All Things in Proportion?

American Rights Doctrine and the Problem of Balancing

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This Article describes and evaluates the evolution of rights doctrines in the United States, focusing on the problem of balancing as a mode of rights adjudication. In the current Supreme Court, deep conflict over whether, when, and how courts balance is omnipresent. Elsewhere, we find that the world's most powerful constitutional courts have embraced a stable, analytical procedure for balancing, known as proportionality. Today, proportionality analysis (PA) constitutes the defining doctrinal core of a transnational, rights-based constitutionalism. This Article critically examines alleged American exceptionalism, from the standpoint of comparative constitutional law and practice. Part II provides an overview of how constitutional judges in other systems use PA, assesses the costs and benefits of adopting it, and contrasts proportionality with American strict scrutiny. Part III recovers the foundations of proportionality in American rights review, focusing on two critical junctures: (1) the emergence of a version of PA in Dormant Commerce Clause doctrine in the late nineteenth century, the core of which persists today; and (2) the consolidation of the strict scrutiny framework in the mid-twentieth century. Part IV demonstrates that the "tiered review" regime chronically produces pathologies that have weakened rights protection in the United States, and undermined the coherence of the Supreme Court's rights jurisprudence. PA, while not a cure-all for the challenges facing rights-protecting courts, avoids these pathologies by providing a relatively systematic, transparent, and trans-substantive doctrinal structure for balancing. We also show that all three levels of review—rational basis, intermediate review, and strict scrutiny—have, at various points in their evolution, contained core elements of proportionality. In Part V, we argue Supreme Court can and should develop a home-grown version of PA, based on its existing case law and American constitutional traditions and values, and we respond to objections to the argument.

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I. INTRODUCTION

When it comes to constitutional rights review, American courts have a balancing problem. Disagreement runs deep over the proper role for balancing in rights review: over whether, when, and how courts should turn to balancing. Nor is the problem a new one. Past struggles over the merits of balancing are etched into our constitutional case law.[1] American rights doctrines are a tangle of different tests, some requiring the court to "balance" or "weigh" factors, and some taking the form of categorical constitutional rules.[2] This mix reflects, in part, the changing fortunes of balancing, which have waxed and waned over the years.[3] To borrow a phrase from Alexander Aleinikoff, American constitutional law has experienced "several ages of balancing," and its status has always been controversial.[4] In the current Supreme Court, conflicts over its legitimacy regularly flare into view; today, a new struggle over balancing is coming to dominate the politics of rights in America.[5]

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[1] *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 964 (1987); Kathleen M. Sullivan, *Categorization, Balancing, and Government Interests, in* STEVEN GOTTLIEB, PUBLIC VALUES IN CONSTITUTIONAL LAW 241, 241-44 (1993).

[2] *See* Aleinikoff, *supra* note 1, at 964-71 (canvassing constitutional balancing tests).

[3] *See infra* Part III; *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267, 1288-89 (2007) (noting that the Supreme Court adopted a balancing approach to First Amendment claims that was quite speech-protective in the 1940s, which was replaced by a more deferential balancing approach starting in 1949). Of course, the diversity of legal tests in American constitutional law also reflects, in part, the diversity in the structure of rights found in the constitution. Some rights lend themselves easily to formulations as constitutional rules (*e.g.*, "no quartering of soldiers"), and others are more easily read to invite balancing tests (*e.g.*, due process).

[4] *See* Aleinikoff, *supra* note 1.

[5] In *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), Justices Scalia and Breyer engaged in an unusually acerbic argument about the appropriate methodology to be employed in review of a District of Columbia measure

The picture looks very different elsewhere. In contrast to the United States, constitutional courts in legal systems around the world have converged on a method for adjudicating rights claims, proportionality analysis (PA), an analytical procedure that has balancing at its core. In the past half-century, PA has become a centerpiece of rights jurisprudence across the European continent, as well as in common law systems as diverse as Canada, South Africa, Israel, and the United Kingdom.[6] PA, which began as an unwritten set of general principles of law, has evolved into a standardized doctrinal framework that can be applied across substantive areas of law. Today, across the globe, judges have raised proportionality to the rank of a fundamental, *constitutional* principle, which they deploy to manage rights claims, including conflicts between constitutional rights. PA has also been adopted by the most powerful international courts, including the European Court of Justice, the European Court of Human Rights, and the Appellate Body of the World Trade Organization. In a previous article,[7] we elaborated a theory of why judges are attracted to PA; we traced the framework's global diffusion outward from Germany after World War II; and we showed that adopting PA serves to enhance the importance of rights, and of judicial authority, within policy processes otherwise dominated by non-judicial officials.

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that banned handguns in the home, and required that other firearms be rendered inoperable. Writing for a five-member majority, Justice Scalia focused on the early history of the United States, the object of which was to show that the Second Amendment possessed a categorical, rule-like structure. Once it was determined that the Second Amendment guaranteed an individual right to bear arms for self-defense, the law was struck down. On the issue of balancing, Justice Scalia stated that the Second Amendment, like the First, "is the very product of an interest-balancing by the people—which Justice Breyer would now conduct for them anew," yet he would claim: "We know of no other enumerated right whose core protection has been subjected to a free-standing balancing approach." *Id*. at 2821. For his part, Justice Breyer, joined by Justices Stevens, Souter, and Ginsburg in dissent, asserted that a "sort of proportionality" balancing approach is regularly used in "various constitutional contexts, including election law cases, speech cases, and due process cases." *Id.* at 2852 (Breyer, J., dissenting). Advocating an "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests," Justice Breyer then adopts a relatively standard version of three-stage proportionality analysis to show why the District of Columbia's ban should be upheld. *Id*. at 2851, 2854-68 (Breyer, J., dissenting). For extended discussions of *Heller*'s debate over balancing, *see* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 83 N.Y.U. L. REV. 375 (2009); Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367 (2009).

[6] *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72 (2008).

[7] *See* Stone Sweet & Mathews, *supra* note 6.

This Article takes a fresh look at alleged American exceptionalism in the field of rights review, from the perspective of proportionality. It complements our previous study of the global diffusion of PA, by focusing comparative attention on American experience and practice. Our analysis shines new light on American doctrinal developments, and complicates the image of the United States as an outlier. Strikingly, we find that U.S. courts *did* develop frameworks for rights review that resembled PA, starting in the nineteenth century. The Supreme Court first derived the functional equivalent of PA more than a century ago, as a test for state restrictions on trade under the Dormant Commerce Clause. And in the mid-twentieth century, strict scrutiny review got its start as a rights-favoring balancing framework with pronounced similarities to PA. It turns out that American judges chose proportionality in the past, and introduced it into our doctrinal DNA.

But this heritage is sometimes obscured in current rights jurisprudence and scholarly discourse. The nearest analogue to PA today—the closest thing we have to a common rubric for reviewing claims across different substantive areas—is the set of standards that make up the "tiers of scrutiny."[8] Not only do PA and tiered review share certain core elements but, we argue, in a head-to-head comparison PA has clear advantages. Far from "balancing rights away," PA can protect rights more consistently and coherently than tiered review. The American approach reduces the flexibility of judges in the face of complexity; falsely portrays adjudication as a mechanical exercise in applying law that is akin to a "constitutional code"; and creates unnecessary inconsistency and arbitrariness.

[8] Canonically, the tiers are strict scrutiny, intermediate scrutiny, and rational basis review. The picture is complicated somewhat by less well-established gradations (*e.g.*, "rational basis with bite"). Also, the Supreme Court does not always use these three labels. Kathleen Sullivan points out that tests for a number of constitutional claims, from privilege and immunities issues to public forum speech regulations, amount to intermediate scrutiny. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992).

Our purpose is not to heap abuse on tiered review for its own sake: its shortcomings have already been amply canvassed, by scholars[9] and judges.[10] Rather, we seek to show, constructively, how problems of our constitutional practice can be remedied by incorporating PA. Proportionality's extraordinary success—its value to the judges who have adapted it for use in very different legal systems—lies in the fact that it provides a doctrinal anchor for principled balancing as a mode of rights protection. We argue that American rights review lacks such an anchor, and suffers as a result. Nor does moving towards PA mean adopting an exotic foreign transplant. Instead, it is a matter of reclaiming and building on the foundations that already exist in our own history and doctrine. We seek to show how a modern, distinctly American PA can be constructed in a way that squares with the practices of common law constitutionalism, including a respect for history and precedent.

Together, our claims add up to what we regard as the strongest case for recognizing and incorporating features of PA into American constitutional law. To be clear, we are not proposing that PA should necessarily govern *every* constitutional rights claim. Nor do we regard proportionality as a miracle cure-all that will make hard constitutional questions easier to answer. PA does not spare judges the hard work of theorizing the nature and scope of a right in play (a process that triggers PA) nor does it dictate correct answers. PA does require that judges—openly, routinely, and without embarrassment—engage in balancing, and many will be find this posture uncomfortable. Nonetheless, to the extent that balancing is inevitable in rights adjudication, the proportionality framework offers the best available procedure for doing so.

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[9] *See, e.g.*, Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 496-503 (2004); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417 (1996); Jeffrey M. Shaman, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161 (1984).

[10] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 478 (1985) (Marshall, J., concurring in the judgment and dissenting in part); Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring).

The Article is organized as follows. In Part II, we introduce PA as an argumentation framework, summarize the pros and cons of adopting proportionality as a standardized mode of rights adjudication, and contrast PA with American approaches in broad, relatively abstract, terms. Building on the theoretical treatment of proportionality in our last article, we argue that PA recommends itself to courts for several reasons, and offers a number of system-wide advantages relative to either tiered review, or to more rule-based, categorical approaches. In Part III, we recover the foundations of proportionality in American rights review, focusing on two critical junctures: (1) the emergence of a form of proto-proportionality in Dormant Commerce Clause doctrine in the late nineteenth century, and (2) the consolidation of the strict scrutiny framework in the mid-twentieth century. We demonstrate that both of these developments, which mirrored simultaneous stages in the evolution of PA in Germany, laid a foundation for a structured but suitably flexible approach to rights review. In Part IV, we subject the major features of American rights doctrine, as it currently exists, to critical analysis in the light of PA principles. We conclude (Part V) by considering how PA principles could be given greater expression in American constitutional law, and considering objections to the argument.

II. PROPORTIONALITY AND STRICT SCRUTINY: AN OVERVIEW

In constitutional systems across the globe, proportionality balancing today constitutes the dominant, "best practice" judicial standard for resolving disputes that involve either a conflict between (a) two rights claims, or (b) a rights provision and a legitimate Government interest. In the latter, paradigmatic situation, the analysis proceeds step-by-step, as follows. In a preliminary phase, the judge considers whether a *prima facie* case has been made to the effect that a Government act burdens the exercise of a right. By convention, the judge will use this occasion to discuss the jurisprudential theories that underpin the pleaded right, as well as prior rulings and

other legal materials that will bear upon the court's determination of the right's scope and application in the case at hand. No important claim will ever be rejected at this stage. PA then proceeds through a sequence of three tests. A Government measure that fails any one of these tests violates the proportionality principle, and is therefore unconstitutional.

The first stage of PA mandates inquiry into the "legitimacy" and "suitability" of the measure under review.[11] The Government must show that the purpose of the act is both important and constitutionally legitimate; further, the Government must demonstrate that the relationship between the "means chosen" and the "ends pursued" is rational and appropriate, given a stated policy purpose. This mode of scrutiny is broadly akin to what Americans call "rational basis" review, although, under PA, the appraisal of Government motives and choice of means is more searching. In most systems, few laws are struck down at this stage. Instead, the judge will consider the objective of the measure under review, conceptualized as a *constitutional* "value," "principle," or "interest."

The second step—"necessity"—embodies what Americans know as a "narrow tailoring" requirement. At the core of "necessity" analysis is a least restrictive means (LRM) test: the judge ensures that the measure does not curtail the right more than is necessary for the Government to achieve its goals.[12] For many courts, including the Canadian Supreme Court and the European Court of Justice, the "necessity" stage has the most bite: the vast majority of laws struck down by these courts failed the LRM test. In practice, judges do not invalidate a measure simply because

[11] These stages of PA are sometimes conducted separately. *See* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J 383 (2007); Stone Sweet & Mathews, *supra* note 6, at 75-76 (discussing PA as a four-part analytical structure for evaluating justifications for government measures that would infringe upon a right).

[12] *See* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 TEX. L. REV. 517, 520-24 (2007) (identifying LRM testing as a "central meaning" of the narrow tailoring requirement, criticizing an alternative approach to narrow tailoring in racial preference cases, and calling for a return of LRM testing).

they can find one alternative that would be less restrictive.[13] Instead, most courts, explicitly or implicitly, insist that policy-makers have a duty to consider "reasonably available alternatives," and to refrain from selecting the most restrictive among them. Most courts will rarely if ever strike down a law without comparing it to a list of "reasonably available alternatives."

The third step—balancing *stricto sensu*—is also known as "proportionality in the narrow sense." In the balancing phase, the judge weighs, in light of the facts, the benefits of the act (already found to have been narrowly tailored) against the costs incurred by infringement of the right, in order to decide which side shall prevail. Most judges who use PA would not characterize balancing in such blunt, utilitarian terms.[14] Instead, they would emphasize that the balancing stage allows them to "complete" the analysis, in order to ensure that no factor of significance to either side has been left out. In contrast to the practice of the high courts of Canada and the European Union, for example, the German Federal Constitutional Court and the Israeli Supreme Court tend to move more systematically to the final, balancing, stage, especially when they confront controversial, "hard cases." A court that strikes down a law as unconstitutional in the third stage of PA will typically use the first two steps to pay its respects to the importance of the purposes being pursued by Government, and to the quality of the Government's own deliberations on the proportionality of the law.

Before turning to a more nuanced discussion of balancing within PA and strict scrutiny, two crucial comparative points deserve emphasis up-front. First, in the United States, opponents of judicial balancing have largely built their case on the view that balancing is necessarily *ad*

[13] *See, e.g.*, RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, para. 160 (Can.) ("The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement."); JTI-Macdonald Corp., [2007] 2 S.C.R. 610, para. 43 (Can.) (making similar point).

[14] Following German practice, PA is not a jurisprudence of "interests" but of constitutional "principles," or "values." ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers, trans. 2002); DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 45-48 (1997).

hoc, open-ended, and unprincipled from the standpoint of rights protection. The conclusion, often presented as an easy assumption, is that judicial balancing is an inherently un-disciplined exercise of unbridled lawmaking that deprives rights of their *a priori* normative status, for example, as "trumps" or shields against Government action.[15] This characterization does not easily fit PA. PA is a highly formalized argumentation framework, the basic function of which is to organize a systematic assessment of justifications for Government measures that would burden the exercise of a right. Government must give reasons for such acts, which PA subjects to the highest standard of judicial scrutiny. In doing so, PA enhances the transparency of rights review, not least, by making explicit which justifications for limiting rights the court has either accepted or rejected, at precisely what stage of the analysis. Second, as a formal doctrinal structure, PA is no less intrusive, and no less "strict," or rights-prioritizing, than is American strict scrutiny. In the United States, however, strict scrutiny is only applied to a small number of rights, whereas PA is applicable to virtually all rights claims.

A. Balancing

In classic notions of separation of powers, the responsibility to balance the varied, multi-dimensional costs and benefits to society of any set of public policy options belongs to legislative authority. PA does not challenge that view. Instead, it subjects the balancing that inheres in policy-making to judicial supervision. PA is thus directly implicated in the exercise of legislative power. Indeed, PA forges important causal connections between judicial balancing and the exercise of lawmaking authority, and between lawmaking and the evolution of constitutional rights jurisprudence. Moreover, PA comprises a *multi-stage* balancing framework, that is, judicial balancing is not restricted to the final, "balancing in the strict sense" stage, but

[15] *See, e.g.*, Ronald M. Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS (J. Waldron ed., 1984).

takes place within each of the tests. And the tests are sequenced in order of increasing stringency, so that courts insert themselves into the legislative process no more than is necessary to defend rights. If a measure does not survive the inquiry into the means-ends fit, the court need not escalate to a more probing form of balancing analysis. Consider again the paradigmatic case, wherein a pleaded right (*x*) comes into conflict with the means employed by a given measure to achieve a stated Government purpose (*y*). Under PA, the court must assess the harm (to value *x*) against the contribution (to value *y*) of a policy decision, but it does so in three different ways. In the first two stages, the court examines the means-ends nexus, assessing how lawmakers themselves weighed costs and benefits. The "suitability" test will normally capture laws where the mismatch between means and ends is most acute: irrational or grossly overbroad laws that exact a cost in terms of rights with little or nothing to show for it. The second test, under "necessity" analysis, enables judges to probe intentions of legislators in much more detail, not least, to smoke out "bad motives."[16] If the court finds that less-restrictive alternatives were reasonably available to lawmakers, it overturns the law as a disproportionate exercise of legislative authority. Thus, the court moves to "balancing in the strict sense" only after the measure has survived scrutiny into how the legislator has *already* balanced the values in tension. If the Government is to prevail in the final phase of PA, the court must agree that the measure under review generates enough added benefit to value *y* to justify the harm to value *x*.

Judges who would construct rights in absolute terms, or who would prefer to build fixed hierarchies of constitutional values, or who would seek to ban balancing from their repertoire for other reasons, will have no use for PA. In contrast, most judges who use PA presume that balancing cannot be avoided in rights adjudication. Modern systems of rights protection delegate massive lawmaking authority to constitutional judges, typically under institutional arrangements

[16] *See* Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 430 (1997).

that we have characterized as "structural judicial supremacy."[17] In effect, judicial supremacy is a tax that a polity pays for a maintaining a modern system of constitutional justice. In such systems, judges do not use PA to mask balancing, or to camouflage lawmaking, but to rationalize both within the protective confines of a stable procedure that they see as inherent *judicial*.

B. Proportionality and Judicial Power

In our previous article, we developed a theory to explain why constitutional and supreme courts would find the proportionality framework attractive. Our explanation blended strategic (political) and legal (norm-governed) factors and logics, theorized in particular ways.[18] In a nutshell, we argued that judges are attracted to PA because: (a) it neatly "fits" the structure of qualified rights; (b) it prioritizes rights protection while giving judges the flexibility to tailor outcomes to highly-charged political contexts; and (c) it provides a stable, defensible framework for argumentation and justification that judges can deploy to reduce uncertainty, and to enhance consistency and predictability.[19] We then charted the global diffusion of PA to the most powerful constitutional and supreme courts in the world. As we demonstrated, these courts adopted PA in order to deal with the most politically salient and controversial cases that they could be expected to face. In every system examined, we also found that the move to PA served to enhance the status of rights, and the judiciary's role, in both lawmaking processes, and in the overall process of constitutional development. The institutionalization of the framework places non-judicial actors in an ever-deepening shadow of rights adjudication. In consequence, policymakers become increasingly careful to build records of the proportionality of their own decision-making,

[17] Stone Sweet & Mathews, *supra* note 6, at 86 ("Modern constitutionalism is characterized by structural judicial supremacy, where the principals have, in effect, transferred a bundle of significant political property rights to judges for an indefinite duration."); *see also id*. at 85-96 (discussing the concept of structural judicial supremacy with reference to balancing).
[18] *Id*. at 80-97.
[19] *Id*. at 87-90.

knowing full well that their decisions will be subject to review by the courts, under PA. Further, all relevant actors in the system, including future litigants and their lawyers, Government officials, and legal scholars, gradually begin to think of their roles in terms of proportionality, further consolidating PA's centrality.

Proportionality balancing necessarily exposes judges as lawmakers, and raises the classic legitimacy dilemmas associated with such exposure.[20] At the same time, PA provides various means of coping with these dilemmas, which partly accounts for the framework's popularity. Here we highlight four strategic advantages that PA offers the balancing, rights-protecting judge.

