jurisdiction over "all cases" arising under "the Laws of the United States"); Art. VI (Constitution and "the Laws of the United States" made in pursuance thereof are declared "the supreme Law of the Land"); *see also* U.S. CONST. amend. III (providing that derogations during war time from the usual rule—that "no soldier shall in time of peace be quartered in any house"—can only occur "in a manner to be prescribed by law").

> of powers that maximizes the complementary institutional strengths of legislatures, the executive and the courts. Elected representative bodies continue to act as responsible policy-makers, both empowered and disciplined by the constitutional instrument. The executive acts in compliance with the rule of law.[136]

For Weinrib, the first part of "justification" under proportionality analysis is to show that the challenged action has been authorized by enacted law. "In most instances the legality stricture requires the state to have authorized the encroachment through the regular channels of law-making, so that it is the product of a representative, accountable, deliberative public process and embodied in an accessible and intelligible legal instrument."[137] Without benefit of this kind of lawmaking process it is more difficult for courts to evaluate governmental claims of the necessity or appropriateness of actions that infringe on protected rights.[138]

Thus, proportionality in Beatty's terms is a principle that might come into play after a prior constitutional determination of whether challenged government action is authorized by law. Granted, courts may be more inclined to find executive action to be ultra vires when it appears to impose disproportionate or otherwise suspect burdens.[139] But it devalues the role of legislatures in informing our understanding of and making decisions about how to balance public need with individual privation to suggest that legislative authorization of executive action is irrelevant to analysis of constitutionality.

Proportionality's Value; Two Kinds of Rights? Nonetheless, Beatty's large point—that the concept of "proportionality" is a basic, useful trope of judicial reasoning in challenges to govern-

136. Weinrib, *supra* note 19, at 16–17.

137. *Id.* at 17. *Cf.* Bressman, *supra* note 95, at 494, 499–500 (arguing that separation of powers should be understood as protection against arbitrary government action).

138. *Cf.* Watkins, 354 U.S. at 205–06 ("Protected freedoms should not be placed in danger . . . [absent] a clear determination by the House or the Senate that a particular inquiry is justified by a specific legislative need . . . . An excessively broad charter. . . places the courts in an untenable position if they are to strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free from unnecessary governmental interference.").

139. *See, e.g.*, Public Comm. Against Torture v. State of Israel, HCJ 5100/94, ¶ 39 (Sup. Ct. Isr. 1999), *available at* Supreme Court of Israel Website, http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf (last visited Nov. 18, 2005) (holding use use of torture by investigators to be unlawful, at least absent very explicit legislative authorization, stating "Whether it is appropriate for Israel, in light of its security difficulties, to sanction physical means is an issue that must be decided by the legislative branch, which represents the people. We do not take any stand on this matter at this time.").

ment action—seems unassailable. This is not to say that in every case it will be helpful; in well-established areas under older constitutions, such as some aspects of U.S. First Amendment law, proportionality may have little role to play. The practice of judicial review is to some extent self-legitimating, and part of its self-legitimation lies in the constraints of acting in a manner consistent with existing interpretive practices.[140] Thus, interpretive theory that calls on judges to widely depart from accepted norms of interpretation and its sources—including text and precedent—risks undermining its legitimacy. But in some areas of constitutional law current doctrine approximates forms of proportionality analysis.[141] Proportionality's reference points may well be different in analyzing claims of individual right and claims involving structural allocations of powers, and its valence differs among individual rights in how it is deployed.[142] But its utility and legitimacy in many areas seems beyond question. General language only takes a constitutional court so far; new issues and changing understandings of the meaning of basic constitutional values can often be worked out more systematically through the structure of questions that proportionality analysis asks, especially to the extent that one of the tasks of constitutional law is to prevent unfair treatment of individuals or groups by governments.

