American balancing and German proportionality: The historical origins

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Introduction

Constitutional law is being globalized. It is becoming a shared enterprise that transcends the borders of the nation-state.[1] Around the globe, supreme court justices convene in conferences, enter into dialogue with each other through their judicial opinions, and draw on each other's work.[2] In addition, constitutional law in many countries has increasingly converged upon the same template. This template, termed by Lorraine Weinrib the "post-War paradigm,"[3] includes a robust form of judicial review and a two-stage system of protecting rights, consisting of a rights protection clause and a standard-based doctrine for the adjudication of rights conflicts, namely, proportionality. The spread of proportionality across legal systems has been particularly rapid and has provided a common grammar for global constitutionalism—what

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1 *See* Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819(1999); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Va. L. Rev. 771 (1997); Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 Cardozo L. Rev. 533, 533 (1993); Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in European Constitutionalism Beyond the State 27 (J.H.H. Weiler & M. Wind, eds., 2003).

2 *See* Ann-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Int'l J. 1113, 1116–1120 (2000); Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int'l L.J. 191 (2003).

3 Lorraine Weinrib, *The Postwar Paradigm and American Exceptionalism*, in The Migration of Constitutional Ideals 84 (Sujit Choudhry ed., 2006).

David Law has referred to as generic constitutional law.[4] David Beatty has gone as far as arguing that proportionality was the "ultimate rule of law,"[5] suggesting that convergence on this principle would end age-old controversies over constitutional interpretation and signal the end of constitutional legal history.

While in many respects the United States is the birthplace of constitutionalism and the driving force behind the global success of constitutionalism, its own constitutional law stands apart from this common template. U.S. Supreme Court justices are reluctant to engage in constitutional borrowing and to adopt constitutional templates, such as proportionality, that originate in other legal systems.[6] Instead, American constitutional law, relying on the absolute nature of the U.S. constitutional text, portrays itself as adhering to a categorical constitutional analysis in which the constitutional review begins and ends at the stage of identifying the infringement of a right. American constitutional doctrines concentrate on devising complex categories and subcategories for identifying the kinds of rights infringements that merit constitutional review and the level of scrutiny that should apply to each one.

Frederick Schauer has recently argued, in this regard, that U.S. constitutional law is much more rule-based than non-American (mainly European) constitutional law, pointing to the absence in U.S. constitutional law of a standard-like proportionality test. He has also argued, provocatively, that as European constitutional law matures over time, it will develop the same rule-like structure that characterizes the more mature American constitutional system.[7] The difference between European and American constitutional law, therefore, is portrayed as a difference between rules and standards.[8] However, the United States, too, has standards. After all, it is the birthplace of antiformalism, which

[4] David Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005). Alec Stone Sweet documents the spread of proportionality in all countries of Continental Europe, as well as in Canada, Israel, South Africa, Eastern Europe, Latin America, and also in supranational courts such as the European Court of Justice and the WTO Appellate Body. Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, COLUM. J. TRANSNAT'L L. 19 (forthcoming, 2008) (available at http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=alec_stone_sweet, last visited May 20, 2008).

[5] DAVID BEATTY, THE ULTIMATE RULE OF LAW (2004). For a thoughtful critique of Beatty's approach, *See* Vicki C. Jackson, *Being Proportional about Proportionality*, 21 CONST. COMMENTARY 803 (2004).

[6] *See* Printz v. United States, 521 U.S. 898, 921 n.11 (1997) (Justice Scalia expressed the view that "comparative analysis [is] inappropriate to the task of interpreting a constitution," and that "our federalism is not Europe's"). But see Vicki C. Jackson, *Forward: Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (Arguing that Scalia's approach does not represent the general approach of the Supreme Court). For two excellent recent accounts of American exceptionalism, *see* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005); EUROPEAN AND US CONSTITUTIONALISM 49 (Georg Nolte ed., 2005). For American resistance to applying proportionality analysis in American constitutional law, *see* Jackson, *supra* note 5, at 857 (pointing to the "dark side" of proportionality: "[i]t is an approach that may offer less constraint on political branches"); *see* also Richard Fallon, *Strict Judicial Scrutiny*, 54 UCLA. L.REV. 1267, 1333 (2007).

[7] Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND US CONSTITUTIONALISM 49, 68 (Georg Nolte ed., 2005); Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 32 (Michael Ignatieff ed., 2005).

[8] *See* Frederick Schauer, *The Convergence of Rules and Standards*, N.Z. L. REV. 303 (2003). *See* also Simon Evans & Adrienne Stone, *Balancing and Proportionality: A Distinctive Ethics?* (Draft for discussion at the VII World Congress of the International Association of Constitutional Law (Athens, June 2007) (a copy with the authors) (responding to Schauer's account).

shuns rules and prefers standards, and this phenomenon has not completely passed over constitutional law. It is incorporated in the balancing doctrine that resembles proportionality in many respects and is also a standard-based doctrine.[9]

The two tests, balancing and proportionality, resemble each other in important aspects and are often discussed in tandem. However, balancing has never attained the status of an established doctrine in U.S. constitutional law in the same way that proportionality has in European constitutional law. Moreover, balancing has always been the subject of fierce criticism and is very much a controversial concept in U.S. constitutional law. From the 1950s onward, balancing has been at the center of a heated debated within the Supreme Court.[10] As Richard Fallon put it, recently: "balancing applications frequently draw outraged protests from dissenting Justices who contend that the Court has betrayed the staunch commitment to preserve individual rights."[11]

Since the two tests, balancing and proportionality, seem to be analytically similar and to perform similar functions, it is fair to ask why the treatment of proportionality is so different in Europe and in the United States. How is it that proportionality raises very little opposition in Europe, while balancing raises so much opposition and resistance in the United States? European proponents of proportionality are perplexed by this American resistance. After all, they argue, some form of a two-stage proportionality analysis is both unavoidable and commonsensical. Why not make use of the fact that balancing is a familiar concept in American jurisprudence and increase its centrality to constitutional discourse, instead of marginalizing it and stressing the differences between American and European constitutional law.[12] Such an approach is viewed sometimes as rooted in American isolationism and unilateralism.[13]

One can, of course, deny that balancing and proportionality are similar and argue that, despite superficial similarities, they are analytically distinct. However, as we will show in section 1, we believe that the analytical differences between the two concepts are not substantial enough to account for the differences in attitudes toward them. Other, more promising explanations for the differences in attitudes between the U.S. and Europe may be found in aspects of legal and political culture.[14]

[9] Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987) (documenting the spread of balancing in American constitutional law); *see* Fallon, *supra* note 6 at 1306–1308, 1328 (portraying one version of strict scrutiny as a weighted balancing text). For a recent example of the use of balancing in Supreme Court adjudication, *see* Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 Tex. L.Rev. 517 (2007) (discussing the use of balancing in affirmative actions cases).

[10] *See infra*, section 3.2.3. For the same debate in scholarly literature, *see* Laurent B. Frantz, *The First Amendment in the Balance*, 71 Yale L.J. 1424 (1962) (arguing against balancing in First Amendment cases); Wallace Mendelson, *The First Amendment and the Judicial Process: A Reply to Mr.* Frantz, 17 Vand. L. Rev. 479 (1964) (endorsing balancing in First Amendment cases).

[11] Fallon, *supra* note 6, at 1307.

[12] Dieter Grimm, *Proportionality in Canadian and German Constitutional Law Jurisprudence*, 57 Univ. of Toronto L.J. 383 (2007); Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 Univ. of Toronto L.J. 369 (2007).

[13] Weinrib *supra* note 3 at 85. For an account of American unilateralism *see* Jed Rubenfeld, *Commentary: Unilateralism and Constitutionalism*, 79 N.Y.U. L.Rev. 1971 (2004) (documenting American unilateralism).

