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To: Mark Graber et al

From: Vicki Jackson

Thoughts re "Canon" of Comparative Constitutional Law

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Here are some areas that in the last few years have seemed of pressing interest to me in comparative constitutional law:

Institutional design issues: how courts are constituted, organized, to review constitutionality of government actions; federalism/consociationalism; voting (how organized, theories of representation); legislatures and executives; role of independent entities (e.g., central banks, ombudspersons, human rights commission, electoral commissions); amendment (process, unamendability); secession; review of laws - parliamentary only or judicial review; rights override provisions [e.g., notwithstanding clauses]; positive rights as directive principles or justiciable; emergency provisions; constitution-making and different mechanisms (and esp. role of public participation).

Interpretive issues: proportionality; the "constitutional bloc"; unconstitutional amendments; rights, how to implement doctrinally(esp. positive rights); deference or not to legislation; deference (or not) to executive.

Constitutional theory - relationship international and constitutional law; relationship among constitutions and related doctrine; transnational constitutional law; defining polities (relating to secession, limits on amendment); unamendable provisions; who exercises the "pouvoir constiuant" – limitations on self definition; role of constitutional law or doctrines at international level; reconceptualizing constitutions in light of disaggregated governance structures.

Attached is a very rough start on a paper on proportionality, it would be very helpful to me if folks could give me constructive comment/critique back.

Proportionality, Justice, and American Constitutionalism – thought on a project

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Proportionality has become a leading aspect of public law decisions in Europe, Canada, and a number of other countries. As doctrinalized in the area of constitutional rights, it requires, first, that government action that intrudes on protected rights or freedoms must, in order to avoid invalidation, be authorized by a law with a legitimate and important purpose in a free society. Even laws with such legitimate purposes must employ rational or suitable means, and minimally impair the protected right; finally, on balance, the purposes and/or benefits of the measure must be expected to exceed its intrusion on/harm to protected rights. Precise formulations vary. But for present purposes the basic outline of proportionality as a judicial doctrine in individual rights area will suffice. In the arena of individual rights in the United States, it can be argued, that the tiers of review deployed in both equal protection and due process analysis, beginning in the middle of the twentieth century, represent versions of proportionality. But what seems clear is that proportionality like tests are not deployed with consistency in U.S constitutional law.

Proportionality is also used in some jurisdictions to evaluate claims of structural violation of constitutional norms, including in the area of federalism. In both the United States and in Canada “proportionality” doctrines limit (in respect of at least some national powers) the validity of “ancillary” or “prophylactic” measures designed to achieve an end legitimately within the national government’s authority to achieve.¹ And it has recently been argued that early and continued development of dormant commerce clause doctrine reflects strong elements of proportionality analysis.²

¹ In the United States, “proportionality and congruence” were fairly recently introduced to analyze the federal government’s powers under Section 5 of the fourteenth Amendment. *Boerne v Flores*. It is arguable that the doctrine is less as a way to maintain a balance between national and state powers than a way to enable the Court to have the final word on the scope of rights protected by Section 1 of the Fourteenth Amendment. Whether viewed as an issue of federalism or separation of powers, it is clear that proportionality is being used here in U.S. constitutional law on a structural question of the allocation of lawmaking or of interpretive authority.

² See coauthr and Stone Sweet, Emory, 2011

In this paper I want to explore why and how proportionality doctrine is related to constitutional government generally, and to constitutional government in the United States. I hope to do so with a view to identifying both its advantages and its drawbacks. At this time, I think its advantages lie primarily in rationalizing and making more transparent constitutional decisions and in providing a consistent method to implement constitutional principles. At this time, I think its drawbacks include some of its expressivist implications against categorical rules, which I will challenge below, and its lack of fit with problems of resolving institutional authority questions.

The first question is whether constitutions are linked to the basic idea of proportionality. Constitutions generally are designed to establish government structures to enable effective governance towards a good society. People establish governments under constitutions to maintain peace and advance visions of the social good. *Written* constitutions in the U.S. tradition, as *Marbury v Madison* explained, are designed not only to enable effective governance but also to impose limits on government, preventing tyranny and protecting individual rights and freedoms. This commitment to limiting government and protecting individual rights while advancing the public good is a hallmark of western constitutionalism. Indeed, the Preamble to the U.S. Constitution leaves no doubt that it is designed in order “to establish Justice” and “secure the blessings of liberty,” as well as to promote the “general welfare”. It is the limitation on government behavior through law that is at the core of the idea of constitutionalism ³

In light of the purposes of the U.S. Constitution to establish a government that works but also a limited government, one that will promote justice and secure the blessings of liberty as it protects the national defense and advances the common welfare, it follows that the Constitution contemplates and is designed to prevent disproportionate government action. Proportionality has long been regarded as a hallmark of justice – not only in the context of criminal punishments but far more

