

Proportionality and freedom—An essay on method in constitutional law

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Abstract: This article presents a functional explanation of why proportionality has become one of the most successful legal transplants in contemporary constitutional law. It argues that proportionality helps judges mitigate what Robert Cover called the ‘inherent difficulty presented by the violence of the state’s law acting upon the free interpretative process’. More than alternative methods, proportionality calibrates the violence that the justification of state coercion inflicts on private (non-official) jurisgenerative interpretative processes in constitutional cases. The first three sections show, through an analysis of different constitutional styles which I label Doric, Ionic and Corinthian, how proportionality seeks to place a non-deontological conception of rights within a categorical structure of formal legal analysis. This method aims to synthesize fidelity to form and institutional structure (thesis) with ‘fact-sensitivity’ to contexts in which specific controversies arise (antithesis). Proportionality positions judges vis-à-vis the parties and the parties in relation to one another differently from other constitutional methods. The next sections distinguish between constitutional perception and reality. While the normative appeal of proportionality can be traced to the perception of its integrative aims, in reality, judicial technique does not entirely live up to those aims. Proportionality succumbs to pressures from the centrifugal forces of universalism and particularism that it seeks to integrate. The final section draws on the works of Kant and Arendt and discusses the implications of an approach to constitutional method such as that reflected in the advent of proportionality for the project of constitutionalism more generally.

Keywords: constitutionalism; constitutional method; courts; judicial review; proportionality

Introduction

The advent of proportionality in constitutional adjudication is one of the most significant developments in contemporary law. Proportionality has become the ‘universal criterion of constitutionality’.¹ Its spread around the world has led scholars to describe it as the ‘most successful legal transplant

¹ David Beatty, *The Ultimate Rule of Law* (Oxford University Press, Oxford, 2004) 162.

of the twentieth century'.² However, this success remains confounding. Proportionality's empowerment of judges seems to bring it into tension with ideals of democratic rule. Furthermore, the protection this method affords to constitutional rights is not automatic, but conditional upon contextual assessment by courts that rights are sufficiently strong to override conflicting public or private interests. In the proportionality machinery, rights become mere considerations in the process of judicial reasoning—which is, admittedly, 'not much'.³

Nevertheless, ours is the 'era of proportionality'.⁴ From countries in Eastern Europe to South Africa and from Canada to Brazil to Europe's supranational courts, judges have adopted proportionality as their method of choice in constitutional cases and beyond. This global spread of proportionality has been extensively documented.⁵ From its origins in nineteenth century Prussian administrative law and transition to the constitutional domain after World War II, at first in Germany and gradually far beyond, this method has colonized the imagination of constitutional jurists around the world. With the exception of American law,⁶ the centrality of proportionality in constitutional adjudication has made this method 'a foundational element of global constitutionalism'.⁷

However, the explanation of proportionality's success remains elusive. The range of available accounts spans the entire spectrum from cold realism to an idealism of sorts. From a realist perspective, judges favour

² Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2003) 2 *International Journal of Constitutional Law* 574–96, 595.

³ Ibid 582. ('Having a right does not confer much on the rights holder: that is to say, the fact that he or she has a prima facie right does not imply a position that entitles him/her to prevail over countervailing considerations of policy.')

⁴ Aharon Barak, 'Proportionality and Principled Balancing' (2010) 4 *Law and Ethics of Human Rights* 1–18, 14.

⁵ See, e.g. Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72, 160; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, Cambridge, 2012).

⁶ For a study of proportionality in the context of American law generally, see E Thomas Sullivan and Richard S Frase, *Proportionality Principles in American Law: Controlling Excessive Government Actions* (Oxford University Press, Oxford, 2008); Jud Mathews and Alec Stone Sweet, 'All Things in Proportion? American Rights Review and the Problem of Balancing' (2011) 60 *Emory Law Journal* 797; Moshe Cohen-Eliya and Iddo Porat, 'The Hidden Foreign Law Debate in *Heller*: The Proportionality Approach in American Constitutional Law' (2009) 46 *San Diego Law Review* 367.

⁷ Stone Sweet and Mathews (n 5) 160. The authors base this conclusion on the observation that 'By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of proportionality analysis.' Ibid 74.

proportionality because it hides the exercise of judicial discretion more credibly or effectively than alternative methods, such as categorical reasoning or balancing. By giving a formal structure to the weighing of conflicting interests, proportionality offers the illusion that values can be aligned along one scale despite their incommensurability. However, such accounts leave much unanswered. Tracing the success of proportionality solely to this cover-up function is a jurisprudential short cut to a likely dead end. The painstaking process of proportionality-structured judicial reasoning cannot be *a priori* dismissed as merely a sham. By contrast, idealist accounts zero in on that reasoning process and emphasize its inherent rationality.⁸ As we will see, these accounts of proportionality tend to overlook significant shortcomings in its judicial technique. But even if they did not, many idealist accounts justify the advent of proportionality, without explaining its appeal. Quite apart from a healthy dose of scepticism about the possibilities of pure (legal) reason in the aftermath of the mass murders and catastrophes of the twentieth century, rationality alone cannot fully reveal this method's appeal to complex institutional actors such as courts.

My aim in this paper is to provide an additional perspective on the rise of proportionality as a constitutional method. I argue that, more than alternative methods, proportionality helps judges mitigate what Robert Cover called the 'inherent difficulty presented by the violence of the state's law acting upon the free interpretative process'.⁹ In addition to routine deployment of its force-dispensing machinery, forcing citizens 'to be free',¹⁰ the institutions of the constitutional democratic state must also justify the direction of that deployment. Law's violence is thus twofold. One coercive dimension takes the form of the actions or inactions that the state imposes on its subjects. But a second, and related, dimension of violence stems from the process of justifying those coercive effects. As we

⁸ See, e.g. Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463–90; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law and Ethics of Human Rights* 141–57.

⁹ Robert Cover, 'Foreword: *Nomos* and Narrative' (1983) 97 *Harvard Law Review* 4, 48. Since the state is often involved as a party in constitutional conflict seeking court permission to override individual rights, Cover's mention of 'state law' is best understood as referring to the 'law of the state'. My emphasis on interpretation here tracks Cover's, insofar as it is an emphasis on constitutional (as a form of legal) interpretation. For an argument about law's 'homicidal potential', by contrast—or, perhaps, in relation to—its jurispactic dimension, see Robert Cover, 'Violence and the Word' (1986) 95 *Yale Law Journal* 1601.

¹⁰ The formulation is Rousseau's. See Jean-Jacques Rousseau, *The Social Contract* [1762] (Penguin, London, 1968) Book I, ch 7.

will see, that justification represents the state's rejection of the outcome of the losing party's jurisgenerative interpretative processes. I suggest that proportionality appeals to judges because of their need for adequate methods to mitigate the violence that their justification of state coercion inflicts on private (non-official¹¹) jurisgenerative interpretative processes in constitutional cases.¹²

Left unmitigated, this second dimension of law's violence can undermine the duty of responsiveness that courts owe to litigants *qua* citizens. In contrast to totalitarian regimes, whose institutions do not react to—or, worse, retaliate against—the demands of their subjects, the public institutions of a constitutional democracy have a duty to respond to the claims of the citizenry in ways that recognize and reinforce the social standing of each citizen claimant as free and equal.¹³ In the case of legal disputes, responsiveness cannot always require the substantive satisfaction of all the claimants. But it does require that the process of justifying outcomes meet certain conditions. For instance, it requires that the justification treat with respect and dignity all the claimants, including those whose claims are inevitably unsuccessful.¹⁴ Proportionality, I submit, answers these demands better than alternative methods.

At first glance it might seem counter-intuitive that judicial responsiveness should depend on how successfully courts mitigate the violence they inflict on the parties' jurisgenerative processes. For one, litigants routinely set themselves up for disappointment by exaggerating the strength of their claims. One's distorted view of the strength of his or her claim heightens the perception of violence inflicted by a court's failure to endorse it, with the result of placing an unreasonably high bar for judicial responsiveness. Moreover, even when the expectations are not overblown, the mere imperative of not leaving cases undecided opens a wide gap between the

¹¹ 'Private' should not be interpreted as 'individual' but as 'non-official'. It includes the government's constitutional interpretation seeking protection of its state interests.

¹² I should note that Cover's own substantive position about the possibility of justification is far more sceptical than the position presented in this article. For more on this difference, see (n 17).

¹³ See e.g. Thomas Pogge, *Politics as Usual* (Polity Press, Cambridge, 2010) (defining as a feature of democracy 'the moral imperative that political institutions should maximize and equalize citizens' ability to shape the social context in which they live'.) 200.

¹⁴ I discuss the duty of responsiveness in Vlad Perju, 'Cosmopolitanism and Constitutional Self-Government' (2010) 8 *International Journal of Constitutional Law* 326–53. For now I should only mention that I don't understand 'responsiveness' as a purely procedural value. For such an approach, see the analysis in Frank Michelman, 'Must Constitutional Democracy be "Responsive"?' (1997) 107 *Ethics* 706–23 (reviewing and analysing the procedural conception of democratic responsiveness in Robert Post's *Constitutional Domains*).

perceptions of the parties—whether private individuals or the state¹⁵—*ex ante* and *ex post* the judicial decision. At least in hard cases, claims of ostensibly comparable strength are presented as the outcomes of the parties' jurisgenerative interpretative processes that aspire to official endorsement by courts as the institutions mandated to settle disputes over constitutional meaning. Yet there is a striking discontinuity between the perceived strength of the parties' claims, understood as their reasonable constitutional interpretations and assessed *ex ante* the judicial decision, and the effects on the parties of binary statements of constitutional validity, as experienced by them *ex post* the decision. Binary statements of legal validity (valid/invalid, legal/illegal) erase all traces of the chance for success that the losing claim had before the judicial decision was delivered.¹⁶ The binary effects of statements of validity heighten the violence on the parties' free interpretative processes by which legal controversies come to an end. As a constitutive feature of a constitutional system, it seems that perceived judicial unresponsiveness cannot be a source of law's violence.