[14] Elsewhere, we have developed a cultural account regarding the differences between American balancing and German proportionality. *See* Moshe Cohen-Eliya and Iddo Porat, *The Hidden Foreign Law Debate in* Heller*: Proportionality Approach in American Constitutional Law*, 46 San Diego Law Review 367 (2009). In

In this article we suggest another explanation for the difference between balancing and proportionality, one which has been largely overlooked to date—an explanation based on the different history of balancing and proportionality. As proportionality originated in Germany, an examination of the different ways in which proportionality and balancing developed in Germany and in the United States, respectively, would be of value. These differences, we believe, go a long way toward explaining the different attitudes toward the two concepts.

Examining the history of the concepts of balancing and proportionality, we find that there are distinct differences between the two. Indeed, the differences are so evident that they outweigh the similarities. For instance, proportionality was originally developed in administrative law, and was related only tangentially (if at all) to private law, while balancing arose in private law and was only later extended to public law. Moreover, proportionality was created as part of an attempt to protect individual rights against a background of little textual support for such protection, whereas balancing was created for the exact opposite purpose—to check the overzealous (libertarian) protection of rights by the U.S. Supreme Court based on an excessively literal reading of the constitutional text. And, finally, proportionality was developed in the course of the formalistic and doctrinal jurisprudence of the German administrative courts and was not part of an antiformalistic legal philosophy, whereas balancing was part of the antiformalist revolution of the U.S. progressives, and a leading aspect of this revolution. We believe, therefore, that the historical account shows that we have an interesting phenomenon confronting us: two legal principles that began very differently but came to a point where, today, it seems natural to discuss the two together.

We start in section 1 by presenting and refuting three main arguments regarding the analytical differences between proportionality and balancing. We then turn both to the origins of proportionality in Germany (section 2) and in the United States (section 3), noting their pro- or antirights associations, as well as to their jurisprudential characteristics in terms of formalism and antiformalism. We conclude, in section 4, by discussing the implications of the historical accounts as they pertain to the differences in attitude toward balancing and proportionality and raise the question of whether the two concepts will converge.

1. Analytical differences between balancing and proportionality

In this section we will briefly discuss the analytical structure of proportionality and balancing in order to determine whether they are analytically different from each other.

our article we suggested that Justice Bryer's attempt to introduce proportionality into American constitutional law may be problematic since it disregards the different cultural meanings that are associated with proportionality in Germany and balancing in the U.S.

Wherever the proportionality test has been introduced, it has the same basic two-stage structure. The first stage is to establish that a right has been infringed by governmental action. In the second stage, the government needs to show that it pursued a legitimate end and that the infringement was proportional. The proportionality requirement comprises three subtests: first, the means adopted to advance the governmental end must be appropriate for furthering that goal (suitability); second, the means adopted must be those that least infringe on the right of the individual (necessity); and third, the loss to the individual resulting from the infringement of the right must be proportional to the governmental gain in terms of furthering the governmental goal (proportionality in the strict sense).[15]

For example, in the Israeli case of *Horev v. Minister of Transportation*,[16] which concerned a road detour imposed by the Jerusalem municipality to prevent cars passing through an ultraorthodox Jewish neighborhood during the Sabbath, the Israeli Supreme Court analyzed the case in the following way. It first identified an infringement of the right to free movement and identified the legitimate governmental end of protecting religious feelings. It then applied the three steps of the proportionality test: (*a*) it asked whether the governmental means (the detour) furthered the governmental end (protecting religious feelings) (the suitability test); (*b*) it asked whether the means chosen were the least restrictive possible (the necessity test); and (*c*) it asked whether the harm to the right to free movement was proportional to the benefit of protecting religious feelings (proportionality in the strict sense). Applying these three subtests, the Court arrived at the conclusion that the detour would be mandated only during prayer times on the Sabbath.

Like proportionality, balancing is triggered when a constitutional right or another constitutional provision has been infringed (or burdened), and, like proportionality, it concerns the comparison between the burden on the right and the importance of the governmental interest.[17] Thus, in the first case to apply balancing in free speech jurisprudence, *Schneider v. New Jersey*,[18] in which a municipal ban on the distribution

[15] The literature on proportionality is immense. We note here a few recent theoretical and analytical engagements with the subject: Beatty, *supra* note 5; Jackson, *supra* note 5; Robert Alexy, A Theory of Constitutional Rights (2002); Julian Rivers, *Proportionality and Variable Intensity of Review,* 65 Cambridge L.J. 174 (2006); Mattias Kumm, *What Do You Have in Virtue of a Constitutional Right? On the Place and Limits of the Proportionality Requirement, forthcoming* in Law, Rights, Discourse: Themes of the Work of Robert Alexy (S. Paulssen, G. Pavlokos eds., 2007); Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing and Global Constitutionalism,* Columbia Journal of Transnational Law 19 (forthcoming, 2008) (available at http://works.bepress.com/cgi/viewcontent.cgi?article=1010&context=alec_stone_sweet, last visited May 20, 2008); Grimm, *supra* note 12; Barak, *supra* note 12; J. Lowell & A. Lester, *Proportionality: Neither Novel Nor Dangerous*, in New Directions in Judicial Review 51 (J.L. Jowell and D. Oliver, eds., 1988).

[16] HCJ 5016/96 Horev v. Minister of Transportation (an English translation of the Court decision is available at http://elyon1.court.gov.il/files_eng/96/160/050/A01/96050160.a01.htm [last visited May 20, 2008]).

[17] For definitions of balancing in American constitutional law, *see* Aleinikoff *supra* note 9. *See* also Iddo Porat, *The Dual Model of Balancing,* 27 Cardozo L. Rev. 1393 (2006); Iddo Porat, *On the Jehovah Witnesses Cases, Balancing Tests, Indirect Infringement of Rights and Multiculturalism: A Proposed Model for Three Kinds of Multicultural Claims*, 1 Law and Ethics of Human Rights 429 (2007).

[18] Schneider v. New Jersey, 308 US 147 (1939).

of handbills was attacked as unconstitutional, the Supreme Court balanced the right of free speech against the municipal interest in clean streets and held that in the circumstances of the case the ban violated the right to free speech.

There are at least three separate arguments for why these two doctrines—balancing and proportionality—are analytically distinct. We will now review these arguments and show the difficulties in each, concluding that analytical differences alone do not help explain the different attitudes toward the two concepts in the United States and other countries.

First, German and Canadian scholars often argue that the proportionality test is more structured and doctrinal than balancing, since it is divided into three analytically separate tests that logically follow from and complement each other, while the balancing test is vague, general, and lacking in structure.[19] As a result, it can be argued that the proportionality test has greater value than that of balancing in several respects: it is better at assisting judges in structuring their decisions and arriving at the right conclusions; it allows greater transparency in the judicial process, providing a greater degree of legitimacy to judicial decisions; and it has a better regulative and educative effect on the public and on government. By contrast, because balancing lacks structure, it leaves more room for judicial subjectivity and might enable judges to uphold governmental infringement of rights more easily.

These scholars may be overemphasizing the rule-like nature of proportionality. More importantly, however, by comparing balancing, on the one hand, and the three subtests of proportionality, on the other, they engage in an unfair comparison between balancing and proportionality. Only the final subtest of proportionality, proportionality in the strict sense, is analogous to balancing. The first two tests are means-ends tests that do not involve balancing—at least, not as it is usually understood in American jurisprudence.[20] The first two subtests, suitability and necessity, do not require a comparison between the end and the right. All that is required is a better fit between the means and the end, one which does less harm to the right. In this sense, the first two subtests of proportionality function as Pareto-optimal tests.[21]

[19] Grimm, *supra* note 12, at 395 (criticizing the Canadian Supreme Court for not following the analytical steps of the proportionality test and for conducting undisciplined balancing in the necessity test); Weinrib, *supra* note 3, at 96 (emphasizing the structural and analytical nature of proportionality analysis); Beatty, supra note 5, at 172 (emphasizing the neutral characteristics of proportionality). Robert Alexy goes as far as arguing that the three subtests of the proportionality analysis follow logically from the concept of rights as principles. *See* Alexy, *supra* note 15, at XXIX.