First, adopting the proportionality framework comprises an effective procedural response to an intractable, substantive problem. Constitutional rights are famously imprecise, open-ended, and incomplete in other important ways, and these qualities are amplified when provisions are qualified by limitation clauses. While moving to balancing is, arguably, an appropriate response to incompleteness, it can only reinforce the perception that rights adjudication is outcome-indeterminate. Nonetheless, judges can bring a semblance of determinacy to balancing by subjecting it to a fixed procedure, the most formalized and well-tested of which is PA. As important, PA offers judges the possibility of building trans-substantive coherence, since it can be applied across the board, to virtually all disputes involving rights.

Second, PA bestows a sheen of politico-ideological neutrality on a court, across time and circumstances. In any dispute, one party—or constitutional value—will ultimately prevail against the other, but only with regard to a specific context, or set of facts. Under PA, it is not the law that varies from case to case, but the facts or decision-making context. In a future case involving a conflict between the same two values, the other side may well prevail if circumstances lead the judge to weigh the values in tension differently. PA maximizes the court's flexibility *vis à vis* all

[20] *Id*. at 80-87.

potential litigants in *future* cases, and it gives the court a structured setting in which to pay equal respect and honor to each of the constitutional values on its own, and in competition with one another, before determining a winner.

Third, PA is specifically designed to reduce the harm to the losing party—as far as possible. The point, formalized by Robert Alexy, follows from the view that (a) rights, and the constitutional values that must be balanced against rights, are "legal principles," to be distinguished from "legal rules"; and that (b) a conflict among two principles requires that both be "optimized" through balancing. However rights are conceptualized, "necessity" analysis requires narrow tailoring, which permits the judge to access the legitimizing logics of Pareto Optimality.[21] Under PA, a Government measure that restricts a right more than is necessary to achieve a legitimate state purpose can never be justified, since the right claimant can be made better off with no additional cost to the value being pleaded by the Government.

As a practical matter, we can expect PA to constrain judicial lawmaking, in ways that can be tracked empirically, in so far as judges actually assess the proportionality of Government measures with competence and in good faith. As mentioned, a court will rarely strike down a law in the necessity stage unless it can demonstrate that the law infringes more on the right than a range of other, explicitly identified, "reasonably available alternatives." In our view, judges gain an important strategic resource when they treat this (defensive) practice as a *de facto* constitutional duty. Similarly, in the balancing *stricto sensu* phase, many judges assume an obligation, we would call it a constitutional duty, to be as precise as possible about how they weigh the contribution of a Government act to value *y* (the Government's legislative purpose) compared to the harm of that measure to value *x* (a pleaded right).

[21] ALEXY, *supra* note 14, at 40-110.

Fourth, adopting PA is a way for courts that seek to secure their *bona fides* in the field of rights protection to build their credibility. The recognition of PA as a "best-practice standard" of global constitutional law is an outcome of an ongoing social process of diffusion, and of legitimation, that has taken place on a global scale. This process has all the hallmarks of what sociological institutionalists call "institutional isomorphism," in that PA's diffusion has become subject to logics of mimesis and increasing returns (band-wagon effects).[22] Faced with similar problems, judges copy what they take to be the emerging, high prestige standard, thereby ensuring the result. For new constitutional courts, or for old courts charged with protecting a new charter of rights, embracing PA is a low-cost move, compared to the costs of developing an untested alternative on their own. Finally, PA is a simple, but comprehensive, doctrinal structure, which facilitate diffusion. Lawyers, law students, and judges can learn the basics quickly, and deploy the framework with ease, which benefits constitutional judges in obvious ways.

Steadfast opponents of PA may well concede these points while maintaining their objections. Although critiques vary in subtlety and sophistication, most share a common hostility toward judicial balancing *per se*, and a suspicion of judicial lawmaking and supremacy.[23] Consider the following provocative statement, with which we would agree:

> "If we ask the question—what does a person have by virtue of a right?[24]—the answer, under PA, is that a right gives a right-bearer an entitlement to have her claim evaluated under the proportionality framework, and nothing more."

[22] The classic treatment is Paul J. Dimaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, *in* THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS 63, 67-69, (Paul J. Dimaggio & Walter W. Powell eds. 1991).
[23] *See, e.g.*, Grégoire Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CAN. J.L. & JURIS. (forthcoming 2010); STAVROS TASKYRAKIS, *Proportionality: An Assault on Human Rights?* (NYU School of Law Jean Monnet Program, Working Paper No. 09/08, 2008).
[24] Mattias Kumm, *What Do You Have in Virtue of Having a Constitutional Right? On the Place and Limits of the Proportionality Requirement*, *in* 4 LAW & ETHICS HUM. RTS. (forthcoming 2010). The answer given to Kumm's question is ours, and not necessarily Kumm's.

Many who believe that rights express (or positivize as constitutional law) moral principles,[25] or that rights constitute shields (against Government action),[26] or that rights have a categorical, rule-like quality (rather than being "principles" to be optimized),[27] will also share a commitment to the belief that a more principled mode of rights protection is possible to achieve. We are skeptical that judges can or should dispense with balancing when they adjudicate rights claims, for reasons argued through this Article, but we do not deny that balancing may require some to rethink certain deeply held assumptions about the nature of rights and of rights adjudication.

With respect to separation of powers, PA is clearly not a neutral, analytical procedure. Compared to alternatives, PA is a highly intrusive standard of judicial review. Wherever it has been adopted, PA replaced more deferential standards. (Judges can build *de* facto deference into PA on an *ad hoc* basis, but deference, too, is an outcome of the analysis and, thus, a product of judicial decision-making.) Those, like Jeremy Waldron, who have taken the view that rights adjudication adds nothing of value to the quality of policy deliberations, and who believe that principles of democracy are violated by systems in which courts have "the final word," must attack PA as inherently un-democratic.[28] It is obvious that PA positions constitutional judges as powerful lawmakers and that, under conditions of structural supremacy, judges will often dominate lawmaking processes and the evolution of the constitutional law. We see such outcomes as costs that any polity must inevitably pay if it wishes to maintain an effective system

[25] *See, e.g.*, Kai Möller, *Balancing and the Structure of Constitutional Rights*, 5 INT'L J. CONST. L. 453 (2007) (arguing that constitutional rights ought to be described and balanced from the standpoint of substantive morality); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184-205 (1977) (arguing that moral aspects of rights makes balancing inappropriate except in emergency situations).

[26] *See, e.g.*, Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 443 (1993) (describing constitutional rights in the United States as "shields").

[27] *See, e.g.*, Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV 767 (2001) (arguing that the rule-like structure of the First Amendment requires inquiry into Government purpose, and forbids balancing); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing that rights as rules limit the balancing discretion of judges and commit them to judicial restraint). The broader literature is reviewed by Blocher, *supra* note 5.

[28] *See* Jeremy Waldron, *Some Models of Dialogues Between Judges and Legislators*, 23 SUP. CT. L. REV. 7 (2004); J Waldron, *The Case Against Judicial Review*, 115 YALE L.J. 1348 (2006).

of constitutional justice. If a polity does not wish to pay such costs, it must not, within its constitutional law, include a charter of rights meant to be protected by a judicial body whose decisions are effectively insulated from reversal.

In contrast to the views of more fervent supporters of PA,[29] we deny the claim that PA gives a unique, correct answer to complex legal questions involving the interpretation and application of rights. As we have already stated, PA is an analytical procedure, a framework for assessing justifications for Government policy that would infringe upon rights. PA does not tell judges what weight to give constitutional values that are in tension. At best, when used properly, PA guides, or constrains, how judges balance once they have a sense of how the contending values are to be weighed. Put differently, balancing will always require some background notions, or theories—of the nature and scope of rights, of the proper role of the state in the society, economy or private life, and so on. PA does not supply these background ideas, leaving them open. Further, it is far from clear that any court can actually test the "necessity" of a Government measure with any precision, let alone determine which policy options fall along a presupposed "Pareto Frontier." These are specific examples of the generic, potentially irresoluble, problem with balancing. Balancing typically involves weighing two goods that are formally incommensurable, in that the respective values cannot be measured on the same scale or metric.

In our view, these are valid points, though different conclusions can be drawn from them. An opponent of PA may well conclude that, at best, PA is little more than fancy, doctrinal window-dressing for what is, in fact, generic lawmaking by any other name. From the same facts, we conclude only that rights adjudication can never be dissociated from lawmaking; that it will regularly involve difficult cases; that there exists no stable, compelling alternative to

[29] *See, e.g.*, DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 159-76 (2004).

balancing; and that PA provides the most defensible balancing structure currently available. We will seek to defend the latter two points in the remainder of the Article.

C. Strict Scrutiny

Given the importance of strict scrutiny to rights protection in the United States, one might assume that American readers would need no introduction to it. Until recently, however, little systematic research on the origins, evolution, or law and politics of the doctrine existed.[30] Since 2005, four important articles on the topic have appeared, by Richard Fallon,[31] Stephen Siegel,[32] G. Edward White,[33] and Adam Winkler.[34] In this Article, we seek to contribute to this literature, as well as to a rapidly emerging *comparative* research agenda.[35]

Although we will compare PA and strict scrutiny throughout the Article (most directly in Part IV), we wish to emphasize four general points in advance of the analysis to follow. First, as noted, PA overlaps strict scrutiny in crucial respects. In addition to sharing constitutive components, in the form of tests, both frameworks displaced doctrines that were far more deferential to legislative power and Government authority. In the United States, what made the scrutiny "strict" was the fact that it negated the *normal* presumption that legislation would be treated as constitutionally valid unless the law failed basic rationality requirements. When the

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[30] We do not mean to understate the importance of research that bears upon how the Court has used (and changed how it uses) strict scrutiny in specific cases or areas of the law, of which there are literally dozens of important articles.

[31] *See* Fallon, *supra* note 3.

[32] *See* Stephen A. Siegel, *Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 359-60 (2006).

[33] G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C.L. REV.1 (2005).

[34] Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

[35] On the comparative agenda, *see* BEATTY, *supra* note 29; Cohen-Eliya & Porat, *supra* note 5; Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. Rev. 789 (2007); and Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574 (2004). A symposium issue of Law and Ethics of Human Rights, edited by Iddo Porat and Moshe Cohen-Eliya and dedicated to the topic of "Rights, Balancing & Proportionality" is forthcoming (2010).

Supreme Court decides to protect a right under strict scrutiny, its *de facto* supremacy within lawmaking processes is fully realized.

Second, the Supreme Court developed strict scrutiny in order to deal with a set of specific strategic problems.[36] Fallon describes the standard as "a judicially crafted formula for implementing constitutional values," specifically, those rights determined to be "preferred" or most "fundamental."[37] But he also insists, that the Court needed something like strict scrutiny "to impose discipline, or at least the appearance of discipline, on judicial decision-making, and thus to escape the taint of both *Lochneresque* second-guessing of legislative judgments and of flaccid balancing."[38] As we have argued throughout this section, PA too gives rights-protecting courts a means to rationalize and discipline judicial review, and balancing in particular. It is also true that, at times, the Court seeks to render balancing invisible, notably by treating a right as quasi-absolute.

Third, strict scrutiny contains within it space for balancing—indeed, strict scrutiny began as a structure for balancing—and the Court has never been able to banish balancing from it.[39] As we describe in more detail below in the next section, the modern strict scrutiny formula was first consolidated in First Amendment cases, where it represented a more rigorous and rights-favoring

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[36] Here is how Fallon puts it: "In the 1960s, the Warren Court was eager first to establish and then to consolidate a doctrinal structure sharply differentiating preferred from ordinary constitutional rights. With rational basis review established as the norm in run-of-the-mill cases, this strategy required the development of an implementing test or tests to protect preferred rights. Strict scrutiny furnished an attractive model . . . . " Fallon, *supra* note 3, at 1335.

[37] *Id*. at 1268.

[38] *Id.* at 1270.

[39] *See* Siegel, *supra* note 32, at 394-97. Siegel shows that strict scrutiny was not, in its original guise, designed to aid motive analysis, through "smoking out" illicit motives. "When the Court introduced narrow tailoring and the compelling state interest standard into First Amendment analysis, it did so as part of its general 'balancing / cost-benefit justification' approach to First Amendment questions." And later: "The compelling interest requirement in First Amendment litigation, and in the fundamental rights branch of equal protection has been used as a cost-justification metric."

The fact that the strict scrutiny framework initially came together in First Amendment cases, not Equal Protection cases as often asserted, is itself telling. The strict scrutiny formula of "narrowly tailored to a compelling interest" was not originally conceived of as a device for smoking out illegitimate motive, a role it would later play in the Equal Protection context. Rather, it was a refinement of the balancing of interest approach that had long been taken in First Amendment cases.

updating of an approach to expressive rights that the Court had long employed. In fact, as Stephen Siegel points out, the rights absolutists Black and Douglas concurred in the early First Amendment decisions applying strict scrutiny, rather than joining them, so as not to endorse a balancing approach to rights.[40] Indeed, the structure is sometimes overtly deployed as a "weighted" or "all-things-considered balancing test."[41] Generally, however, the scope for balancing within the strict scrutiny framework contracted sharply by the 1970s, owing to the framework's embrace by an ascendant civil libertarian majority on the Supreme Court and its migration into Equal protection jurisprudence, where it was typically deployed to a different end: to ferret out illegitimate motives.

The fourth point follows from the third. To allow some scope for proportionality analysis in domains where tiered review now occupies the field is not, as some critics would have it, somehow unprincipled or unsanctioned by precedent. To the contrary, restoring balancing is faithful to the foundational strict scrutiny precedents and recovers an aspect of our constitutional practice that has been obscured. This point is developed further in Parts IV and V.

III. ROOTS OF PROPORTIONALITY IN U.S. RIGHTS REVIEW

This Part charts the evolution of rights review frameworks in U.S. constitutional law, focusing on two critical developments: the construction of Dormant Commerce Clause doctrine, and the consolidation of the strict scrutiny standard. Our aim is not to offer a comprehensive or definitive history, but rather, a high-speed and selective tour, focusing on those sites that hold particular interest from a comparative perspective on rights adjudication. We show that elements of proportionality analysis have deep roots in U.S. constitutional law, which must prompt a reassessment of American exceptionalism when it comes to balancing. Given the importance of

[40] *Id*. at 394-95.
[41] *Id.* at 1306.

doctrinal continuity in American law, recovering this history subtly shifts the burden of justification. It is the subsequent move of those judges, and their academic supporters, to condemn balancing that demands explanation. Recovering the foundations of proportionality in American law is also important because these lines of cases offer a precedential hook and a doctrinal roadmap to a more transparent, flexible, and consistent rights review practice (Part V).

A. The Dormant Commerce Clause

Since Chief Justice Marshall's opinion in *Willson v. Black Bird Creek Marsh* (1829), the Supreme Court has interpreted the Commerce Clause[42] as authorizing the States to "regulate commerce in its dormant state."[43] States in the Union possess a presumptive "right" to use their "police powers" to regulate market activity, in the absence of federal preemption, albeit under the supervision of the Federal Courts. Prior to the Civil War, the U.S. Supreme Court confronted few (if any) important cases in the area, and it established no lasting doctrine that is relevant here.[44] During the 1875-1902 period, the Court faced a rising tide of litigation brought by merchants and traders seeking to invalidate State regulations whose effect was to prohibit or burden inter-State commerce. It met this challenge by developing a full-fledged version of PA: the Court begins with an inquiry into the legitimacy and importance of State purposes; it then assesses the "necessity" of the regulations through the deployment of a LRM test; and it fashioned a place for balancing, in the form of an unreasonable burden standard. During this

[42] "The Congress shall have Power . . .[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes . . . ." U.S. CONST. art I, § 8.
[43] *Willson v. Black Bird Creek Marsh*, 27 U.S. 245, 252 (1829).
[44] The one case still cited, *see, e.g.*, *United Haulers v. Oneida-Herkimer Solid Waste Mgmt. Auth.* (2007), 550 U.S. 330, 338 (2007), is *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851), in which the Court considers the basis for permitting local governments to take measures that would affect commerce: "Now the power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demand a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation." 53 U.S. 299, 319.

period, the Court also derived, from the Commerce Clause, an individual right to buy and sell goods across borders.

The early Dormant Commerce Clause cases deserve our attention for a number of reasons. It is in this domain that the LRM test first appears as a stable feature of American constitutional law, along with the "undue burden" standard.[45] Second, in asserting judicial authority to review the necessity of State "police acts," the Court had to overcome the view, deeply held by many judges at both the State and Federal levels, that assessing the necessity of public policy was a legislative, not a judicial, function. Third, the Court's Dormant Commerce Clause jurisprudence was part and parcel of a broader move to give rigorous *constitutional* protection to freedom of contract and property rights. The Court would retreat from this stance post-New Deal, of course, but not in the domain governed by the Dormant Commerce Clause. Last, viewed comparatively, the Court's doctrine in the area is all but indistinguishable from PA. We will explore each of these points in turn.

The LRM test first surfaced in an 1875 Supreme Court decision, *Chy Lung v. Freeman*.[46] The case involved the extortion of Chinese immigrants by California officials who claimed that impounding shipping vessels and their cargo—in this case, women alleged to be sex workers—was necessary to secure the public order. Although the facts do not fit what would become the typical Dormant Commerce Clause case, Justice Miller's decision was ritually cited by the Supreme Court in all cases throughout the seminal period:

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[45] Guy Miller Struve claims that the "roots of the principle" go back at least to *Lawton v. Steele*, 152 U.S. 133 (1894). Guy Miller Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463, 1464 n.4 (1967). In fact, *Lawton v. Steele* absorbs the LRM from prior Dormant Commerce Clause cases.
The first glimmers of LRM testing appear even earlier. In the 1821 case *Dunn v. Anderson*, raising a challenge to an exercise of the congressional contempt power, the Court ruled that Congress may only employ "the least possible power adequate to the end proposed." 19 U.S. 204, 230-31. But it was some decades before this test was employed systematically in an important doctrinal area, as we describe in the main text.

[46] 92 U.S. 275 (1875).

> "We are not called upon by this statute to decide for or against the right of a State, in the absence of legislation by Congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right. . . . Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity. . . . The statute of California goes so far beyond what is necessary, or even appropriate, for this purpose, as to be wholly without any sound definition of the right under which it is supposed to be justified."[47]

Two years later, in *Railroad Co. v. Husen*,[48] the Court confronted a Missouri embargo on "Texas, Mexican, or Indian" cattle, which was put in place for nine months of the year.[49] The State argued that the measure was necessary on health grounds, given that these particular cattle carried diseases that could infect and devastate Missouri's herds. A unanimous Court struck down the law. In *dicta*, Justice Strong noted that the State had legitimate interests in regulating inter-State commerce under a number of public policy headings, including "domestic order, morals, health, and safety."[50] He continued:

> "We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the state. . . . It may . . . be admitted that the police powers of a state justify the adoption of precautionary measures against social evils. . . . While we unhesitatingly admit that a State may pass sanitary laws and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, &c., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State beyond what is absolutely necessary for its self-protection."[51]

In his ruling, Justice Strong noted that neither the Missouri legislature, nor the Missouri Supreme Court (upholding the law), had considered less restrictive alternatives to an outright ban. But such alternatives were available, he insisted, in the form of animal inspections or quarantine. Either option would have protected a valid State interest while reducing the burden on interstate

[47] *Id*. at 280.
[48] 95 U.S. 465 (1877).
[49] *Id*. at 468-69.
[50] *Id*. at 471.
[51] *Id*. at 470-71.

commerce. The decision has all the look and feel of plain PA: because Missouri chose the complete "destruction" of commerce, when less intrusive options were reasonably available, the law could not stand.