³ Wil Waluchow, Constitutionalism, Stanford Encyclopedia of Philosophy

generally.⁴ Whether goods and rewards are to be distributed according to “merit,” or according to “need,” ideas of proportionality are immanent in many theories of justice. A constitution concerned only with promoting effective governance might not be committed to justice, or to proportionate responses. Heavy handed measures may be very effective in quelling popular revolt or disagreement; imposition of very harsh penalties on those who disagree with a regime is indeed a hallmark of tyranny. Stringent measures, particularly in the economic sphere, are also sometimes imposed in democracies, in circumstances that arguably do promote the “general welfare.”⁵ Yet constitutions based on the premise of limited government necessarily commit themselves to government action that aims not to be arbitrary or disproportionate, that is, that aims not to impose undue or unfair burdens on any of the people in its polity, even on behalf of the “general welfare.”

The harder question, I think, is not whether the Constitution should be understood to be designed to promote proportionate government action, but rather, what are the mechanisms by which it does so. Recall that in *McCulloch v Maryland*, the Court wrote that the principal mechanism to check abusive taxation was that the tax would fall on the constituents who elected the legislatures with jurisdiction over taxation. For Marshall, this is a part of the theory of just taxation.⁶ If the legislature voted an unduly burdensome tax, their constituents would vote them out and vote into office representatives who would repeal the abusive tax and impose more reasonable taxes. On this view, a precursor of John Hart Ely’s theory of judicial review, courts can police taxes to make sure that they fall only on those who are represented in the legislature, but the principal mechanisms for assuring nonabusive taxation lie in the institutions of representative democracy.

⁴ See Aristotle, *Nicomachean Ethics*, Book V [widely characterized as advancing proportionality as a principle of distributive justice]; Beccaria [articulating a more general political theory, “every act of coercion of one man against another that does not derive from absolute necessity is tyrannical”], p. 11.

⁵ Consider price controls imposed to combat war-time inflation, as occurred in the United States during World War II. For an example of stringent measures arguably justified on “general welfare grounds in a non-democracy, see [China’s one child policy].

⁶ *McCulloch v Maryland*, 17 U.S. 316, 430 (1819) (finding a failure on “just theory,” of the state government’s right to tax an instrumentality of the national government)

More generally, one might characterize one strand in western constitutionalism as relying on elected parliaments to protect the rights of the people and to prevent undue or disproportionate action. Historically, the United Kingdom (at least prior to adoption of the Human Rights Act, 1998) treated Parliament as unconstrained by judicial review; constitutionalism was maintained both through the cultural commitments of the people and their representatives and through independent courts assuring that government action was taken in accordance with law, subject to inferences in favor of reasonableness and the protection of traditional liberties.⁷ The practice of relying on elected parliaments for the protection of the rights and freedoms of the members of the society is the animating theory of much of the Australian Constitution to this day.

In the United States, however, the constitutional tradition relies on the courts, and on their review of the actions of other branches and levels of government, not only to maintain the jurisdictional boundaries of the active institutions of government but also more affirmatively to protect individual rights and liberties. From *Marbury* on, the Court's leading cases have proclaimed, explicitly or implicitly, the need for judicial review to assure that the other branches or levels of government did not engage in conduct that was "otherwise prohibited", to the detriment of the "legal rights" of the people.

The United States thus has a fairly robust tradition of judicial review of government action to protect individuals' rights. Its constitution includes specific prohibitions on government actions and secures specific rights, especially in the context of criminal prosecution, protectable by the courts. Its protections for due process of law and for equality have provided the basis for a broad jurisprudence of rights protection as well, some of which is motivated by the insight that legislation (tax or otherwise) that singles out particular groups for unfairly inequitable treatment may be less subject to correction by legislative action and more in need of judicial review.

⁷ On parliamentary supremacy, see Dicey. On judicial enforcement of assumptions re common law liberties, see [Entick v Carrington [(1765) 19 St Tr 1030]; but note narrowness of *Wednesbury* reasonableness, at least until recently.