[20] *See* also Donald H. Regan, *Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-federal system: Protectionism and Balancing, Da Capo*, 99 Mich. L. Rev. 1853, 1853 note 1 (2001) "[N]either pure 'rationality review' nor pure 'less restrictive alternative analysis' is a form of balancing as I use the term. Both these modes of review focus on whether there are any benefits, either from the regulation in itself, or from the regulation as opposed to some alternative. Neither requires the comparison of benefits and burdens."
One may claim that judges do engage in balancing even in the first and second subtests. *See* Grimm, *supra* note 12, at 395; Guy Davidov, *Separating Minimal Impairment from Balancing: A Comment on R. v. Sharpe (B.C.C.A.)*, 5 Rev. Const. Stud. 195 (2000). However, to the extent that balancing enters these tests, it is an example of smuggling in the third subtest into the first and second subtests.

[21] Beatty, *supra* note 5, at 110; Rivers, *supra* note 15, at 198.

Moreover, American constitutional law includes tests that are very similar to the first and second subtests of proportionality, although not at the balancing stage of the constitutional analysis. For example, the least-restrictive-means test, which is an important test in American constitutional law, operates very similarly to the second subtest (necessity) of proportionality.[22] In addition, the first subtest (suitability) of proportionality is inherent in each of the three tiers of scrutiny, even in the most deferential rational-basis test.

Second, some advocates of proportionality argue that proportionality is more objective and reliable, since its analytical structure renders it immune to one of the main problems that plagues balancing—the problem of incommensurability. The argument is that proportionality, even in its third subtest (proportionality in the strict sense), does not require the comparison between two incommensurable values.

There is a nice example that may explain this claim.[23] Consider a dog show in which there are different contests: the best bulldog in the show, the best schnauzer, and so on. However, there is also a final contest for the best dog overall. Comparing one schnauzer with another can make sense, but how are we to compare bulldogs and schnauzers? Proportionality, so the argument goes, provides a solution: we take the bulldog that won the bulldog show and the schnauzer that won the schnauzer show, and ask with respect to each one how close it came to the ideal bulldog or schnauzer in terms of the standards for its respective species. Similarly, the proportionality test assesses each value in its own terms, without the need to compare incommensurable values, and then asks with respect to each one how close the infringement in the case was to the core of this value.

Beatty seems to use a similar argument to explain why the Israeli *Horev* decision does not include balancing, which would have required the Court to compare incommensurable values. According to Beatty, the Court did not have to balance the importance of free movement with the protection of religious feelings. Instead, what it did was to examine the extent of the harm done to each value *in its own terms* and to look for a solution that would dramatically decrease the extent of harm to one value (religious feelings) while minimally harming the other value (free movement). Requiring the detour for a few minutes only during prayer times is such a solution. Beatty's account also emphasizes the advantages of proportionality as focused on the facts of the case rather than on value judgments and, hence, as promoting judicial legitimacy and decreasing the extent of judicial subjectivity.[24]

Our objection to the argument is twofold. First, to the extent that this argument is true, it is equally true of balancing. In other words, if it is possible to apply the third test of proportionality in a way that does not require the comparison of incommensurable values, it is also possible to apply balancing in the same fashion. To the extent that this

[22] Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 468 (1969); Guy M. Struve, *The Less Restrictive Alternative Principle and Economic Due Process*, 80 Harv. L. Rev. 1464 (1967).

[23] We are indebted to Prof. Bruce Chapman for the idea of this example.

[24] Beatty, *supra* note 5, at 169. Beatty relies on David Luban, *Incommensurable Values, Rational Choice and Moral Absolutes*, 38 Clev. St. L. Rev. 65, 75 (1990), stating that the Court in *Horev* reached a commonsense conclusion based on a small–large trade-off.

has not been done with regard to balancing, it is not because of the structural limitations of balancing but because of the inclinations of American judges. More importantly, the argument substantially disregards the ways in which normative assessments are indispensable and unavoidable in any kind of proportionality or balancing test. One must take into account the relative importance of the conflicting rights and interests. Thus, for example, in *Schneider* a substantial harm to the valid interest in clean streets did not override the less substantial harm to free speech, in view of the greater relative importance of the latter in a democratic society.

Third, and finally, the advocates of proportionality often view balancing as less protective of rights, as compared with proportionality. Proportionality, the argument goes, is based on a view that upholding the right is the norm, while infringing it is the exception that requires strict justification for it to be upheld.[25]

This argument, however, is not based on an analytical distinction between balancing and proportionality but is, rather, based on an assumption about constitutional cultural differences that tip the balance in favor of protecting the right in legal systems where proportionality is applied. There is nothing inherent in the concept of balancing that would prevent a similar result in the United States. For example, the strict scrutiny test, even in its mildest form, which is termed by Fallon a "weighted balancing test," is "distinguished from other balancing tests by its premise that the stakes on the rights side of the scale are unusually high and that the government's interest must therefore be weighty to overcome them."[26] In addition, even in a proportionality-based system such as the Canadian one, the approach that gave priority to rights as established in the seminal *Oakes*[27] test has been eroded over time.[28] It is, therefore, inaccurate to portray proportionality, as contrasted with balancing, as a device that is analytically (rather than culturally) prorights.

This brief review suggests that analytical differences may not be substantial and, as a result, cannot account, to a satisfactory degree, for the difference in attitudes toward these concepts. We will now take up an historical account of the origins of proportionality in Germany and of balancing in the United States.

[25] Lorraine Weinrib, *The Supreme Court of Canada and Section 1 of the Charter*, 10 Sup. Ct. Rev. 469 (1988); Lorraine Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in Defining the Field of Comparative Constitutional Law (Vicki Jackson & Mark Tushnet eds., 2002) (describing proportionality as a method for protecting rights); David Beatty, Constitutional Law in Theory and Practice (1995) (same).

[26] Fallon, *supra* note 6, at 1306.

[27] R. v. Oakes,1 S.C.R. 103 (1986).

[28] The strict *Oakes* test was eroded quite rapidly in *R. v. Edward Books and Art* [1986] 2 S.C.R. 713, 772, when the Court deferred to the government in the application of the necessity subtest of proportionality. For an excellent reading of the erosion of the *Oakes* test, *see* Sujit Choudhry, *So What is The Real Legacy of* Oakes*? Two Decades of Proportionality Analysis under the Canadian* Charter*'s Section 1* , 35 Sup. Ct. L. Rev (2d) 501 (2006). *See also* Christopher M. Dassios & Clifton P. Prophet, *Charter Section 1: The Decline of the Grand Unified Theory and the Trend towards Deference in the Supreme Court of Canada*, 15 Advocates' Quarterly 289, 291 (1993); Robin Elliot, *The Supreme Court of Canada and Section 1—The Erosion of the Common Front*, 12 Queen's L.J. 277, 281 (1987); Gerard La Forest, *The Balancing of Interests under the Charter*, 2 n.j.c.l. 133 (1993); Ruth Colker, *Section 1, Contextuality, and the Anti-Advantage Principle*, 42 University of Toronto L.J. 77 (1992).

2. The origins of proportionality in German administrative law

The principle of proportionality first arose in Germany. It was an important instrument for the introduction of individual rights into an authoritarian legal system that, historically, had provided only a limited textual basis for such rights. By insisting that the government choose only such means that were least harmful to individual rights, the use of proportionality set a formal limitation on the exercise of police powers, thus introducing the notion of rights into German positive public law.

This section deals with the historical origins of proportionality in Prussia, the politically and intellectually dominant German *Land* in the eighteenth and nineteenth centuries. As discussed below, between 1882 and 1914 the legal doctrine of proportionality was extensively employed by Prussian administrative court judges. We begin, therefore, with a short introduction to the foundations of Prussian administrative law.

2.1. Proportionality and *Rechtsstaat*

Beginning in the second half of the eighteenth century, Prussia gradually evolved from an authoritarian state, in which the king was the supreme and sole source of authority, into a state that was governed by law—a *Rechtsstaat.* At that time, Prussia was a military and economic power ruled by Friedrich the Great. Well-versed in the principles of enlightened absolutism and influenced by the first buds of liberal social contractarianism and rationalism (upon which the French and the American Revolutions were founded), Friedrich the Great believed that a monarch's authority was not unlimited but, rather, that he was "the first servant of his state."[29] He acted, therefore, to establish Prussia's legal system on the basis of principles of rationalism, religious tolerance, and individual freedoms.