Or can it? It helps to recall that violence is a matter of degree. While some level of violence seems unavoidable,¹⁷ judicial methodology structures the process of justification and thus calibrates the degree of violence. The two sources of law's violence—outcome and justification of outcome—are related. The process of justification calibrates the levels of violence. As Charles Tilly concluded in his sociological study of reason-giving, 'whatever else happens in the giving of reasons, givers and receivers are negotiating definitions of their equality or inequality.'¹⁸ Proportionality stands out by how it positions judges vis-à-vis the parties and the parties in relation to one another. This is the proper context for understanding the common defence of proportionality as a method that 'shows equal respect

¹⁵ For an argument about how constitutional rights become interests by entering the decisional calculus, see Richard Fallon, 'Individual Rights and the Powers of Government' (1993) 27 *Georgia Law Review* 343.

¹⁶ As Habermas put it, 'norms of action appear with a binary validity claim and are either valid or invalid; we can respond to normative sentences, as we can to assertoric sentences, only by taking a yes or no position or by withholding judgment', in Habermas, *Between Facts and Norms* (MIT Press, Cambridge, MA, 1996) 255. See also Ronald Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge, MA, 1985) 119–20 (discussing the bivalence thesis that applies to law, as to all dispositive concepts).

¹⁷ There are limits inherent in the process of justification. Robert Cover refers to them as tragic limits in the common meaning that can be achieved in justifying the social organization of legal violence. See Robert Cover, 'Violence and the Word' 95 *Yale Law Journal* (1986) 1601, 1628–9.

¹⁸ Charles Tilly, *Why?* (Princeton University Press, Princeton, 2006) 24–5 (footnotes omitted).

and concern for everyone concerned'.¹⁹ Proportionality mitigates the gap between the positions of the parties *ex ante* and *ex post* the judicial decision, because it treats with due consideration and respect the public interest pursued by the state as well as the individual interests of the right-holder.

My explanation of the success of proportionality is functional, not causal. The worldwide spread of proportionality is a complex phenomenon whose causes span from the historical to the sociological.²⁰ By contrast, my account makes no claim about how proportionality comes into existence, but it does aim to explain its staying power and success.²¹ I identify a function that proportionality plays in contemporary constitutional law and practice—namely, helping judges mitigate the violent effect of their decisions on the claimants' jurisgenerative processes—together with an account of what in contemporary law might explain why such a function is perceived as necessary (the fact of social pluralism, judges' angst over law's under-determined nature, the complexity of the relations between state and individual). This argument supplements, without replacing historical, sociological or other compatible normative explanations.

This broad approach to proportionality teaches as much about contemporary constitutional thought as it does about the method itself. Rather than analysing this method as a stand-alone legal tool, I take a broader view, one that integrates proportionality within a larger configuration of patterns of constitutional doctrine and discourse. I refer to such configurations as 'constitutional styles'. A style encapsulates in its methodology a comprehensive approach to constitutional rights, the role of courts and their duties of responsiveness, and generally to the substance of law's shaping impact on the 'culture of liberty'²² in a constitutional democracy. Different styles are often intertwined in practice, but my description here treats them as ideal-types. Proportionality epitomizes a particular style. Since each style can be differentiated by its peculiar

¹⁹ Beatty (n 1) 169. Kumm argues that proportionality marks the shift from interpretation to justification: 'The proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy. Or to put it another way: it provides a structure for the justification of an act in terms of public reason', in Matthias Kumm (n 8) 150. However, it is important to incorporate in a theory of proportionality the perspective of the right-holder himself. From that perspective, proportionality remains a method of interpretation. As I argue in the third and fourth sections, a virtue of proportionality is that it can integrate both perspectives.

²⁰ For a discussion of available explanations, see Cohen-Eliya and Porat (n 8) 467–74.

²¹ On functional explanations, see GA Cohen, *Karl Marx's Theory of History* (Oxford University Press, New York, 1978) 249–77.

²² I borrow this phrase from Ronald Dworkin, *A Bill of Rights for Britain* (Chatto & Windus, London, 1990).

approach to the positioning of different constitutional actors—that is, to the construction of constitutional space—I use an architectural metaphor to label it the Corinthian style.²³ This constitutional style, like the Greek architectural order itself, has an integrative aim that combines elements of two other constitutional styles. The first is the Doric constitutional style, which is characterized by a top-down form of legal reasoning and a categorical method of constitutional interpretation of deontological rights. The second is the Ionic constitutional style that relies on a contextualized bottom-up form of reasoning and a balancing judicial methodology.

The first two sections describe the Doric and Ionic styles, respectively. A description is necessary because the Corinthian style, to which I turn in the third section, integrates their respective approaches through the proportionality method. Proportionality places a non-deontological conception of rights within a categorical structure of formal analysis. It represents a synthesis of Doric fidelity to form and institutional structure (thesis) with Ionic ‘fact-sensitivity’²⁴ to contexts in which specific controversies arise (antithesis) that gives the perception of enhanced judicial responsiveness. However, one should not conflate the issue of perception and that of substantive worth. I argue in this section that while proportionality is comparatively more responsive than alternative methods, its judicial technique has not entirely lived up to its integrative aims. Proportionality succumbs to pressures from the centrifugal forces of universalism and particularism that it seeks to integrate. These pressures give rise to a paradox in that the back-loading of proportionality analysis (the fact that, in practice, most governmental measures survive the first stages of the analysis) is both its flaw and the source of its appeal. It is its flaw because such back-loading raises the stakes at the later (balancing) stages of proportionality analysis by increasing the need for principled decision-making techniques. Such formalizing techniques are no more available here than they are under the Ionic style. But the escalating stakes are also a source of proportionality’s appeal because they have the effect of validating both competing interests. As far as the state interest is concerned, the more stages of proportionality analysis the challenged regulation survives, the stronger the recognition of the underlying public interest becomes. On the right-holder’s side, the demanding scrutiny of the state interest seeking to override the right reinforces the weight that the constitution places on the interest protected by the right. However counter-intuitively,

²³ For a discussion of the different orders of Greek and Roman architecture, see Fil Hearn, *Ideas That Shaped Buildings* (MIT Press, Cambridge, MA, 2003) 97–133.

²⁴ Philip Sales and Ben Hooper, ‘Proportionality and the Form of Law’ (2003) 119 *Law Quarterly Review* 426–54, 428.

the judicial vindication of the strength of both conflicting interests narrows the *ex ante/ex post* gap to a considerable extent, thus enhancing the perception of judicial responsiveness.

In the fourth section I take up the objection that judicial violence on private jurisprudential interpretative processes is jurisprudentially irrelevant. The discussion progresses from constitutional methodology to the broader impact of the fact of social pluralism on constitutional adjudication in late modern democracies. Pluralism opens ‘abysses of remoteness’,²⁵ as Hannah Arendt calls them, that challenge the fundamentals of the interaction between citizens and their institutions. Pluralism widens the pool of perspectives on social and political life from which claims are drawn while, at the same time, deepening the need for justification of specific institutional responses in ways acceptable to a pluralist citizenry. I argue that the fact of pluralism, together with the critique of legal determinacy and the changing role of the state, lengthens the distance between claimants, widens the *ex ante/ex post* gap, and heightens the need for mechanisms of institutional responsiveness to mitigate the violence that the law of the state inflicts on private jurisprudential interpretative processes.

Michael Walzer described the challenge of judging not as ‘that of detachment, but of ambiguous connection’.²⁶ The last section analyses the role of the imagination in how modern law constructs the ambiguous connection between judges and their audiences. Using the works of Kant and Arendt, I analyse the role imagination plays in how different constitutional styles construct the positional objectivity of decision makers. Proportionality synthesizes the forces of universalism and particularism and relies on the role of imagination in ways that other constitutional styles have traditionally sought to avoid. In conclusion, I will argue that the relation between proportionality and freedom is complex, and identify some dangers and opportunities in the age of proportionality.

The Doric constitutional style

Reasoning categorically on down from text or high principle, at the ‘emancipatory core’ of the Doric style is the idea that constitutional—like all subspecies of legal—judgment should resist ‘subsumption under

²⁵ Hannah Arendt, ‘Understanding and Politics’ in Jerome Kohn (ed), *Essays in Understanding 1930–1954* (Harcourt Brace, New York, 1994) 323.

²⁶ Michael Walzer, *Interpretation and Social Criticism* (Harvard University Press, Cambridge, MA, 1987) 37.

particularistic causes'.²⁷ Such causes erode the virtues of generality, universalism, and legal form. In this view, succumbing to particularistic causes corrupts the commitment to the rule of law and undermines the responsiveness of the constitutional system to the demands of litigants *qua* citizens. Since constitutional judges decide cases 'by virtue of their authority, and not because they are any more likely to be right than other people',²⁸ judicial power is usurped whenever judges are perceived to deliver all-things-considered decisions.

The Doric style builds walls—the 'sworn enemy of caprice ... the palladium of liberty'²⁹—to fragment the constitutional space into separate spheres of authority and discredit 'Olympian'³⁰ standpoints. Constitutional rights are walls that carve out absolute spaces of decision-making authority.³¹ The corresponding method of interpretation is categorical analysis. A claim that a right has been violated requires an 'assessment of the state's justifications for action in light of the principles that defined the legitimate basis for state action in the particular sphere in question'.³² That assessment is jurisdictional, so to speak, rather than substantive. For instance, burning a flag or criticizing the government's energy policy are actions which the constitutional right to free speech shields from governmental intrusion, no matter how strong or even cogent the government's reasons for interference might be. Rights are grounds for dismissing as irrelevant—not as weak or otherwise defective—claims to the satisfaction of collective goals that conflict with the right-holder's interests.³³

²⁷ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, New York, 2004) 503–4.

²⁸ Charles Fried, 'Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test' (1963) 76 *Harvard Law Review* 755, 761.

