have encountered... establishes the impartiality of the principle... Proportionality is a universal criterion of constitutionality. It is an essential, unavoidable part of every constitutional text... A constitution without some principled way to resolve cases of conflicting rights would be incoherent; it just wouldn’t make any sense... The idea that a constitution could exist without some standard of proportionality is a logical impossibility. It serves as an optimizing principle that makes each constitution the best it can possibly be...

...Proportionality goes by different names, “reasonableness” in India and Japan, “toleration” in Israel, “strict scrutiny” in the United States, ... but its meaning never changes... Although it is commonly broken down into three distinct principles, testing the “rationality” (suitability), “necessity” and proportionality in the “strictest” or “narrowest” sense, the first two are really just clear and easy applications of the third. ... Laws that can’t pass the necessity test constitute gratuitous infringements on people’s constitutional rights because they are broader and more burdensome than they need to be. There is no (rational) reason, no legitimate interest for not pursuing a less restrictive and less draconian alternative which would accomplish all of the Government’s objectives while lightening the burden on... those they adversely affect... As a general principle, 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.

QUESTIONS AND COMMENTS

1. Is proportionality analysis more appropriate in reviewing executive action not specifically authorized by statute than in reviewing a statute itself?

2. Critics of proportionality argue that it is an amorphous standard that invites judges to enact their own views of justice into law. Beatty argues that it is impartial because, properly done, judges determine proportionality by careful evaluation of the parties’ perspectives. Is Beatty’s response persuasive?

3. One might locate the debate over proportionality review more generally in what the Chief Justice of Norway characterized as “an international debate on constitutional law method.”

On the one hand, there is the idea of an evolving constitution, a living instrument whose concepts must be interpreted dynamically so that it meets the practical necessities of contemporary society. On the other hand, there are the constitutional conservatives—traditionalists, textualists—who argue in varying degrees that the very purpose of a constitution is to impede the progress of change.

Carsten Smith, Judicial Review of Parliamentary Legislation. Norway as a European Pioneer, [2000] Public Law 595, 603. Justice Scalia has forcefully argued that originalism is the best available method at constraining judges’ human tendency to impose their own values as a basis for invalidating
democratic decisions. See Antonin Scalia, Originalism: The Lesser Evil, 57 U. Cin. L. Rev. 849, 863-64 (1989). How important is such constraint? Is it related to the perceived legitimacy, and efficacy, of judicial decisions? To what extent are those perceptions culturally and historically contingent?

4. Beatty defends proportionality as an impartial and objective method of review. Consider a different defense: Perhaps proportionality analysis is found in the jurisprudence of many constitutional courts because it helps to structure questions common to the means-ends analysis that provide a major alternative to historical, intentional analyses of large concepts like due process, fundamental fairness, or equality found in many national constitutions, as well as in international human rights commitments. Perhaps its advantage over historical, intentional analysis is that it is more neutral and determinate but that it asks different questions. Especially as the constitutional documents being interpreted become older and farther removed from enacting bodies, it becomes more difficult and makes less sense for interpretation to be governed by the specific intentions of past decisionmakers with respect to generally worded constitutional commitments. Central to the workability of a highly entrenched constitutional system is the capacity of courts as interpreters to promote the values expressed in the constitution at a high level of generality. Current understandings of fairness and justice, to the extent other interpretive canons allow room for their operation, are captured and structured through the questions proportionality analysis requires. And perhaps it could be argued that accountability of judges is served by proportionality’s requirements of structured, on the record reasoning about the legitimacy of the government’s purposes, the rationality and intrusiveness of the means, and the degree to which constitutionally protected rights are burdened. For arguments along these lines, see Vicki C. Jackson, Being Proportional About Proportionality: A Review of David Beatty, The Ultimate Rule of Law (2004), 21 Const. Commentary (2005).

5. PROPORIONALITY AND THE POSSIBILITIES AND LIMITS OF COMPARISON

Drawing on Frankenberg’s classic article, Jacco Bomhoff uses the doctrine of proportionality as a vehicle for exploring the possibility of gaining knowledge from comparative study. Bomhoff argues that comparative law always involves considerations of both the “local” and the “universal,” making generalization and even knowledge across legal systems difficult. Bomhoff also problematizes the categories of “functionalism” and “expressivism” as comparative methodologies.