140. *See* Fallon, *supra* note 106, at 1233 (constitutional theory as mix of descriptive and normative components); *cf.* Richard Fallon, *How to Choose a Constitutional Theory,* 87 CAL. L. REV. 535, 544 (1999) ("[E]ven the most paradigmatically practice-based theory must acknowledge that American constitutional practice has a text at its center."). Constitutional theories are widely thought to require some degree of fit with existing "points of agreement... that are absolutely rock solid," like the correctness of *Brown v. Board of Education*, David A. Strauss, *What is Constitutional Theory?*, 87 CAL. L. REV. 581, 583–84 (1999), and Beatty has suggested that interpretive methods also require some degree of fit with existing practice (pp. 33–35).

141. *See supra* note 80.

142. In addition to proportionality's use in *Boerne* and its progeny to constrain national power under the Fourteenth Amendment, "rough proportionality" has been used in U.S. law to help define land use regulations that will be treated as regulatory "takings" entitling the property owner to compensation and thereby to limit the powers of state and local governments. *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). Commentary has focused on the danger of "*Lochner*-izing" judicial review of regulation through "rough proportionality" and its emphasis on what one scholar calls "consequential fit". Barton H. Thompson, *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261 (2000); *see also* Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158 (2002). The debate over these developments, like that over the proportionality test of *Boerne v. Flores*, points up that proportionality analysis is a method of review that can lead in very different policy directions, depending on what values are used as the baseline against which proportionality is conducted and the degree of strictness with which the standard of proportionality is applied.

Proportionality analysis as Beatty envisions it implies that rights are not absolute trumps protecting an arena of individual conduct from obstruction by regulation, but only interests, some stronger than others, which can be overcome provided the justification offered is sufficiently compelling.[143] This may be a sensible way to understand what many rights mean. Rights to equality cannot meaningfully be defined, as noted earlier, without decisions about what kinds of differences in treatment based on what kinds of criteria and for what kinds of purposes are justifiable.[144] The due process clause recognizes that important interests—in liberty, in property, arguably in life itself—may be limited, provided proper process and/or substantive justification is present. The Fourth Amendment speaks in terms of the "reasonableness" of a search, a term that virtually invites inquiry into the relationship, or fit, between the government's legitimate interests and the citizen's interests in privacy, as well as between the object of the search and its scope.[145] The ban on "cruel" punish-

143. As a formal matter in the United States a constitutional "right" is not "overcome," but its content may be narrowed or defined by reference to the government interest in regulation; in Canada, the "right" is recognized as being infringed but the infringement may be constitutional if sufficiently and properly justified. The differences between these two kinds of analytics may be of practical significance in doing proportionality analysis. Proportionality analysis requires a clear articulation of what the constitutionally protected right claimed to be violated is, a clarity that may be submerged in an analysis that melds the question of right with that of justification. *See supra* note 97 (discussing *Dennis*).

144. *See generally* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

145. In *Lago v. Atwater*, 532 U.S. 318 (2001) the Court rejected the argument that the Fourth Amendment prohibits warrantless arrests for minor offenses punishable only by fines. Yet the majority agreed that, on the facts, the government conduct—arresting the parent-driver of young children for a first-time seat belt offense punishable by a $50 fine—was unjustifiable. *See* 532 U.S. at 346–47 ("In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case."). But, the Court concluded, the "Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Id.* This concern for the administrability of a rule against warrantless arrests for nonjailable offenses may be of a piece with the more general phenomenon that Professor Stuntz has criticized: the absence of proportionality between investigative methods regulated under the Fourth Amendment and the seriousness of the crime involved. *See* William J. Stuntz, *O.J. Simpson, Bill Clinton and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 865 (2001). Had the Court relied on a more structured proportionality analysis, it would not have stopped with identifying the possible adverse effects on policing of allowing such claims but would have inquired also as to the benefits to effective policing in a democracy from adhering to such a rule and would have considered not only the "pointless indignity" imposed on the complainant (and the relatively small number of others who suffered similar arrests), but the harm that knowledge of such po-

ments, or "excessive" fines, by their language might seem to demand inquiry into proportionality.[146]