²⁹ 'Form is the sworn enemy of caprice, the twin sister of liberty ... Fixed forms are the school of discipline and order, and thereby of liberty itself. They are the bulwark against external attacks, since they will only break, not bend, and where a people has truly understood the service of freedom, it has also instinctively discovered the value of form and has felt intuitively that in its forms it did not possess and hold to something purely external, but to the palladium of its liberty.' (Rudolf von Jhering, quoted in Roscoe Pound, 'The End of Law as Developed in Legal Rules and Doctrines' (1914) 27 *Harvard Law Review* 195, 208–9.

³⁰ Fried (n 28) *ibid*.

³¹ There are a number of ways in which the constitutional spaces are carved out, and here I focus on just one approach. See generally Stephen Gardbaum, 'A Democratic Defense of Constitutional Balancing' (2010) 4 *Law & Ethics of Human Rights* 1–28.

³² Richard H Pildes, 'Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law' (1994) 45 *Hastings Law Journal* 711, 713.

³³ This is the idea of exclusionary reasons. See Joseph Raz, *Practical Reason and Norms* (Oxford University Press, Oxford, 1999) 35–49. See also Jeremy Waldron, 'Pildes on Dworkin's Theory of Rights' (2000) 29 *Journal of Legal Studies* 301 ('Rights are limits on the kinds of reasons that the state can appropriately invoke in order to justify its actions.'). See also Pildes (n 32) 712.

According to the Doric style, responsiveness is owed to the allocational scheme and, through it, to the right-holder. This form of system-centred responsiveness is best understood through an institutional lens. The preservation of social order under conditions of pluralism requires constant reinforcement of the equal status of claimants and the stabilization of their expectations. Since rights protect the actions of right-holders within pre-designated spheres of authority, their judicial enforcement is not tantamount to endorsing the wisdom of their holders' substantive choices. Rather, in enforcing individual rights, courts (re-)enforce an institutional scheme that allocates to the right-holder the authority to act and decide as he thinks best.³⁴ Does the constitution place the authority to decide whether to terminate an unwanted pregnancy with the woman and her doctor or with the state?³⁵ Does it leave it to the right-holder or to the state to decide if loaded handguns can be kept at home in urban areas with high crime rates?³⁶ As a further example, consider whether terminally ill patients have a constitutional right to experimental drugs.³⁷ That question is not about the *wisdom* of the choice to take such a risk (i.e., whether or not it is wise or reasonable to put oneself at a heightened risk from insufficiently tested and thus potentially unsafe drugs). Rather, the question is to whom (the patient, the doctor, the state, etc.) does the constitution allocate the authority to make the decision that the risk is or is not worth taking.

Of course, this approach allows for great variety of approaches—historical, moral, etc.—in answering such allocational questions. Moreover, that scheme itself may reflect substantive judgments.³⁸ But stipulating as rights the outcomes of those substantive judgments marks an epistemological break: a particular liberty interest is protected not because it is important, but rather because the constitution says so. As one scholar put it, 'a litigant's reference to freedom of speech or conscience is not simply a claim for immediate satisfaction, but is the assertion of an interest which can be understood only as a reference to systemic ways of doing things, to roles,

³⁴ Howe, 'Foreword: Political Theory and the Nature of Liberty' (1953) 67 *Harvard Law Review* 91 ('Government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign immunity.')

³⁵ For this interpretation of the early abortion cases, see Laurence Tribe, 'Structural Due Process' (1975) 10 *Harvard Civil Rights-Civil Liberties Law Review* 269.

³⁶ *District of Columbia v. Heller* 554 U.S. 570 (2008).

³⁷ See *Abigail Alliance for Better Access to Experimental Drugs v. Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007), cert. denied mem., 128 S.Ct. 1069 (2008).

³⁸ The scheme can be 'the very product of [substantive] interest-balancing'. 128 S. Ct. 2783 at 2821 (Scalia, J)

institutions and practices.³⁹ In this world, each wall ‘creates a new liberty’.⁴⁰ The advantage of this framing of constitutional questions is not that disagreement will fade away—it won’t—but rather that such framing allows for a better grasp of what the disagreement is about.

The Doric conception of rights has a deontological character that basic goods lack.⁴¹ Rights are not like iPads or designer clothes or any other consumer good we might wish to own but have no special entitlement to demand. Rather, as Ronald Dworkin put it, ‘if someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.’⁴² Rights have a strong anti-utilitarian animus.⁴³ Jeremy Waldron captures this well:

The resolution of any conflict with considerations of utility is obvious: rights are to prevail over utility precisely because the whole point of setting them up is to correct for the defects in the utilitarian arguments which are likely to oppose them. We do not stare at the utility calculus and then stare at the rights, and discover that the second is sufficiently important to ‘trump’ the importance of the first. Instead, our sense of the internal connection between the two established the order of priorities.⁴⁴

From this perspective, cracking the deontological shell that encases the constitutional rights, for instance by open balancing, compromises the structure of constitutional liberty. Such a procedure reopens the constitutional space to the kind of substantive negotiation that rights are supposed authoritatively to bring to an end. The stakes of revisiting the allocation of decision-making authority between actors of asymmetrical power—the state and the individual—are so high that the constitutional space should not be malleable: constitutional experimentation of this type is discouraged. The Doric space is simply not open to contestation in that way.

It is, however, open to contestation in other ways. Understanding rights as structural devices for the fragmentation of political authority should not obscure that the Doric culture of liberty is nevertheless a culture

³⁹ Fried (n 28) 769. The right to free speech is a second-order reason about how the constitution allocates decision-making power within the spheres of authority that it carves out.

⁴⁰ Michael Walzer, ‘Liberalism and the Art of Separation’ (1984) 12 *Political Theory* 315–30, 315. Walzer continues: ‘The art of separation is not an illusory or fantastic enterprise; it is a morally and politically necessary adaptation to the complexities of modern life. Liberal theory reflects and reinforces a long-term process of social differentiation.’

⁴¹ Habermas (n 16) 257.

⁴² Ronald Dworkin, *Taking Rights Seriously*, (Harvard University Press, Cambridge, MA, 1977) 269.

⁴³ *Ibid* 277.

⁴⁴ Jeremy Waldron, ‘Rights in Conflict’, 99 *Ethics* (1989) 503–19, 516.

of argument.⁴⁵ For one, rights themselves are not absolute. They can be overridden, presumably so long as limitations remain exceptional.⁴⁶ The Doric style uses a twofold strategy to mitigate the impact of rights limitations. First, it requires a narrow definition of rights. This is unsurprising: defining broadly rights that are understood deontologically will increase exponentially the number of instances when government policies violate constitutional rights. Such an approach would expand the constitutional domain and make courts the sole negotiators of state's role in society. The second strategy of the Doric style is to structure the typical constitutional conflict as between individuals and the state. In situations when constitutional norms do not apply horizontally, conflicts of individual rights that could challenge the deontological conception will be infrequent. Assessing the success of this double strategy depends largely on how one defines success. If one takes a participant's perspective, the mere possibility that rights can be limited, however exceptionally, is sufficient to enable the interested party—typically the state—to argue that the case at hand warrants precisely such an exception.⁴⁷

As should be apparent by now, the Doric style denies the constitutional relevance of the *ex ante/ex post* gap. In this view, there is only one legal standpoint and that is the standpoint of the constitutional allocation of decision-making authority. Judges are the guardians of that scheme. Constitutional responsiveness means respect for the allocational scheme and the underlying values or principles. Doric responsiveness requires that the judicial mind should never become unmoored, for fear that, if it set sail, it might drift away from the perspective of the allocation of decision-making power and toward the forbidden space of 'particularistic causes'.⁴⁸

⁴⁵ Martti Koskenniemi (n 27) 502. ('To put it simply and, I fear, through a banality it may not deserve, the message is that there must be limits to the exercise of power, that those who are in positions of strength must be accountable and that those who are weak must be heard and protected, and that when professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community overriding particular alliances and preferences and allowing a meaningful distinction between lawful constraint and the application of naked power.')

⁴⁶ For a discussion, see generally Stephen Gardbaum, 'Limiting Constitutional Rights' (2007) 54 *UCLA Law Review* 785 (discussing 'internal limits' on rights).

⁴⁷ At the same time, as the example of the American constitutional culture shows, the constant reaffirmation through public discourse of the deontological conception of rights in a Doric culture of liberty can be a successful self-fulfilling prophecy. For a critical discussion of the broader cultural implications of this deontological approach to rights in the US context, see Mary-Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press, New York, 1991).

⁴⁸ Koskenniemi (n 27) 501. ('Formalism seeks to persuade the protagonists (lawyers, decisionmakers) to take a momentary distance from their preferences and to enter a terrain where these preferences should be justified, instead of taken for granted, by reference to standards that are independent from their particular positions or interests.')

The Ionic constitutional style

The Ionic style develops as an alternative to the detached immutability of the judicial standpoint in the Doric approach. Specifically, it is an alternative to the ‘impartial reason [that] aims to adopt a point of view outside concrete situations of action, a transcendental “view from nowhere” that carries the perspective, attitudes, character, and interests of no particular subject or set of subjects’.⁴⁹ In this view, the attempt to move beyond ‘current human choices’⁵⁰ breeds estrangement and alienation. The cold aloofness of Doric judicial reason can ignore context only by detaching from social life itself. From this perspective, the quest to resist the pressures of particularistic causes misunderstands the challenge of modern law. That challenge is not how to artificially detach constitutional reason from an unruly social life. Rather, it is how to face that complexity full-on and overcome, though law, ‘the frictions of distance’⁵¹ that separate us.

The Ionic alternative to detachment is *situatedness*. Situated decision-making rejects ‘the notion that there is a universal, rational foundation for legal judgment. Judges do not ... inhabit a lofty perspective that yields an *objective* vision of the case and its correct disposition.’⁵² Situatedness does not require that the judge be situated somewhere, anywhere—that would be trite—but rather that he be situated in the (particularist) context of the case. As Judith Resnik put it in her study of feminist adjudication, ‘adjudication is one instance of government deployment of power that has the potential for genuine contextualism, for taking seriously the needs of the individuals affected by decisions and shaping decisions accordingly. Precisely because adjudication is socially embedded, it can be fluid and responsive.’⁵³ Responsiveness here is conceptualized as respect for the rich and multi-layered social meanings of the participants in the constitutional process. A contextual, pragmatic, bottom-up approach leads constitutional

⁴⁹ Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press, Princeton, 1990) 100.