Still missing from the emerging framework was a conception of individual constitutional rights. The Court first began to fill this lacuna explicitly in *Minnesota v. Barber* (1890).[52] The litigation targeted a Minnesota statute that prohibited the sale of dressed meat unless it was inspected—within the State—a minimum of twenty-four hours before its sale.[53] The statute was facially neutral, applying to all such products regardless of origin, which Minnesota argued should insulate the law from censure.[54] But because of the tight time limitation, slaughterhouses in the surrounding states would find it impossible to transfer their cattle for inspection, ship it back to the slaughterhouse for processing, and then return it to Minnesota for sale, all within twenty-four hours.[55] The case thus involves indistinctly applicable measures that created differential burdens that, plaintiffs claimed, constituted discrimination. Writing for the Court, Justice Harlan accepted the State's claim that the law "was enacted in good faith for the purpose . . . of protecting the health of the people of Minnesota," but then struck it down. The State's defense of the law, Harlan complained, "ignores the *right* which the people of other States have in commerce between those States and the State of Minnesota, and it ignores the *right* of the people of Minnesota to bring into that State, for purposes of sale, sound and healthy meat,

[52] 136 U.S. 313 (1890).
[53] *Id.* at 318-19.
[54] The Court rejected the assertion: "To this we answer that a statute may upon its face apply equally to the people of all the states and yet be a regulation of interstate commerce which a state may not establish. A burden imposed by a state upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the states, including the people of the state enacting such statute." *Id.* at 326.
[55] *Id.* at 322.

wherever such meat may have come into existence"[56] [emphases added]. Moreover, the statute fails the LRM test, among other reasons, because:

> "Minnesota's ordinance does not countenance the possibility of allowing the home States of the foreign slaughterhouses to inspect the animals prior to slaughter and have that certification suffice."[57]

Here we find the germ of what international trade law today calls the "principle of mutual recognition," which the European Court of Justice articulated in its celebrated free movement of goods judgment, *Cassis de Dijon*.[58] The U.S. Supreme Court would also come to rely heavily on the principle, when doing its own necessity analysis.

By the turn of the twentieth century, the Court had expressly recognized a constitutional right to buying and selling across State borders. In *Reid v. Colorado*,[59] another case involving State regulation of trade in livestock under the heading of protecting health, Justice Harlan for the Court stated:

> "Now it is said that the defendant has a *right* under the Constitution of the United States to ship . . . from one State to another State. *This will be conceded on all hands*. But the defendant is not given by that instrument the right to introduce into a State, against its will, livestock affected by a contagious, infectious, or communicable disease, and whose presence in the State will or may be injurious to its domestic animals. The State—Congress not having assumed charge of the matter . . . —may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States." [60]

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[56] *Id.* at 329.
[57] *Id.* at 322.
[58] *Cassis de Dijon*, ECJ 120/78 [1979] ECR 649. The ECJ explicitly speaks of the *right* of individuals to engage in intra-EC trade, which it derived from the prohibition of non-tariff barriers under Article 28 EEC. There is another important parallel between these cases. In *Cassis de Dijon*, the ECJ (controversially) extended proportionality review to national market regulations that applied equally to goods, regardless of their origin. Prior to *Cassis de Dijon*, the ECJ limited proportionality review to measures that directly regulated trade. *See* MIGUEL POIARES MADURO, WE, THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION (1998); ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 109-45 (2004).
[59] 187 U.S. 137 (1902).
[60] *Id*. at 151 (emphases added).

Harlan has thus neatly expressed the constituent elements of PA. Although the standard of scrutiny is as robust as any in the Court's repertoire, the Court nonetheless upheld the necessity of Colorado's measure, as it had done in prior cases.[61]

There is an evident awkwardness to the Court's derivation of an individual, constitutional right to trade across State borders from the Commerce Clause, let alone treating such a right as impossible to impugn in a legal proceeding. Nowhere does the Federal Constitution proclaim such a right; and, in formal terms, the right's existence depended entirely upon the U.S. Congress *not* having taken action under the Commerce Clause. Yet, by the time *Reid v. Colorado* was decided, the Court had already embarked on its venture to construct and defend property rights as "preferred freedoms" (in all but name). Not surprisingly, the Dormant Commerce Clause jurisprudence of this period came to be imbued with the Court's position on freedom of contract and due process more generally.

Doctrinally, the Court prioritized economic liberty, as a constitutional value, through constructing a proto-type of PA, or strict scrutiny. At its core is a LRM test. Although the LRM test was born in Dormant Commerce Clause jurisprudence, it quickly spread to other areas in which the courts were asked to review State police power regulations restricting economic freedom. It did so, in our view, because it broadly fit a general orientation of the judiciary to recognize a sphere of private liberty—in the form of vested economic rights—that were viewed by the judicial elite as constituting an inherent, but not quite absolute, restriction on the exercise of legislative authority.[62] Legislative interferences with private liberty or property interests were permissible only when they promoted the general welfare of the whole. When legislative acts

[61] Compare *Plumley v. Massachusetts*, 155 U.S. 461 (1894) (upholding a state law regulating the sale of margarine on consumer protection grounds) with *Schollenberger v. Pennsylvania*, 171 U.S. 1 (1898) (striking down as unconstitutional a state law regulating the sale of margarine on LRM grounds).

[62] Moreover, congressional powers were limited to the exercise of those enumerated in Article I, Section 8 of the Constitution. These other limits also grounded in constitutional hooks for this: due process, and the law of the land.

could not be so justified—where they were arbitrary, or class legislation, enacted for the benefit of certain groups—they would be held to be improper exercises of legislative power and, hence, invalid. In *Lawton v. Steele*, 152 U.S. 133 (1894), the Supreme Court gave expression to this general orientation, while insisting that the judiciary must have the last word on the necessity of State legislation.[63] *Lawton v. Steele* is not a Dormant Commerce Clause case; the Court sided with the State, while strongly voicing its support of property rights more generally; and three Justice dissented on the grounds that, in their view, constitutional rights to property had been violated because necessity had not been met.

As we will stress throughout the Article, under PA and strict scrutiny, the State will confront a giving-reasons requirement, and the reasons given will be subjected to searching scrutiny. But these frameworks do not contain, in and of themselves, anything like a strong presumption that the measures under review are unconstitutional. One of the virtues of proportionality balancing is that it allows a court to claim doctrinal consistency while retaining flexibility across time and cases. Courts commit a strategic error when they destroy these virtues; that is, when they use the framework in an outcome-determinate way, in effect rigging outcomes in advance. The Supreme Court grew increasingly rigid in its jurisprudence of property rights and due process in the early twentieth century, just as it did again, years later, with respect to strict scrutiny.[64] Doing so was reckless; and the discredit and analytical difficulties that ensued support to our case for PA.

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[63] *See* 152 U.S at 136 (Miller, J.) ("To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.").

[64] *See* Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

PA and strict scrutiny are still balancing frameworks whose use will inexorably blur distinctions between legislative and judicial functions. In the Dormant Commerce Clauses cases of the pre-New Deal era, the Court routinely confronted resistance, on the part of State judges and some of its own members, to LRM testing. As Justice Fuller, dissenting in *Schollenberger v. Pennsylvania*, charged: necessity analysis cannot be separated from "questions of fact and of public policy the determination of which belongs to the legislative department, and not to the judiciary."[65] We think that the PA-style framework that emerged in the late-nineteenth century makes sense in the Dormant Commerce Clause domain, just as it does today. These cases involve important constitutional values that will routinely come into conflict with one another in our federal polity; and, being highly context-specific, they will be difficult to resolve using a more rule-based approach. Further, in so far as the Court deploys LRM testing rigorously and effectively, States will be led to reduce reliance on measures that facially discriminate against out-of-state goods and services. Instead, they will turn to measures that are indistinctly applicable to all goods, services, and traders. If State purposes are, in fact, protectionist in nature, some state will always be tempted to disguise these purposes, by claiming some important or compelling public interest. This is, in fact, what happened. In response, the Court began to deploy LRM testing as a means of "smoking out" protectionist motives, using an undue burden test to deal with the residual interests at stake. This approach is defensible given the importance of an overarching value: the building and maintenance of market federalism.

By the end of the 1950s, the Supreme Court had abandoned the task of protecting economic liberties under the Due Process clause. The basics of Dormant Commerce Clause doctrine, however, remain largely intact, although two changes deserve mention. First, the post-New Deal era sees the virtual disappearance of reference to the constitutional right of individuals

[65] *Schollenberger v. Pennsylvania*, 171 U.S. 1, 30 (1898) (Fuller, J., dissenting).

to engage in inter-State commerce—although remnants of this right remain today, as *Granholm v. Heald* confirms.[66] Instead, the Court came to rely on one of several (largely compatible) theories of the Commerce Clause to justify jurisdiction.[67] This change has had little, if any, practical effect on how parties litigate cases, or how the Court decides them. Not so with regards to the second change. In the 1950s,[68] the Court began to treat State and local regulations that facially discriminate against inter-State commerce as presumptively unconstitutional,[69] although that presumption could, in theory, be rebutted if the State or local authority could show that its interest was both sufficiently important and "unrelated to economic protectionism."[70] Some justices now explicitly used the phrase, "strict scrutiny," to describe what the Court does in such cases.[71] The more difficult litigation, of course, concerns facially neutral market regulations that

[66] 544 U.S. 460, 473 (2005) (Kennedy, J.) ("Laws of the type at issue . . . deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid.").

[67] *Compare* H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531 (1949) ("Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties or regulations exclude them."), *with* B. Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (arguing that the dominant value protected by the Dormant Commerce Clause is "national unity": the Constitution's Dormant Commerce Clause corrects one of the main defects of the Articles of Confederation—the ability of states to legislate benefits for their own citizens at the expense of the rest of the nation); *cf*. Hughes v. Oklahoma, 441 U. S. 322, 325-326 (1979) (noting that case law in this domain "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."); *and* South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938) ("Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.").

[68] See, for instance, *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), which the Supreme Court would cite widely in subsequent cases.

[69] *See, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

[70] Wyoming v. Oklahoma, 502 U.S. 437, 454-55 (1992).

[71] *See, e.g.*, *United Haulers*, 550 U.S. at 360 (Alito, J., dissenting) ("The Court has long subjected discriminatory legislation to strict scrutiny, and has never, until today, recognized an exception in favor of a state-owned entity."). *See also* C & A Carbone, Inc., v. Town of Clarkstown, 511 U.S. 383, 392 (1994) (characterizing standard as "rigorous scrutiny"); *id*. at 422 (Souter, J., dissenting) ("virtually fatal scrutiny").

incidentally burden inter-State commerce. The leading decision is *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), which puts balancing at the core of the framework:

> "Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[72]

Although Dormant Commerce Clause doctrine is one of the most durable structural features of American constitutional law, it has also been subjected to relentless attacks both from within and beyond the Court, and these assaults have mounted steadily in the past two decades. The most recent Dormant Commerce Clause case of significance, *United Haulers*, provides a good example. In his opinion for the Court, Chief Justice Robert succinctly summarized the core elements of its established doctrine.[73] He then proceeds to balancing (weighing the benefits of a County ordinance in dealing with a waste management crisis, against the costs to trucking companies of higher tipping fees), finding that "any arguable burden the ordinances impose on interstate commerce does not exceed their public benefits."[74] In his concurrence, Justice Scalia reiterated his view that the whole edifice of Dormant Commerce Clause doctrine was "an unjustified judicial intervention" with no Constitutional foundation. He further dismisses "so-called 'Pike balancing'" on the grounds that "the balancing of various values is left to Congress—which is precisely what the Commerce Clause (the *real* Commerce Clause) envisions [emphasis in original].[75] Whereas Justice Scalia would adhere, restrictively, to the judicial

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[72] 397 U.S. 137, 142 (1970).
[73] 550 U.S. at 331, 346 ("Discriminatory laws motivated by 'simple economic protectionism' are subject to a 'virtually *per se* rule of invalidity,' which only be overcome by a showing that there is no other means to advance a legitimate local purpose. . . . [But] [t]he Counties' . . . ordinances are properly analyzed under the test set forth in *Pike* v. *Bruce Church, Inc.*, which is reserved for laws 'directed to legitimate local concerns, with effects upon interstate commerce the local ordinances under at are only incidental.'").
[74] *Id*. at 346.
[75] *Id*. at 348 (Scalia, J., concurring).

enforcement of the Dormant Commerce Clause, "on *stare decisis* grounds,"[76] Justice Thomas would "discard" the Court's jurisprudence altogether, for similar reasons.[77] The attack on balancing has also been as ferocious on the part leading academic commentators in the area, notably, Donald Regan.[78]

We conclude on a comparative note. The Supreme Court's approach to the Dormant Commerce Clause, whether viewed from the vantage point of the year 1900 or the year 2000, would be immediately recognizable to any European as a familiar, remarkably straightforward, version of proportionality. The proportionality framework first emerged as a principle of European public law in the German States, notably Prussia, during precisely the same period—the late nineteenth century.[79] In the 1970s, the European Court of Justice (ECJ) developed a virtually identical framework to deal with "free movement of goods" litigation under the Treaty of Rome. These cases, brought by traders challenging Member State market regulations in the national courts, dominated the ECJ's docket throughout the 1970s and 1980s. The ECJ used PA, in this and related areas, to help jump start efforts to complete the Single Market, in the face of

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[76] *Id*.

[77] *Id*. at 349 (Thomas, J., dissenting) ("The negative Commerce Clause has no basis in the Constitution and has proved unworkable in practice. As the debate between the majority and dissent shows, application of the negative Commerce Clause turns solely on policy considerations, not on the Constitution. Because this Court has no policy role in regulating interstate commerce, I would discard the Court's negative Commerce Clause jurisprudence.") (citations omitted). Regarding balancing, Justice Thomas had this to say: "To the extent that Congress does not exercise its authority to make that choice, the Constitution does not limit the States' power to regulate commerce. In the face of congressional silence, the States are free to set the balance between protectionism and the free market. Instead of accepting this constitutional reality, the Court's negative Commerce Clause jurisprudence gives nine Justices of this Court the power to decide the appropriate balance." *Id*. at 352.

[78] Simplifying a complex position, Regan argues that the courts should rarely engage in LRM testing and never engage in balancing, under *Pike* or any other authority, but should limit themselves exclusively to inquiry into "legislative purpose." If the Court finds discriminatory purpose, then it must strike down the law. Regan further argues that the Supreme Court does not really balance at all, although it claims to do so. We find many of Regan's readings of the Court's case law strained at best, and his interpretation seems impossible to square with the two most recent Supreme Court rulings in the area, *United Haulers* and *Granholm v. Heald*. *See* Donald Regan, *Judicial Review of Member-State Regulation of Trade within a Federal or Quasi-Federal System: Protectionism and Balancing, Da Capo*, 99 MICH. L. REV. 1853 (2001); Donald Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

[79] *See* Stone Sweet & Mathews, *supra* note 6, at 101("[B]y the late nineteenth century, German administrative courts were striking down [state] police actions that violated proportionality, which was conceptualized at that time as an enforceable LRM test.").

protectionism and collective action failures on the part of the Member States.[80] In the WTO, the Appellate Body would later adopt PA to deal with the legal issues that most resemble those faced by the Supreme Court and the ECJ.[81] It may be that market integration can proceed across State borders without courts as commitment devices, and without intrusive but flexible doctrines like proportionality, but we are skeptical.[82]

While the comparative parallels are compelling, it is also obvious that the Court's Dormant Commerce Clause jurisprudence has maintained an affinity to strict scrutiny that reaches back more than a century. While the familiar strict scrutiny formula, coupling a compelling governmental interest standard to a LRM test, first appeared in First Amendment and Equal protection jurisprudence, it is striking and significant that a functional equivalent developed in the nineteenth century, within the Court's approach to the Commerce Clause and, later, to property rights more generally. Indeed, a plausible case can be made for the view that the origins of strict scrutiny are neither in equal protection law nor in First Amendment jurisprudence, as is commonly argued,[83] but are to be found within the Court's approach to the Commerce Clause and, later, to property rights more generally. One might even conclude that the Court transferred doctrine developed to protect one set of "preferred freedoms" (property rights), pre-New Deal, in order to serve a new set of preferred rights (free speech and civil rights), post-New Deal, as described in more detail below.

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[80] STONE SWEET, *supra* note 58, at 109-45.
[81] *See* Stone Sweet & Mathews, *supra* note 6, at 152-59.
[82] For a view of courts and judicial review as guarantors of credible commitments between federated states engaged in market-building projects, with reference to the United States, see Jenna Bednar and William Eskridge, Jr., *Steadying the Court's "Unsteady Path": Theory of Judicial Enforcement of Federalism*, 68 CAL. L. REV. 1447 (1995); and to Europe, STONE SWEET, *supra* note 58, at 7-9, 109-45; WALTER MATTLI, THE LOGIC OF REGIONAL INTEGRATION: EUROPE AND BEYOND (1999); and Martin Shapiro, *The European Court of Justice*, *in* THE EVOLUTION OF EU LAW 321 (Paul Craig & Grainne De Burca eds., 1999).
[83] *See, e.g.*, MELVIN UROFSKY, DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941-53 89-90 (1997) (arguing it emerged first in equal protection litigation); Siegel, *supra* note 32 (arguing that strict scrutiny emerged first in First Amendment cases). *Cf.* Fallon, *supra* note 3 (arguing that it emerged almost simultaneously in a number of areas).

B. Strict Scrutiny and Rights Protection

In the twentieth century, Dormant Commerce Clause doctrine was an island of stability in a sea of constitutional upheaval. The heightened scrutiny of police power actions that infringe economic liberties, as in *Lawton*, did not last. It was overtaken by the decisive changes in the Supreme Court's constitutional jurisprudence during the New Deal, when the Court famously relaxed its scrutiny of social and economic legislation.[84] But in a broader view, those changes of the New Deal Court were part of a still larger redistribution of judicial scrutiny that took two more decades to complete. The Court's retreat from a generalized scrutiny of legislation preceded—and precipitated—a concentration of scrutiny around a set of "preferred freedoms."[85] The favored technique for testing restrictions on those freedoms, arrived at after years of experimentation, was strict scrutiny.

The New Deal Court afforded social and economic legislation a presumption of constitutionality,[86] which the Court operationalized with a rational basis test: legislation forfeits the presumption only when it is found to lack a rational basis in the law.[87] The Court demonstrated time and again just how weak a constraint this was.[88]

But this slackening of scrutiny contributed to another development. The Court's new posture of deference heightened the concern of some that important civil liberties were underprotected. The idea that certain rights deserve increased protection had advocates on the Court for years, including Harlan, Holmes, and Brandeis. [89]The presumption of constitutionality

[84] *See, e.g.*, Nebbia v. New York, 291 U.S. 502 (1934); Shaman, *supra* note 3, at 162-63.
[85] *See* Jones v. City of Opelika, 316 U.S. 584, 608 (1942) (Stone, C.J., dissenting) ([T]he Constitution, by virtue of the First and the Fourteenth Amendments, has put those freedoms [of speech and religion] in a preferred position.").
[86] *See* Shaman, *supra* note 84, at 161-63.
[87] *Id*.
[88] *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); *see also* infra Section IV.A.
[89] *See* Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, POL. RES. QUART. 623, 640-44 (1992).

lowered the baseline of protection, and made those concerns all the more pressing.[90] *Carolene Products*' famous footnote 4 gave voice to this anxiety. The presumption of constitutionality may have a "narrower scope," Justice Stone submitted, when legislation runs up against specific constitutional prohibitions, notably, those found in the bill of rights.[91] Justice Stone also identified two other classes of statutes that deserve greater scrutiny, previewing two of the abiding preoccupations of the Court's constitutional jurisprudence over the next half-century: legislation affecting the political process, and legislation targeting minorities.[92] But it was some time before the Court adopted a stable formula for operationalizing this solicitude for "preferred" rights—namely, strict scrutiny analysis.