Yet there may be some individual rights—for example, against being assassinated by the government, against being prosecuted for mere beliefs (*e.g.*, in the existence or nonexistence of a deity), or against being tortured—that we would want categorized as nonderogable rights. One might take this position for intentionalist reasons, or for ontological reasons, but one might also take this approach for more instrumental reasons. If one measure of a successful constitutional theory is its capacity to promote protection of individual rights, a pragmatic, consequentialist approach, designed to identify the most "proportional" or fitting method of interpretation for the protection of particular constitutional values or interests,[147] might itself yield the conclusion that some rights should be presumed to be "trumps" as against government action.[148] Categorical rules against torture, or against prior restraints on speech, may in particular cases seem grossly disproportional, if great harm seemingly could be avoided through breach of the rule. But to the extent that proportionality analysis directs our attention to the relationship between means and end—here, between a court's interpretive position and the desired constitutional goal—a court might decide to eschew case-by-case analyses of proportionality in favor of rigidly uncontextualized rules, designed to protect commitments that would be unusually fragile to the foreseeable

lice power may impose on others in a democratic society, whether or not they are actually subject to the same "indignities."

146. U.S. CONST. amend. VIII. Beatty's powerful arguments that proportionality is a necessary attribute of a rule of law system that reconciles individual and community interests would support more rigorous review of the proportionality of criminal sentences in the United States. That proportionality doctrine has been applied to control punitive damages in civil litigation, but not to the length of criminal sentences, is hard to understand, given that the Due Process Clause applies to both. *But cf.* Karlan, *supra* note 101, at 914–15, 919–20 (suggesting that availability of checks on criminal convictions—including the requirements of public initiation of suit, proof beyond a reasonable doubt and the presence of statutory maximums—might be thought to diminish the need for proportionality review).

147. I use the term proportionality here, not in the way Prof. Beatty does, as an approach to be applied by courts to resolve specific cases on their facts, but rather to refer to the fit between interpretive method and the goals of constitutional protections.

148. I assume for purposes of this essay that one can think of rights within one system either as absolute protections of defined behavior or status or as rights to not be treated in a certain way except with proper justification by the government. For helpful discussions of these differing ways of understanding rights or protected interests, see Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415 (1993); Richard H Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993); *see also* sources cited *supra* note 16.

effects of errors in the application of proportionality analysis on a case-by-case basis.[149]

Whether to view constitutional challenges as better resolved by categorical rules, institutional presumptions, or more contextualized case-by-case analysis under some form of proportionality standard is an inquiry that may itself be informed by pragmatic consideration of the consequences of different approaches and of the relationship between the means (that is, here, the interpretive method) and the end (protection of constitutional values and individual rights).[150] But trying to determine whether a particular interpretive approach is best designed, over the long run, to promote realization of constitutional values can be quite difficult,[151] for reasons illustrated by the U.S. Court's most recent application of a balancing approach to procedural due process issues, in the context of the constitutionality of executive detention of "enemy combatants."

In *Hamdi v. Rumsfeld*,[152] the Court upheld detention of U.S. citizens in the United States as enemy combatants, provided that detainees had a meaningful opportunity before an impartial tribunal to contest that designation. The holding was, on the one hand, a significant rejection of a claim of essentially unlimited executive power to detain based on "some evidence," not subject to refutation, and for a wide range of purposes, including inter-

---

149. *See also* Frederick Schauer, *Formalism*, 97 YALE L. J. 509, 543 (1988) ("[W]e must . . . decide the extent to which we are willing to disable good decisionmakers in order to simultaneously to disable bad ones.").

150. The idea that a concern to produce proportionate results might support either ex post case-by-case evaluation or ex ante rules has some parallels to the debate over rule utilitarianism and act utilitarianism. *Cf.* Sunstein & Vermeule, *supra* note 111, at 924 ("The choice between interpretive formalism and antiformalism has some of the same intellectual structure as the choice between rule-utilitarianism and act-utilitarianism."). For an introduction to the debate, see BRAD HOOKER, IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY (2000); CONRAD D. JOHNSON, MORAL LEGISLATION: A LEGAL-POLITICAL MODEL FOR INDIRECT CONSEQUENTIALIST REASONING (1991); J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, *in* J.J.C. SMART & BERNARD WILLIAMS UTILITARIANISM: FOR AND AGAINST 9–12 (1973); *see also* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955) (distinguishing between rules about *acts* and rules about *practices*).