Under his successor, Friedrich Wilhelm III, the codification of Prussian law was completed. Article 10(2) of the Allgemeines Landrecht of 1794 authorized the government to exercise police powers in order to ensure public peace; however, at the same time, it also limited those powers to such measures that were essential for achieving that goal. The article stated that "[t]he police is to take the *necessary* measures for the maintenance of public peace, security and order."[30] This is the first textual basis for a requirement of proportionality. It is clear, both from the language of this provision and from its underlying logic, that this was a reversal of the default rule by which state action was legitimized under German public law. If, in the past, state action had been held to be valid even when it was not explicitly permitted under the law, henceforth, the validity of such action depended on explicit textual authorization. This is the essence of the *Rechtsstaat* principle in German public law to this day. Although the precise meaning and implications of "*Rechtsstaat*" are still debated, this principle played in Germany a role similar to

[29] Gerhard Ritter, Frederick The Great: A Historical Profile 166 (Translated with introduction by Peter Paret, 1968) (1954).

[30] *See* Stone Sweet & Mathews, *supra* note 4 at 19.

that of the British "rule of law," imposing limits on governmental actions, thereby providing citizens with a much greater degree of freedom than would otherwise have been the case.[31]

Functionally, the requirement of proportionality, namely, that the use of police powers be proportional to the goals defined by law, corresponded to the *Rechtsstaat* requirement and complemented it. Both principles provide ways to cope with a system in which there are few formal limits to police powers. The concept of the *Rechtsstaat* permitted the government to infringe individual rights but only when such infringement was clearly authorized by law. The principle of proportionality further limited this power, permitting the government to exercise only those measures that were necessary for achieving its legitimate goals. In other words, the requirement of a clear legal basis for the use of police powers and the requirement that such use be proportionate were meant to maximize individual autonomy under a legal system that did not have a constitutional bill of rights.

2.2. Judicial review and the development of the principle of proportionality

The ideas of *Rechtsstaat* and proportionality required the establishment of an institutional mechanism to implement them. This was the basis for the formation of the highly influential administrative courts in Prussia in the second half of the nineteenth century.

Because the Prussian Parliament was a reactionary body and subservient to government demands, it did not require ministerial accountability, which is an essential prerequisite for preventing the abuse of police powers. Thus, in the middle of the nineteenth century, after German liberals had lost hope of institutionalizing an effective parliamentary system of government, they shifted their demands from ministerial to judicial accountability. In other words, instead of having ministers and their subordinates accountable to parliament, they now demanded that public officials be accountable to the courts.[32] The reformists regarded judges as the best guardians of individual rights against administrative abuse.[33]

[31] The principle of the *Rechtsstaat* is not identical to the principle of the rule of law, despite the liberalizing effect of both. The Anglo-American conception of natural rights assumes that men and women have rights that precede the existence of the state, whereas the German *Rechtsstaat* is more state-centered. Thus, Leonard Krieger in his classic The German Idea of Freedom 460 (1957) argued that the *Rechtsstaat* is not "defined in terms of a state which permitted to the individual rights apart from the state. It became now simply the kind of state whose power was articulated in legal modes of action—that is, in measures which conformed to general rules." Krieger sketches a conservative and even authoritarian concept of the *Rechtsstaat*. *See also* Hans Rosenberg, Politische Denkstromungen in deutschen Vormärz (1972) (the state was conceived in Germany not only as an institutional safeguard for the protection of individual rights but also as a "fatherland").

[32] Kenneth F. Ledford, *Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court (1876–1914)*, 37 Central European History, 203, 222 (2004).

[33] *Id.*, at 210.

In the end, a separate system of administrative courts was established.[34] These courts had the authority to review the use of police powers.[35] Between 1882 and 1914 the Prussian Supreme Administrative Court (PSAC) made intensive use of proportionality as a method for examining the legitimacy of government intervention in economic and social life. Without explicitly announcing a new legal principle,[36] the PSAC held, in a series of important decisions, that an exercise of police powers that infringed on political and economic rights must be proportional and narrowly construed. In its seminal 1882 *Kreuzberg* decision, the PSAC struck down a Berlin ordinance that banned the construction of buildings that blocked city views of a national monument on the grounds that the government could only act to prevent danger to public safety and could not impose its own aesthetic judgment.[37]

In a separate case, it ruled that restrictions on the rights of Social Democrats to assemble and demonstrate must be based on concrete facts. Such facts must demonstrate a genuine danger to public order, and the restrictions could not be based on police assumptions that the combination of alcohol consumption and political opposition to the government would inevitably result in a disturbance to public peace.[38] A particularly strict test was established in a series of rulings relating to the controversial play *The Weaver*, which was suspected of being sympathetic to, and fomenting, popular revolt against capitalist exploiters. The court ruled that the police could not ban performances of the play based on a remote possibility that it would lead to a disturbance of public order. Rather, the police needed to prove "an actual, near and impending danger" in order to justify such censorship.[39]

2.3. Proportionality, natural law, and formalism

In the absence of explicit protection of constitutional rights, many liberals resorted to the rhetoric of natural rights in order to justify the introduction of rights in German public law. The rhetoric of natural rights was indeed pervasive in the writings of liberal Prussian legal scholars of the time. Two of the leading scholars who developed the principle of proportionality, Otto Mayer and Günther Heinrich von Berg directly linked proportionality and natural rights. Von Berg, for example, wrote that "[t]he police law may abridge the natural freedom of the subject, but only insofar as a lawful goal requires as much."[40] And according to Mayer, "natural rights demand that the use of police powers by the government be proportionate."[41] We must

[34] The compromise between the bureaucrats, who supported internal administrative review, and the liberals, who preferred external judicial review of the administration, was to establish a separate system of administrative courts, composed of equal numbers of jurists and bureaucrats. *Id.*, at 212.

[35] Section 127 of the State Administrative Act of 1883 granted the Prussian Supreme Administrative Court explicit authority to review any governmental order after exhausting all administrative appeals.

[36] Lothar Hirschberg, Der Grundsatz der Verhältnismäßigkeit 3 (1981).

[37] Decisions of the Prussians Administrative Law Court, 9 (1882) 353.

[38] Vernon L. Lidtke, The Outlawed Party: Social Democrats in Germany 1878–1890, 241–262 (1966).

[39] Ledford, *supra* note 32, at 220.

[40] Cited in Stone Sweet and Mathews, *supra* note 4 at 17.

[41] Otto Mayer, Deutsches Verwaltungsrecht, 1. Bd., S. 267 (1895).

remember that, at that time, natural rights were perceived in Germany as libertarian rights that imposed constraints on the use of governmental powers and expanded the protection of political and economic freedoms. Thus, the liberal bourgeoisie had a fundamental economic and political interest in promoting such legal developments.[42]

One should note, however, that in spite of the connection between proportionality and natural law concepts, and in spite of the association of proportionality with judicial activism, the methodology employed by the Prussian administrative judges remained essentially formalistic and never shifted toward realism and pragmatism. The judges of the PSAC regarded themselves as acting within the framework of the formalist tradition of German law, which considered itself an autonomous, complete, and logical system of concepts and rules that contained within it solutions for all the cases that came before it.[43] In general, Prussian administrative judges refrained from presenting themselves as conducting a commonsense cost-benefit analysis. Although the Prussian court did not split the requirement of proportionality into a tripartite test (as is the custom today in German public law), it seems that a major element guiding its rulings was its insistence on a more formal means-ends analysis (rational connection and the less drastic means), rather than the more substantive (balancing) inspection typically conducted within the framework of proportionality in the strict sense, as we think of it today.[44]

Early twentieth-century German liberals, such as Max Weber and Hans Kelsen, regarded the formalistic analysis of the kind mentioned above as, on the one hand, a crucial means for ensuring a more effective governmental system and, on the other, as an important tool for maximizing individual freedom, since it set clear limits on state actions and thus afforded the individual wider scope for activity.[45] The tendency of Prussian administrative courts to focus on a formal analysis of

[42] David Blackbourn, *The Discreet Charm of the Bourgeoisie: Reappraising German History in the Nineteenth Century* in The Peculiarities of German History 157 (David Blackbourn & Geoff Eley eds., 1984) (noting that the *Rechtsstaat* principle was necessary for the creation of a solid middle-class society and fostered capitalist modernization in nineteenth-century Germany).