It is often asserted—not least, in the opinions of the Supreme Court[93]— that strict scrutiny originated in equal protection cases dating from the 1940s, *Skinner v. Oklahoma*[94] and *Korematsu v. United States*.[95] But while the phrases "strict scrutiny" and "scrutiny more exacting" appear in these decisions, the Court actually applies strict scrutiny in neither case.[96] As Stephen Siegel argues, the roots of strict scrutiny analysis are in fact to be found in First Amendment cases from the 1950s and early 1960s.[97] And in looking there, we find that strict scrutiny started life not as a blunt hammer for striking down legislation, but a flexible instrument

[90] *Id*. at 640-47.
[91] United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938).
[92] *Id*.
[93] *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124-28 (1991) (Kennedy, *J*., conc.); *see also* Greg Robinson & Toni Robinson, *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 L. & CONTEMP. PROBS. 29 (2005); Suzanne Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 496-503 (2004); Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PENN. L. REV. 1, 3 n.1 (2000).
[94] 316 U.S. 535, 541 (1942).
[95] 323 U.S. 214 (1944).
[96] We follow Stephen Siegel in taking strict scrutiny to consist of three parts: (1) a burden-shifting to the government to justify the constitutionality of its law, and the requirement that a statute must be (2) "narrowly tailored" to serve (3) "a compelling state interest." *See* Siegel, *supra* note 32.
[97] *See id* at 361-80; *see also infra*.

that combined new and old doctrinal elements to balance the benefits and costs of rights-infringing legislation.[98]

The first piece of strict scrutiny analysis in place was narrow tailoring. Refined in Dormant Commerce Clause cases as described above, narrow tailoring had been familiar in First Amendment analysis since the 1940s.[99] At first, narrow tailoring was applied alone, not in conjunction with a compelling state interest test. As a result, highly speech-restrictive measures could be upheld, so long as they were narrowly tailored to serve even a trivial state interest. And with the post-New Deal Court's permissive approach to legislation, the universe of valid state interests was almost limitless.[100]

The compelling state interest standard took longer to emerge, and evolved out of the balancing that had been a regular feature of First Amendment cases since the 1940s. Strikingly, at first it was the Court's civil libertarian wing that turned to balancing, typically with pro-speech results.[101] But by the 1950s, balancing had become the favored approach of an ascendant majority that valued speech rights less highly.[102] The Court famously used a balancing

[98] Good accounts of this development from different perspectives can be found in Richard H. Fallon, *supra* note 3, at 1285-97; Siegel, *supra* note 32; and Gillman, *supra* note 89. The most detailed contemporaneous analysis is MARTIN M. SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW (1966).

[99] The facts of *Martin v. City of Struthers* are representative of how narrow tailoring was used. At issue was a municipal ordinance that forbade the ringing of doorbells for the purpose of distributing "handbills, circulars, or other advertisements." The Court concluded that the prohibition violated the First Amendment, because the measure restricted far more communication than necessary to combat the ills targeted by the measure. 319 U.S. 141 (1943).

[100] *See* Gillman, *supra* note 89, at 649.

[101] *See* SHAPIRO, *supra* note 98, at 76-78 (describing balancing as a adjunct of the clear-and-present-danger and preferred position doctrines). *Marsh v. Alabama* offers a concise statement of how the 1940s Court deployed balancing in the service of civil liberties: "When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." 326 U.S. 501, 509 (1946). The author is, of all people, Justice Black, who would later become balancing's most persistent critic on the Court.

[102] *See* Fallon, *supra* note 3, at 1289-90; *see also, e.g.*, Barenblatt v. United States, 360 U. S. 109, 126 (1959); American Communications Assn. v. Douds, 339 U. S. 382 (1950).

methodology to find against rights claimants in some high profile First Amendment suits. [103] And balancing acquired a bad name among civil libertarians, both on and off the Court.[104]

It was not until the Court arrived at a formula that combined balancing with a special regard for rights that the doctrine attained a measure of stability. The first glimpse of this approach came in Justice Frankfurter's concurrence in *Sweezy v. New Hampshire*,[105] which introduced a compelling state interest test for the first time. *Sweezy* concerned the contempt conviction of a New Hampshire college professor who refused to answer questions from the State's Attorney General about subversive tendencies in his teaching. The Court decided the case on the narrow ground that the Attorney General was acting in excess of his remit from the legislature, but questioned in dicta whether any state interest would justify interference with Sweezy's First Amendment interests in lecturing free from state interference. Frankfurter responded to this open question in his concurrence: the state could "intrud[e] into this activity of freedom" but only "for reasons that are exigent and obviously compelling."[106] Frankfurter justified this high bar with a peroration to the importance of free academic discourse: "For society's good," he wrote, the interchange of ideas connected with the social sciences "must be left as unfettered as possible."[107]

It is clear from Frankfurter's discussion that he does not understand the compelling interest standard as imposing a rigid, one-size-fits-all requirement on state action infringing speech, but rather, as creating an adaptable test that can be calibrated to different circumstances.

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[103] United States v. Dennis, 341 U.S. 494 (1951), is perhaps the case that has done the most to give balancing a bad name. The *Dennis* Court rejected a First Amendment challenge to the conspiracy conviction of a domestic communist leader, where the conspiracy consisted of participating in an organization that advocated the overthrow of the United States government.

[104] *See, e.g.*, Barenblatt, 360 U.S. at 139-44 (Black, J., dissenting); Laurent Franz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

[105] 354 U.S. 234 (1957).

[106] *Id*. at 262 (Frankfurter, *J*., concurring).

[107] *Id.*

Whether the state's interest qualifies as "compelling" is not determined in a vacuum, but rather, depends on the weight of the free expression interests at stake. Thus, the state's reason for requiring Sweezy's testimony was not compelling, because it was insufficient relative to the costs imposed on First Amendment freedoms: "When weighed against the grave harm resulting from governmental intrusion into the intellectual life of a university, such justification for compelling a witness to discuss the contents of his lecture appears grossly inadequate."[108] In his *Sweezy* concurrence, Frankfurter did not abandon his customary, balancing, approach to First Amendment cases. Rather, in light the importance he placed on academic freedom,[109] he has upgraded to a form of balancing more solicitous of the right at stake: a balancing with bite.

While some Justices invoked Frankfurter's compelling state interest standard after *Sweezy*, frequently in cases where the balance was struck in the government's favor, it was really owing to Justice Brennan's embrace that the standard became a fixture of First Amendment jurisprudence and the centerpiece of a rigorous but not rigid approach to rights.[110] Brennan drew the link between the balancing inherent in the "compelling" standards and the high level of protection for speech favored by the Court's civil libertarians. If the "compelling interest" standard sets a very high bar, it is because the First Amendment values at stake are so important, as recognized in past precedents.

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[108] *Id*. at 261. *See also id*. at 265 ("But the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the wellbeing of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing interest of the State as may be argumentatively found in the remote, shadowy threat to the security of New Hampshire allegedly presented in the origins and contributing elements of the Progressive Party and in petitioner's relations to these.").

[109] *See* Siegel, *supra* note 32, at 367.

[110] But as Stephen Siegel notes, although strict scrutiny was applied in several First Amendment cases in the 1960s, it was only in the 1970s, after strict scrutiny had been embraced in Equal Protection jurisprudence, that it became a cornerstone of First Amendment doctrine.

This comes through clearly in Brennan's dissent from *Braunfeld v. Brown*, a free exercise case concerning Sunday closing laws.[111] Brennan addressed the question of rights review methodology head-on, stating that "[t]he first question to be resolved . . . . concerns the appropriate standard of constitutional adjudication in cases in which a statute is assertedly in conflict with the First Amendment . . . ."[112] He asserted that it is well-established that "freedoms of speech and of press, of assembly . . . are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."[113] Brennan then assessed the laws' interference with free exercise rights: "Their effect is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen.[114] He next invoked the compelling interest test to move into balancing mode, asking, "What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom?"[115] The asserted interest is paltry: "It is the mere convenience of having everyone rest on the same day."[116] And hence, in Brennan's view, the plaintiffs should prevail.

Brennan's important conceptual move in *Braunfeld* is employing a balancing test (framed as whether the interest is compelling) as a way to give meaning to the stringent standard of constitutional review from *Barnette*. And after 1962, when personnel changes on the Court cemented a majority with strong civil libertarian tendencies, Brennan was increasingly in a position to stamp this perspective onto the Court's caselaw.

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[111] 366 U.S. 599, 610 (1961) (Brennan, J., concurring and dissenting).
[112] *Id*. at 611.
[113] *Id*.
[114] *Id*. at 612.
[115] *Id*. at 613-14.
[116] *Id*. at 614.

Brennan's coalitions applied the standard aggressively, and the First Amendment plaintiff prevailed in each instance. These cases were not always precise or consistent in defining how closely the means chosen by the legislature had to fit the end in question. Finally, in the 1963 free exercise case *Sherbert v. Verner*,[117] Brennan yoked the compelling state interest standard to narrow tailoring, operationalized as a least restrictive means test. Even if a compelling state interest were found for the state to condition unemployment benefits on a willingness to work on Saturdays, "it would plainly be incumbent upon [South Carolina] to demonstrate that no alternative forms of regulation would [serve such interest] without infringing First Amendment rights."[118] The pairing of a compelling state interest test with narrow tailoring stuck. Here was the mature strict scrutiny framework, which would be come to be applied across a range of doctrinal areas in coming years.

Another example can be added to illustrate how the compelling state interest standard was sometimes used as a vehicle for balancing interests in First Amendment cases during the 1960s. *Williams v. Rhodes* concerned a freedom of association challenge to Ohio laws raising barriers for new parties to make it onto presidential election ballots in the state.[119] Ohio advanced a number of state interests served by the statutes, but the Court, in an opinion by Justice Stewart, found that none of these "justifie[d] imposing such heavy burdens on the right . . . ."[120] Some of the state's arguments were rejected because the tailoring of means to ends was not sufficiently tight.[121] The Court also conceded that some of the state's asserted interests—such as the interest

[117] 374 U.S. 398 (1963).
[118] 374 U.S. at 407.
[119] 393 U.S. 23 (1968).
[120] *Id.* at 31. The right to vote was also implicated, but the Court's analysis of these two rights was the same.
[121] For instance, the state argued that promoting a two-party system encouraged compromise and political stability. But the Court noted that the measures did not just promote a two-party system; rather, they gave two particular parties a monopoly over citizens' votes. *Id.*

in having the election winner be the choice of a majority of voters—would indeed be served by the laws. But the burdens on the right were too great to justify the benefit:

> [T]o grant the State power to keep all political parties off the ballot until they have enough members to win would stifle the growth of all new parties working to increase their strength from year to year. Considering these Ohio laws in their totality, this interest cannot justify the very severe restrictions on voting and associational rights which Ohio has imposed.[122]

In subsequent years, of course, the strict scrutiny framework migrated into Equal protection analysis and became a mainstay of constitutional rights review in that and other doctrinal areas.[123] And it was in the course of its expansion out from its First Amendment roots that strict scrutiny gained a reputation for unbending stringency—for being, in Gerald Gunther's famous phrase, "fatal in fact."[124] The balancing of interests, undertaken openly in the context of the "compelling state interest" requirement in some early cases of the 1960s, was less apparent in the 1970s.[125] More often, the Court would direct intense scrutiny towards the tailoring of the statute, striking down legislation on the basis of overinclusiveness or underinclusiveness, so as to avoid having to consider whether the interest at stake qualified as "compelling."[126]

C. Assessment

We have shown that PA has analogues and antecedents in our own constitutional history, both in Dormant Commerce Clause and strict scrutiny. Strikingly, the evolution of rights review

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[122] *Id*. at 32.
[123] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).
[124] Gerald Gunther, *The Supreme Court, 1971 Term--Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 37 (1972).
[125] *See* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 5 (2000) ("In the courts, strict scrutiny is essentially invoked, not employed. Despite its name—strict "scrutiny"—it ordinarily amounts to a finding of invalidity, not a tool of analysis.").
[126] *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), illustrates the point. There, Massachusetts advanced an interest in protecting shareholders to support its ban on corporate contributions to political campaigns. But the Court found the statute was both overinclusive and underinclusive with respect to those interests. The Court "assum[ed], *arguendo*, that protection of shareholders is a 'compelling' interest under the circumstances of this case," and struck down the statute on the basis of fit. *Id*. at 795.

in the United States parallels developments in Germany.[127] In both countries, judicial efforts to protect individual liberties passed through two distinct phases. In the late nineteenth century in Germany, as in the United States, courts devised techniques to test state encroachments on private freedoms that set standards for both the ends and means of government power. In Germany, the target of judicial scrutiny was administrative action, not legislation, and the courts were specialized administrative tribunals, the first of which was created in 1875. In the famous *Kreuzberg* decision of 1882, the Prussian higher administrative court circumscribed the reach of the police power: it only authorized measures to promote public safety—as opposed to, say, aesthetics.[128] That same decade, the court also began imposing a least restrictive means test on administrative actions that curtailed private freedoms.[129] While Germany's courts lacked the capacity for constitutional review of statutes, it is striking that the techniques they derived so closely resembled those applied by the U.S. Supreme Court in cases like *Lawton v. Steele* and the Dormant Commerce Clause cases.

There are similarities to the second phase as well. Starting in the 1950s, Germany's Constitutional Court, like the United States Supreme Court, began experimenting with techniques to give heightened protection to rights of constitutional stature. An early form of proportionality analysis appeared in a 1958 case, *Apothekenurteil* (discussed in Part IV). PA built on the least restrictive means test that had been pioneered decades earlier, but strengthened the

[127] These events are described in some detail in our previous article. *See* Stone Sweet & Mathews, *supra* note 6, at 97-111.

[128] In *Kreuzberg*, the court struck down a regulation by the Berlin police that restricted the heights of buildings in order to afford a view of a military monument.

[129] For instance, in an 1886 case, the court ruled that the police could not require, on public safety grounds, a landowner to remove a post erected at the edge of his property. Rather, all that was necessary to protect the public was requiring the landowner to light the post after dark. As the court explained, "[t]he protection from accidents . . . is indeed the task of the police; this task and the authority finds its limit, however, in that the chosen measures may not extends farther than they must to meet the goal of eliminating the danger." Preußisches Oberverwaltungsgericht [PrOVG] [Prussian Higher Administrative Court] July 3, 1886, 13 Entscheidungen des preußischen Oberverwaltungsgerichts [PrOVGE] 426, 427.

protection for rights by adding a balancing component. The balancing step ensured that even narrowly tailored measures would be permitted only if their benefit exceeded the cost in terms of the rights infringement. This balancing stage was insisted upon by the eighteenth century natural law scholars who originally conceptualized proportionality analysis, and constitutional law scholars in the 1950s thought that the step was necessary in order to complete the analysis.[130] Once formalized in subsequent cases, the PA framework quickly became a fixture of German constitutional law, spreading into a number of different rights areas in the 1960s.

These similar stations of development, in the face of the manifold legal and political differences between Germany and the United States, testify to the powerful, functional imperatives that modern courts face to manage tensions between important values. And they suggest that PA offers real advantages to courts in that position.[131] In both systems, when tasked with protecting rights against interventionist states in a manner suitable for modern liberal polities, courts came up with similar formulas that combine LRM testing and balancing. The attractiveness of proportionality-based doctrinal frameworks is understandable. They enable judges to protect rights at a high level, without proclaiming any right to be absolute, in light of all important contextual factors. Further, they accommodate judges with different views on the merits of particular disputes. PA channels disagreements on the merits into the substantive issues that matter most: whether measures are narrowly tailored, and whether the state's asserted interest is sufficiently compelling to curtail a right.

The development towards convergence in the 1960s also casts the subsequent divergence between the United States and Germany in another light. Why did strict scrutiny gain the

[130] Stone Sweet & Mathews, *supra* note 6, at 99, 108-09.
[131] Nor should the parallels obscure important differences in the scope of review. Most importantly, in nineteenth century Germany, judicial scrutiny was only applied against administrative action, not legislation, and in the twentieth, proportionality persisted as an administrative doctrine even as it gained new life in constitutional law.

reputation as a rigid test, while new tiers of analysis evolved to handle different legal questions (see Part IV), while in Germany PA came to be accepted as an all-purpose technique for adjudicating constitutional rights? Our response is three-fold.

First, when strict scrutiny spread into equal protection, the "suspect class case" quickly became the paradigmatic application for strict scrutiny. But in that context, and in particular in cases involving racial discrimination, the strict scrutiny test assumed a different purpose. The intensive scrutiny on the connection between means chosen and the state's asserted interests was a technique of "smoking out" invidious purposes, of testing the state's good faith.[132] While the narrow tailoring requirement serves this purpose well, use of the test in this way tended to obscure its suitability for a balancing analysis.[133]

Second, the dominance of a liberal majority on the Court during the period in which strict scrutiny was consolidated helped to cement the idea, on the Court and in the legal academy, that strict scrutiny constituted a test under which state measures virtually always failed. This empirical regularity appears to have shaped the Court's own conception of how strict scrutiny operates, so that the framework was defined more by an outcome than by the technique.[134] At a deeper level, the predictability of outcomes under strict scrutiny may have promoted a particular—absolutist—conception of rights. The rights-protecting majorities that applied strict scrutiny contained justices who viewed some rights, at least, as trumps that admitted no infringement.[135] Although this view was never endorsed by a majority of the Court, the results appears to have subtly reinforced the underlying conception of absolutists.

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[132] *See* Fallon, *supra* note 98, at 1308-11; *see also* Rubenfeld, *supra* note 16.
[133] We thank Jed Rubenfeld for making this point even more forcefully.
[134] As has been noted, however, strict scrutiny is by no means always "fatal in fact." *See* Winkler, *supra* note 34. Winkler's article does not cover cases before 1990; it has yet to be demonstrated how fatal strict scrutiny in fact was during the first years of its ascendancy.
[135] As noted above, *see supra* text accompanying note 40, Justices Black and Douglas, who took this view of rights, originally declined to join opinions applying strict scrutiny, but in time they did join them.

Third, the retreat from open balancing in strict scrutiny reflects a move on the Court's part to protect itself from exposure as a lawmaking body. This motivation is not without its ironies. An open balancing of the relevant interests usurps the role of the legislator far less than the kind of probing underinclusiveness/overinclusiveness analysis that the Court undertook in *Bellotti*.[136] And if the alternative to a principled balancing is the elaboration of constitutional rules as the basis for decision, a court cannot hide from lawmaking. The court that constructs a constitutional code—that derives a rule for every occasion—makes itself not only a lawmaker, but a supreme, constitutional lawmaker.

IV. PATHOLOGIES OF TIERED REVIEW

We now shift the focus from the past development of rights review frameworks to the present state of rights doctrine, focusing on tiered review. The contemporary tiered review regime is the heir to the developments discussed in Part III.B. As the strict scrutiny framework gained its reputation as "fatal in fact," the Burger Court improvised new forms of intermediate review to handle new classes of claims. Together, the set of standards that make up tiered review are the closest functional analogue we have to proportionality: a general rubric for reviewing rights claims in multiple substantive areas. But, we argue, there are serious pathologies associated with tiered review, including: (A) judicial abdication, in the form of rational basis review; (B) analytical incompleteness, in the absence of an explicit balancing stage; and (C) doctrinal instability. Compared to PA, each of these pathologies threatens rights protection in fundamental ways.

The discussion brings to light a peculiar and persistent dynamic in the evolution of our doctrinal standards. There are elements of proportionality scattered throughout American rights

[136] *See supra* note 126.

doctrines, indeed, as we will show, even rational basis review, as conducted until the mid-1950s, had affinities with classic PA.[137] Over time, though, the Court worked to shut down the interest balancing internal to these standards, with the result that the outcome of rational basis review, and strict scrutiny, became practically a foregone conclusion. Faced with this rigidity, the Court has been led to bring balancing back in, often in the form of a new, *ad hoc* standard or test.