151. Professor Fallon has argued that a constitutional theory should be measured by the degree to which it protects the rule of law, a set of substantive rights, and fair opportunities for democratic decisionmaking. *See* Fallon, *supra* note 140, at 568–70. In making this judgment, he has controversially suggested, one might consider such historically contingent factors as who the judges are in any given period. *Id.* Without some historically specific analysis, it may be difficult to make the instrumental assessment of what method of interpretation will yield interpretations that will best protect individual rights—a question that requires scrutiny not only of the interpretive decisions but of how they will be received and implemented by other courts and actors within the system.

152. 124 S.Ct. 2633 (2004).

rogation.[153] The various opinions read together make clear that a detainee who contests the designation must have a hearing before a neutral decisionmaker with an opportunity to rebut the government's determination through evidence and with the assistance of counsel.[154] The plurality opinion by Justice O'Connor[155] relied on a form of balancing developed in *Mathews v. Eldridge*[156] to decide what procedures were due in light of the detainee's interest in not being wrongfully detained and the government's interest in not disrupting national security or military operations by pulling personnel from the field to provide live testimony to meet a burden of proof. It sought to design a procedural approach that was proportional—that is, that would protect against erroneous designations and their severe consequences for individual liberty by providing a meaningful hearing before an impartial decisionmaker, while not imposing undue burdens on the government's ability to prosecute war.[157]

In so doing, however, the Court also upheld a substantial authority in the Executive to designate citizens as enemy combatants and hold them for the duration of hostilities.[158] In thus approving an extension of executive authority to detain citizens in the United States—outside of the ordinary criminal justice

---

153. The Court also held that where a citizen is captured on the battlefield and detained as an enemy combatant, indefinite detention was authorized because of the need to prevent such enemy combatants from rejoining the battle, but not for the purpose of interrogation (as the government had argued). *See id.* at 2641–42 (O'Connor, J., for the plurality).

154. The Court on this point consisted of Justice O'Connor's plurality for four, joined by Justice Souter writing for himself and Justice Ginsburg.

155. The plurality was joined by Justice Breyer (a proponent of consequentialist concerns, including for proportionality, in his academic writing). *See* Breyer, *supra* note 85, at 253.

156. 424 U.S. 319, 334–35 (1976).

157. *See e.g.*, *Hamdi*, 124 S.Ct. at 2649 (in light of "uncommon potential to burden" the military from full dress hearings, hearsay evidence could be admitted and a presumption in favor of the government could be used). The plurality opinion considered the parties' "narratives," in Beatty's sense: it acknowledged the important interests of a citizen in not being wrongfully detained as an enemy combatant by good faith mistake, *i.e.*, when they were in a war zone for journalism, tourism, or humanitarian purposes, *see id.* at 2649, or in bad faith (e.g., through abuse of power to detain for political ends). *See id.* at 2647 (noting that "an unchecked system of detention carries the potential to become a means for oppression and abuse"). It recognized the government's interest in preventing those who had fought against it in time of war, whether citizen or not, from returning to the field of battle. It thus identified both the liberty interest of the citizen and the government's interest in detaining bona fide enemy combatants as important and legitimate, and concluded that some meaningful hearing for citizens who contest their designation was required. *See id.* at 2646–49.

158. The five justice majority on this point consisted of Justice Thomas, who believed that no process was required other than the presidential decision to detain, and Justice O'Connor, writing for the four-justice plurality.

process and outside of the system of military justice—the Court's decision in *Hamdi* may come to stand as much for its recognition of an expanded presidential authority as it does for the proposition that the claimed authority is subject to judicial review.[159] *Hamdi* was a significant affirmation of executive authority to detain, without charge or trial, U.S. citizens in the U.S., on a military determination that, while subject to judicial review, is likely to be difficult to overcome and which may result in indefinite and lengthy periods of detention.