[43] For an excellent overview of the radical formalist characteristics of German legal thought in the nineteenth century, *see* Mathias Reiman, *Nineteenth-Century German Legal Science*, 31 B.C. L. Rev. 837 (1990).

[44] We would like to emphasize that we are not claiming that the PSAC made no reference to what we now refer to as proportionality in the strict sense. It is clear, however, that the rhetoric of balancing was not pervasive in its decisions and that the legal analysis focused more on the empirical and logical connections between means and ends. *See* Jurgen Schwarze, European Administrative Law, Ch. V, C5 (2006).

[45] Weber viewed formal rationality as almost the "twin brother of liberty," since it prevents the government from taking arbitrary action. *See* M. Weber, *Diskussionerede zu dem Vortag von H. Kantorowicz Rechtwissenschaft und Soziologie*, in Gesammelte Aufsätze zur Soziologie und Sozialpolitik 477–481 (1924). The translation into English of parts of this article can be found in Weimar, A Jurisprudence of Crisis 50, 53 (A. Jabloner & B. Schlink eds., 2000). For similar reasons, Hans Kelsen opposed the inclusion of a bill of rights in the German constitution. Because rights are drafted in an open-ended manner, the inclusion of rights in a constitution would grant judges too much power to interpret the meaning of such rights. *See* Stone Sweet, *supra* note 4, at 16.

proportionality was in line with mainstream formal German legal science of the day (*Rechtwissenschaft*).[46]

The German law scientists of the time, led by Friedrich Carl von Savigny, often borrowed from the natural sciences in order to exemplify the logic of the law and the systematic way in which legal rules are created and function. For example, in the same way that one can derive the length of one side of a triangle from the lengths of its two other sides, one can also derive (so they claimed) any missing rules from the existing rules of law.[47] In the same vein, some compared the science of law to chemistry; if, in chemistry, one can create matter out of certain basic elements, so in law one can create new rules out of the basic rules of law. Even the Darwinist theory of evolution had an influence on the way German legal science presented itself, comparing the development of law to that of an organism.

The formal reading of proportionality in the judgments of the PSAC, already mentioned, should be contrasted with another notion, known as the "balancing of interests," that was developed in parallel (though in an unrelated manner) in German law. During this period, there arose a radical antiformalistic movement in German law science—the *Freirechtschule*—that criticized formalism and conceptualism, mainly in private law.[48] The proponents of *Freirecht* viewed law as a domain whose purpose is to settle conflicts between competing interests by way of balancing. Also writing critically on legal formalism at the time was Von Jehring, who's influential writing made central the concept of balancing interests.[49]

It seems that there has been no direct link between balancing and proportionality in German law and that, in a certain sense, they were even associated with opposing legal movements. First, balancing of interests has its origins in German private law while proportionality originated in German public law. Second, in contrast with the influence of the twentieth-century American legal realists, the *Freirechtschule* signaled a radical departure from the dominant formalistic tradition of the German law of the time, and, thus, it had no real influence on German jurisprudence. Clearly, the administrative courts did not associate themselves with this radical movement. Instead, they placed themselves within the framework of mainstream German formal thought. Lastly, the ideas of the *Freirechtschule* were considered by liberal formalists such as Weber as a real threat to the principles of liberalism and democracy. In sum, the *Freirecht* ideas were opposed, ideologically, to the formalistic principles on which the principles of the *Rechtsstaat* and proportionality were based. Accordingly, they did not find their way into the jurisprudence of the PSAC.

[46] Mathias W. Reimann, *Free Law School*, in Encyclopedia of Law and Society 605 (David S. Clarck, ed., 2007) (showing that the *Freirecht* movement was not part of mainstream German jurisprudence).

[47] Reimann, *id.*, at 876–883.

[48] For a thoughtful comparison between the *Freirechtschule* and American realism, *see* James Harget & Steohen Wallace, *The German Free Law Movement as the Source for American Legal Realism*, 73 Va. L. Rev. 399 (1987).

[49] Reimann, *supra* note 46, at 605.

2.4. Conclusion

For purposes of the present argument, there are several conclusions that may be drawn from the development of the principle of proportionality in German public law. First, proportionality was an instrument by which the idea of rights was introduced into German law. Consequently, the principle of proportionality stands in Germany for the protection of rights. Second, the effect of proportionality was to enhance the protection of political and economic rights, which were considered at that time to be "natural" rights. Obviously, the liberal bourgeoisie had a fundamental interest in ascertaining that such a legal development take place. Third, the legal doctrine of proportionality was not related to realistic or pragmatic theories of law, such as those championed by the *Freirechtschule* and American legal realist school. Its origins are in the formalistic approaches that are deeply embedded in the German legal tradition. Proportionality was a prerequisite for improving the law's administration and making it more effective, and this improvement could be achieved by focusing on the means-ends nexus rather than by ad hoc balancing of opposing interests. Finally, the proportionality doctrine originated in administrative law, not in private law.

3. The origin of balancing in American constitutional jurisprudence

While in Germany the idea of proportionality was the way in which the protection of rights was introduced into a system that provided limited formal protection of rights, in the United States balancing was applied to address the opposite problem. In the U.S. there was strong textual support for the protection of rights but little textual basis for limiting rights. Balancing, therefore, was an important interpretative tool for the prevention of absolutism in the protection of rights; it achieved this by requiring that rights be balanced with other important interests. In addition, unlike proportionality in Germany, balancing sprang from the antiformalist movement and originated in private law, not in public law. Finally, the natural rights theory that was associated with proportionality was not linked with balancing. On the contrary, natural rights theories were criticized by the progressives who applied balancing in American constitutional law.

3.1. Balancing as a critique of formalism and Langdellianism

3.1.1. *Langdellianism*

The idea of balancing entered American legal thought through the writings of Oliver Wendell Holmes, in his critique of formalism and Langdellianism in American private law.

Christopher Columbus Langdell, who was dean of Harvard Law School in the last decades of the nineteenth century, was one of the major proponents of formalism in American jurisprudence. Influenced by the German legal science movement, and

aspiring to promote the stature of law as an academic discipline, he set out to establish law as a serious and rigorous scientific enterprise, like physics or geometry.[50] The Langdellian conception of law, therefore, portrayed the legal sphere as having the following three scientific characteristics: law was determinate—legal conclusions could be arrived at with certainty and were only minimally subject to individual discretion; it was systematized—law was based on a coherent and limited set of abstract principles; and it was autonomous—law was separate from other spheres such as society, politics, and morals.[51] Langdellianism also emphasized categorical distinctions between different areas of law and different legal concepts, rather than distinctions of degree; absolute rather than relative rights and concepts; and the conceptual meaning of rights, rather than their social function.[52]

These claims with regard to the law were applied by Langdell mainly in the sphere of private law. The claims that he made for law as a legal science were made with an idealized private law in mind. By contrast, he considered constitutional law to be "soft" law, not a field of serious, scientific legal thought.[53] One of the famous examples of Langdellian jurisprudence is the mailbox rule. Langdell resolved the question of whether an insurance contract was valid from the time it was placed in the mailbox or from the time it was received by the insurance company through a process of logical deduction based on the legal concepts of a promise and of a contract. A promise in order to be binding and become a contract had to be met with consideration in terms of a return promise by the offeree. However a promise, by nature, had to be communicated. Therefore, unless the acceptance letter is received and read there is no returned promise and no valid contract. Considerations such as customary practice and practical difficulties, what Langdell termed "the balance of convenience," were thought to be legally irrelevant.[54]

3.1.2. *Balancing as anti-Langdellianism*

Beginning with Holmes, the Landellian vision of the law was attacked by the progressive movement. The idea of balancing was an important conceptual element of this attack. For example, Holmes believed that, instead of logically deducing results from the abstract meanings of rights and principles, the law should be viewed as a means to a social end, and that the methodology for arriving at the best legal rule involved balancing the various social interests that were affected by it. Thus the mailbox rule

[50] *See* Duncan Kennedy, *Towards a Historical Understanding of Legal Consciousness: The case of Classical Legal Thought in America, 1850–1940*, 3 Res. L. & Soc'y 3 (1980); Thomas Grey, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1, 50 fn. 180 (1983); *see e.g.* Neil Duxbury, Patterns of American Jurisprudence 10 (1995).