⁵⁰ Martha Minow, ‘Interpreting Rights: An Essay for Robert Cover’ 96 *Yale Law Journal* 1860, 1877 (‘legal positivism or objectivity that implies an authoritative basis or foundation beyond current human choices’). See also Martha Minow and Elizabeth Spelman, ‘In Context’ (1990) 63 *Southern California Law Review* 1597.

⁵¹ David Harvey, *Cosmopolitanism and the Geographies of Freedom* (Columbia University Press, New York, 2009) 140.

⁵² Catharine Wells, ‘Situated Decisionmaking’ 63 *Southern California Law Review* (1990) 1727, 1728

⁵³ Judith Resnik, ‘On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges’, (1988) 61 *Southern California Law Review* 1877, 1935. The Ionic architectural order itself was associated with the feminine gender. See Hearn (n 23) 110.

analysis to reflect on the richness of the life that law aims to regulate. If the Doric divides social space into absolute spheres of authority, the Ionic constitutional space is relative; the landscape changes with the perspective of each stakeholder.⁵⁴

Under this view, rights are not spaces of exclusion; fellow citizens and the state are not presumed to be intruders. Dieter Grimm made the point that ‘the function of the constitutional guarantees of rights is not to make limitations as difficult as possible but to require special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity.’⁵⁵ By contrast to the deontological approach to rights, the Ionic style routinely authorizes judges to break the shell encasing the right in order to access the background interests. Rights are understood as claims to institutional protection for select substantive needs, and not as ambits delimiting spheres of sovereignty. For instance, speech and privacy are super-valued interests that the *pouvoir constituant* selects and for whose protection and/or realization the state summons its coercive force.⁵⁶

By contrast to the Doric style, which focuses on the delimitation of the sphere of constitutional authority and interprets rights narrowly, the Ionic approach interprets rights broadly and then channels the superior quantum of the judge’s interpretative energy to the question of whether their override is justified. For instance, when asked to decide whether there is a constitutional right to physician-assisted suicide, a judge first recognizes the privacy interest in these situations and then proceeds to consider whether the government has sufficiently good reasons to limit its exercise. The broad interpretation of rights has a cumulative effect on the legal system. Because public policies will more often interfere with broadly defined rights, the frequency with which public interest overrides individual rights will correspondingly increase, lest the government should be brought to a halt. This structure of the constitutional doctrines accordingly shapes the Ionic culture of liberty. In this culture, rights are not separating walls of a deontological cast.

⁵⁴ Catharine Wells (n 52) 1734 (‘Understanding a controversy ... requires that it be experienced from several different perspectives as a developing drama that moves towards its own unique resolution.’).

⁵⁵ See Dieter Grimm, ‘Proportionality in Canadian and German Constitutional Jurisprudence’ (2007) 57 *University of Toronto Law Journal* 383, 391.

⁵⁶ The legal recognition of interests is of course not unidirectional. Some interests do not pre-exist legal norms; they are, rather, a consequence of their creation. The expectation that a benefit-granting statutory scheme will not be discontinued absent change in circumstances may give rise to interests that cannot logically precede the adoption of that scheme. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

So, what exactly are rights? Can they be more than ‘just rhetorical flourish’?⁵⁷ Since breaking the deontological shell turns rights-claims into substantive reasons for demanding a particular institutional response, it seems that ‘having a right does not confer much on the rights holder.’⁵⁸ The existence of a privacy interest protected by a right does not *eo ipso* entitle the right-holder to rely on the state’s protection of his privacy interests. If that protection is granted, it will be as the outcome of a balancing process wherein judges deem that privacy interest comparatively stronger than conflicting interests.⁵⁹

And so begins, in the view of its critics, the out-of-control process of judicial empowerment. After surveying more than three decades of German constitutional jurisprudence, David Currie concluded that ‘[a] balancing test is no more protective of liberty than the judges who administer it.’⁶⁰ However strong, rights as substantive reasons are mere ‘reasons that can be displaced by other reasons’.⁶¹ Critics have dismissed the law-ness of this approach: ‘A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.’⁶²

The critics get one point but miss another. Yes, this style empowers courts to override rights in specific contexts. But judges do so in a culture of argument that requires them to justify their decisions. While it may be disquieting to realize that the satisfaction of rights-protected interests depends on further judicial recognition, the fact is that no constitutional style—the Doric style included—can get around this problem, if a problem it is, once it is acknowledged that either public or private interests may override constitutional rights. To paraphrase a classic, the contemporary jurist who feels uneasy about leaving law to the ‘mercy’ of argument was

⁵⁷ Beatty (n 1) 171. (‘When rights are factored into an analysis organized around the principle of proportionality, they have no special force as trumps. They are just rhetorical flourish.’)

⁵⁸ Mattias Kumm (n 2) 582. (‘Having a right does not confer much on the rights holder: that is to say, the fact that he or she has a prima facie right does not imply a position that entitles him/her to prevail over countervailing considerations of policy.’)

⁵⁹ The outcome of balancing can be stated in the form of a legal rule. See Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, New York, 2002) 56 (‘The result of every correct balancing of constitutional rights can be formulated in terms of a derivative constitutional rights norm in the form of a rule under which the case can be subsumed.’).

⁶⁰ David P Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press, Chicago, 1994) 181.

⁶¹ Alexy (n 59) 57. It is of course possible to devise categorical protections within the model of rights as substantive reasons. As Kumm reminds us, certain types of reasons—say, religious reasons for introducing prayer in public schools—are categorically excluded from the comparative weighting of interests in proportionality analysis. See Kumm (n 2) 591.

⁶² Scalia, J in *Heller* 128 S. Ct. at 2821.

born in the wrong century. In our late modern age, the terms of collective self-government are the object of argument and debate.⁶³

Rather than mourn the lost age of certainties, we would be better served to study just how different styles construe the constitutional inquiry. This is where Ionic balancing comes up short because it fails to adequately structure the process of weighing conflicting interests. The lack of formal structure is meant to facilitate the judge's immersion into the particular contexts of the parties.⁶⁴ Context-based analysis requires flexibility, which means there can be 'no purely logical or conceptual answer'⁶⁵ to the question of how to prioritize conflicting interests. At one level, the constant resurfacing of background interests in the balancing analysis is a welcome reminder of what makes them worth protecting as rights.⁶⁶ However, leaving the judicial weighing of conflicting interests completely unscripted undermines the methodic dimension of balancing. Because there is no method to follow, parties can expect from judges only the outcome of the process—and that outcome is bound to be unpredictable. Balancing opens up the constitutional space and then simply leaves it open. But a constitutional method must do more. It must be administrable in a way that makes it responsive to the requirements of the institutional structure and the legitimate expectations of future claimants. Further, it must operationalize, again in an administrable fashion, the weight and pedigree of the right-holder's interests that enter the balancing analysis. Granted, those interests do not automatically trump state interests. But then again, nothing happens 'automatically' in a culture of argument.

⁶³ Rights can also alter the time-horizon in which that process unfolds. For instance, rights can be part of the *ongoing* interaction between the right-holder and social institutions over time. Martha Minow writes: 'A claimant asserts a right and thereby secures the attention of the community through the procedures the community has designated for hearing such claims. The legal authority responds, and though this response is temporary and of limited scope, it provides the occasion for the next claim. Legal rights, then, should be understood as the language of a continuing process rather than the fixed rules. Rights discourse reaches temporary resting points from which new claims can be made. Rights, in this sense, are not "trumps" but the language we use to try to persuade others to let us win this round.' See Martha Minow (n 50) 1875–6 (footnotes omitted).

⁶⁴ Judith Resnik (n 53) 1935. ('Rather than bemoan ... a switch in roles, feminism teaches us to celebrate such rearrangements, to require judges to let others judge them. Such moments might better enable judges to be empathetic, to adopt the perspective of the other, to enter into the experience of the courtroom unprotected by their special status. Judge as witness can thus be understood as a profound challenge to a stable hierarchy, as a subversive act to be applauded.')

⁶⁵ 128 S. Ct. 2850 (Breyer, J, dissenting).

⁶⁶ Contrasting balancing to rule-based categorical reasoning, Kathleen Sullivan has defended balancing on precisely this ground: 'rules lose vitality unless their reason for existing is reiterated', in Kathleen Sullivan, 'Post-Liberal Judging: The Roles of Categorization and Balancing' (1992) 63 *University of Colorado Law Review* 293, 309 (footnotes omitted).

Somewhere along the way the Ionic insight about the importance of context becomes a trap. The point of rights was to transcend context, yet it turns out that rights depend on context. That is the insight. But the demise of the deontological conception of rights also erodes the protected space that rights were supposed to create, whose enforcement depends in part on the interpreters' awareness of the role of rights in the general constitutional scheme. It is a mistake to downplay that effect. The Ionic correction of Doric detachment from context and reliance on legal form swings too far in the opposite direction. The challenge becomes not how to choose between these two styles, but rather how to synthesize them.

The Corinthian constitutional style

Like the Corinthian architectural order itself, which combines Doric and Ionic elements, this constitutional style integrates fidelity to legal form and institutional structure with versatile 'fact-sensitivity'⁶⁷ to the contexts in which controversies arise. This style aims to adjust the Ionic correction of the Doric style just enough to enhance judicial responsiveness to actual context and fulfil the demand of systemic predictability and administrability that are associated with the rule of law in complex democracies. The proportionality method epitomizes this integrative ethos. The method frames a non-deontological conception of rights within a categorical structure of formal analysis. Proportionality analysis consists of one preliminary step, where courts ask about the purpose of challenged regulation, followed by three 'proper' steps: suitability, necessity, and (Ionic-type) balancing where courts weigh the gain from satisfaction of the goal against the loss that results from the intrusion on the constitutional right.⁶⁸ Limitations on rights that fail any one of these steps are invalidated as violations of constitutional rights. Measures that survive the proportionality test are allowed to override constitutional rights.