The plurality opinion did not purport to rely on any form of proportionality analysis in concluding that the President had power to detain,[160] but considered the proportionalities only in deciding what process is due in the hearings it held were required in contested cases. But did the availability of a made-to-measure, "proportional" hearing facilitate upholding the executive power to detain? Would all members of the O'Connor plurality have upheld the detention power were it not for the availability of the truncated due process protections prescribed?[161]

Four other justices would have found the President to lack authority to detain. Resting principally on institutional concerns ('representation-reinforcement'), Justice Souter, joined by Justice Ginsburg, concluded that clearer language was required to authorize such presidential designations given the liberty interest involved.[162] Acknowledging that difficult balances must be

159. *Compare* United States v. Nixon, 418 U.S. 683 (1974) (rejecting the President's claim of immunity from subpoena of presidential tape recordings). Although the *Nixon* case was hailed at the time as a great victory for the rule of law in checking a potentially abusive presidency, over the years since it has been of signal importance for its recognition of a constitutional basis for Presidential claims of immunity from compelled disclosure of information, notwithstanding the absence of a text in Article II paralleling the Speech and Debate Clause immunity for Members of Congress. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 749–55 (1982); Public Citizen v. United States Dept. of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring in the judgment); Cheney v. United States District Court, 124 S. Ct. 2576, 2588 (2004).

160. The plurality found that the President had been given statutory authority to detain enemy combatants in accordance with the laws of war and, relying in part on Ex parte Quirin, 317 U.S. 1 (1942), that nothing precluded citizens from being so treated. *Hamdi*, 124 S. Ct. at 2640–44 (O'Connor, J., for the plurality).

161. It is also possible that, had a *Mathews v. Eldridge* analysis been unavailable—had members of the plurality believed that the choices were full criminal trial, release, or acceptance of the government claim that no further judicial process was due—given the high stakes of military operations, one or more of these justices might have concluded that *no* process was due, rather than direct the prisoner's release or subject the government to criminal trial type procedures. The point here is the difficulty of assessing, empirically, the relationships between proportionality-like tests as a tool of analysis and particular, concrete outcomes.

162. 124 S. Ct. at 2652 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). On "representation-reinforcement," see GEOFFREY R. STONE, ET

struck between liberty and security in wartime, he argued that the legislative branch was the appropriate body to strike that balance in the first instance.[163] He thus deployed a form of representation-reinforcing, constitutional ultra vires argument to protect liberty absent legislatively authorized intrusions,[164] without significant resort to balancing or proportionality. Taking a more "interpretive" and categorical approach, Justice Scalia, joined by Justice Stevens, concluded that the Constitution had addressed the question of emergencies and of traitorous activity by citizens against the United States, and allowed only two possibilities.[165] Either the government could bring criminal charges against Hamdi or others associated with the enemy, subject to criminal trial in an Article III court as contemplated by Article III's Treason clause, or Congress could act to "suspend the writ" of habeas corpus (perhaps subject to conditions like those prescribed by the Court). Unless government action fell within one of these two categories, liberty was to be preserved.[166] Again, no balancing of proportionalities was called for.

AL., CONSTITUTIONAL LAW 61, 73–74 (5th ed. 2005); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

163. *Id.* at 2653–55 (relying on prior statute prohibiting detention of U.S. citizens without explicit authority and on need to protect liberty from executive branch depredations). Justice Souter also acknowledged that "in a moment of genuine emergency" without time for deliberation the Executive could detain a citizen feared to be an imminent threat for a short time. *See id.* at 2659. One might see Souter, then, as employing a more complex interpretive strategy, in which executive power to detain is ordinarily prohibited absent legislative authorization for institutional reasons, but in which a "true" emergency might make unauthorized executive detention a proportionate and constitutional response.

164. Had the issue been remanded to Congress, it is, of course, possible that the Congress would have authorized detentions on terms more draconian than the Court. Given experience in other western democracies, there is at least some reason to believe that legislative bodies would provide for time limits on detention, access to counsel and judicial review. *See* Brief Amicus Curiae of Comparative Law Scholars and Experts on the Laws of the United Kingdom and Israel in Support of Respondent, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004) (No. 03–1027), 2004 U.S. S. Ct. Briefs LEXIS 298 [hereafter *Brief of Comparative Law Scholars*]. *See also Hamdi*, 124 S.Ct. at 2659 (Souter, J., concurring in the judgment) (referring to USA Patriot Act, 8 U.S.C. § 1226a(a)(5), imposing time limits on detention without charge of suspected alien terrorists and stating: "It is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado"); 8 U.S.C. § 1226a(a)(7) (with respect to aliens certified for removal, certification is reviewable every 6 months).