A. Abdication

Judges who use the proportionality framework typically begin by discussing the nature, scope, and purpose of the pleaded right, first in the abstract, then with reference to the claimant and the conflict between the right and another constitutional value, such as that being pleaded by Government (Part II above). When balancing under PA, the court is typically led to consider how much of the "essence" of the right is implicated in any dispute: the greater the incursion into the essential core of a right, the weightier must be the public interest invoked by the Government to justify the incursion. Thus, a court may recognize that an individual's wish to consume child pornography falls within the rubric of free expression, while permitting Government to regulate the harms that result from the sexual exploitation of children, including criminalizing the possession of such pornography.[138] That same court might also consider political protest to be presumptively protected from state regulation. Only a small sliver of the right to free expression is implicated in child pornography, whereas the value of political speech constitutes part of the

[137] *See infra* Section IV.A.

[138] In a leading child pornography case, R. v. Sharpe, [2001] 1 S.C.R. 45 (Can.), the Canadian Supreme Court held that a provision of the Criminal Code, as applied to Mr. Sharpe, violated his freedom of expression but was justified as a proportional measure designed to protect children from exploitation. The approach thus contrasts with categorical, rule-based approaches to rights protection that seek to dispense with balancing once the nature and scope of the right has been defined. In this latter approach, a court might decide that Mr. Sharpe's rights were not abridged, since child pornography is not a protected form of expression, per se. *Cf.* United States v. Ferber, 458 U.S. 747 (1982).

essential core of that freedom. The multi-stage proportionality framework facilitates the task of developing such distinctions in a principled, relatively transparent manner.

In contrast, as it is presently deployed, rational basis review leads American judge to abdicate their duty to protect rights—including with respect to rights, like property that are expressly provided for by the Constitution. The underlying doctrinal justification for abdication is unclear: either the claimed "right" is, in fact, not a right; or the "right" is not important enough to deserve the judicial protection that "fundamental" rights are afforded; or, through balancing, the Court has been determined that the right can never outweigh any reasonable public purpose being legitimately pursued by Government. Further, the Supreme Court often portrays and uses rational basis as a kind of deference doctrine: it covers policy domains in which legislators, not courts, are to do the balancing. As regards property rights, the Court traded one rigid position (aggressive protection of property in the *Lochner* era) for another (abdication in the post-*Lochner* era). We think it is a bad strategic move for the Court, or any rights-protecting court, to treat a rights provision as either *de facto* absolute or *de facto* without force. It is also indefensible, as a formal matter, to excise a right from a Constitution. Yet that is what the Court has done, in this and many other cases, to its discredit.[139]

A telling example is the well-known Supreme Court decision in *Williamson v. Lee Optical* (1955),[140] which put the last nail in the coffin of the *Lochner* era. The case involved an Oklahoma statute that would have made it impossible for opticians (who grind and duplicate lenses, and fit them to frames and to faces) to sell their services and products without the prior authorization of either an ophthalmologist (a medical doctor specializing in eye care) or an

[139] We are not the first to take this view. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (1998).
[140] 348 U.S. 483 (1955).

optometrist (a licensed professional who diagnoses but does not treat eye disease, and who writes prescriptions for lenses). Among other things, the law would prohibit opticians from replacing old with new frames, or from duplicating existing lenses to insert into old frames, without the customer first obtaining a prescription from an ophthalmologist or optometrist. Ophthalmologist and optometrists would also possess the authority to designate which optician a customer could use. Days before the law was to enter into force, opticians asked a three-judge Federal District Court to strike it down on the grounds that the reform would violate property rights guaranteed by the Constitution; they also claimed that the statute comprised an illegal delegation, to private parties, of the authority to determine who would do business as a dispensing optician in the state. For its part, Oklahoma claimed that the statute was designed to promote better eye care, not least, by increasing the frequency of eye exams.

After extensive testimony, the District Court[141] found that the effect of the law would be to put many opticians out of business[142]—a total deprivation of rights—while providing no added benefit to public health.[143] Under PA, such findings can only lead to one result: the invalidation of the law as a disproportionate exercise of legislative power. Judge Wallace, writing for the court, recognized that the dispute was to be resolved under a rationality standard. But he did not consider rational basis to be a strict deference standard that would insulate the statute from judicial review of the rights claim. Instead, Wallace understood rational basis to

[141] *Lee Optical v. Williamson*, 120 F. Supp. 128 (1954).
[142] "The inevitable result of the enforcement of the provisions found by this Court unconstitutional . . . will be to literally put said plaintiffs out of business . . . ." *Id.* at 143.
[143] "The evidence indicates, almost without variance, that written prescriptions issued by the professional examiner contain no directive data in regard to the manner in which the spectacles are to be fitted to the face of the wearer. In addition, the Court is satisfied that the mere fitting of frames to the face, where the old lenses are available, is in reality only an incident to what fundamentally is a merchandising transaction, that is, the sale of a pair of frames; and, in any event, the knowledge necessary to perform these services is strictly artisan in character and can skillfully and accurately be performed without the professional knowledge and training essential to qualify as a licensed optometrist or ophthalmologist." *Id*. at 135.

require verification that the state had not abridged the rights of the opticians in an arbitrary[144] or unreasonable[145] manner:

> It is recognized . . . that all legislative enactments are accompanied by a presumption of constitutionality; and, that the court must not by decision invalidate an enactment merely because in the court's opinion the legislature acted unwisely. Likewise, where the statute touches upon the public health and welfare, the statute cannot be deemed unconstitutional class legislation, even though a specific class of persons or businesses is singled out, where the legislation in its impact is free of caprice and discrimination and is rationally related to the public good. A court only can annul legislative action where it appears certain that the attempted exercise of police power is arbitrary, unreasonable or discriminatory.[146]

In this passage, Wallace took pains to distinguish his approach from the kind of robotic formalism that had so discredited "reasonableness" review during the so-called *Lochner* era. He moved further in this direction by building elements of PA into the analysis. Citing what he took to be stable precedent, the state's exercise of police powers would be justified only if it could be shown:

> First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[147]

He then disposed of the case in ways that anyone versed in PA would find familiar[148]:

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[144] "The dispensing optician, a merchant in this particular, cannot arbitrarily be divested of a substantial portion of his business upon the pretext that such a deprivation is rationally related to the public health." *Id.* at 142.

[145] "The action by the legislature in the instant is as unreasonable as if pharmacists were divested of their right to do business by legislative action which delegated to physicians the absolute control and responsibility for accurate compounding of medical prescriptions for the reason that a physician alone is qualified to prescribe drugs for patients." *Id*. at 137.

[146] *Id*. at 132.

[147] *Id*. at 137.

[148] Judge Murrah's concurrence on this part of the ruling also has the feel of a standard proportionality decision . "The obvious result of this legislation is to appropriate a property right of one class to follow a legitimate calling or occupation and to give it to another class not shown to be more competent in the public interest. Indeed, the evidence shows that it would be inimical to the public interest to require the wearer of eye glasses to return to the ophthalmologist in order to obtain a prescription for the replacement or duplication of an eye glass, or to place the burden upon the ophthalmologist of merchandising frames and mountings and other appliances, or placing that purely commercial monopoly in the optometrist. There is no rational basis for depriving the optician of the right to

> The means chosen by the legislature [do] not bear 'a real and substantial relation' to the end sought, that is, better vision, inasmuch as . . . [opthamologists and optometrists] possess no knowledge or skill superior to a qualified practicing optician . . . [I]n fact [opthamologists and optometrists] . . . as a class, are not as well qualified as opticians as a class to either supervise or perform the services here regulated.[149]

The District Court held that three provisions of the Oklahoma statute violated the Due Process Clause of the Fourteenth Amendment of the Constitution, and that one provision violated the Equal Protection Clause of that same Amendment.

It is crucial to stress that the District Court did not find elements of PA alien or inimical to rational basis review. As we found with respect to earlier versions strict scrutiny (Part III), American judges considered necessity analysis and balancing to be inherent parts of the judicial repertoire when they adjudicated rights.

The Supreme Court overturned the District Court's (much more nuanced) decision without so much as a single word concerning the rights being pleaded; and it did so without serious consideration of facts or policy. Instead, Justice Douglas, writing for a unanimous Court, simply abdicated:

> The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement. . . . It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought. We emphasize again what Chief Justice Waite said in *Munn v. State of Illinois*, "For protection against abuses by legislatures, the people must resort to the polls, not to the courts."[150]

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perform this purely mechanical and commercial service to the public." Circuit Court Judge Murrah, concurring in part and dissenting in part (on provisions affecting advertising, which we do not discuss here). *Id.* at144.

[149] *Id.* at 138.

[150] 348 U.S. at 488 (internal citations omitted).

Abdication also entailed an extraordinary act of constitutional lawmaking: the Supreme Court rewrites the U.S. Constitution so as to deprive individuals of the judicial protection of rights expressly guaranteed by that same Constitution.[151] Arguably, the decision is one of the most poorly reasoned ever handed down by the Court in an important case. Indeed, it contains virtually no rights reasoning whatsoever.[152]

The American Court's ruling in *Williamson v. Lee Optical*, and its enduring effects, deserves to be considered with regard to what the German Federal Constitutional Court (GFCC) was doing at the same time. In *Apothekenurteil* (1958)[153] one of its earliest balancing cases, a druggist challenged a Bavarian law regulating drug stores on the grounds that it violated Article 12(1) of the Basic Law,[154] which provides for occupational freedom. The law authorized the licensing of new pharmacies only when "in the public interest," and only when new stores would not destabilize the market by threatening the viability of existing pharmacies.[155] In framing its analysis, the GFCC squarely confronted the tension between individual rights and public goals, which led it to embrace balancing:

> The constitutional right should protect the freedom of the individual; the professional regulation should ensure sufficient protection of societal interests.

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[151] Justice Field's dissent from *Munn v. Illinois*, which Douglas cites as authority, applies equally well to *Lee Optical*: "The construction actually given by . . . this court makes the provision, in the language of Taney, a protection to 'a mere barren and abstract right, without any practical operation upon the business of life,' and renders it 'illusive and nugatory, mere words of form, affording no protection and producing no practical result.'" 94 U.S. 113, 145 (1876) (Field, J., dissenting).

[152] With respect to the Equal Protection claim, Douglas had only this to say: "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here." 348 U.S. at 489.

[153] BVerfG June 11, 1958, BVerfGE 7, 377.

[154] Article 12(1): "All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law." Basic Law for the German Federal Republic [Grundgesetz].

[155] Gesetz über das Apothekenwesen [Drug Store Statute], June 16, 1952, as amended by statute of December 10, 1955, art. 3, § 1, GVBl. Bayern 267.

> The individual's claim to freedom has a stronger effect . . . the more his right to free choice of a profession is put into question; the protection of the public becomes more urgent, the greater the disadvantages are, that come from the free practicing of professions. When one seeks to maximize both . . . equally legitimate . . . demands in the most effective way, then the solution can only lie in a careful balancing [*Abwägung*] of the meaning of the two opposed and perhaps conflicting interests.[156]

In a rich and complex decision, the court then elaborated an early version of PA, tailored to the specifics of Article 12(1),[157] and annulled the law on necessity grounds. In a case decided the next year,[158] the German Court dismissed claims under Article 12(1), upholding a law that prohibited businesses other than licensed pharmacies from selling pre-packaged, non-prescription drugs at retail. It held that public health would be better served if all drugs were sold by trained professionals, and that pharmacies would be economically imperiled if they could no longer rely on this stream of income.

The German Court did not use these cases to lay a procrustean bed that would then force every set of facts to the same result. On the contrary, it developed a flexible balancing framework capable of adaptation to changing circumstances. While balancing may lead to inconsistent outcomes (a functional economic argument is rejected in the first case, but accepted in the second, if on different facts[159]), the GFCC did not abdicate its constitutional duties. Unlike the U.S. Supreme Court, the GFCC (a new jurisdiction whose political legitimacy remained to be tested) did not tell rights claimants: "go to the polls, not the courts." Rather, it fully accepted the responsibility that attends the power of judicial review. Taking a wider perspective, the German Court's commitment to proportionality balancing has helped it avoid the kinds of problems that

[156] BVerfGE 7, 377 (404-05).
[157] The case was decided before the GFCC had fully developed the proportionality principle. Today there is one proportionality test for all fundamental rights. Stone Sweet & Mathews, *supra* note 6, at 110-11.
[158] BVerfG Jan. 7, 1959, BVerfGE 9, 73.
[159] See Paul Kauper, *The Constitutions of West Germany and the United States: A Comparative Study*, 58 MICH. L. REV. 1091, 1130 (1960).

the U.S. Supreme Court created for itself. In the pre-New Deal era, the American Court committed itself to defending freedom of contract and *laissez-faire* capitalism against market regulation, as if that defense was one of its central institutional missions; it then abandoned property rights altogether. The German Court has consistently held that the Basic Law is "neutral" with respect to the kind of economic system or regulation to be fashioned by the legislator.[160] Yet that position has never entailed abdication.[161] On the contrary, one of the major responsibilities of the GFCC has been to define the reciprocal limits of market regulation and property rights,[162] as German society and the economy have evolved. While doing so, it has sometimes angered the Christian Democratic Right, sometimes the Social Democratic Left, but it has never, over more than five decades, lost its centrality to economic governance. The German Court would have failed, as the American Supreme Court did, if it had embraced rigidity and absolutism.

B. Incompleteness

[160] The leading decision is the *Investment Aid I* case, BVerfG July 20, 1954, BVerfGE 4, 7. A translation and commentary can be found in KOMMERS, *supra* note 14, at 243-45.

[161] The GFCC seeks to reduce, as far as is possible, the tension between the property right being pleaded and the public good resulting from a limitation of property rights; that is, the GFCC balances among contending constitutional values in light of the context of the case. In cases like *Williamson v. Lee Optical*, the U.S. Supreme Court has little use for either the Constitution or context. For a superb comparison of German and American approaches to property rights as constitutional rights, see Gregory Alexander, *Property as a Fundamental Constitutional Right? The German Example*, 88 CORNELL L. REV. 101 (2003).

[162] The Basic Law provides for the right to property in Article 14, which qualifies the right to property in a manner that strongly implies the use of PA.

Article 14:

(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

(2) Property entails obligations. Its use shall also serve the public good.

(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts.

GRUNDGESETZ [GG] [Constitution] art. 14 (F.R.G.).

From the perspective of a judge who systematically uses PA to manage rights litigation, the Supreme Court's use of variegated approaches can, at times, seem casual or worse. The American judge is much more comfortable leaving out analytical steps that the PA judge would view as essential. The PA judge always begins with a general discussion of the right being pleaded, as a matter of constitutional structure, or theory, and in light of past rulings. Once a right as been so constructed, the judge then turns to PA. If the Government measure under review survives necessity analysis, then the balancing in the strict sense stage will allow the judge to ensure that the law does not infringe too much on the right, given the polity's constitutional commitments. The judge thus begins with a relatively abstract construction of the right, and ends with analysis of the right in a specific conflict with an opposing value. The American judge may leave out one or both of these steps, even in strict scrutiny, as when the judge does compelling interest inquiry without giving serious consideration to the right, or without balancing.

A well-known example of egregious incompleteness is *U.S. v. O'Brien*.[163] Mr. O'Brien had burned his draft card, in violation of federal statutes, while protesting the Vietnam War and military conscription. Although the case raises important questions about the Government's use of a statutory amendment to stifle protest,[164] our focus here is on the Supreme Court's treatment of the right to "wordless" or "symbolic" speech. The Court mentions but takes no firm position on the question of whether O'Brien's act is to be considered "speech" under the First

[163] *U.S. v. O'Brien*, 391 U.S. 367 (1968).
[164] Congress adopted the amendment to deter those who would burn their draft cards in protest of the war. The Circuit Court, noting that O'Brien's action was already punishable under a separate regulation, declared the amendment unconstitutional, on the grounds that it was expressly designed to limit speech.

Amendment—the inquiry is simply left incomplete.[165] Instead, the Court is led to formulate the following test:

> This Court has held that, when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is justified if it is within the constitutional power of the government; if it furthers an important or substantial government interest; if the government's interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[166]

The Court does not distinguish a "compelling interest" from a "substantial interest"; on the contrary, it is implied that the "descriptive terms" listed are broadly synonymous. On the basis of this test, the Court upheld O'Brien's conviction, since the draft card fulfilled a variety of administrative functions, such as communicating the rights and duties of the bearer.

The judgment concludes in deafening silence on the question of whether the Government's interest does or does not outweigh O'Brien's "alleged" speech right—which one might have learned if the framework contained a balancing in the strict sense phase. The Court might also have balanced the contending values in its discussion of the nature of the Government's "important or significant" interest; instead it marches through the test while saying nothing of any importance about speech. If such a case was resolved under a standard version of PA, the Court would have been required to consider the nature and scope of the right

[165] *See* 391 U.S. at 376 ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea. However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity.").
[166] *Id*. (internal citations omitted).

at play, upfront, and then ensured that the right did not get lost in the analysis of the Government's position at the end.

O'Brien may illustrate something else about American rights review. As we mentioned, *O'Brien* does not hold fast to the literal strict scrutiny formula of "compelling" state interest: a "substantial" or "important" government interest will do. There are different ways to interpret the Court's move here. Some might view *O'Brien* as a strict scrutiny case in all but name; others might reject this conclusion, especially in light of the result: the government wins. But if *O'Brien* is not a strict scrutiny case, what is it?

O'Brien may well be a forerunner of the intermediate scrutiny tests that would proliferate starting in the 1970s.[167] Like *O'Brien*, the canonical intermediate scrutiny test also requires an "important" state interest (although it does not impose a narrow tailoring test).[168] To the extent that we regard the *O'Brien* standard as an early intermediate scrutiny test, the case follows another pattern. As with the strict scrutiny framework, we see the Court undertaking a doctrinal innovation with respect to the vanguard of civil liberties—First Amendment rights—which in short order spreads to other constitutional rights. We discuss the creation of intermediate forms of scrutiny immediately below.

C. Instability

The third pathology is related to the first two. In the classic "bifurcated review" regime, judges are asked to sort the stream of cases into two bins that represent extremes of stringency

[167] Kathleen Sullivan, for one, views the *O'Brien* test as a version of intermediate scrutiny. Sullivan, *supra* note 8, at 297.
[168] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996). Instead of narrow tailoring, the test requires a "substantial" relation to the government's objectives, again echoing *O'Brien*'s language.

and deference.[169] The inadequacy of these options generates a persistent instability in the doctrinal structure. Time and again, the Court has invented new, intermediate standards of review to govern its inquiry in different areas of law.[170] These new standards all represent efforts to make a space for balancing in the context of rights review. As such, they are also symptomatic of the dysfunctionality of classic two-tiered review.

But the ad hoc introduction of new standards of review does not "solve the problem" of two-tiered review: it creates new problems. For all its faults, the two-tiered framework of review was at least rooted in a coherent distinction between economic liberties and "preferred" fundamental rights.[171] Adding in new tiers registers as a deviation from this baseline, and may come across as an unprincipled or illegitimate move. The dissenting opinions in the cases that first adopt intermediate scrutiny reliably paint them in this light.[172]

More generally, defections from bifurcated review undermine the stability of rights adjudication. Because we have no meta-theory of rights that maps certain classes of claims into standards of review, confusion and contention over the proper standard are common, particularly when new rights claims arise. The unpredictability and instability of tiered review are partly to blame for the fact that so much of the analytic firepower in our constitutional caselaw is aimed at the standard of review, rather than the substance of the claim.[173]

We illustrate these points by taking a close look at cases where courts elaborate new standards of review in an attempt to introduce some balancing into the analysis. We discuss two developments well-known to students of constitutional law: the Supreme Court's changing

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[169] *See* G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299 (1996) (describing the Court's "bifurcated review project").
[170] Worse still, on occasion the Court has claimed to be applying one of the two canonical standards, but transparently not done so. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr,. Inc., 473 U.S. 432, 478 (1985).
[171] *See* Gillman, *supra* note 89, at 625-26; White, *supra* note 169, at 309.
[172] *See, e.g.*, Craig v. Boren, etc.
[173] *See* White, *supra* note 33, at 82-83.

approach to sex discrimination under the Equal Protection Clause, and *Planned Parenthood v. Casey*'s revisions to the *Roe v. Wade* framework for abortion rights. We also consider a less well-known federal appeals court case, involving a constitutional challenge to a local juvenile curfew. This case shows a court trying to fit a new classification into the existing tiers, and the difficulties and conflicts that ensue.[174] We pair familiar and unfamiliar cases deliberately, to underscore how pervasive tiered review is in our legal system.[175]

1. Sex Equality and Equal Protection

The equal protection jurisprudence of sex classifications has famously followed a meandering course. The Supreme Court originally subjected sex classifications to rational basis review, then increased the scrutiny without formally changing the standard, and even flirted with full suspect classification status before devising a new standard of intermediate scrutiny. And then, in time, the intermediate scrutiny standard drifted upward, to become more stringent. From a comparative perspective, one cause of this well-known evolution seems clear. The inherited two-tier framework offered the Court no opportunity to measure the harms of gender distinctions against their benefits, and the Court has struggled ever since to find a workable formula for doing so.