The previous sections have identified two approaches to the *ex ante/ex post* gap. I have argued that the Doric style does not perceive the gap as a problem; the Ionic approach does perceive it as such but lacks the resources to solve it. The Corinthian constitutional style seeks a more satisfactory approach. The key is its integration within the judicial standpoint itself of what Hannah Arendt called, in the context of judgment in general, the

⁶⁷ Sales and Hooper (n 24) 428.

⁶⁸ I use here Alexy's standard 'balancing' formula: '[t]he greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other' (n 59) 102.

‘plurality of diverging public standpoints’.⁶⁹ Rather than assign judges to an immutable standpoint ‘above the *melée*’⁷⁰ or immerse them into the standpoint of each participant, the Corinthian style gives them a method—the proportionality method—to transcend by integrating the perspectives of the parties. The plurality of those perspectives, and its relevance for constitutional judgment, is neither denied, as in the Doric style, nor extolled, as in the Ionic, but simply acknowledged as a fact of social life. Proportionality guides the judge to move back and forth between his position and that of the claimants, thus enlarging the judicial standpoint by integrating different perspectives. This constitutional space is neither absolute nor relative, but relational.⁷¹

The next sections reconstruct the ‘positional objectivity’⁷² of the judicial standpoint in proportionality analysis. For now I am interested in the details of this method’s structure and application. I have thus far provided an account of this method’s aims, in their best light. However, attention to detail reveals a disconnect between its integrative aims and judicial technique. Proportionality aims to integrate universalism and particularism. In that task it ultimately fails because it succumbs to the centrifugal pressures exerted by these two poles. Put differently, the success of proportionality can be traced to the perception of enhanced judicial responsiveness, yet, as will be seen below, that perception itself is not fully supported by constitutional practice. Precisely because of this disconnect between reality and perception, a phenomenological approach to proportionality can be illuminating. For instance, only an inquiry into that perception itself can help to understand the distinction between proportionality and balancing. A purely analytical or conceptual different would fail to identify differences, as they both rely on a similar approach to rights.⁷³ Nevertheless, judges who apply the proportionality method

⁶⁹ Lisa Jane Disch, *Hannah Arendt and the Limits of Philosophy* (Cornell University Press, Ithaca, 1994) 162.

⁷⁰ Hannah Arendt, *Lectures on Kant’s Political Philosophy* (University of Chicago Press, Chicago, 1989) 42.

⁷¹ I borrow this classification (absolute, relative, relational spaces) from David Harvey (n 51), although I should point out that my use does not completely track Harvey’s. For more on relational space, see Henri Lefebvre, *The Production of Space* (Blackwell, Oxford, 1991).

⁷² This phrase is Amartya Sen’s. Sen argues for conception of objectivity that is positional-dependent and person-independent. Observations and beliefs are objective if any subject could reproduce them when placed in a position similar to that of the initial observer. The challenge then becomes how to define the position-dependent. See Amartya Sen, ‘Positional Objectivity’ 22 *Philosophy and Public Affairs* (1993) 126–45.

⁷³ See Gardbaum (n 46).

adamantly deny that balancing and proportionality are two names for the same method. The perception that proportionality is a method apart needs to be studied in both its doctrinal and theoretical roots. We begin with doctrine.

Consider the tensions deriving from the formalization of the different steps of proportionality analysis. The distinctiveness of these steps aims to enhance the administrability and legal certainty of the proportionality method in contrast to the more ill-structured balancing process. Concerned with applications of proportionality that blur the line between the ‘necessity’ and the balancing stages of the test, Dieter Grimm has warned that ‘a confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable.’⁷⁴ Arbitrary and unpredictable is how critics describe balancing. The formalization of the different steps is supposed to placate these worries.⁷⁵

But formalization replicates the tensions between the Doric and the Ionic styles. Consider, for instance, the analysis of legislative purposes at the preliminary stage. Judges’ demand that legislators present the legislative purpose is a significant challenge to the legislative prerogative. It signifies that the pedigree of a statute enacted by the people’s elected representatives is insufficient ground for upholding its validity; further justification is necessary. This demand introduces a Doric element into the Corinthian style: the idea that rights protect a space which the government may not enter when pursuing impermissible goals. In theory, the purpose analysis can be quite demanding since courts can impose requirements about the level of specificity at which the purpose must be formulated, as well require evidence that the stated purpose of legislation is the actual purpose, rather than an *ex post facto* rationalization.⁷⁶

In the practice of proportionality, however, legislation is virtually never invalidated at this early stage. It turns out, unsurprisingly, that it is almost always possible to come up with some permissible goal for the challenged statute. Courts can strike down legislation at this stage only by pushing back, and that has not been a strategy of choice for courts applying proportionality analysis. Judges have preferred to defer to the legislature on separation of powers grounds: the democratically elected branch has the right to set its

⁷⁴ Grimm (n 55) 397.

⁷⁵ The idea is also to avoid the twin risk of what the South African Constitutional Court called the ‘mechanical adherence to a sequential check-list,’ S Manamela, 2000 (3) SA 1 (CC) 20 (cited in Gardbaum (n 46) 841).

⁷⁶ For an example of such analysis in American constitutional law, see *United States v. Virginia*, 518 U.S. 515 (1996).

policy agenda.⁷⁷ To be sure, structural deferral does not make the preliminary stage meaningless. Even without close judicial scrutiny of legislative goals, the stated goals will shape the lines of argument available at later stages. However, asking for legislative reasons but failing to question their soundness is no doubt an odd combination.⁷⁸ It is a combination that veils the unease of courts keen to be perceived as actors responsive to the overall constitutional structure.

Structural deference at the preliminary step sets in motion a sliding scale toward the later stages of analysis which threatens to collapse proportionality into unstructured balancing. The back-loading of proportionality analysis inevitably puts heightened pressure on the balancing stage. The greater the deference of courts at the first stages of proportionality analysis, the more the substance of their review is pushed back to the latter stage. Paradoxically, herein lies both proportionality's great flaw and the source of its irresistible appeal. On the one hand, the escalating stakes require a judicial technique for principled balancing. As we will see, it is questionable if such a technique is available. On the other hand, the ever-greater stakes legitimize the strengths of the competing interests. As far as the state interest is concerned, the more stages of proportionality analysis the challenged regulation survives, the stronger becomes the recognition of the underlying public interest. On the right-holder's side, this analytical structure ensures that demanding scrutiny awaits any attempts to override the individual interest, given its importance under the overall constitutional scheme. However counter-intuitively, this judicial vindication is the source of responsiveness, understood as due consideration, that bridges

⁷⁷ See Grimm (n 55) 388. Canadian courts initially tried to impose a higher threshold on the government by asking that the governmental objective be 'pressing and substantial' (Aharon Barak, 'Proportional Effect: The Israeli Experience', 57 *University of Toronto Law Journal* 369, 371 (2007) concern or 'sufficiently important to justify overriding a Charter [constitutionally protected] right'. See Barak *ibid* 371 (quoting Peter Hogg, *Constitutional Law of Canada*, (student edn, Carswell, Toronto, 2005) 823. Over time however, as the other steps in the analysis have become more substantial, even Canadian courts have begun to defer more and more to the legislature. See generally Sujit Choudhry, 'So What Is the Real Legacy of Oakes?' (2006) 34 *Supreme Court Law Review* (2d) 501).

⁷⁸ Some advocates of proportionality—including judges writing extra-judicially—have argued for a more incisive judicial involvement at this stage. President Barak has expressed doubts about the wisdom of deferring to the legislator. See Aharon Barak *ibid* 371 ('Despite the centrality of the object component, no statute in Israel has been annulled merely because of the lack of a proper object [or purpose]. A similar approach exists in German constitutional law ... This is regrettable. The object component should be given an independent and central role in examining constitutionality, without linking it solely with the means for realizing it. Indeed, not every object is proper from the constitutional perspective. This is not the expression of a lack of confidence in the legislature; rather it is the expression of the status of human rights.') (footnotes omitted).

the *ex ante/ex post* gap and mitigates the violent dimension of judicial decision.

At the balancing stage of proportionality analysis, judges break the institutional shell that encases the right and engage in a comparative Ionic-like weighing of the seriousness of the infringement of the right against the degree of satisfaction to the interests protected by the challenged statute. Formalizing techniques are necessary in order to show that judicial analysis at this stage is not ‘free-style’ moving in and out of form. I discuss below the formalizing technique of distinguishing between the core and periphery of rights and find it unconvincing. I conclude that the appeal of proportionality should be sought elsewhere.

The distinction between the core and the periphery of rights is a widely used formalizing technique. Its aim is to confine trade-offs in the balancing process to the periphery of rights. As former President of the Israeli Supreme Court Aharon Barak put it, judges ‘must aim to preserve the “core” of each ... libert[y] so that any damage will only affect the shell’.⁷⁹ Once an interest has been identified at the core of a right—for instance, the interest in self-defence at the core of the Second Amendment right to bear arms or the interest in political speech within the broader freedom of expression—that interest must not be balanced away.

The centrifugal jurisprudential forces that structure proportionality analysis are apparent. By contrast to the deontological conception of rights, this conception authorizes judicial access to the underlying interests. The assumption is that a state measure—or conflicting individual right, as the case may be—affects only some interests protected by the right.⁸⁰ However, those interests are prioritized. The corresponding gradation of degrees of difficulty matching the hierarchy of protected interests reflects the centrality of legal form. Assuming a vertical constitutional conflict, the state will find it more difficult, perhaps almost impossible, to justify overriding the core of a constitutional right. The more onerous the justification becomes on that scale of difficulty, the closer to categorical the protection that the core of the right receives. This is how the Corinthian style integrates a Doric dimension within a non-deontological, Ionic conception of rights.

There are, however, difficulties. Not all rights have clear cores. For instance, disability rights, which in many jurisdictions have constitutional

⁷⁹ See *Shavit v. The Chevra Kadisha of Rishon Le Zion, C.A. 6024/97 (1999)* (Supreme Court of Israel) at § 9.