... Courts in much of the Western world often use very similar-sounding, “balancing” language when adjudicating constitutional or fundamental rights claims. In freedom of expression cases, for example, the U.S. Supreme Court has used a variety of balancing tests;... the European Court of Human Rights makes standard references to the need to “balance” individual rights and public interests; and the
Complicating matters still further is the fact that the precise nature of these relationships to this dimension of universality can be shown, again, to differ among legal systems and cultures. The article argues that because of this local/universal duality, balancing is intimately attached to the foundational concerns of the two competing basic models for comparative analysis: functionalist approaches and their criticisms.

II. Similarities and Differences: Balancing, Functionalism, and Expressivism

A. Introduction

Understanding references to "balancing" by courts and commentators in different legal systems means confronting one of comparative law's most vigorously contested dilemmas: the question of similarities and differences among legal cultures. Successive waves of comparative law scholarship have debated this question to such an extent that for some modern authors, "the division between the proponents of similarity-oriented and those of difference-oriented comparison constitutes the most visible methodological cleavage in contemporary comparative law." The similarities/differences debate can, in turn, be seen as a reflection of two fundamental issues at stake in comparative research: (a) the question of what to compare (objects of comparison), and (b) the question of what and how much context to include (scope of comparison). The relationship between the dilemma and these two underlying, fundamental questions becomes evident from looking at the key tenets of two opposing camps in comparative methodology: that incomparables cannot usefully be compared and that findings of sameness are "necessarily based on a repression of pertinent differences."...
controversy. The objects of comparison are the "solutions" different legal orders have found to the uniform problems that face them. In this sense, functionalist studies are interested in outcomes rather than in the processes that lead to these outcomes; what counts for the purpose of comparison in functionalist approaches "is the fact of a solution and not the ideas, concepts, or legal arguments that support the solution." With regard to the differences/similarities controversy, functionalists come down strongly on the side of similarities. For Vivian Grosswold Curran, the dominant functionalist perspective has reflected a "conscious, articulated intent to identify unifying elements and to discount differentiating ones." The question of context, by contrast, has not received such an unequivocal answer, for here functionalists face a basic dilemma. Functionalist approaches cannot specify all important functions at too high a level of abstraction, or in terms that rely too heavily on "mere rationality." Doing so would carry the twin dangers of ethnocentric bias in approach and of irrelevance and inapplicability of conclusions. At the same time, functionalists cannot specify functions "so precisely that every institution performs a complex set of functions unique to it," as incorporating too much context in this way would make all comparison impossible.

E. Functionalism's Critics: Expressivist

In terms of the objects of comparison, the focus shifts decidedly away from the "solutions" cherished by functionalists. As Gertrude Franklin has put it: "by stressing the production of 'solutions' through legal regulations the functionalist disavow as irrelevant or

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41 Tushnet, note 40 supra.
43 [Editor] Annemieke Risse, Wignaraja's Treasure Box: Comparative Law in the Era of Information.
44 [Editor] Curran, supra note 40, at 81.
45 Curran, supra note 40, at 81.
justice... Although the broad contours of these appeals are similar, their precise content may differ significantly between legal systems.

Balancing references are often used as shorthand for neutral, rational decision-making: a conception of adjudicating that fits particularly well with liberal rule of law ideals. A judge who balances it is often thought, takes all relevant aspects of a case into consideration without any predetermined preferences or biases... A closer look at these defenses of balancing as rational, however, shows that "rationality" is invoked to reflect disparate meanings. Bomhoff contrasts the European debate over the rationality of balancing, which focuses on whether it accords with Max Weber's concept of "formal rationality," with American discussions, which focus less on the formal rationality of balancing than on a more "instrumental" form of rationality, being "geared towards achieving results based on ethical imperatives and utilitarian and other expediency rules".]

D. Balancing and Claims to the Universal (2): Fairness

Balancing's second claim to universality lies in its close connections to two dominant, contemporary understandings of justice: (a) proceduralism, and (b) justice as (substantive) fairness... [which are] thought to at least partly transcend local values and conceptions of justice.

Balancing, firstly, makes direct appeals to the notion of procedural justice... [It] appeals to proceduralist conceptions of justice go beyond mere neutrality. Frank Coffin, an American judge, has described balancing as,

[A] process with demanding standards of specificity, sensitivity and candor. Open balancing renews the judge and minimizes hidden or improper personal preference by revealing every step in the thought process; it maximizes the possibility of attaining collegial consensus; and it offers a full account of the decision-making process for subsequent professional assessment and public appraisal.84...

The appeal of balancing to ideals of justice is not limited to aspects of procedure—neutrality, taking all relevant factors into consideration, reason-giving, etc.—but is also visible with regard to its purported outcome: a "fair balance" between opposing rights, values and interests. Courts in many different jurisdictions have elaborated upon what they see as the intimate relationship between balancing and a conception of justice as fairness...