In the mid-twentieth century, the Supreme Court had subjected sex classifications to rational basis review, and upheld them.[176] As traditional attitudes about gender roles began to fade, it became apparent that rational basis review provided women with no meaningful

[174] Another line of prominent cases where the Court shifts the standard of review, with dramatic results, includes *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990) (applying intermediate scrutiny to affirmative action policies in broadcasting), and *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (applying strict scrutiny to affirmative action policy in federal contracting program).
[175] Tiered review is also a pervasive feature of state constitutional doctrine, which space prevents us from discussing in this Article. Notably, states have also been at the forefront of experimenting with rights review, and some have opted out of tiered review of their constitutional claims. *See* Goldberg, *supra* note 9, at 295 n.54.
[176] *See, e.g.*, *Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948).

guarantee to the equal protection of the laws.[177] In *Reed v. Reed*, Chief Justice Burger, writing for a unanimous Court, struck down an Idaho law giving a preference to men in estate administration, ostensibly on a rational basis standard.[178] But the opinion lacked the characteristic deference to legislative judgments that is associated with rational basis review. The state's justification for the preference was to avoid controversy when more than one person applied to administer the will. The Court dismissed the rationale summarily, criticizing the policy as "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[179] The Court added, without further explanation, that "whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex."[180] Even as *Reed* pledged allegiance to rational basis review, it marked a sharp, *sub silentio* departure from it.

The *Reed* approach did not long endure, however. Two years later, in *Frontiero v. Richardson*, [181] a plurality of the Court pushed to shift gender from rational basis review into strict scrutiny by claiming gender as a suspect classification. The dispute in *Frontiero* concerned a federal policy that made it easier for male military personnel to claim their spouses as dependents, for benefit purposes, than for female military personnel to claim their spouses as dependents. The appropriate standard of review for gender-based restrictions became the focal point of the case, and fractured the Court.

Justice Brennan authored the plurality opinion, which first noted that *Reed* "depart[ed] from 'traditional' rational basis analysis": the asserted basis for the law was "apparently

[177] In *Goesaert*, for instance, the Court held that Michigan had a rational basis for banning women, except the wives or daughters of male bar owners, from tending bar.
[178] *Reed v. Reed*, 404 U.S. 71 (1971).
[179] *Id*. at 76.
[180] *Id*. at 76-77.
[181] 411 U.S. 677 (1973).

rational," and yet the Court struck down the statute.[182] Moreover, Brennan argued, the departure from rational basis was "clearly justified." Brennan highlighted the ways in which sex resembled the other classifications that were considered suspect: discrimination against women was pervasive, and sex is an immutable characteristic that usually has no bearing on "ability to perform or contribute to society."[183] Accordingly, Brennan concluded, "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."[184] Applying this standard, Brennan quickly found fault with the statute, arguing that the government's cost-saving rationale behind the policy was unsupported by evidence.

The proposition that sex classifications should be subjected to strict scrutiny found only four votes: Brennan was joined by Justices Douglas, White, and Marshall. Justice Powell wrote an opinion, joined by Justice Blackmun and Chief Justice Burger, that reached the same result on the authority of *Reed* without elevating sex classifications to suspect status. The concurrence declined to decide whether sex was a suspect class, because the statute failed even under the lesser measure of *Reed*-style rational basis review.[185]

The status of sex classifications in equal protection analysis reached an equilibrium of sorts in 1976, with *Craig v. Boren*.[186] *Reed* and *Frontiero* had demonstrated that there was no majority of the Court satisfied with analyzing sex classifications under rational review, and no majority willing to apply strict scrutiny. In *Craig*, the Court found a way out of the impasse by creating a new option: an intermediate standard of review for classifications relating to sex.

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[182] *Id*. at 684.
[183] *Id*. at 686.
[184] *Id*. at 688.
[185] The Powell concurrence also argued that for the Court to decide the issue would effectively preempt democratic deliberations on precisely this issue, as the Equal Rights Amendment was then under consideration, and would have the effect of making sex a suspect classification. *Id.* at 692 (Powell, J., concurring). Justice Stewart concurred separately, and Justice Rehnquist dissented, adopting the opinion of the district court.
[186] 429 U.S. 190 (1976).

The case concerned an Oklahoma statute prohibiting the sale of low-alcohol beer to women younger than age 18, and to men younger than age 21. Writing for a bare majority, Justice Brennan articulated a new standard of review for gender distinctions as a distillation of recent practice. Citing to *Reed*, *Frontiero*, and other cases, he wrote: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[187] The government objective asserted here was public safety, and the state had sought to demonstrate the statute's fit with statistical evidence showing, most pertinently, that men ages 18-20 were much more likely to be arrested for drunk driving than women of the same age. The Court concluded that this evidence was insufficient to establish the requisite substantial relation: only 2% of the men in this cohort were found to drive drunk, and penalizing them all was unjustified.[188]

Brennan's intermediate standard in *Craig* won the support of a majority on the Court—and was applied in subsequent cases—but fewer that half of the Justices on the *Craig* Court endorsed the standard without reservation. Justices Powell and Stevens both joined the opinion, but wrote separately to express misgivings over the introduction of a new, intermediate standard for sex-based classifications. Justice Powell was candid about the problems with two-tiered analysis and about *Reed*'s divergence from traditional rational basis review, but he would prefer proceeding under *Reed*'s nominal rational basis review to "a further subdividing of equal protection analysis."[189] Justice Stevens, for his part, challenged the value of the tiered analysis altogether. He began:

[187] *Id*. at 197.
[188] *Id*. at 202.
[189] *Id.* at 210 (Powell, J. concurring).

> There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. Whatever criticism may be leveled at a judicial opinion implying that there are at least three such standards applies with the same force to a double standard.[190]

In his own analysis of the statute, Justice Stevens emphasized the poorness of fit between the statute and the alleged purpose in his decision to strike it down.[191]

Chief Justice Burger and Justice Rehnquist dissented. Rehnquist in particular visited scorn on the creation of a new standard, emphasizing the arbitrariness and novelty of Brennan's formulation:

> The Court's conclusion that a law which treats males less favorably than females "must serve important governmental objectives and must be substantially related to achievement of those objectives" apparently comes out of thin air. The Equal Protection Clause contains no such language, and none of our previous cases adopt that standard. I would think we have had enough difficulty with the two standards of review which our cases have recognized the norm of "rational basis," and the "compelling state interest" required where a "suspect classification" is involved so as to counsel weightily against the insertion of still another "standard" between those two.[192]

Rehnquist also faulted the content of this standard—in particular, the qualifiers "important" and "substantial"—as not lending themselves to perspicuous judicial application. The dissent went on to fault the majority for rejecting the statistical evidence proferred by the state, evidence showing higher drinking while driving among young men than women, in support of the policy.[193]

In the years after *Craig v. Boren*, the application of an intermediate scrutiny standard to sex classifications was accepted and followed in a number of cases.[194] But even as the standard seemed settled, the formula for review proved less than completely stable. Starting with the 1979

[190] *Id*. at 211-12 (Stevens, J., concurring).
[191] *Id*. at 213-14 (Stevens, J., concurring).
[192] *Id*. at 220-21 (Rehnquist, J., dissenting).
[193] *Id*. at 225-26 (Rehnquist, J., dissenting).
[194] Califano v. Westcott, 443 U.S. 76 (1979); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Webster, 430 U.S. 313 (1977).

case *Personnel Adm'r of Massachusetts v. Feeney*,[195] a number of decisions emphasized the stringency of the *Craig v. Borden* test by noting that it requires "an exceedingly persuasive justification" from the government.[196] In striking down Virginia Military Institute's exclusion of women in 1996, Justice Ginsburg for the Court took "an exceedingly persuasive justification" not merely as a characterization of the standard, but as the standard itself.[197] The Court found fault with Virginia's proferred justification—that the exclusion of women was necessary to achieving VMI's mission—because there were some women who would want to attend VMI and could meet its standards. The ratcheting up of intermediate scrutiny in the majority opinion did not escape the notice or criticism of Chief Justice Rehnquist, concurring, or Justice Scalia in dissent. [198] Rehnquist faulted the new language as having less "content and specificity" than the older formula—which he had previously criticized for its own opacity.[199] For his part, Justice Scalia excoriated the majority at length for its application of intermediate scrutiny in a manner that, in his view, amounts to strict scrutiny.[200]

As Kathleen Sullivan has written, "'[i]ntermediate scrutiny,' unlike the poles of the two-tier system, is an overtly balancing mode."[201] The Supreme Court's development of an intermediate scrutiny standard reflects how ill-equipped the bifurcated review regime is for

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[195] 442 U.S. 256 (1979).
[196] Miss. Univ. for Women v. Hogan, 458 U. S. 718 (1982); Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981).
[197]518 U.S. 515, 524, 529, 530, 531, 533, 534, 545, 546, 556. The groundwork for this move was laid by *Hogan* and J. E. B. v. Alabama ex rel. T. B., 511 U.S. 127 (1994). In these cases, the Court also characterized the defendant's burden as providing "an exceedingly persuasive justification" for the discrimination. But, in the Court's analysis, the way to meet this burden was, in essence, to show a substantial relation to an important governmental interest: the test derived from *Craig*.
[198] 518 U.S. at 559 (Rehnquist, C.J., concurring in the judgment).
[199] Craig, 429 U.S. at 225-26 (Rehnquist, J., dissenting).
[200] 518 U.S. at 570-76 (Scalia, J, dissenting) ("Only the amorphous 'exceedingly persuasive justification' phrase, and not the standard elaboration of intermediate scrutiny, can be made to yield this conclusion that VMI's single-sex composition is unconstitutional because there exist several women (or, one would have to conclude under the Court's reasoning, a single woman) willing and able to undertake VMI's program. Intermediate scrutiny has never required a least-restrictive-means analysis, but only a 'substantial relation' between the classification and the state interests that it serves.").
[201] Sullivan, *supra* note 8, at 297.

evaluating the range of gender-based distinctions in public law. But creating this new standard hardly fixed the problems of tiered review. First, the new standard is ad hoc and improvised, and as such, lacks roots in constitutional theory.[202] And second, introducing another tier of analysis may resolve a case, but it does not necessarily offer a workable solution to future cases with different questions and contexts. The post-*Craig* drift in the intermediate scrutiny standard show that the formula has been unstable and, if anything, grown more contentious over time.

2. Undue Burdens and Abortion Rights

The "undue burden" standard in abortion cases is another doctrinal device introduced to allow some scope for balancing in a field of law previously governed by a rigid tiered review standard. Under *Roe v. Wade*, the Court held that restrictions on abortion before the point of viability would be subject to strict scrutiny.[203] Given the Court's rightward shift over the following two decades, *Casey v. Planned Parenthood*, which came before the Court in 1992, was widely expected to overturn *Roe*.[204] The Court's use of strict scrutiny in abortion cases was under attack on the Court, with a plurality of justices urging by 1989 that restrictions on abortions should be subject only to rational basis review.[205] In fact, *Casey*'s lead plurality opinion, authored jointly by Justices O'Connor, Kennedy and Souter, preserved the right to terminate pregnancies before the point of viability, but offered an "undue burden" standard to replace strict scrutiny as the framework for evaluating restrictions on that right. The plurality explained that a state places an undue burden on the right when "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable

[202] As Justice Rehnquist pointedly noted in dissent, the *Craig* test—that measures must be substantially related to the achievement of important government objectives—seems to "come[] out of thin air." *See* 429 U.S. at 220.
[203] 410 U.S. 113, 155 (1973).
[204] 508 U.S. 833 (1992).
[205] Webster v. Reproductive Health Services, 492 U.S. 490, 517-19 (1989) (plurality opinion).

fetus."[206] The plurality opinion was upfront that justices might agree on the standard, and yet disagree on its application in a concrete case:

> Even when jurists reason from shared premises, some disagreement is inevitable. That is to be expected in the application of any legal standard which must accommodate life's complexity. We do not expect it to be otherwise with respect to the undue burden standard.[207]

Although the *Casey* dissenters alleged that the "undue burden" standard was an unprecedented and unprincipled invention,[208] undue burden analysis had previous been undertaken when judges are asked to balance competing interests, including, but not only, in the abortion context.[209] Notably, the undue burden language mirrors almost exactly the "unreasonable burden" standard applied in early Dormant Commerce Clause cases.[210] In our view, the dispersion of undue burden standards in U.S. constitutional law is not accidental. The undue burden standard, like the move to intermediate scrutiny, is a means to allow courts consider the interests on both sides of a constitutional controversy. The introduction of such devices in domains previously governed by the bifurcated review regime is symptomatic of the mismatch between the rigidity of the received doctrinal structures and the demands placed on constitutional judges in complex disputes raising multiple important values.

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[206] 508 U.S. at 877.
[207] 508 U.S. at 878 (internal citation omitted).
[208] *See id*. at (Rehnquist, *C.J.*, dissenting) (describing the undue burden standard as "created largely out of whole cloth by the authors of the joint opinion").
[209] Abortion rights opinions to discuss some form of undue burden analysis include City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 463 (1983) (O'Connor, *J*., dissenting); Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); Bellotti v. Baird;, 443 U. S. 622 (1979); Bellotti v. Baird, 428 U. S. 132 (1976). For more on the use of undue burden standards in and out of the abortion rights context, *see* Alan Brownstein, *How Rights are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867 (1994); Valerie J. Pacer, Note, *Salvaging the Undue Burden Standard—Is it a Lost Cause? The Undue Burden Standard and Fundamental Rights Analysis*, 73 WASH. U. L. Q. 295 (1995). One author notes that 256 Supreme Court decisions issued between 1945 and 1993 contain the phrase "undue burden" or the equivalent. Curtis E. Harris, *An Undue Burden: Balancing in an Age of Relativism*, 18 OKLA. CITY U.L. REV. 363, 423 (1993).
[210] *See supra* Part III.A.

3. Juvenile Curfew and Equal Protection

Subsection IV.C.2 above illustrate how intermediate scrutiny came into being, as a result of the struggle to situate the review of sex classifications within equal protection doctrine. The cases below, which concern youth curfews, illustrate how the introduction of this new tier has added a measure of flexibility, but also a dose of confusion, to equal protection analysis when issues of first impression arise. Intermediate scrutiny makes it easier for courts to strike an appropriate balance between the poles of strict scrutiny and rational basis deference. But because intermediate scrutiny is not so much a theoretically-justified standard as a "Goldilocks" solution—a happy midpoint between these extremes—there is little to guide courts seeking to sort new legal issues into the tiers.

A number of appeals courts have encountered challenges to local youth curfews over the past two decades, and the results—both as to standard of review, and as to outcome—have varied wildly. The Second Circuit held that a youth curfew should be examined under intermediate scrutiny, and struck it down.[211] The D.C. Circuit and Fourth Circuit each applied intermediate scrutiny to a challenged curfew, but went on to uphold it.[212] The Fifth Circuit determined that strict scrutiny was the appropriate standard, and sustained a curfew under that standard.[213] The Ninth Circuit also applied strict scrutiny, and struck down a curfew.[214] Of course, there is nothing unusual about circuit splits and differences of approach, and courts' framings of issues are also responsive to how litigants frame their claims. But we contend that the tiered review framework generates an extra measure of uncertainty and disagreement. (We note also that all of the cases mentioned above included dissents—an unusual feature in appeals

[211] Ramos v. Vernon, 353 F.3d 171 (2nd Cir. 2003).
[212] Hutchins v. District of Columbia, 188 F.3d 531 (D.C. Cir. 1999) (en banc); Schleifer v. City of Charlottesville, 159 F.3d 843 (4th Cir. 1998).
[213] Qubt v. Strauss, 11 F.3d 488 (5th Cir. 1993).
[214] Nunez v. City of San Diego, 114 F.3d 935 (9th Cir. 1997).

court decisions, and another measure of the discord that these cases produce.) We illustrate how the framework fails to provide adequate guidance by looking more closely at one case, the most recent, from the Second Circuit.

Youth curfews present a double challenge to equal protection analysis. They seem to implicate both the fundamental rights and the suspect classification prongs of equal protection doctrine, but a categorical approach to these would not subject curfews to any real scrutiny. The mobility right at issue is an important one, but not one conventionally included in the canon of "fundamental" rights. And while juveniles are a discrete, vulnerable group, age is not considered a suspect classification. Courts that believe youth curfews merit more than minimal scrutiny will therefore find themselves pushing against the categorical approach to equal protection analysis.

Ramos v. Vernon concerns a challenge to a nighttime curfew for persons under age 18, established in 1994 by local ordinance. Angel Ramos, a minor resident of Vernon, Connecticut, and his parents sued the town in 1998, claiming, among other things, that the curfew impermissibly burdens the fundamental rights of minors.[215]

The district court's analysis of this claim was something of a jumble. First, the court seemed to rule out a higher measure of scrutiny for this ordinance based on its disparate treatment of juveniles, reasoning that age is not a suspect classification.[216] Then, the court moved to take up plaintiffs' claim that the ordinance violated a fundamental right to travel. But without pausing to consider whether any such right was implicated here, the court immediately circled back to the relevance of plaintiffs' age to their constitutional claim. The court observed that

[215] Ramos also raised vagueness, First Amendment overbreadth, and Fourth Amendment claims against the statute, as well as claims arising under the Connecticut constitution. His parents also alleged infringement of their right as parents to direct the raising of their children. The district court rejected all of the federal claims, and certified the state law claims to the Connecticut Supreme Court, which rejected them. *See* Ramos v. Vernon, 48 F.Supp.2d 176, 188 (D. Conn. 1999).
[216] *Id*. at 184.

"[t]he Supreme Court has never clearly indicated the appropriate level of scrutiny to apply to legislation that affects minors," but noted reasons given in the *Bellotti* plurality decision for treating children's constitutional rights differently than adults'. In the next sentence the court concludes, "[a]fter careful consideration of the *Bellotti* factors and other Supreme Court jurisprudence involving minors," the youth curfew should be subject to "less than the strictest level of scrutiny": that is, intermediate scrutiny.[217] The court's "careful consideration" of these issues is not shared with the reader, and the choice of intermediate scrutiny is presented as a fait accompli.

With the standard selected, the court's analysis of the Equal Protection claim was brisk. Because the plaintiffs did not deny that the importance of the town's stated interests—in protecting the community from crime, and the safety and welfare of minors—the analysis turned on the issue of fit: were the ordinance's means substantially related to these goals? The concluded they were. The court noted that crime in Vernon had dropped since enactment of the curfew, and while declining to assert a causal connection, the court deferred to the legislative judgment that the ordinance was effective. The court also noted that the ordinance's limited hours were not unduly burdensome, and that the numerous exceptions allowed most unobjectionable activities to proceed undeterred.[218]

The plaintiffs appealed to the Second Circuit Court of Appeals, which reversed the district court, finding an equal protection violation. The bulk of the Second Circuit's analysis was occupied with selecting the proper tier for evaluating the curfew. Although the appeals court's inquiry was far more expansive than the district court's, it too came up short, as the court

[217] *Id*. (quoting Schleifer, 159 F.3d at 847).
[218] 48 F.Supp.2d at 185-86.

arrived at the intermediate standard through a process of elimination, and provided few affirmative reasons for why intermediate scrutiny was appropriate.