⁸⁰ The assumption, as Dieter Grimm put it, is that: ‘It is rarely the case that a legal measure affects a fundamental right altogether. Usually, only a certain aspect of a right is affected ... The same is true for the good in whose interest the right is restricted. Rarely is one measure apt to give full protection to a certain good.’ Grimm (n 55) 396.

stature, are said not to have cores.⁸¹ The delimitation of cores is also a matter of dispute, as the interpretation of freedom of religion shows.⁸² Critics have pointed out that it is often impossible to identify the core of a right without reference to competing public interests.⁸³ The delineation will depend upon which methodology the interpreter uses, and how the methodology is used in the given case. For instance, in the U.S. Supreme Court debate in *District of Columbia v. Heller* showed, the distance between the majority's originalist analysis and the dissenters' proportionality method was much shorter than either side acknowledged. In that case, the dissenting justices used historical analysis to distinguish core and periphery (or central and ancillary purposes) of the Second Amendment right to bear arms and found the challenged regulation constitutional because it affected only the ancillary interest in individual self-defence, rather than the interest in partaking in a militia that was at the core of the constitutionally-protected right.⁸⁴ The central disagreement between the majority and the dissent was about the correct historical interpretation. These difficulties have led some courts, such as the South African Constitutional Court, to stop relying on this technique at the balancing stage of proportionality analysis.⁸⁵

⁸¹ Samuel Bagenstos, 'Subordination, Stigma, and "Disability"' (2000) 86 *Virginia Law Review* 397, 406 (arguing that disability rights do not have a 'core').

⁸² In the context of freedom of religion, if judges may break the institutional shell of a right, then they may look for the 'core' of the free exercise right in the beating heart of the belief and practice of a religious experience, but this is a notoriously sticky enterprise. 'It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field.' *Employment Division, Dept of Human Resources v. Smith*, 485 U.S. 660 (1988). See also *Shavit v. The Chevra Kadisha of Rishon Le Zion*, C.A. 6024/97 (1999) (Supreme Court of Israel) (Judge England) (deciding whether Jewish burial societies, which customarily administered cemeteries throughout the country, had the right to prevent family members from inscribing on the deceased's tombstone her birth and death dates according to the standard Gregorian calendar as well as the Hebrew calendar).

⁸³ For these reasons, the distinction between core and periphery raises more questions than it answers. See also, Julian Rivers, 'Proportionality and Variable Intensity of Review' 65 *Cambridge Law Journal* 174–207, 187 ('The problem with the "very essence" of a right is that it is almost impossible to define it usefully without reference to competing public interests.').

⁸⁴ 554 U.S. 570 (2008).

⁸⁵ To be specific, the constitutional provision in the South African Interim Constitution followed the essentialist paradigm of the German style. The Court's discussion of its shortcomings can be found in *S. v. Makwanyane* (1995) (3) SALR 391 (CC), para 132 ('The difficulty of interpretation arises from the uncertainty as to what the "essential content" of a right is, and how it is to be determined. Should this be determined subjectively from the point of view of the individual affected by the invasion of the right, or objectively, from the point of view of the nature of the right and its place in the constitutional order, or possibly in some other way?').

A more comprehensive study would be required to present the definitive case that judicial technique does not live up to proportionality's integrative aims. But even a partial account should suffice to establish that technique alone cannot adequately explain the success of proportionality. The next section looks at that success in a broader jurisprudential perspective.

Constitutional method in 3-D

Constitutional conflict is not only a conflict of interpretation, though this is the best normative reconstruction of the form that conflict takes before courts. Each party brings a claim as to why, in its interpretation, the constitution extends its protection in the given context to a specific interest. The role of courts is thus to create law as much as it is to suppress it. After mentioning the 'inherent difficulty presented by the violence of the state's law acting upon the free interpretative process', Cover continues: 'It is remarkable that in myth and history the origin of and the justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle that creates the problem to which the court and the state are the solution.'⁸⁶

When approached from a liberal perspective, a solution is needed for fear that, if left untamed, the fecundity of the jurisgenerative process can endanger the social order. While not all jurisgenerative processes are interpretative in nature, specific concerns about interpretation processes go as far back as Hobbes. As he argued, if individuals are left to their own lights to interpret the demands of the law—be that the law of nature or, by modern analogy, any form of higher law such as a written constitution—they will come up, for a variety of reasons not all of which include self-interest, with diverging interpretations.⁸⁷ Those interpretations make coordination impossible, which in turn spells disaster. To enable coordination, individuals can be said to entrust to the state and its institutions the final authority to interpret the law.⁸⁸ Judicial interpretation therefore supersedes private interpretation—that is, interpretation anchored in the citizens' legal

⁸⁶ Robert Cover (n 9).

⁸⁷ Hobbes, *The Leviathan*, Richard Tuck (ed) (Cambridge University Press, Cambridge, 1996).

⁸⁸ The Supreme Court delivers final statements of legal validity. The common reference is to Justice Jackson's statement: 'We are not final because we are infallible, but we are infallible only because we are final', *Brown v Allen* 344 US 443, 540 (1953) (Jackson J, concurring). See Larry Alexander and Frederick Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110 *Harvard Law Review* 1359.

imaginaries⁸⁹—just as the law of the state trumps private law-making more generally. State law by necessity crushes private jurisgenerative processes and that inevitably disappoints the hopes that the future losing party had *ex ante* the judicial outcome. Why, then, is the violence that courts inflict on the private laws or legal interpretation a problem?

To see why, let us first note that an account of the nature of political authority explains precisely that—the nature of political authority. Yet not all the questions about power and public life concern the nature of political authority. As Bernard Williams pointed out, there are questions about politics that are not first-order questions about its foundations.⁹⁰ This simple point is relevant to our purposes. The issue of the nature of judicial authority is conceptually distinct from that of the effects of judicial decisions, which itself is distinct from how adjudicators reach those decisions. An account of the foundations of political or constitutional authority is not, without (much) more, also an account of constitutional methodology. While it is true that a theory of the foundations offers a lens for assessing methodological approaches, even that perspective is just one among many.

An alternative is the perspective from reality. The starting point here is not the foundation of political authority but a fact of social life or legal practice, such as the rise of proportionality as method of constitutional analysis around the world. This success can be understood as one indication that courts perceive as insufficient—or, as I have suggested, insufficiently responsive—to justify violence by reference solely to the need for an allocational constitutional scheme that gives judges the final word over what the law is. The reasons why invoking the allocational scheme is insufficient have as much to do with the perception of that violence as with the allocational scheme itself. The invocation of the allocational scheme is seldom appropriately ‘thin’, in other words, it is often difficult to resist the attraction of using the existence of the allocational scheme to support conclusions in specific cases without the need to further defend one’s interpretative choices. A combination of factors explains why such conclusions are unsupported. Consider first the fact of social pluralism. Pluralism makes it significantly more difficult to justify exercises of political power that coerce subjects into compliance with norms which they, as

⁸⁹ I use the idea of ‘legal imaginary’ by analogy with Charles Taylor’s conception of the social imaginary, in Charles Taylor, *Modern Social Imaginaries* (Duke University Press, Durham, NC, 2007). Taylor defined the social imaginary as ‘a largely unstructured and inarticulate understanding of our whole situation ... an implicit map of the social space’. (25)

⁹⁰ Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press, Princeton, 2005).

individuals holding diverging life plans, can—and often do—reasonably challenge on substantive grounds of fairness as they understand it. The fact of pluralism puts particular pressure on judicial responsiveness. It widens the pool of perspectives on social and political life from which claims are drawn while at the same time deepening the need for justification of specific institutional responses in ways acceptable to a pluralist citizenry. How can the free institutions of a constitutional democracy retain an appropriately high degree of responsiveness to the claims of a citizenry that holds deep, reasonable, yet incompatible comprehensive doctrines of the good?

Add to this the critique of legal determinacy in modern jurisprudence. Drawing inspiration from the mid-twentieth century philosophy of language, jurists have identified open-texture as a phenomenon central to law's medium, language.⁹¹ This is especially relevant in the case of open-ended constitutional provisions where it is assumed that there will be a multiplicity of interpretative options, some rooted in conflicting, and sometimes irreconcilable, political and ideological visions of society. This critique of determinacy has heightened the perception of fallibility of legal justification and has recast the rights discourse in a different light.⁹² Recent calls for transparency and candour must be understood in this context, as attempts to compensate the inescapable need for legal interpretation through the virtues of the process of interpretation or the ethics of the legal interpreters.⁹³

Another reason why reference to the constitutional scheme is insufficient has to do with the complexity of the relations between individuals and the modern state. The role and functions of the modern state have expanded in the course of the twentieth century and the dynamic of the relationship between its institutions and citizens has become accordingly complex. As far as the law's task is concerned, this complexity can cut both ways. Law's role can be to counterbalance that complexity and preserve the polyphonic simplicity of the Doric style: constitutional rights are insuperable side-constraints on the satisfaction of state interests.⁹⁴ Or, conversely, the state's functions might require its law to reflect the intricate dynamic of the relations between the state and its citizens. This approach,

⁹¹ See HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press, Oxford, 1994), Chapter VII.

⁹² For a critical discussion, see Lawrence Solum, 'On the Indeterminacy Crisis: Critiquing Critical Dogma', (1987) 54 *University of Chicago Law Review* 462–503. See also Mark Tushnet, 'Essay on Rights' (1984) 62 *Texas Law Review* 1363.

⁹³ See Vicki Jackson, 'Being Proportional about Proportionality' (2004) 21 *Constitutional Commentary* 803.

⁹⁴ Robert Nozick, *Anarchy, State and Utopia* (Basic Books, New York, 1974) 29.

encapsulated by the Corinthian style, sees law as lacking real ground on which to pretend that conflicts between the state (that is, us) and the individual right-holders are any less complex than we know them to be. While much can be said for both approaches, the spread of proportionality shows that constitutional practice has taken the latter route.