165. *Hamdi*, 124 S.Ct. at 2660 (Scalia, J., dissenting).

166. *See Hamdi*, 124 S.Ct. at 2660–61 (Scalia, J.,)("The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.")

Which interpretive approach would we associate with the most "proportional" set of responses to this and similar legal controversies? Notwithstanding Beatty's apparent rejection of considerations of institutional role in deferring to legislative or executive determinations,[167] his argument would surely not preclude reliance on ultra vires doctrines as a first approach to executive threats to fundamental freedoms. In a number of western democracies, detailed provisions authorizing detention of terrorists had been enacted by legislatures.[168] From the perspective of developing constitutional law that accords with norms of proportionality in protecting constitutionally defined human rights, how should one determine which approach is likely to yield better answers where a chief executive has already acted to effect seizures—one in which the Court assumes the responsibility for designing procedures to permit such detentions to continue or remands the issue to the legislature for its determination? Surely the Court is correct that basic commitments of due process require that if the executive wants to hold a U.S. citizen on a claim that he is an enemy combatant, the detainee should have a meaningful opportunity to contest the facts underlying the designation. But whether the President should have been deemed to have authority to detain on so unspecific an authorization as that provided by the Authorization of Force Resolution is harder. Beatty's failure to develop an institutional component to the idea of proportionality leaves us without an analytic framework to consider the importance of democratic support for and deliberation about executive power during wars or emergency.[169] Moreover, to the extent that Beatty is concerned with what courts actually do, we find widespread reliance on ultra vires analysis to constrain executive conduct, suggesting that historically, human rights are protected not only by direct rulings on the permissibility of constraints on individual liberties, but also by courts requiring executives to obtain (democratic) legislative support for their departures from customary liberties.[170]

---

167. *See supra* note 110 and accompanying text.

168. *See Brief of Comparative Law Scholars, supra* note 164, at *9–*27 & app. A (surveying laws of Australia, Canada, France, Germany, Israel, Spain, and United Kingdom).

169. For a recent effort to consider how theories of interpretation might be improved by more systematic efforts to analyze the institutional roles and capacities of the different institutions of governance, see Sunstein & Vermeule, *supra* note 111.

170. *See, e.g.*, Public Comm. Against Torture v. State of Israel, HCJ 5100/94 (Sup. Ct. Isr. 1997) *available at* Supreme Court of Israel Website, http://elyon1.court.gov.il/files_eng/94/000/051/a09/94051000.a09.pdf (last visited Nov. 18, 2005) (finding that the security forces could not engage in special interrogation practices involving torture in the

Consider the implications of a proportionality approach to the question of torture raised by recent revelations of prisoner abuse in Iraq and of legal memoranda (now withdrawn) appearing to justify what many would regard as torture notwithstanding legal prohibitions. One can readily posit extreme cases in which some jurists, relying on a proportionality analysis focused on the interests of those most concerned, might permit torture to gain information that would save many lives, perhaps after a due process hearing to determine that the person to be tortured was likely to have relevant information.[171] Yet understanding this problem not within the context of a single case, but as a matter of longer-term consequences for other parties not before the court, might favor an absolute ban on torture, a formalist prohibition, nominally immune to the demands of particularly compelling facts.[172] A long-term analysis of the proportionalities, taking into account the ex ante effects of judicially articulated rules, might favor a categorical ban (arguably embodied in the Eighth Amendment) as the best way of minimizing the amount of torture that will occur.[173]

Beatty's version of proportionality as a tool of constitutional analysis in individual rights cases, then, has a dark side. Precisely

---

absence of very explicit authorization by Knesset).