The court began its analysis by declaring that the curfew implicated the fundamental right to intrastate travel, a right previously recognized in the Second Circuit.[219] The court then asked whether this curfew, which would receive strict scrutiny if applied to adults, should be reviewed under a less stringent standard because it applies only to juveniles. The court noted that other circuits had reviewed curfews under each of the tiers, and proceeded to consider the different approaches.

First to be considered, and rejected, was rational basis review. The court found no justification for concluding that juveniles are excluded from the right to intrastate travel, although greater limits on their rights than adults' rights may be permissible, owing to the vulnerabilities and other characteristics of minors. Since "denying the existence of a constitutional right is too blunt an instrument to resolve the question of juvenile rights to freedom of movement," the court would "prefer to admit minors to the protected zone and then engage in a balancing of constitutional rights and children's vulnerabilities."[220]

The court then considered, and rejected, strict scrutiny. Strict scrutiny, the court argued, "embodies a constitutional preference for 'blindness,'" and should be deployed only where blindness as to classifications is desired.[221] In the equal protection context, there are some rights—the fundamental rights—so important that they should almost always be available without reference to any group classifications, and there are some classifications—the suspect classifications—that are in themselves so pernicious that the state should almost never be use them. But, the court noted, "youth-blindness is not a goal in the allocation of constitutional

[219] 353 F.3d at 176.
[220] *Id*. at 178.
[221] *Id*. at 179.

rights."[222] Hence, strict scrutiny is not appropriate. The court concludes, almost by default, that intermediate scrutiny is the appropriate standard:

> Hence, strict scrutiny would appear to be too restrictive a test to address government actions that implicate children's constitutional rights. Consequently, we choose the second of the three approaches described above and apply intermediate scrutiny.[223]

There are a couple of features worth noting about the court's selection of a standard of review. First, the analysis implicitly treats intermediate review as a residual category, to be adopted when neither of the traditional standards of review are suited to the issue at hand. This is consistent with the genesis of intermediate review, but it also leaves out some crucial things. Nowhere does the court build up an affirmative case for intermediate scrutiny as the appropriate standard of review here (although the court does note that intermediate review has some advantages). Second, in choosing a standard, the court has slipped from the fundamental rights prong of equal protection analysis into a kind of suspect class view. According to the court's analysis, strict scrutiny is appropriate where blindness is the goal. But the court treats this case as belonging to the fundamental rights prong of equal protection analysis, not the suspect classification prong.[224] As the court presents the issue, the relevant question to determine if strict scrutiny is appropriate is, is the freedom of movement so important a right that it should be afforded to individuals without regard to group classifications? Instead, however, the court asks whether blindness to age is a goal in the allocation of constitutional rights.

Having settled on intermediate scrutiny, the court then proceeded to evaluate the curfew. The court identifies two of the interests given by Vernon—protecting minors from harm and

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[222] *Id*.
[223] *Id*. at 180 (citations omitted). The court goes on to argue that intermediate scrutiny is flexible enough to allow legislation properly drafted to address the needs and vulnerability of children, but probing enough to disallow legislation justified by facile and untested generalizations about the young. *Id*. at 181.
[224] *See id*. at 181 n.4.

protecting the community from youth crime at night—as important.[225] The question becomes whether the ordinance has a substantial relation to these goals. The court found it did not. Although the ordinance was prompted by a concern about crime, the town provided no good reasons for the particular features of the ordinance: for the hours it was in effect, or for its application to minors. Nor was there any proof that the curfew was responsible for a drop in crime. Therefore, the court concluded, the curfew violated equal protection.

In a wide-ranging dissent, Judge Ralph Winter took issue with, among other things, the court's selection of intermediate scrutiny. Judge Winter emphasized the well-established legal recognition of children's custodial control by their parents, and denied that minors had a right to travel independent of parental control.[226] Hence, the curfew should be subjected only to rational basis review, and upheld.[227]

4. Evaluation

The examples above demonstrate the persistent instability of tiered review. Some critics—including the authors of some of the dissents—might counter that this "instability" is really just a lack of judicial discipline. Nothing forces judges to adopt new standards such as intermediate scrutiny or the "undue burden" test: when judges do so, they are recklessly pushing a political agenda without respect for precedent. We note first that this charge cannot be leveled at the curfew ruling: when courts face questions of first impression, existing doctrine offers little or no guidance as to what standard should govern.[228] And even if the pathologies of bifurcated

[225] *Id*. at 182.
[226] *Id*. at 188 (Winter, J., dissenting).
[227] Id. at 190-91 (Winter, J., dissenting). The dissent also considered, and rejected, the claim that the curfew burdened parental or guardian rights.
[228] *Cf.* Heller, 128 S.Ct. 2817-18 (evaluating the firearms restriction without selecting a standard of review).

review did not produce a *Casey* or a *Craig* in any deterministic sense, these rulings and many others are best understood as responses to the shortcomings of tiered review.

Consider the sex discrimination cases again. The two-tiered framework put judges in an impossible position: choosing between these dichotomous standards of review meant committing either to uphold, or to strike down, virtually every gender distinction in law. The incentive to find, or create, some middle ground is powerful. That middle ground took the form of intermediate scrutiny. And the improvisatory character of intermediate scrutiny opened the door for future evolution. If intermediate scrutiny had started life as a distinct standard of review with a deep grounding in constitutional theory, rather than as a workaround to the difficulties of bifurcated review, the *VMI* majority might have found it more difficult to change the operative test. Of course, the members of the Court are responsible for the particular ways in which sex discrimination caselaw has developed. But the broadest outlines of this development are influenced by the doctrinal structures that confront the justices and constrain their moves.

PA offers a more stable, principled alternative. As a unified framework of analysis that allows the court to tailor the stringency of review to the particulars of each claim, PA sidesteps the conflict and confusion surrounding the choice of a standard of review. Nor is approach a far-fetched departure for American law. As we have noted, Justices Marshall and Stevens have proposed something similar for equal protection claims. Justice Marshall has argued that "the level of scrutiny employed in an equal protection case should vary with 'the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.'"[229] Adopting such an approach would

[229] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 460 (Marshall, J., dissenting in part) (quoting San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 411 U. S. 99 (1973) (MARSHALL, J., dissenting)).

not eliminate disagreement among judges. But it would refocus the disagreement onto the substantive issues of importance.

The jurisprudence of the German Federal Constitutional Court (GFCC) gives a glimpse into what a proportionality-based approach to an equality right looks like.[230] Naturally, there are important differences between the Basic Law's Article 3, which guarantees equality before the law, and the Constitution's Fourteenth Amendment.[231] And of course, adopting PA does not mean reaching the same outcomes as the German court—indeed, the Supreme Court could use PA, and still replicate most of the judgments that have been arrived at by other means, and are worth preserving. Still, the GFCC's approach to Article 3 shows how proportionality can provide a stable argumentation framework for dealing with the most difficult legal issues.[232]

Since the 1980s, the GFCC has construed the general equality right in ways that are tailor-made for PA. The right amounts to a guarantee that any unequal treatment under the law be justified by a "sufficiently weighty reason."[233] What counts as a sufficient reason depends the particulars of the claim. In effect, the more a distinction in the law threatens the core values of equality, the greater the state's burden of justification.[234] For instance, when a challenged measure cuts across the exercise of a fundamental right, or when groups are disadvantaged based on personal characteristics rather than voluntary behavior, the Court insists on "a strict

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[230] A good overview of the doctrine in English can be found in Suzanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L . 249 (1999). A more detailed treatment, albeit in German, can be found in a constitutional commentary, such as HANS D. JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: KOMMENTAR 90-137 (2006).

[231] One notable difference is that Article 3 spells out what we would call "suspect classifications," on the basis of which discrimination is not allowed. GG art. 3 para. 3. ("No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavoured because of disability."). *See also id*., para. 2 (specifically addressing sex equality).

[232] PA is not used across the board in the GFCC's Article 3 jurisprudence, but increasingly it is supplanting older approaches. *See* Baer, *supra* note 230, at 260; Hans D. Jarass, *Folgerungen aus der neueren Rechtsprechung der BverfG für die Prüfung von Verstößen gegen Art. 3 I GG*, 50 NEUE JURISTISCHE WOCHENTSCHRIFT 2545 (1997). We focus our discussion on the "new" proportionality-based approach to the general equality guarantee in Article 3 paragraph 1.

[233] BVerfG Apr. 28, 1999, BverfGE 100, 138 (174); *see also* BVerfG May 30, 1990, BverfGE 82, 126.

[234] Baer, *supra* note 230, at 262; JARASS & PIEROTH, *supra* note 230, at 100.

application of the proportionality requirement."[235] On the other hand, when none of these factors are implicated, or a measure falls within the particular competence of the legislature, the Court operates with a healthy degree of deference to distinctions drawn by the legislature. [236] Proportionality is no silver bullet, and Germany's equality jurisprudence has not been free of controversy.[237] But the basic framework, grounded in PA, has been stable and widely accepted.

With respect to abortion politics, which have been ferocious in Germany,[238] the GFCC's jurisprudence has had a legitimizing and stabilizing effect. The GFCC has issued two landmark rulings on abortion, roughly contemporaneous with *Roe* and *Casey*.[239] These rulings established that, given Germany's responsibility for the Holocaust and other crimes against humanity prior to and during World War II, the criminal law must always discourage abortion as a taking of life, but that abortion would nonetheless be permitted, under certain specified conditions.

In its 1975 decision and in contrast to the U.S. Supreme Court's approach, the GFCC held that the right to life covers the fetus.[240] That finding comprised the critical starting point for the balancing to come, given that the constitutional value represented by the life of the unborn child will, at times, conflict with the constitutional rights of the woman carrying the child, in her human dignity, bodily integrity, and the free development of her personality.[241] Summarizing a rich and sophisticated decision, the Court held that to permit abortion without restriction, and without the express disapprobation of the state, would infringe too much on the right to life, and

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[235] BverfGE 99, 367 (388).
[236] JARASS & PIEROTH, *supra* note 230, at 99, 100. The legislature has substantial latitude, for instance, in choosing the subjects and rates of taxation. *Id*. at 109.
[237] For a (now somewhat dated) overview of prominent critiques and controversies, see ALBERT BLECKMANN, DIE STRUKTUR DES ALLGEMEINEN GLEICHHEITSSATZES 1-2 (1995).
[238] ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN WESTERN EUROPE 109-14 (2000).
[239] BVerfG Nov. 7, 1993, BVerfGE 88, 203 ("Abortion II"); BVerfG Oct. 7, 1975, BVerfGE 39, 1 ("Abortion I").
[240] A careful comparison of the two approaches can be found in Richard E. Levy & Alexander Somek, *Paradoxical Parallels in the American and German Abortion Decisions*, 9 TUL. J. INT'L & COMP. L. 109 (2001). An abridged translation of the two key German decisions is contained in KOMMERS, *supra* note 14, at 336-56.
[241] BverfGE 88, 203 (253).

would therefore be unconstitutional; but it also insisted that the right to life did not extinguish the rights of pregnant women. Indeed, the Court ruled, the latter's rights must prevail in special circumstances. Although abortion could not be decriminalized, *per se*, the procedure could nonetheless go unpunished after mandatory counseling, and when justified by eugenic (birth defects probable), medical (heath risk for the mother), criminal (pregnancy the result of rape), or social hardship reasons.

In 1993, the GFCC upheld the basics of its earlier ruling, while creating an "unreasonable burden" (*Unzumutbarkeit*) test. The test is rooted in the logic of proportionality: abortions would be tolerated by the criminal law if carrying a fetus to term would impose on pregnant women "heavy and unusual burdens" that go well beyond "reasonable sacrifice."[242] That is, "another interest"—of bodily integrity and self-determination—"equally worthy of constitutional protection asserts itself with such urgency that the state's legal order cannot require the pregnant woman always to defer to the rights of the unborn."[243] Although scholars have debated whether the *Unzumutbarkeit* standard is identical to proportionality or partially distinct,[244] "the practical effect of the *Unzumutbarkeit* principle is to balance the unborn child's right to life against the mother's interest in bodily integrity and personal autonomy."[245]

Comparing the abortion jurisprudence of the U.S. Supreme Court and GFCC, and its broader reception, reveals some striking commonalities and differences. The baseline constitutional rules in the two countries appear as opposites: the right to access abortion services prohibits a ban on abortions in the United States, and the unborn child's rights require restrictions on abortion in Germany. But as both courts have balanced, they have presided over a

[242] BverfGE 88, 203 (255). BVerfGE 39, 1 (48).
[243] BverfGE 39, 1 (50) (quoted in KOMMERS, *supra* note 14, at 341).
[244] *See* Rudiger Konradin Albrecht, *Zumutbarkeit als Verfassungsmaßstab, Der eigenständige Gehalt des Zumutbarkeitgedankens, in* ABGRENZUNG ZUM GRUNDSATZ DER VERHÄLTNISMÄSSIGKEIT (1995).
[245] Levy &Somek, *supra* note 240, at 122.

convergence in abortion law.[246] Since *Roe*, however, abortion has become far and away the most controversial issue the Supreme Court touches, dominating the confirmation of judges and creating a social movement that challenges the political legitimacy of the Court itself.[247] The GFCC's rulings on abortion were also politically controversial, but not because they were understood to be inconsistent, unprincipled, and inherently political.[248]

We do not claim that proportionality is the key variable that explains this latter difference. But it plays a crucial role in political acceptance of the GFCC's involvement in regulating abortion. In both abortion cases, the GFCC anchored its analysis in balancing, whose legitimacy had been built over previous decades. The technique allowed the GFCC to give due consideration to the competing interests at stake, and required that the judges seek to reduce harms as far as possible. Both German cases generated hard-hitting dissents. But no dissenter questioned the appropriateness of balancing; rather they challenged the relative weights given to the values in tension by the majority when it balanced.

V. CONCLUSION: ALL THINGS IN PROPORTION?

A. Bringing Proportionality Back In

We have shown that the tiered review regime chronically generates pathologies that have weakened rights protection, and undermined the coherence of rights jurisprudence in the United States (Part IV). PA, while not a cure-all for the challenges facing constitutional courts, avoids these pathologies by providing a relatively systematic, transparent, and trans-substantive

[246] *Id.* at 111 ("In both countries, abortion is generally available early in the pregnancy after various informational, counseling and waiting restrictions; and is available later in the pregnancy to protect the life or health of the mother, as well as in cases of serious fetal deformity, rape, or incest.").
[247] See Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV.C.R.-C.L. L. Rev. 373 (2007).
[248] The difference in tone extends to the bench as well. The German abortion rulings produced dissents, but none that challenged the legitimacy of the majority's ruling, or the good faith of the justices, like Justice Scalia's blistering dissent in *Casey*. *See* 505 U.S. at 982-1002 (Scalia, J., dissenting).

analytical procedure for the adjudication of virtually all rights litigation. We also found that all three levels of review—rational basis, intermediate review, and strict scrutiny—have, at various points in their evolution, contained core elements of proportionality. In our view, this finding bolsters our claim that no rights-protecting court can, in practice, do without these elements unless it is willing to commit itself to a posture of abdication or absolutism. We conclude here by sketching, in broad strokes, how American judges could amplify and regularize the elements of PA that already exist, if at times partially buried, in our doctrines.[249] We also note and respond to objections to the argument.

As a first cut, we submit that every doctrinal area now subject to the tiered review framework should instead be governed by a single, proportionality-style, standard of review. Support for the argument has been presented in Parts II-IV of this Article. The basic idea is hardly radical: Justices Marshall and Stevens have both advocated such an approach in the equal protection context, and these voices have been joined by a number of scholars. [250]

As discussed, what we call strict scrutiny has its roots as a framework for balancing. Whether an interest counted as "compelling" was a judgment to be made contextually, in light of

[249] As we noted before, a number of areas of American constitutional law have interest balancing tests that resemble PA. Justice Breyer lists some of these in his *Heller* dissent. *See* 528 U.S. at 403 (citing examples where the Court has taken such an approach); see also, e.g., Thompson v. Western States Medical Center, 535 U. S. 357, 388 (2002) (Breyer, J., dissenting) (commercial speech); Burdick v. Takushi, 504 U. S. 428, 433 (1992) (election regulation); Mathews v. Eldridge, 424 U. S. 319, 339-349 (1976) (procedural due process); Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U. S. 563, 568 (1968) (government employee speech). The Supreme Court has employed balancing tests outside the constitutional context as well. Perhaps most famously, the "rule of reason" used to evaluate combinations and contracts in restraint of trade under Section 1 of the Sherman Act is a balancing test: the court asks whether net effect of a restriction on trade is pro-competitive. *See* Bd. of Trade of Chicago v. United States, 246 U.S. 231 (1918). Indeed, in recent years federal appeals courts have supplemented the *Board of Trade* balancing with a LRM test, so that the total effect closely resembles PA. *See* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. UNIV. L. REV. 561, 580 (2009).

[250] Justice Marshall gave the fullest expression to his alternative to the Court's "rigidified approach to equal protection analysis" in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 98, 97-110 (Marshall, J., dissenting). *See id*. at 102-03 ("As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.").

the particular interests at stake; and what qualified as a compelling interest for overcoming a rights claim would vary, given the intensity of the right infringement. Within PA, the "balancing in the strict sense" stage is designed to focus analytical attention on these issues. Recovering this original sense of the compelling interest test would create more space within strict scrutiny analysis for an open balancing of interests. A subtle change in the sequence of the analysis would do most of the work. Judges would, first, undertake least-restrictive means testing (the "narrow tailoring requirement," in American parlance; "necessity analysis" in PA); they would, second, deploy a balancing *qua* compelling interest test to complete the analysis. Such tweaks to strict scrutiny hardly represent a radical or unprecedented departure. The Court constantly adjusts its doctrinal frameworks, changing the interpretation, emphasis, and sequence of different stages of analysis.

The reintroduction of interest balancing within strict scrutiny would unlock a broader reappraisal of the tiered-review regime. Once balancing has been acknowledged and openly practiced, it would become obvious, as Justice Stevens wrote regarding equal protection, that cases in different tiers "actually apply a single standard in a reasonably consistent fashion."[251] After all, under the standards of intermediate scrutiny, the courts already operate in "an overtly balancing mode."[252] As to rational basis review, proportionality-style balancing undeniably offers a more principled way for the courts to deal with cases presently decided by the courts through abdication. Under a version of PA, the concerns raised by the District Court in *Lee Optical* (that the state had regulated in an arbitrary and irrational manner) would be dealt with in the first ("suitability" or "legitimacy") stage; under PA, the District court would have struck the law down without having to move to either necessity, or to balancing in the strict sense. In this

[251] 429 U.S. at 210.
[252] Sullivan, *supra* note 8, at 297.

scenario, under PA, the Supreme Court could still have reversed the District Court's decision, but only after showing that the means chosen by Oklahoma to achieve better eye care were necessary, and that this purpose outweighed the property rights in play. Given its view that property rights have little if any weight, the Supreme Court would have reversed.

Blurring the lines between tiers of review would not require a rejection of existing precedents; rather, it is a way of making sense of them. Earlier judgments assigning different standards of review reflect a judicial assessment of the balance of interests at stake in different kinds of cases. The case law would continue to have precedential value, and the doctrinal tests they contain would provide guidance as to what kind of showing is required for a right claim to prevail against a state measure, given different contexts. Moving forward, the courts would treat guiding precedents as points along a continuous spectrum of scrutiny, within a common master test.