[51] *See* Thomas C. Grey, *The New Formalism*, (September 6, 1999). Stanford Law School, Public Law and Legal Series, Working Paper No. 4, page 5, Available at SSRN: http://ssrn.com/abstract=200732 (last visited May 23, 2008). *See also* Richard Pildes, *Forms of Formalism,* 66 U. Chi. L. Rev. 608, 667 (1999) (arguing that according to the formalist conception, right answers are "derived from the autonomous, logical working of the system").

[52] *See* Grey, *id. See* also Morton J. Horwitz, The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy (1992) 17–19, 198–199.

[53] *See* Grey, *id. See also* Horwitz, *id.*

[54] *See* Grey, *supra* note 50, at 3–4.

should have been decided based on a balancing of the interests of the insured and the insurer, taking into consideration actual business practices and market relations.[55] In his *Common Law*, Holmes argued, as early as 1870, that when "two rights run against one another . . . a line has to be drawn," and the decision must be based on "distinction of degree," rather than on "logical deduction" from conceptions of absolute rights.[56] And in *The Path of Law,* Holmes wrote that "Judges . . . have failed adequately to recognize their duty of *weighing* considerations of social advantage."[57]

Holmes did not view rights and legal principles as discrete entities but in conflict with each other as well as having areas of convergence and overlap. Thus, Holmes wrote that "[t]he boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side."[58]

Another proponent of balancing was Benjamin Cardozo, who wrote that legal decisions depend "largely upon the *comparative importance* or value of the social interest that will be thereby promoted or impaired."[59] Roscoe Pound also wrote emphatically in favor of "weighing social interests" and argued that the law "is an attempt to satisfy, to reconcile, to harmonize, to adjust . . . overlapping and often conflicting claims and demands."[60]

The progressive movement was influenced by philosophical movements both inside the United States and without. Domestically, one of the major influences was pragmatism and the philosophies of William James and James Dewey, which provided the intellectual background for both progressivism and balancing. Pragmatism viewed truth as a social construct, the only basis for the truth of a concept being its pragmatic use in human affairs. Rather than looking for answers in metaphysics, pragmatism required that actual interests be identified and balanced in order to determine the truth.[61] Abroad, progressives were influenced by the German *Freirecht* movement, which criticized formalism and conceptualism in German private law. One can draw a direct line from the idea of interests balancing promoted by von Jhering and the German *Freirecht* movement,[62] itself a response to the legal metaphysics of Savigny

[55] Holmes wrote with regards to the consideration doctrine that framed Langdell's discussion of the mailbox rule: "The doctrine of consideration is merely historical. . . . Consideration is a mere form. Is it a useful form? If so, why should it not be required in all contracts? . . . Why should any merely historical distinction be allowed to affect the rights and obligations of business men?" Oliver W. Holmes, *The Path of the Law,* 10 Harv. L. Rev. 457, 465 (1897).

[56] Oliver W. Holmes, *Privilege, Malice, and Intent,* in Collected Legal Papers 122 (1920).

[57] Holmes, *The Path of Law,* in Collected Legal Papers, *id.,* at 184.

[58] Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

[59] Benjamin Cardozo, The Nature of the Judicial Process 122 (1921).

[60] Roscoe Pound, *A Survey of Social Interests,* 57 Harv. L. Rev. 1, 4 (1943).

[61] *See,* generally, Robert S. Summers, Instrumentalism and American Legal Theory (1982).

[62] *See* John .M. Kelly, A Short History of Western Legal Theory 330 (1992) (describing the origins of the conception of law as the arena for balancing conflicting social interests, starting with August Comte and Rudolf von Jhering); James E. Herget & Stephen Wallace, *The German Free Law Movement as The Source of American Legal Realism,* 73 Va. L. Rev. 799 (1989); *cf.* Carl J. Friedrich, The philosophy of Law in Historical Perspective 156–157 (1963) arguing that the progressives' adoption of German balancing involved a change in the original concept of balancing.

described sarcastically by von Jhering as the "heaven of legal concepts,"[63] and the jurisprudence of interests promoted by Pound.

Bearing in mind the history of proportionality in Germany, one must note that the intellectual soil from which balancing in American law arose, even before it entered constitutional law, was quite different from that which fostered German proportionality. Balancing was associated with antiformalism and pragmatism, while proportionality was much more modest intellectually and aspired only to be a mechanism to be applied within the general formalistic conception of law. As noted earlier, the German scholars that influenced American balancing—von Jhering and the other *Freirecht* scholars—were in no way associated with the principle of proportionality in Germany.

3.2. Background for progressive balancing in constitutional law: Balancing and antiformalism in constitutional law

The progressive antiformalist attack that began as a critique of Langdellianism in private law was soon extended to constitutional law as an assault on Lochnerism. The progressives used the antiformalistic arsenal to assail the formalistic way in which the Court interpreted constitutional rights. Progressive balancing in constitutional law occurred in two different contexts. The first was anti-Lochnerian and entailed advocacy of the principle of balancing in Fourteenth Amendment jurisprudence. The second was advocacy of balancing in First Amendment jurisprudence during the McCarthy era. Both phases of balancing, however, had the same effect of advocating judicial restraint and suggesting that rights be treated as social interests that had to be balanced against other social interests.

3.2.1. *Lochnerism*

The Lochner Court is the name commonly used to refer to the U.S. Supreme Court roughly between the years 1900 and 1937. The *Lochner*[64] decision, which gave its name to the entire legal era, exemplifies both the formalist methodology of the Court and its ideological libertarian inclinations.

In *Lochner*, the Court struck down a New York state law that limited bakery employees' working hours to ten hours per day and sixty hours per week. The Court ruled that the right to liberty in the Fourteenth Amendment included the right to freedom of contract, and that this right was protected, absolutely, from legislative incursions, except in the limited context of "police powers of the state."[65]

The decision was formalistic in two senses. First, it sought (and found) the solution to the legal issue in the meaning of one concept—liberty—through a process of

[63] Rudolf von Jhering, *In the Heaven of Legal Concepts*, translated in Morris R. Cohen & Felix S. Cohen, Readings in Jurisprudence and Legal Philosophy 678 (1951).

[64] Lochner v. New York, 198 U.S. 45 (1905).

[65] *Id.* at 53.

logical deduction from the proper meaning of that concept. Second, it arrived at its legal conclusion without referring to the social realities of labor relations, in which workers had no meaningful "liberty" to accept or reject working conditions that were, in fact, imposed on them by their employers.

In addition, the decision also revealed the ideological background of the *Lochner* Court and its philosophical reliance on natural rights. The right to liberty was interpreted within a conceptual framework in which the state could intervene in the exercise of individual liberty only to protect a limited set of crucial interests termed "police powers of the state."[66] All in all, individual liberty was considered protected as part of the inalienable natural rights of the person—the right to life, liberty, and property. This natural rights theory had an obvious libertarian effect when applied to market intervention by the state.[67] It was opposed to state intervention for purposes of economic redistribution or social equality, and, based on its principles, legislative attempts to regulate the economy, such as Roosevelt's New Deal initiatives, were struck down.