The question remains why proportionality has been perceived as more attuned to the need to justify interpretative violence and judicial coercion. I have already suggested that part of the answer has to do with respect. In hard cases, where the indeterminacy of the interpretative choice makes it both harder and more urgent to mitigate the *ex ante/lex post* gap, proportionality enhances judicial responsiveness by enabling judges to show ‘equal concern and respect for everyone involved’.⁹⁵ As Alec Stone Sweet and Jud Mathews note, this method makes clear that ‘a priori, the court holds each of the (parties’) interests in equally high esteem ... [and] provides ample occasion for the court to express its respect, even reverence, for the relative positions of each of the parties’, enabling the court to ‘credibly claim that it shares some of the loser’s distress in the outcome’.⁹⁶

The attention it gives to the claims before it, its substantive engagement and the respect with which it treats them—all of these validate the claims and make proportionality a respectful and thus responsive method. Proportionality aims to place the impartiality of the judicial standpoint without denying the objectivity—tantamount in this context to the strength—of the claimant’s positions. As David Beatty put it, ‘Because it is able to evaluate the intensity of people’s subjective preferences objectively, [proportionality] can guarantee more freedom and equality than any rival theory has been able to provide.’⁹⁷ As we have seen, the back-loading of proportionality analysis escalates the stakes by heightening the need for a method that will allow judges to measure and ultimately decide which of the conflicting interests will be allowed to prevail. As far as the state interest is concerned, proportionality treats legislation with all the deference possible in a system of assertive judicial review. Judges do not reject out of hand the public interest as understood by the people’s elected representatives. Rather, they put it through a series of steps and are deferential to it up to and including the point when a decision needs to be made. The more stages of the analysis a claim survives, the more its legitimacy is confirmed and the stronger it becomes. By the same token, this method reaffirms the importance of the right-holder’s interest by ensuring that only important

⁹⁵ Beatty (n 1) 169.

⁹⁶ Stone Sweet and Mathews (n 5) 88, 89. The authors see this feature as part of proportionality’s strategic dimension.

⁹⁷ Beatty (n 1) 172.

public interests will override the very high level of legal protection given to the individual's rights. Of course, deciding remains inescapable. It would be unreasonable for the members of pluralist societies to imagine they can go through life without having to compromise with the other free and equal members of their communities. As Arendt put it, we share the world with men, not man.⁹⁸ But against the horizon of that necessary act of coercion, proportionality does more than alternative methods to make judges treat the parties with respect.

We can now place the three constitutional styles along a spectrum. The Doric style reserves the stamp of objectivity for a judicial standpoint that transcends the 'subjective' perspectives of the participants. The Ionic denies the possibility of objectivity altogether, which it understands as requiring 'an authoritative basis or foundation beyond current human choices'.⁹⁹ By contrast, the Corinthian style constructs the judicial standpoint to incorporate a plurality of perspectives of claimants and acknowledges the objectivity of their claims leading up to and including the moment of decision.¹⁰⁰ The last section takes a closer look at how different constitutional methods articulate the positional objectivity of the judge.

Freedom and imagination: The critique of (constitutional) judgment

Being seen and being heard by others derive their significance from the fact that everybody sees and hears from a different position. This is the meaning of public life ... The end of the common world has come when it is seen only under one aspect and is permitted to present itself in only one perspective.¹⁰¹

Public life requires citizens to bridge the abysses that separate them and experience the world from the perspectives of others. Because we cannot visit other people's standpoints in reality, we must do it in thought. Imagination plays a crucial role. When one 'tries to imagine what it would be like to be somewhere else in thought,' one becomes 'liberated from one's own private interests' and 'one's judgment is no longer subjective'.¹⁰²

⁹⁸ Hannah Arendt, *The Human Condition* (University of Chicago Press, Chicago, 1958) 7.

⁹⁹ See Martha Minow (n 50) 1877.

¹⁰⁰ As Hannah Arendt wrote referring to judgment in general, 'impartiality is obtained by taking the standpoints of others into account: impartiality is not the result of some higher standpoint that would then settle the dispute by being above the *melée*.' Hannah Arendt (n 70) 42.

¹⁰¹ Arendt (n 98) 57–8.

¹⁰² Arendt (n 70) 105–6.

The power of imagination thus becomes the precondition of our enlightenment.¹⁰³ Imagining the world from other people's perspectives—that is, imagining the people we have not become—unveils dimensions of one's own identity that routine and thoughtlessness would otherwise have continued to conceal. Only the person that has trained his imagination 'to go visiting'¹⁰⁴ and discover the vastness of social space can be trusted to be free.

Yet, imagining other people is difficult. We can hardly imagine what it is like to be the people we know and love, much less a stranger, a political opponent or an adversary in the courtroom. Reliance on imagination as a guarantor of political generosity is a dangerous gambit.¹⁰⁵ Why then would such reliance in the context of constitutional methodology be any different?

I will not answer here the question *why*. My aim is solely to study the forms that reliance might take. To this end, I look at the role that imagination plays in each constitutional style and discuss what value, if any, the focus on imagination adds to understanding constitutional methodology. Since constitutional judgment is a subspecies of judgment in general, I use the works of Kant and Arendt as helpful guides.

Like Kant's transcendent idealism, the Doric style enlarges the judicial perspective by detaching the judge from contingent particulars—including his own—to a universal position from which independent judgment is possible. Kant wrote: 'However small the range and degree to which a man's natural endowments extend, it still indicates a man of enlarged mind: if he detaches himself from the subjective personal conditions of his judgment, which cramp the minds of so many others, and reflects upon his own judgment from a universal standpoint (which can be done by shifting (one's) ground to the standpoint of others).'¹⁰⁶ The objectivity and impartiality of the Doric judicial standpoint are functions of the judge's capacity to transcend the perspectives of the claimants. But before transcending, the judge must imagine the position of the claimants—he must represent them. Representation is an essential faculty of constitutional

¹⁰³ See generally Paulo Barrozo, 'Law as Moral Imagination: The Great Alliance and the Future of Law' (unpublished dissertation, Harvard University, 2009) (on file with Harvard Law Library).

¹⁰⁴ Arendt (n 70) 43.

¹⁰⁵ Elaine Scarry, 'The Difficulty of Imagining Other People' in Martha Nussbaum *For Love of Country?* (Beacon Press, Boston, MA, 2002) 98–110.

¹⁰⁶ Kant, *Critique of Judgment*, § 40 (JH Bernard translation, Hafner, New York, 1951). This is the edition that Arendt used. On her usage, see Arendt (n 70) 157. For a slightly different translation, see Kant, *Critique of the Power of Judgment* (Paul Guyer (ed) Cambridge University Press, Cambridge, 2000) 175.

judgment: the judge bridges ‘the abysses of remoteness that separate him from the parties by representing them’.¹⁰⁷

The process of representation-imagination is scripted. The script—namely, judicial method—has the role of filtering out elements of the context whose relevance law does not recognize. And Doric law does not recognize most elements of context. Legal form de-robes people of their contingencies; as Elaine Scarry nicely put it, ‘constitutional strategies rely on a strategy of *imagined weightlessness*, since they define rights and powers that are independent of any person’s personal features.’¹⁰⁸

Access to the universal standpoint requires detachment from the particulars of context and thinking in the place of ‘any other man’.¹⁰⁹ Presumably, this task is not peculiar to judges only. Since representation is not a one-way street, the parties too must imagine themselves in the standpoint of their judges.¹¹⁰ They must make the effort to see whether the judgment by which they are required to abide is the same as the judgment they would have reached if they themselves had been in the position of the decision-maker. The burden of representing the standpoint of judges is significant. It requires parties to bracket away the need to satisfy the interests that brought them to court in the first place. That position places the claimants behind a veil of ignorance where awareness of their positions and the certainty of their own rightness no longer shape their perspective.¹¹¹ This cognitive ability to grasp the mutability of social roles by learning how to detach oneself from the contingencies of one’s own social position is a defining characteristic of a Doric constitutional culture. There are far-reaching consequences for a political culture when citizens come to understand their social roles as being the result of fortune as much as of virtue or vice. It is a failure only of imagination, and not of possibility, if one cannot conceive of one’s life taking a different turn in ‘the yellow wood’.¹¹²

¹⁰⁷ Emphasis on representation of others in judicial reasoning, in the best understanding of the Doric or any of the other styles, is not meant to replace or supplement political representation. The disreputable history of such an approach is told in Martti Koskenniemi, ‘Legal Cosmopolitanism: Tom Franck’s Messianic World’ (2003) 35 *New York University Journal of International Law and Politics* 471.

¹⁰⁸ Elaine Scarry (n 105) 106 (my emphasis).

¹⁰⁹ *Ibid.*

¹¹⁰ They must do so as part of their duties of citizenship. For the idea of citizens as office-holders, see John Rawls, *Law of Peoples* (Harvard University Press, Cambridge, MA, 2001) 135.

¹¹¹ See Koskenniemi, (n 27) 501.

¹¹² Robert Frost, ‘The Road Not Taken’ in Thomas Fasano (ed) *Selected Early Poems* (Coyote Canyon Press, Claremont, CA, 2008) 141.

Critics of the Doric approach have questioned that style's imperative of detachment. In this view, the impossibility of transcending all formative contexts that shape one's perception of the world is only compounded by a mindset of striving towards the universal standpoint. That mindset breeds estrangement and alienation from the political and social world. As we saw in the previous section, the Ionic style offers situatedness as an alternative to detachment. Judges immerse themselves in the positions of the parties and experience the controversy in its fullness from their perspective. This constitutional space is hyper-relativized: from each standpoint the landscape looks different. The Ionic style conceptualizes responsiveness not as transcendence of particulars but as empathy with the particulars. The other is represented empathetically, and empathy is the process by which the decision-maker immerses himself into the standpoint of the parties.

One critique of empathy targets its inherent instability. When conducted properly, empathy runs the risk of blurring the lines between oneself and others.¹¹³ The discovery of humanity in others ultimately threatens to transgress the boundaries of our inherent separations. For this reason empathy can be considered 'assimilationist'.¹¹⁴ Its object assimilates it. The one who loses himself in another cannot be said to remain situated anywhere: he is always at the mercy of his object of attention. If the Doric approach positions judges in ways that are too aloof and distant, the Ionic correction errs in the opposite direction: the judicial standpoint melts under the heat of empathy. This is no doubt a rather drastic approach to the mutability of institutional roles.