171. *See, e.g.*, ALAN DERSHOWITZ, WHY TERRORISM WORKS: UNDERSTANDING THE THREAT, RESPONDING TO THE CHALLENGE 142–63 (2002) (arguing for judicial issuance of torture warrants); *but cf.* MICHAEL IGNATIEFF, THE LESSER EVIL: POLITICAL ETHICS IN AN AGE OF TERROR (2004) (arguing for balance of liberty and security, with derogations from traditional civil liberties subject to judicial review); *id.* at 140 (supporting absolute ban on torture, notwithstanding need for information, because of its infliction of "irremediable harm on the torturer and the prisoner"); *id.* at 141 (challenge is to define distinction between permissible and impermissible duress, the latter to "include any physical coercion or abuse").

172. *See* Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Civil Disobedience*, 88 MINN. L. REV. 1481, 1528 (2004). For exploration of the phenomena, and moral difficulties, posed by "serious rules," see Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191 (1994).

173. *See* Gross, *supra* note 172, at 1500–03; *see also id.* at 1506–07 ("The use of preventive interrogational torture under certain extreme circumstances is inevitable.... [A]cknowledging that inevitability, it still makes good sense to reject absolutely the use of torture."). Gross quotes Frederick Schauer: "Resisting the inevitable is not to be desired because it will prevent the inevitable, but because it may be the best strategy for preventing what is less inevitable but more dangerous." *Id.*, *quoting* Frederick Schauer, *May Officials Think Religiously?*, 27 WM. & MARY L. REV. 1075, 1085 (1986). It might be objected that Gross's theory is inconsistent with norms of transparency in legal decisions, to the extent that it contemplates a seemingly absolute rule that is not expected absolutely to constrain the prohibited conduct. I do not think this aspect of Gross's approach lacks transparency; rather, it lacks some degree of predictability in application in individual cases. The lack of predictability of the availability, ex post, of immunity from prosecution of punishment, however, is designed to have a strong deterrent effect on those holding the coercive power of the state.

because it corresponds to and helps structure intuitive notions of fairness and pragmatic reactions to factual situations, it is an approach that may offer less constraint on political branches at those times when they are most tempted to depart from customary protections of liberties—for at those times courts will be so tempted as well.[174] Without some sense of institutional roles and of the longer term effects of judicial rulings, I am not sure it can serve—by itself—as the "ultimate" and exclusive rule of law Beatty envisions.[175]

V.

Beatty's book bears the mark of one who has experienced "revelations," a word used in one of the chapter subheadings. Like many revelations, its light at once reveals an important landscape and casts shadows over other important topographical features. Although I have disagreed with Prof. Beatty on a number of claims, in the end I agree with him that questions of proportionality are pervasive in analyzing whether a challenged law or action unduly infringes a liberty or fails to treat people or groups in a sufficiently consistent way. Where other tools of analysis leave open an interpretive question, analysis of the consequences and proportionality of the action seems an entirely appropriate and commendable approach for judges to take—always within the constrained limits of interpretive plausibility.

But to claim omnicompetence for any one principle in constitutional law will prevent that body of law from doing some of its most important work. Constitutions serve a number of purposes, at once expressing the commitments of a particular national polity, a particular structure of government, protecting rights deemed important in that polity and protecting those basic human rights that undergird commitments to representative democracy and the rule of law. As many of the cases Beatty relies on demonstrate, national courts often rely both on concerns of

174. See Vicki C. Jackson, *Proconstitutional behavior, political actors, and independent courts: A comment on Geoffrey Stone's paper*, 2 INT'L J. CONST. L. 368, 369, 378–79 (2004). For related reasons, Bruce Ackerman would continue to prohibit torture even during emergency periods in which exceptions to other constitutional norms would be possible. *See* Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1071–73 (2004).