By what tools of interpretive analysis does this practice of judicial review proceed? A central focus in many constitutional cases is on the government's *justifications* for acting. In some cases, to be sure, the reasons for action are irrelevant; where a particular act is either completely prohibited (granting of titles of nobility, for example) or always required (a grand jury indictment to commence a federal felony prosecution, unless waived), the reasons for departure may not matter. But in most cases, there is room for considering the reasons for the government action or omission that is being challenged. Indeed, it is widely thought, to have a constitutionalist culture is to have a culture of government justification.⁸

And here enters the space for proportionality. The contemporary culture of justification under our old constitution is not likely to be satisfied simply by asserting, because the text says so. Although that mode of argument is certainly present in our legal discourse, it is almost always buttressed by other forms of justification. A demand for justification might be thought satisfied by the offering of a reason, of any legitimate reason. The idea of proportionality, however, requires a “good enough” reason, a well-reasoned out reason. And this idea – that the government needs a “good enough” reason to restrain our liberties, or treat some of us differently from others -- is embedded across U.S. constitutional law.

Part I will identify uses of proportionality analyses, or doctrines akin to proportionality, in U.S. constitutional law. Recent scholarship, including that of Alec Stone Sweet and Jud Mathews, Alice Ristroph, Steve Gardbaum, reflects a growing realization that proportionality as an idea emerged long ago within US constitutional law itself.⁹ It is a feature not only of the analysis of punishments under the Eighth Amendment, and of punitive damages under the Due Process Clause, but also emerges in standards for reviewing government action challenged

⁸ See, e.g., David Dyzenhaus, *Law as Justification: Etienne Mureinik's Conception of Legal Culture* (1998) 14 SAJHR 11; [cite Mureinik's piece from 1994, arguing that new South African constitution should be bridge away from culture of authority to culture of justification]]; cf. David Law, *Generic Constitutionalism*, *Minn. L. Rev.* (2005).

⁹ See, e.g., Stephen Gardbaum, *The Myth And The Reality Of American Constitutional Exceptionalism*, 107 *Mich L Rev* 391 (2008); add cites for Ristroph, Stone Sweet

under the dormant commerce clause, and in the tiered review typical of equal protection and substantive due process claims in the late 20th century, as well as in the different standards of review for different kinds of First Amendment issues. We might think of proportionality analysis as requiring a “good enough” reason for the challenged practice, and argue that insistence on a “good enough” reason or set of reasons is a necessary feature of legitimate constitutional jurisprudence given post-realist modern consciousness. Thurgood Marshall’s jurisprudence is exemplary of the insistence on a good enough reason, at times through doctrinal approaches resonant with understandings of proportionality doctrine elsewhere.

To be sure, there are a number of *different* conceptions of proportionality at work in U.S. jurisprudence. In some forms proportionality analysis is deeply connected to equality concerns, both at the level of individual comparisons and in the formulation of appropriate rules for different categories; despite discussion of “cardinal” and “ordinal” notions of proportionality in some of the literature on criminal punishment, each of these categories, I will suggest, rests at bottom on comparisons that might be understood as ones of human equality. But not all uses of proportionality arise in this context, especially those that are concerned with proportionality in the context of monetary awards and limitations on property, where proportionality plays a different role. Proportionality is a doctrine that has also been introduced into federalism analysis in the United States, and echoes of proportionality considerations can be found in some of the more functionally oriented separation of powers cases. Uses of proportionality in this setting are quite distinct from their uses in the setting of individual rights and elude grounding in human rights of liberty or equality.

In Part II I consider the relationship between legal “acts” and legal “rules” in the application of proportionality, borrowing from the debate over rule utilitarianism and act utilitarianism. Many writers assume that proportionality analysis must be applied at the level of the individual case. For example, David Beatty’s defense of proportionality is based on its capacity to take into account how government regulation affects matters of importance to individuals and rejects the relevance of institutional factors in its application. Working in a different tradition,

Robert Alexy, a leading European theorist of proportionality, associates its use with constitutional rights, which, he argues, are in the nature of principles, which (in contrast to legal rules) are in effect mandates to optimize certain values.¹⁰

In some contrast to these accounts, I want to suggest that proportionality analysis may also inform the development of categorical rules, in ways that problematize the choice between proportionality analysis performed at the individual or act level and proportionality analysis performed at the level of general rules or general standards. That is, proportionality as a principle of justice can be used both in evaluating a general rule and in evaluating its application in particular cases: when should applications of a generally proportional rule, in circumstances that produce a disproportionate result, be checked by application of case by case proportionality review? The logic of proportionality itself will not ultimately help answer this question. Rather, institutional factors going to the role and capacities of courts and other branches of government, as well as expressive understandings of law and rule of law concerns (that in turn may relate to the categorical character of some constitutional rights), will limit the scope of proportionality analysis as judicial doctrine.