This critique is only partly sound. The risk that the empathetic self can become entirely assimilated to its object is exaggerated.¹¹⁵ For the same reason why Doric transcendence cannot shake off its formative contexts before setting out to judge, so here the immersion into another person's perspective does not wipe out all previous traces of one's own personality. But it is true that the Ionic style lacks a synthesis formula, so to speak, to show how the judicial standpoint grows and expands as its object of empathy keeps shifting from one object to the next. Without such a formula, the judge runs the very real risk of becoming assimilated—or 'locked', as Kant put it¹¹⁶—into other people's prejudices and biases.

¹¹³ For example, see Judith Resnik (n 53) 1935.

¹¹⁴ Disch (n 69) 161.

¹¹⁵ See Robin West, *The Anti-Emphatic Turn* (2011) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1885079>. On empathy generally, see Karsten Stueber, *Rediscovering Empathy* (MIT Press, Cambridge, MA, 2006).

¹¹⁶ Kant, *Critique of Judgment* (n 106) 160.

Without critical distance and a method, an adjudicator might end up trading one set of prejudices for another.¹¹⁷

But there is another and greater difficulty with Ionic empathy and it has to do with the fact of pluralism. While this style embraces (indeed, extols) pluralism, it also tends to miscalculate its depth. Its friendly attitude results from the questionable belief that distances between people are shorter than they appear. One can of course find evidence to the contrary, and the very line that separates reasonable from unreasonable conceptions of the good is itself the object of (reasonable) dispute. But whatever the truth of the matter is, it might still be prudent to select a judicial method on the premise that the distance between the members of a political community is considerable. The need for a judicial mind that does not just travel but can also synthesize the resulting information is paramount to then applying constitutional law in a way that coordinates social interaction. Synthesis of that sort requires detachment to an impartial—that is, objective—judicial standpoint.

Like all legal judgments, constitutional judgment must be impartial. Impartiality reflects the decision makers' distance from any claimants' private interests: the judge should speak from the perspective of the citizenry and its laws.¹¹⁸ The Corinthian style seeks to construct an empathetic yet impartial judicial standpoint somewhere in the 'middle ground between cognitive truth claims and mere subjective preferences'.¹¹⁹ We have already seen why and how it goes about doing it, and have reflected on its limited success.

Arendt's work on the critique of judgment eloquently captures the task of the Corinthian style. Arendt famously framed this analysis as an explanation of Kant's Lectures on Political Philosophy. Commentators have noted that there is more Arendt than Kant in those explanations.¹²⁰

¹¹⁷ See Disch (n 69) 162 (discussing the risks of shifting '(others') prejudices for the prejudices proper to (one's) own station'). It can be said, with respect to proportionality analysis, that the division into four distinct steps imposes a 'mental double-check' aimed precisely at creating the distance necessary to identify and counter possible prejudice. For a discussion of mental double-checks and the psychology of judging, see Dan H Kahan, David A Hoffman and Donald Braman, 'Whose Eyes Are You Going to Believe? Scott v Harris and the Perils of Cognitive Illiberalism' (2009) 122 *Harvard Law Review* 837.

¹¹⁸ Judicial decisions, like all acts of state authority, are coercive acts. And 'any coercive act in a liberal democracy has to be conceivable as a collective judgment of reason about what justice and good policy require.' See Mattias Kumm (n 8) 157.

¹¹⁹ Nedelsky cited in Amy Salyzyn, 'The Role of Agency in Arendt's Theory of Judgment: A Principled Approach to Diversity on the Bench' (2004) 3 *Journal of Law & Equality* 165, 174.

¹²⁰ Amy Salyzyn *ibid* 169. ('While Arendt seeks to appropriate many of the core concepts of Kant's theory, she rejects his transcendental universalism and moves away from his formalism to situate judgments in real, particular communities.')

Yet, it is telling that Arendt herself did not see it that way. I believe the reason is that she saw her interpretation as solving the instability inherent in the concept of representation in the only way it can be solved, hence Kant's only possible implied solution. The instability has to do with how much detachment judgment requires. As one commentator formulates the problem, 'representation is principally oriented toward creating distance. It detaches me from the immediacy of the present where there is no space in which to stop and think. Representation is a limited withdrawal that makes the present less urgent and the familiar strange but stops sort of disengaging me to the point that I no longer care to wonder what a situation means.'¹²¹ Now, the problem is the same we have encountered in the discussion between Doric universalism and Ionic particularism.

Arendt's way out is to emphasize plurality as an alternative. She starts by rejecting approaches similar to what I labelled as the Doric approach: '[I]mpartiality is obtained by taking the standpoints of others into account: impartiality is not the result of some higher standpoint that would then settle the dispute by being above the *melée*.'¹²² By the same token, the process of representation 'does not blindly adopt the actual views of those who stand somewhere else, and hence look upon the world from a different perspective: this is a question ... of empathy.'¹²³ As one of Arendt's commentators put it, empathy requires to 'be or to feel like somebody else, while in representation—of the kind that Arendt has in mind—visiting is hypothetically to think and to feel as myself in a different position.'¹²⁴ Rather, the standpoint gives the judge sufficient distance from a controversy to gain the perspective on which impartiality depends but not so much as to become disconnected and aloof.¹²⁵

The situated impartiality of the (Corinthian) judicial standpoint, as Arendt describes the standpoint of judgment generally, is the outcome of 'a critical decision that is not justified with reference to an abstract standard

¹²¹ Disch (n 69) 158.

¹²² Arendt (n 70) 42.

¹²³ Hannah Arendt, 'Truth and Politics', cited in Ronald Beiner, 'Interpretative Essay', in Arendt (n 70) 107.

¹²⁴ Disch (n 69) 168.

¹²⁵ Arendt, 'On the nature of totalitarianism: An essay in understanding' (quoted in Lisa Disch (n 69) 157) ('Only imagination is capable of what we know as "putting things in their proper distance" and which actually means that we should be strong enough to remove those which are too close until we can see and understand them without bias and prejudice, strong enough to bridge the abysses of remoteness until we can see and understand those that are too far away as though they were our own affairs. This removing some things and bridging the abysses to others is part of the interminable dialogue for whose purpose direct experience establishes too immediate and too close a contact and mere knowledge erects an artificial barrier.')

of right but by visiting a plurality of diverging public standpoints'.¹²⁶ In this relational constitutional space, moving back and forth enlarges the judicial standpoint by integrating different perspectives. And that integration of the different perspectives within the judicial standpoint—as constitutional interpretations whose objectivity is undisputed—enhances the perception of judicial responsiveness.

The presence of social pluralism in the form of a plurality of standpoints in constitutional methodology is a defining feature of proportionality. At one level, this development is unnerving. The purpose of law is to solve disagreement, not replicate it.¹²⁷ However, the success of proportionality also shows that legal doctrine and method need not necessarily implode under the pressure of multiple standpoints. Exactly why not is a different matter that I cannot explore here. But pursuing this line of inquiry, that is, understanding how and why in some legal practices the judicial standpoint can incorporate multiple perspectives might help explain why proportionality continues to be resisted in American constitutional law. That answer will probably include reference to the 'integrity-anxiety' of the choice of the constitutional methodology that can help the legal system perform its socially stabilizing function under the constant pressures of political polarization.¹²⁸

Conclusion

The relation between proportionality and freedom is complex. In this paper I have suggested that the main source of proportionality's appeal is its promise of enhancing judicial responsiveness. I have also argued that proportionality does not entirely deliver on that promise since its judicial technique is not, at least in its current forms, able to synthesize properly the twin needs for the universality of form and the particularity of context. Nevertheless, a study of proportionality offers a glimpse at where

¹²⁶ Disch (n 69) 162. Arendt goes on. As she describes it: 'form an opinion by considering a given issue from different viewpoints, by making present in my mind the standpoints of those who are absent: I represent them. ... The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and valid my final conclusions, my opinions.' Arendt (n 70) 'Interpretative essay' 107.

¹²⁷ Jeremy Waldron, 'Kant's Legal Positivism' (1996) 109 *Harvard Law Review* 1535, 1540 ('law must be such that its content and validity can be determined without reproducing the disagreements about rights and justice that it is law's function to supersede.')

¹²⁸ This argument has been made in the related context of the American rejection of the use of foreign law in constitutional interpretation. See Frank Michelman, 'Integrity-Anxiety?' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, Princeton, 2005).

constitutional practice and theory are today and where they might be headed in the future.

That future is fraught with dangers and opportunity. The need for internal stability and consistency can take proportionality in the direction of ever-greater reliance on expertise and an aseptic formalization of legal reasons. This development, whose signs are already present in contemporary constitutional practice, will turn the method into a powerful tool for the ‘administratization’ of constitutional law,¹²⁹ thus squaring the circle of its nineteenth century origins and the widespread colonization of the legal imagination two centuries later. It would take another paper to argue why such development ought to be resisted. For now, it suffices to say that, in my view, this development would impoverish constitutional discourse and leave contemporary constitutional democracies without an essential forum which, for all its flaws and insufficiencies, still enables citizens to reflect, albeit in a stylized form, on the terms of their collective self-government.¹³⁰ Conversely, attention to proportionality understood as portrayed in this paper can channel the considerable resources of constitutional thought in the right direction, that is, in the direction of synthesizing the universal and the particular, form and context—the deep forces that shape contemporary constitutional doctrine and theory. The fate of constitutional democracy in many parts of the world may well depend on the success of that project.

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¹²⁹ For such an argument, see Cohen-Eliya and Porat (n 8) 487–90.

¹³⁰ Reflecting on the public space of politics, Arendt wrote that ‘Whenever people come together, the world thrusts itself between them, and it is in this in-between space that all human affairs are conducted’ in Hannah Arendt, ‘Introduction into Politics’ in, Jerome Kohn (ed) *The Promise of Politics* (Schocken, New York, 2005) 106.