Pushing further, we see no reason to limit the adoption of PA to areas now governed by the three-tier regime. Justice Breyer, dissenting in *Heller* and joined by Justices Stevens, Souter, and Ginsburg, forcefully argued that the American approach to rights adjudication more has always included elements of proportionality and balancing. [253] He then went on to demonstrate how a version of PA should be applied to the Second Amendment.[254] The Second Amendment identifies a value to be maximized, subject to certain limitations. There is no question—and the majority does not suggest—that the right to bear arms implies that no restrictions (on any type of weapon, in any circumstance) are permitted. Once it was determined that the Second Amendment covers an individual's right to bear arms outside of a militia context, the crucial

[253] 128 S.Ct. at 2854-68.
[254] In his dissent, Breyer regarded his approach—correctly—not as a great departure from the Court's practice, but as a rationalization of techniques already in place, and of a piece with the standard of review employed in different areas.

questions must be about limits, which PA is designed to address. In his dissent, Justice Breyer applied a version of PA to show that reasoning about limits could proceed, in a principled, open way. Certainly PA would have provided a surer guide to future cases in this area than the approach taken by the majority. In declining even to pick a standard of review under which to evaluate state limitation of the right to bear arms, Justice Scalia provided no guidance for future cases.

But a case like *Heller* is a rarity these days, in that it presents a question of first impression about the existence of a right under one of the Constitution's first ten amendments. The twenty-first century Court almost never writes on a blank slate. Although many other areas of American constitutional law could benefit from the introduction of the proportionality principle, we also recognize that there may be good reasons for the Court to treat some rights as clear, *per se* rules, the Third Amendment's prohibition against quartering, for example.[255] Still, the Court has already determined, and consistently held, that most of the rights that are of importance to Americans are relative, not absolute. Given that the Court already subjects important rights, including those expressed in absolute terms (e.g., the First Amendment) to a litany of limitations and qualifications, courts would be justified in asking the following two questions. First, why should *every* constitutional right *not* be protected by a necessity standard, that is, why should Government be allowed to infringe more on *any* right than is necessary for it to achieve a declared public purpose? Second, do laws that have passed the narrow tailoring requirement nonetheless infringe more on the right more than is tolerable given our constitutional commitments? In asking these questions, judges would be beginning the work of reconceptualizing rights doctrine in terms of PA. Failure to consider these questions will, in most cases, weaken rights protection.

[255] *See* Kumm, *supra* note 24.

That PA can fit with existing constitutional doctrine could be illustrated with reference to examples drawn from every area of the Court's rights jurisprudence. Here we will provide one more, concerning procedural due process claims arising from reputational injuries caused by state action. Such claims are presently governed by *Paul v. Davis*.[256] *Paul* concerned a challenge to a flyer distributed by local police that included the claimant's name and photograph in a list of "Active Shoplifters," on the basis of an arrest for shoplifting that was never prosecuted. *Paul* established that it is not enough to show that stigmatizing state action violates liberty interests protected by the due process guarantee. Rather, something else, some change in legal status, is also required, though the court did not explain what should happen once the "stigma plus" threshold is satisfied. Not surprisingly, the *Paul* decision has been roundly criticized for failing to set out standards for how courts should evaluate claims to procedural due process violations emerging from reputational injuries.[257]

A PA approach would provide a neat solution to the problem. Once a triggering stigma is identified, the court would move into proportionality mode, asking what state interest is at stake, and whether the stigma-causing means are suitable for achieving it. The court would engage the LRM inquiry, and if that is satisfied, it would move to the final stage of analysis, where it asks whether the harm to the claimant is justified, all things considered. The final, balancing stage could effectively do the work now done—poorly—by the nebulous" plus" factor, of filtering out *de minimis* injuries. Using PA in this way would also resonate with the court's balancing approach in *Mathews v. Eldridge*,[258] and its associated line of due process cases. For our purposes, what is important is that the basic structure of the right—the conditions that have to be

[256] 424 U.S. 693 (1976).
[257] *See, e.g.*, Barbara E. Armacost, *Race and Reputation: The Real Legacy of* Paul v. Davis, 85 VIR. L. REV. 569 (1999).
[258] 424 U.S. 319 (1976).

satisfied to state a claim—can be established through the relevant precedents, and PA can solve the balancing problems that remain.

A necessary task of rights review is defining the scope of rights: that is, determining the range of conduct that is protected by the right. Do, for instance, the protections of the First Amendment extend to obscenity?[259] PA is, of course, only an analytical procedure; it is otherwise content-less. Everywhere PA flourishes, however, judges use it to give structure to building a theory of the rights they adjudicate. As Mattias Kumm rightly observes, a legal system's approach to the question of a right's scope, and questions of the right's limitation, are logically linked.[260] So it is in United States as well. Strict scrutiny, for example, represents an extremely stringent approach to limiting rights: a measure infringing a right may only be permitted if it is narrowly tailored to a compelling interest. The stakes of acknowledging a *prima facie* rights claim under strict scrutiny are huge, since the test for infringements stacks the deck in favor of the right. It makes sense, then, that the Supreme Court would be reluctant to hold, for instance, that the full measure of First Amendment protection extends to commercial speech, when doing so would lock the Court into an analysis that streamrolls over limits on, say, liquor advertisements without regard to relevant differences between these and forms of expression nearer the essential core of the First Amendment.[261] A stingy approach to limitations rights goes hand-in-hand with a stingy approach to the scope of rights: when the decision that a right is in play is so consequential, the borders of that right's protection must be carefully policed.

PA offers a different model. As a balancing framework, PA expressly allows for the possibility that *prima facie* rights claims may be outweighed by competing values, if the other steps of the proportionality analysis are satisfied. Because much less hinges on the *prima facie*

[259] *See, e.g.,* Miller v. California, 413 U.S. 15 (1973).
[260] *See* Mattias Kumm, *Who's Afraid of the Total Constitution?*, 7 GERM. L.J. 341, 347 (2006)
[261] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U. S. 557, 566 (1980).

determination that any right can be properly pleaded, judges can afford to define the scope of that right more broadly. An example can help illustrate what this would mean for U.S. rights review if PA were adopted. Free speech jurisprudence recognizes several carve-outs for expressive activity that merits less than the full measure of First Amendment protection, including radical speech,[262] fighting words,[263] obscenity,[264] child pornography,[265] commercial speech,[266] and advocacy of imminent lawless action.[267] In a PA context, a court could arrive at these same outcomes through an explicit (rather than disguised) balancing process. The court would, in effect, recognize that there are, in fact, some expressive interests at stake in these forms of conduct, but to a lesser degree than in the heartland of First Amendment speech. Not only does PA all but require the court to construct a theory of speech rights, it also allows the court to sidestep some of the intractable "border wars" that the American penchant for rules and exceptions inevitably generate. We see few if any advantages to an approach that seeks to determine, once and for all, which side of a line a particular case falls, or where the lines separating rules from exceptions should be drawn in the first place. In any event, the American version of this approach has never actually succeeded in banishing balancing from the judicial tool kit. Pushed out the front door, balancing comes in through the back, where it is used to create ever more nuanced rules and exceptions.[268] In our view, the PA approach is less arbitrary than a binary "yes-no" response to the complexity of rights adjudication. It builds flexibility and a concern for context into rights review; and it makes it far less likely that judges will paint themselves into doctrinal corners.

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[262] *See* Yates v. United States, 354 U.S. 298 (1957).
[263] *See* Chaplinsky v. State of New Hampshire, 315 U.S. 568 (1942).
[264] *See* Roth v. United States, 354 U.S. 476 (1957).
[265] *See* New York v. Ferber, 458 U. S. 747 (1982).
[266] *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).
[267] *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).
[268] *See* Aleinikoff, *supra* note 1, at 963-71.

Finally, PA is not incompatible with another mode of rights-reasoning in the United States: the process of excluding reasons. When a right infringement is alleged, the state is called on to justify its action. But, as Mattias Kumm cogently argues,[269] not just any reason will do. In particular, courts will not countenance justifications for state action that are inconsistent with constitutional values. To know what kind of reason counts as a valid reason thus calls on a court to understand what is important about a right, that is, it calls on a court to *theorize* the right. Again, PA provides judges with a structured setting for building such theories, which are then used to animate the analysis. A court will give weight only to certain reasons when it balances. The Supreme Court's tough line against viewpoint discrimination, as a particular affront to First Amendment values, would bear directly on how it would conduct PA. If a state seeks to proscribe only those "fighting words" with racist content, it might be unable to provide a rationale that would pass constitutional muster, or so it would seem.[270] Thus, it would be wrong to assume that a move to PA would necessarily mean abandoning the delicate constitutional architecture that American courts have constructed to give meaning to rights provisions.

B. Objections

We have tried to make the best case for adopting PA in the United States, but we recognize that there are countervailing considerations. Here we briefly discuss some of the important institutional and historical reasons why PA might appear to be a problematic fit for the American courts.

Formal differences between the American system of judicial review and important, contemporary systems of "constitutional justice" around the world are obvious and important. Most powerful supreme and constitutional courts in the world today understand their *central*

[269] Kumm, *supra* note 24.
[270] *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

mission to be the robust protection of fundamental rights, not least, since their respective constitutions prioritize rights protection. Modern constitutions typically announce rights before state structures are constituted; most rights are qualified by limitation clauses; and the rights-protecting court is expressly designated to be the authoritative interpreter of the higher law. Further, the European constitutional courts—the same can be said in different degrees for the Supreme Courts of Canada, India, and South Africa—are not limited to "case or controversy" jurisdiction. Cases come to them in diverse ways, often in the form of abstract constitutional questions about the meaning, scope, and application of rights.[271] Constitutional judges have an obligation to answer these questions, no matter how controversial; indeed, giving constitutional answers to controversial, deeply "political," questions about rights is basic to their job description. In short, all modern rights-protecting courts perform an oracular function, a by-product of which is lawmaking (constitutional, legislative, administrative, and so on).[272]

The American Supreme Court is not a specialized constitutional court. In contrast to the modern constitutional court, the U.S. Federal Constitution does not confer on the Court the power of constitutional judicial review. Added as supplementary "amendments," rights only surface after the organs of government are created. Moreover, the American Constitution does not give interpretive primacy to the judiciary; it may, in fact, be that the three branches, being co-equal, have the same claim to competence, and obligation, to interpret and apply rights faithfully.[273] In *Marbury v. Madison*, of course, the Court would derive its constitutional judicial

[271] *See generally* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POST-COMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2005); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000).

[272] In such systems, the classic distinctions made between the "judicial function" (dispute resolution under the law) and the "legislative function" (the elaboration of law) breaks down. In these systems, traditional notions of separation of powers become weak sources of systemic legitimacy. Instead, the legitimacy of the constitutional order is critically linked to the constitutional court's capacities to defend rights.

[273] Prominent contemporary defenders of the "departmentalist" position that neither the Founders nor the American Constitution meant to confer onto the judiciary supremacy when it comes to constitutional interpretation include

review authority directly from its Article III, "case or controversy" jurisdiction. Taking a highly formalist view, all judicial lawmaking (constitutional, legislative, and so on) can be understood to be a by-product of the basic judicial (dispute resolution) function. Of course, to claim that the Supreme Court remains principally a "case or controversy" court would do violence to reality, downplaying its oracular, lawmaking function. Although few serious observers would still make that claim, we doubt that many readers would deny that the Article III "case or controversy" limitation comprises an important part of the Supreme Court's historical identity as a judicial organ, constraining the Court in meaningfully ways.

These organic differences must make a difference to how rights are understood, and how rights claims are adjudicated. Across Europe, in Canada, and South Africa, constitutional judges face no serious or sustained challenge to their legitimacy when they protect rights, at least as a formal matter. Indeed, constitutional judges would seriously undermine their political legitimacy if they were to abdicate their rights-protecting role, say, by adopting a rational basis standard as the norm for protecting rights. In the United States, the specter of original sin (*Marbury*) and its evil potentials (*Lochner*), the defensive discourse of the "counter-majoritarian difficulty," and the anxiety over what has become *de facto* judicial supremacy, has meant that any move by the courts away from deference, and toward robust rights-protection, needs *special* justification.[274] American judges and legal academics have engaged in a seemingly endless production and critique of these justifications, but little consensus has been reached. At the same time, there is counter-pressure, which flows from the fact that many of the most important American rights are

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Akhil Amar and Larry Kramer. *See* AKHIL REED AMAR , AMERICA'S CONSTITUTION: A BIOGRAPHY (2006); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2005).

[274] The most influential statements of the problem and (partial) justification of judicial supremacy remain, respectively, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1963); and JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

expressed in absolute terms, as rules to be enforced, which makes adopting a blanket rational basis posture deeply problematic, if not indefensible.

As this discussion implies, a legal system's rights doctrines constitute, and will then embody, notions of what *rights are* in that system. In Kumm's phrase, such notions tell us "what one has in virtue of possessing a right."[275] Although the topic raises jurisprudential issues that range far beyond the scope of this Article, it should be obvious that there will be important structural differences between doctrines that reference a conception of rights as "trumps" (in Dworkin's sense), and those that conceive of rights as defensive "shields" (insulating the sphere of the private from the reach of state action), or as "optimization requirements" (in Alexy's sense).[276] The Supreme Court, of course, has not settled on any dominant "theory" of "what rights are," which partly accounts for the systemic incoherence of its rights jurisprudence.

Europeans were forced to rethink and reconstruct their constitutional law after the horrors of the Holocaust and the destruction of World War II.[277] The new Federal Republic of Germany firmly committed itself to protecting fundamental rights at the highest possible level, while the prestige of political parties and legislative authority was relatively low. As fascist-authoritarian regimes collapsed in Southern Europe in the 1970s, and then across Central and Eastern Europe and the Balkans in the 1990s, that situation was reproduced in key respects, and the German approach to constitutionalism was copied and extended. During these latter episodes, those who drafted new constitutions saw no contradiction between democracy and rights protection. On the contrary, a robust system of rights protection was viewed as a pre-condition for democratic rule.

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[275] Kumm, *supra* note 24.
[276] For a careful discussion of this issue, see Mattias Kumm, *Democracy is not Enough: Rights, Proportionality and the Point of Judicial Review*, 4 LAW & ETHICS HUM. RTS. (forthcoming 2010).
[277] Jed Rubenfeld argues that, due to this fact, the American and European conceptions of constitutionalism, rights, and democracy are fundamentally at odds with one another. Jed Rubenfeld, *The Two World Orders*, 27 WILSON Q. 22 (2003).

Today, even after the consolidation of stable party systems, European citizenries continue to support constitutional courts—which they equate with rights protection—far more than legislatures. Where an ideology of fundamental rights has congealed as kind of civic religion, rights jurisdiction may ground the legitimacy of constitutional review. Tellingly, this civic religion of rights now also permeates common law jurisdictions, including our neighbor to the North, Canada, which (like Israel) adopted PA from the Europeans.

In the United States, there have always been judges and academics who portray PA and balancing as antithetical to American notions of popular sovereignty and, therefore, to democracy itself. We reject this portrayal, not least, as being unsupported by the facts. In the post-New Deal period, when the U.S. Supreme Court moved to protect fundamental rights more robustly, it too began to look like a modern, rights-protecting constitutional court, and less like a "case or controversy" court. Standing doctrines were relaxed; abstract review, in the form of facial challenges and related constitutional remedies emerged and became routine in some areas; and the Court frankly assumed a more oracular role as a constitutional lawmaker.[278] One might say that, for the first time, a system of constitutional justice began to appear in America, with rights-protection at its core. With the important exception of property rights, the Court abandoned deference doctrines, such as rational basis, reserving these for rights judged not to be "fundamental." Further, it began to theorize the rights being favored more explicitly, which went hand in hand with the development of doctrinal tests that one finds central to PA.

C. Conclusion

In this Article, we have sought to describe and assess the evolution of American rights doctrine, not just on its own terms, but with reference to constitutional law and practice

[278] *See* Martin Shapiro and Alec Stone Sweet, *Abstract and Concrete Review in the United States, in* ON LAW, POLITICS, AND JUDICIALIZATION 347-75 (2003).

elsewhere. Our first motivation was, in fact, comparative and empirical. In a first stage of this project, we developed a theoretical explanation of why rights-protecting judges would be attracted to PA: it provides the best-possible response to the challenges of adjudicating qualified rights, and it offers a (partial) solution to certain intractable legitimacy dilemmas generated by judicial lawmaking and supremacy.[279] In a second stage, we tracked the emergence and global diffusion of PA. Today, all of the world's most powerful constitutional courts have adopted a version of PA, which they deploy as an overarching analytical framework for adjudicating rights. Arguably, PA now constitutes the defining doctrinal core of a global, rights-based constitutionalism. Here, we have sought to bring these considerations to bear on the American case, not least, because the United States is often characterized (especially by non-Americans) as an outlier, an island unto itself, a legal system that refuses to participate in the transnational conversation about rights adjudication that has exploded into prominence in recent years.[280] While we would agree that the American constitutionalism is ill-equipped either to engage in constitutional dialogues across borders, or to exercise positive influence on the evolution of global constitutionalism, it is not true that the American system has either rejected balancing or proportionality. Instead, as we have shown, elements of PA have deep roots in American constitutional law, and American courts, try as they sometimes do, have never been able to dispense with balancing when they adjudicate rights.

Our second motivation was normative. We have argued that the American courts would be far better off, on balance, if they too standardized rights doctrine under a version of PA. To take just one example, we have identified three endemic pathologies of American rights jurisprudence, and shown the various ways in which PA would enable the courts to mitigate

[279] *See* Stone Sweet & Mathews, *supra* note 6, at 80-97.
[280]

these pathologies, or to eliminate them altogether. Our normative claims are informed both by our theoretical priors and our comparative findings. We stressed the fact that one of the virtues of PA is that it allows a court to maximize its own flexibility, with reference to the constitutional values and interests it protects, and with regard to present and future litigants.[281] Flexibility inheres in PA in another way: courts can adapt it to fit their own purposes. In fact, how courts use PA varies widely across jurisdictional boundaries.[282] To those who would claim that the proportionality framework is "foreign law," and therefore alien to American constitutionalism, we would reply that the United States has, at different times, evolved "homegrown" versions of PA. This Article shows as much. If the Supreme Court were to develop a more formalized version of PA, along the lines that we have argued, it would be an American creation, referencing existing case law, and it would be consistent with our own constitutional traditions and values. In any event, the problem of balancing in American rights adjudication lies once again at the top of the Supreme Court's agenda. One hopes that, this time, the Justices will consider more deeply the merits of what is the most tried and tested approach to that problem: the proportionality principle. [283]

[281] "This flexibility, which we count as a virtue rather a vice of PA, is never immune from attack by those who believe that a more determinate and principled approach to rights adjudication is possible, or that PA is just a fancy way to package judicial policy-making." Stone Sweet & Mathews, *supra* note 6, 164.
[282] *See id.* at 163-65.
[283] We close on a note of clarification. Though we believe that PA, as a doctrinal framework for adjudicating rights claims, performs better overall than any known competitor, we do not argue that it solves all of the legitimacy dilemmas faced by courts, including the problem of judicial lawmaking. As we wrote: "'The key to the political success of PA, its social logic, is that it provides a set of relatively stable, off-the-shelf, solutions to a set of generic dilemmas faced by the constitutional judge. If PA mitigates certain legitimacy problems, it also creates, or at least spotlights, an intractable, second-order, problem. PA does not camouflage judicial lawmaking. Properly employed, it requires courts to acknowledge and defend honestly and openly the policy choices that they make when they make constitutional choices. Proportionality is not a magic wand that judges wave to make all of the political dilemmas of rights review disappear. Indeed, waving it will expose rights adjudication for what it is: constitutionally-based lawmaking. Nonetheless . . . PA offers the best position currently available for judges seeking to rationalize and defend rights review, given certain strategic considerations, the structure of modern rights provisions, and the precepts of contemporary constitutionalism." *Id.* at 78.