Part III turns to the role of proportionality analysis in U.S. constitutional adjudication, with attention to the institutional and expressivist aspects of law, as well as to rule of law constraints on its usage. *Atwater v City of Lago Vista*, the Fourth Amendment “seatbelt” arrest case, will be one example; the affirmative action in education cases will be another. I conclude that proportionality is a very

¹⁰ See Robert Alexy, *A Theory of Constitutional Rights* (transl. Julian Rivers, 2002). I am not sure that the theoretical foundation of Alexy’s work has application in the United States. His work is based on a conceptualization that rights – and other principles of constitutional stature – conflict. In the United States, because there are fewer rights seen as constitutional in character, there is a smaller arena for conflict. Moreover, unlike systems based on more positive concepts of the state, as in Germany, the dominant trope about the national constitution in the United States is that it is a constitution of constraint, not positive duty, on the government. For that reason, in part, “government interests” are not, in the United States, understood in terms of constitutional principles or values. See Jackson, *Constitutional Engagement*, at __ (describing how “compelling” interests in the U.S. are nonetheless treated as “optional”). Alexy, on the other hand, seems to assume that what in the U.S. are conceived as “government interests” of varying force, could be instead conceptualized as constitutional principles. See Alexy, at 103-04 (elaborating a hypothetical in which an entity views “press freedom” and “national security” as “principles ... ranked equally in the abstract” and developing “indifference curves” to show how the “law of balancing” applies).

useful tool in the arena of many individual rights claims, where questions arise under broadly worded constitutional standards of due process and equality; proportionality analysis can help bring the Constitution, as law, closer to more general understandings of justice.¹¹ To the extent justice is contested, the application of proportionality in these areas will not necessarily have determinate results but will clarify the grounds for the courts' decisions. In its aspiration to do justice through law proportionality is a normatively valuable interpretive tool; and if proportionality is a presumptive component of constitutional justice, institutional reasons for upholding departures from proportionate treatment must be of real substantial weight. In some cases there will be widespread agreement on the question of proportionality, in other cases, however its application will be much less determinate. But it is a mistake to think that the most important function of interpretive approaches must be to constrain judges to reach identical results. Even where it does not produce determinate answers, proportionality analysis has important advantages in structuring and making more transparent the reasons for judicial decisions.

Proportionality analysis as applied in jurisdictions like Canada, moreover, has the further benefit of clarifying the presumptive scope of constitutional rights and freedoms as a first step in analysis, thereby providing at least potentially useful information to other government actors, who are bound – albeit in not always justiciable ways – to try to comply with constitutional principles.¹² It also models a

¹¹ To the extent that judgments of “proportionality” are informed by implicit comparisons between instances of conduct, it may be that more complex regulatory schemes, especially in settings in which the distribution of benefits to some affects the availability of benefits for others, present situations in which what proportionality demands is far more debatable than in the relatively simple context of a traffic stop, or even of criminal punishments, and where there may be multiple answers to the question of what is proportional. In these areas, applying proportionality analysis may well leave less room for judicial intervention, thereby echoing -- to some extent – the “two tiered” approach to economic regulatory legislation and other forms of regulation that emerged after *Carolene Products*. But cf. Mathews and Stone Sweet, 60 Emory L Rev 797, 838-42 (suggesting that the U.S. Court’s application of the “rational basis” test, for example, in *Williamson v Lee Optical* fails any proportionality test).

¹² In this way, proportionality analysis might also be thought to help separate determinations of constitutional meaning from constitutional doctrine designed to implement those meanings. See Fallon, *Implementing the Constitution* (Foreword); Fallon, 2006 piece on administrability and judicial doctrine; Mitchell Berman paper, 90 Va l Rev 1 (2004). But query what one knows re

method of governmental decision-making about means that can usefully inform other decisionmakers.

In contrast to its use in individual rights cases, proportionality's use in other areas of constitutional law – such as federalism, separation of powers, or the delegation of legislative authority -- cannot be defended as bringing law closer to justice. Examples will probably include *Boerne v Flores* (which explicitly used proportionality analysis), *Lopez v United States* (which did not, but could have), and a recent Canadian Supreme Court decision on provincial and national authority in regulating reproductive technologies. Proportionality's use in these contexts must be defended, if at all, on its utility in sustaining constitutional balances in power allocations that require judicial oversight to be sustained.

Proportionality of government action, like fairness or equality, has deep connections to perfectionist understandings of the U.S. Constitution, but also underlies commitments shared across much of the ideological spectrum for the workability of constitutional doctrine. Yet proportionality is not a panacea, nor is its invocation sufficient to answer hard questions about the development of categorical bright line rules as appropriate interpretive tools, for use by courts. And judicial doctrine should not be understood to limit the responsibility of other constitutional actors to aim for proportionate and just laws, and proportionate and just application of the laws, in every realm.

“meaning” of Canadian Charter, if Section 2 is given broad interpretation as to meaning of freedom of expression, but one that can be limited (e.g., the prostitution case) on adequate government showing?