3.2.2. *Balancing as anti-Lochnerism*

Balancing was an integral part of the progressive attack on Lochnerism and on formalism in constitutional law. First, as in the case of Langdellianism, balancing was the alternative to formalism. Instead of deducing, logically, a legal outcome from the meaning of the right to liberty, balancing meant that the decision should be based on the balancing of the conflicting interests. Thus, Holmes, in his famous dissent in *Lochner,* wrote that "general propositions" cannot decide concrete cases, and that the word "liberty" is perverted by the Court's interpretation of it insofar as the Court understood "liberty" as leading directly to the legal conclusion that it reached.[68] Instead, Holmes suggested that the Court, in fact, had relied on its own balancing of interests (in this case, a preference for laissez-faire economy over social equality) while hiding behind the fig leaf of formalism.[69]

Second, balancing was the progressives' way of signaling that certain rights were social interests, and that the Court's reliance on the rhetoric of rights resulted in an unfair emphasis on particular interests—mainly those of the richer segments of society—at the expense of other interests. This point was made very clearly by Pound. In "A Survey of Social Interests,"[70] his most comprehensive piece on balancing, Pound responded to Justice Joseph McKenna's attempt to protect the right of contractual freedom from legislative encroachments. Justice McKenna claimed that there was a "menace in the . . . judgment of all rights, subjecting them unreservedly to conceptions of public policy."[71] Pound thought otherwise,

[66] *Id.*
[67] Horwitz *supra* note 52, at 10.
[68] 198 U.S at 75–76.
[69] *Id.*
[70] Pound, *supra* note 59.
[71] Arizona cooper co. v. Hammer , 250 U.S. 400 (1919) (Justice McKenna dissenting).

criticizing the Court's exaggerated concern for private rights at the expense of public rights:

> It was only the ambiguity of the term "right" . . . that made it possible to think of the decision in question in such a way. . . . The "rights" of which Mr. Justice McKenna spoke were . . . individual wants, individual claims, *individual interests*, which it was felt ought to be secured through legal rights or through some other legal machinery. . . . Thus, *the public policy* of which Mr. Justice McKenna spoke is seen to be something at least *on no lower plane than the so-called rights. . . . There is a policy in the one case as much as in the other*.[72]

The conception of rights as another form of interests stood in opposition to the idea of natural rights used by the *Lochner* Court. There was nothing "natural" in the preference of private property over public interests. The two represented interests that were in conflict with each other and needed to be balanced against each other. The reliance on natural rights was thus exposed as a manipulation in favor of one interest.

The balancing methodology was also integrated into a general conception of constitutional interpretation that saw rights as standards rather than as categorical and absolute restrictions on governmental action. Thus, it supported giving the legislature a certain degree of latitude in the infringement of rights and called for a comparable measure of judicial self-restraint. Once again, Holmes fired the first shot in this attack, arguing that "[a]ll rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."[73] Similarly, Pound wrote that the Fourteenth Amendment is only imposed as a standard on the legislator.

> It sa[ys] to him that if he trenched upon these individual *interests* he must not do so arbitrarily. His action must have some basis in reason. It is submitted that that basis must be the one upon which common law has always sought to proceed, the one implied in the very term "due process of law," namely, *a weighing or balancing* of the various interests which overlap or come in conflict and a rational reconciling or adjustment.[74]

Latter-day progressives such as Harlan Fiske Stone and Learned Hand promoted balancing as part of their view that all constitutional provisions were, in fact, standards rather than exact rules that imposed concrete limits on government. Harlan Fiske Stone wrote:

> The great constitutional guarantees of personal liberty and of property. . . are but statements of standards. . . . The chief and ultimate standard which they exact is reasonableness of official action and its innocence of arbitrary and oppressive exactions. . . . *They do not prescribe formulas to which governmental action must conform. . . .* [They do not subject] government to inexorable commands imposed upon it in another age. [They should] enable government, in "all the various crises of human affairs," to continue to function and to perform its appointed task within the bounds of reasonableness. . . .[75]

[72] Pound, *supra* note 59, at 4 (emphasis added).
[73] Hudson County, 209 U.S. 355.
[74] Pound, *supra* note 59 (emphasis added).
[75] Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 23–24 (1936) (emphasis added).

Progressive balancing was, therefore, hostile to constitutional rights in two important and related ways. First, it sought to equate rights with interests. Rights were nothing more than particular social interests and, thus, should be balanced against other interests. In particular, to elevate rights above interests as a separate and different category was considered a rhetorical or manipulative move, used only in order to further the ideological goals of the Court.

Second, progressives believed that balancing should be left to the legislature. Professor Horwitz makes this view clear: "[I]f law is merely a battleground over which social interests clash, then the legislature is the appropriate institution for weighing and measuring competing interests." And he adds that "by the time *The Path of Law* was written, the focus of Holmes's Darwinism had shifted from courts to legislatures."[76]

3.2.3. *Progressive balancing during the McCarthy era*

Balancing continued to be associated, during the McCarthy era in the 1950s, with an attack on formalistic and absolutist conceptions of rights and with judicial restraint. The justices who applied balancing principles during this period should rightly be regarded as part of the progressive movement, and their actions should thus be included in the review of the origins of balancing.

The liberal-conservative divide was different from that of the *Lochner* period. Now it was the legislature and the executive that were conservative and reactionary, rather than the Court. However, those justices who considered themselves the followers of the early progressives remained faithful, methodologically, to balancing, applying it in the same way that Holmes and Pound had done.[77]

Justice Felix Frankfurter's opinion in *Dennis*[78] is the leading example of the use of balancing during the McCarthy era. The case, which was decided at the height of the McCarthy anticommunist campaign, involved an appeal on constitutional free-speech grounds by members of the American Communist Party of their conviction under the Sedition Act. Justice Frankfurter, writing in concurrence, applied balancing to the First Amendment right of free speech in much the same way earlier progressives had applied it to the right to freedom of contract under the Fourteenth Amendment. He argued that the right to free speech should not be read formalistically and in absolute terms: "[T]here are those who find in the Constitution a wholly unfettered right of expression. Such literalness treats the words of the Constitution as though they were found on a piece of outworn parchment."[79] Instead, he argued, the right should be read as a standard, and as

[76] Horwitz, *supra* note 52, at 142.

[77] For a general review of the use of balancing during the McCarthy era, and for objections on the Court, *see* Melvin I. Urofsky, Division and Discord: The Supreme Court under Stone and Vinson, 1941–1953, (1997). Also *see* Frantz, *supra* note 10; Mendelson, *supra* note 10.

[78] Dennis v. United States, 341 U.S. 494 (1951).

[79] *Id.* at 524.

espousing one of several interests in society that clash and should be balanced one against the other.

> The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.[80]

Like the progressives before him, Frankfurter also argued that the weighing of interests should be left to the legislature, and that the Court should apply judicial restraint: "Primary responsibility for adjusting the interests which compete in the situation before us, of necessity, belongs to the Congress."[81]

Dennis was followed by a line of cases in which balancing was used in this same way.[82] These cases exhibit very clearly all three of the characteristics of progressive balancing discussed above: its antiformalism and antiabsolutism; its association with judicial restraint; and, most importantly, its hostility to the preference for rights over interests and to the idea that rights are immune from public interest considerations. Not coincidentally, to this day *Dennis* symbolizes the dangers stemming from the use of balancing: the danger of judicial capitulation to the legislature in times of national security crises. Nor is it surprising to note that the liberal Warren Court dissociated itself completely from the idea of balancing, in part, as a consequence of the stigma attached to *Dennis*.[83] Most of the major constitutional decisions of the Warren Court avoided balancing rhetoric.[84] Some Warren Court decisions even rejected balancing explicitly.[85]

3.3. Conclusion

The historical origins of balancing in American constitutional law were very different from—even antithetical to—the historical origins of proportionality in German law. First, unlike proportionality, balancing entered a system in which constitutional

[80] *Id.* at 524–525.

[81] *Id.* at 525–526.