... One significant difference between U.S. and European practices seems to hinge on the source and the scope of application of "fairness" in constitutional adjudication. In U.S. constitutional law terms such as "fairness" and "proportionality" surface primarily in three, specific areas of constitutional law: (1) adjudication under the Due Process Clause; (2) the Equal Protection Clause; and (3) the prohibition on cruel and unusual punishment under the Eighth Amendment...

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85 Riles, supra note 56, at 241.
Perspectives on balancing that focus too heavily on the universal, such as David Beatty's view of proportionality as a "universal rule of law," have already come under fire for not telling "the whole story" about different systems. These critiques, however, have so far emphasized elements such as the fact that balancing and proportionality will often "co-exist with attention to historically specific aspects of national constitutions" or that "the way in which balancing is done will differ depending on a society's history and expectations concerning the relative importance not only of individual rights and social interests, but also of the role of courts and legislatures." By underscoring the suggestion that the very idea of balancing itself has different meanings in different legal systems and cultures, this preliminary study should contribute to the development of a richer, fuller perspective on the legitimizing force of a type of argument on which much of modern judicial practice in the field of fundamental rights has come to rest.

QUESTIONS AND COMMENTS

1. Recall Frankenberg's essay in Chapter II. In what ways does Bomhoff draw on those concerns. (Consider here Bomhoff's juxtaposition of the risks of ethnocentrism and irrelevance.) In what ways does Bomhoff's critique differ from Frankenberg's?

2. If Bomhoff is correct that "expressivism" cannot be neatly distinguished from "functionalism," can they be reconciled through a practice of a "contextualization functionalism," which "requires a willingness to question whether functions, concepts, or doctrines that appear similar may in fact be quite different in different societies; an attention to how seemingly separate institutions or legal practices are connected to, and influenced by, others; and a commitment to be open to noticing how legal rules or doctrines may be affected by the ideitratian or expressionist aspects of the constitution." Vicki C. Jackson, Comparative Constitutional Law: Methodologies in OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 72 (Michel Rosenfeld & András Sajó eds. 2012). Or is it illustrous to think that this approach escapes the perils of false simplification of functionalist approaches and the highly contextualized view of expressivism that sees each constitution as unique and incompaerable?

3. Is balancing or proportionality any more likely than other approaches—perhaps, for example, of categorical rules against "torture" or "cruel and inhuman punishment"—as exist in many constitutional systems—to challenge the methodological categories of comparative analysis?

C. JUDICIAL LEGITIMACY AND JUDICIAL EFFICACY

Legitimacy is not the same as efficacy; a court may be regarded as legitimate while its decisions prove inefficacious. Yet legitimacy and efficacy may also be related; a court whose judgments are generally inefficacious is likely to lose legitimacy as rights holders or challengers learn that their judgments are not valuable. Enforcement of judgments has been a major concern, for example, of the Russian Constitutional Court. There is a vigorous debate in the literature about the efficacy of the Court. For example, Gerald Rosenberg, THE HOLLAND HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

In a study of the U.S. Supreme Court and racial equality, Prof. Michael Klarman, FROM JIM CROW TO CIVIL RIGHTS 484 (2004), writes that:

The efficicnss of the Court's decisions depends on certain social and political conditions: the unity and the determination of beneficiaries in enforcing newly declared rights; the relative physical security with which rights can be exercised; the intensity of opponents' resistance; the geographic concentration of opposition; the case with which particular rights can be evaded; the extent to which the vindication of rights turns on disputed facts, which appellate courts find difficult to review; the availability of sanctions for violators; the presence of lawyers with the inclination and capacity to support litigation; the type of court in which the litigation is likely to occur; the existence of organizations that are able to spread the risks and costs of litigation while capturing the benefit; the availability of a market mechanism to facilitate the implementation of rights and the extent to which the enforcement of rights depends on the law as opposed to custom and social norms.

An additional consideration is the extent to which the political branches are willing to provide support for the enforcement of the court's decisions.

To what extent do these factors appear likely to be important in other countries? To what extent are other factors important? Is the Court's interpretive approach related to the likely efficacy of its judgments? What weight, if any, should constitutional courts give to the question whether their judgments will be efficacious? These issues are discussed in the next reading.


The Supreme Court and the President of the Supreme Court enjoy great acclaim and respect within Israel and abroad, but have recently come under attack from a variety of sources. The fact that in some sectors extremely harsh criticism of the court is seen to be an electoral threat to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat. This boost, testifies to the serious and dangerous nature of the threat.