175. Consider here Beatty's analysis of religious liberty claims. *See supra* text accompanying notes 39–42. While in the short run the changes Beatty argues for would allow larger numbers of religiously minded persons to satisfy their religious preferences, in the longer run there is at least a question whether such practices would affect the conditions for religious tolerance without which judicial doctrine is likely to be ineffective.

proportionality and their own constitutional texts and history; both on means-ends analyses and concerns for the special competences of other branches. To the extent that constitutional law is, in part, an expression of national particularity,[176] an interpretive theory that does not allow for such particularities may lack the legitimacy to be workable. Judging constitutional claims under national constitutions in practice may combine proportionality analysis with institutional considerations, including deference to legislatures and concern for the effects of different rulings on the responses and capacities of other institutional actors, as well as with what Beatty regards as the more "interpretive" tools of analysis like text, intent, and precedent. To the extent that the inherited practices of constitutional adjudication by judges have involved consideration of constitutional values and texts and practices and precedents and consequences, to urge them to consider only the individual proportionalities of each case could both delegitimize and destabilize the practice of judging.

Beatty argues that both the challenged government's practices (such as exceptions to a challenged rule not available to the challenger) or less restrictive practices in other countries, provide objective bases on which to conclude that a governmental purposes can be served in a less burdensome way and is thus disproportionate. In earlier work, Beatty has suggested that looking to comparative practices in other countries (such as statutes designed to achieve similar goals in ways less restrictive of human liberty) can increase the "objectivity" of analysis, and argued that "it is principles of justification much more than questions of interpretation, that determine *how well human rights are protected*."[177] A vision of constitutional courts protecting universal human rights supplies much of the normative foundation for his arguments.[178] This book's title claim to an "ultimate" rule of law

176. On the role of constitutions and constitutional law in establishing authentic and distinct national identity, *see, e.g.*, Richard Primus *A Brooding Omnipresence: Totalitarianism in Post-War Constitutional Thought*, 106 YALE L.J. 423 (1996) (suggesting U.S. Court made conscious effort to differentiate the U.S. from European totalitarianism in mid-20th century); Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT'L J. CONST. L. 269, 285–86 (2003) (emphasizing importance of developing autochthonous constitutional law); H.W.O. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65–80 (Douglas Greenberg et al. eds., 1993) (noting role of constitutions in proclaiming national sovereignty).

177. BEATTY, CONSTITUTIONAL LAW, *supra* note 3, at 115, 105.

178. Perhaps because of this commitment to proportionality as a method of protecting universal human rights, in the 2004 book it is sometimes difficult to tell whether a national constitution itself matters to the proportionality review conducted in its name.

seems to resonate with Beatty's earlier concerns for protecting universal human rights and raises the possibility that he is not talking so much about constitutional law—in the sense of the fundamental and entrenched laws binding particular political communities—but rather, an emerging "human rights" law, applied regardless of constitutional text and national distinctivenesss, based on judges' trans-national and increasingly universalized understandings of human rights, justice and proportionality, brought ever closer together by taking as a metric of necessity the most liberal (human freedom and substantive equality advancing) practices in other countries.

Of course, one might argue, a world populated by governments fully committed to the protection of universal human rights would nonetheless offer ample latitude for a diversity of practices in distinctively self-governing communities. But to the extent constitutional review needs to remain an expression of national self-government while at the same time offering protection to basic human rights, it may need to adopt a more complex interpretive approach that retains anchors in the particular decisions and institutions of its particular polity.[179] So I end with a plea for a more proportional approach to the benefits of proportionality analysis, as a necessary, but not sufficient, tool for the interpretive work of constitutional adjudication of still-national constitutions.

For example, Beatty says: "[J]udges behave unconstitutionally if they validate laws they know cannot pass the test of fair shares and the principles of proportionality and equality by which it is applied." (p. 157). *See also supra* note 110 (quoting Beatty at pp. 156–57). "Fair shares" is the description Beatty gives to the principles he sees courts using in enforcing positive rights, a principle that he argues is related to proportionality.

179. Even on such an understanding of constitutional law, thoughtful reflection on the decisions of other constitutional tribunals may be helpful. See Vicki C. Jackson, *Transnational Discourse, Relational Authority and the U.S. Courts: Gender Equality*, 37 LOY. L.A. L. REV. 271, 345–58 (2003). But so, too, is knowledge of the constitutional and judicial practices, peculiarities and traditions of one's own polity.