[82] The major cases involved in this debate were American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Barenblatt v. United States, 360 U.S. 109 (1959); Konigsberg v. State Bar, 366 U.S. 36 (1961); Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

[83] *See* Horwitz, *supra* note 52 at 68 ("As a result of this blatant misuse, the balancing test in civil liberties litigation deservedly acquired a bad reputation among liberal justices, and Warren Court opinions are filled with angry denunciation of its use"); John H. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1490–1491 (1975) ("[Balancing] was hardly the attitude of the Warren Court, at least in its later years. During [that period] the Court was making clear its dissatisfaction with a general balancing approach. . . .").

[84] 347 U.S. 483 (1954). *See* Aleinikoff, *supra* note 9, at 998 (arguing that the major constitutional cases of the Warren Court were not balancing cases. Referring to Brown v. Board of Education, 347 U.S. 483 (1954), he writes: "Of course . . . there were competing interests at stake. But the Court based its decision—as has society—not on the balance of those interests, but on the intolerability of racial discrimination").

[85] *See, e.g.*, Chief Justice Warren in his opinion in United States v. Robel, 389 U.S 258, (1968): "it has been suggested that this case should be decided by 'balancing' the governmental interests . . . against the First Amendment rights . . . This we decline to do." *Id.* at 268 n.20.

guarantees were already present, and in which judicial activism to protect rights was an established norm. Therefore, unlike proportionality, which was a way to guarantee that rights were not harmed unnecessarily, balancing was a way to ensure that rights were not protected unnecessarily, by balancing them against public interests. Second, balancing entered as part of the antiformalist movement, which shunned categorical distinctions between rights and interests and objected to according greater deference to rights than to interests. By contrast, the focus of proportionality, in the context of the *Rechtsstaat*, was to find particular ways of restricting governmental action, restrictions that would be grounded in the unique status of rights and the need for government to provide special justification in order to infringe them.

Finally, both jurisprudentially and ideologically, the background of the two concepts was very different. Proportionality was developed within the well-organized and formalist jurisprudence of the PSAC, without any aspirations to the creation of a sweeping theory. Balancing, on the other hand, was part of a revolutionary antiformalist conception of law, one which changed the face of American law and whose purpose was to undermine the existing legal philosophy. Ideologically, proportionality was based on natural rights liberalism and libertarianism, while balancing sought to undermine natural rights and oppose the libertarian conception of the property and liberty rights.

4. Afterword: A glimpse at post–World War II developments

While balancing and proportionality are thought of as two sides of the same coin, a historical examination of their origins suggests that they are unrelated, arising in different contexts, addressing distinct problems, and serving diametrically opposed functions. Genealogically, they do not share a common ancestor but are, rather, descended from two distinct lines. Most importantly, the *Freirechtschule*—the German legal movement influential in introducing the concept of balancing into American jurisprudence—stood in opposition to German proportionality. Consequently, to the extent that any transatlantic genealogical ties can be identified in this area, they are between the German *Frierecht* proponents of balancing and the proponents of American balancing, but not between proportionality and balancing. Nonetheless, some may argue that this historical account regarding the differences between American balancing and German proportionality is no longer relevant to contemporary constitutional law as there are signs that since World War II the two concepts are converging.

One of the effects of the adoption in postwar Germany of the new Constitution was to expand the principle of proportionality from an administrative law principle to a constitutional law principle.[86] The fact that rights now enjoy constitutional guaranties, as in the United States, means that proportionality analysis can be used to impose limits

[86] Interestingly, the new German Constitutional Court held that proportionality was a constitutional principle, in spite of the fact that the German Basic Law of 1949 provided no textual basis for such a conclusion. *See* Schwarze, *supra* note 43. The Constitutional Court derived the principle of proportionality from another constitutional principle, that of the *Rechtsstaat* (see above, at section 2.1.), but it did not elaborate on the connection between the two, possibly, as Dieter Grimm has suggested, because the Court

on rights, as opposed to exclusively promoting them, as in the past. There have been, in fact, a number of cases in which the German Constitutional Court has applied proportionality to narrow constitutional rights, as has been done in the United States.[87]

The German Constitutional Court has also shifted the focus of the proportionality analysis from its first two subtests (suitability and necessity), which deal with the logical and empirical links between means and ends, to the third subtest (proportionality in the strict sense).[88] This shift signals a greater tendency on the part of the German Constitutional Court (as compared with PSAC) to apply balancing not in a formalistic manner.[89] In this respect, too, it seems that German proportionality is converging with American balancing.

Conversely, in the United States balancing is becoming associated not only with the dilution of rights but also with the protection of rights, as is proportionality. Liberal and progressive justices have discovered the potential of balancing as a tool for the protection of rights. This has occurred, mainly, in cases that promote progressive liberalism and notions of substantive justice in areas such as affirmative action, hate speech, commercial speech, and campaign finance.[90] In addition, balancing is no longer identified, automatically, with judicial restraint. Whereas in the progressive era those who supported balancing associated balancing with judicial restraint

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could not have predicted the important role that the proportionality test would subsequently play in German constitutional law, and, once its importance became clear, it had already become a well-established legal principle and there was no occasion to explain its origins. *See Grimm*, supra note 12, at 386.

87 The German Constitutional Court has held, for instance, that despite the fact that the rights to artistic speech and freedom of religion are drafted in absolute terms in the 1949 Basic Law, they can be limited when the government wishes to promote a different constitutional value. *See* Michael Sachs, Grundgesetz: Kommentar 94, 96 (1996); Haurst Dreier, Grundgesetz–kommentar 83 (1996). *See also* the Court's decision in the Religious Oath case, 33 BverfGE 23 (1972) (parts of the decision are translated to English in Donald Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 453 (2nd ed., 1997).

88 This is the main argument advanced in Grimm, *supra* note 12, at 393–395; *see also* Stone Sweet, *supra* note 6, at 97–98 (noting that European constitutional courts, in particular the German Court, routinely engage in balancing).

89 This has been linked to the fundamental change in German constitutional law from a procedural to a substantive and highly activist model of democracy. *See* Rubenfeld, *supra* note 13; Stone, *supra* note 6. Hence, contrary to the almost obsessive engagement of American constitutional law in the antimajoritarian problem of judicial review, few would argue in Germany that the Constitutional Court's engagement in balancing between competing values lacks legitimacy. For an ideological (libertarian) critique of the jurisprudence of the German Constitutional Court, *see* Ernst W. Böckenförde, *Grundrechte als Grundsatznormen* in des., Staat, Verfassung, Demokratie 167 (1991). For a jurisprudential critique, *see* Erhard. Denninger, *Freiheit – Wertordnung – Pflichtordung: Zur Entwicklung der Grundrechtjudicatur des Bundesverfassungsgericht*, Juristenzeitung 30 545 (1975); Helmut Goerlich, Wertordung und Grundgesetz 140 (1973); Klaus Stern, Das Staatsrecht der Bundesrepublik Deutchland (1988), Band III/1, 913; Wolfgang Zeidler, *Grundrechte und Grundenscheidungen der Verfassung im Widerstreit*, 53 Deutschen Juristentages 133(1980); Carl Schmitt, *Die Tyrannei der Werte*, in Säkularisation and Utopie: Ernst Forsthoff zum 65. geburtstag 37, 45 (Deoring & Greve eds., 1967).

90 In recent years conservative justices in the Court relied on the categorical wording of the First Amendment in order to strike down progressive legislative policies as unconstitutional. *See* James M. Balkin, *Some Realism about Pluralism*, 1990 Duke L.J. 375, 384; Fredrick Schauer, *The Political Incidence of the Free Speech Principle*, 64 U. Colo. L. Rev. 935, 942 (1993).

(any balancing of competing values that needed to be done, according to this view, should be the prerogative of the legislative branch), today this association has all but disappeared. When balancing is invoked as a judicial tool it is usually associated with judicial activism. In other words, it is a step in the direction of convergence with proportionality, which had always been associated with judicial activism.

Despite these steps toward convergence from both sides, we are still very far from a model in which balancing and proportionality function in the same way. Balancing in the United States may have gained some acceptance as a method that can protect rights; however, it is still a controversial and suspect concept, retaining some of its antiformalist reputation. Most importantly it is still subject to claims that it amounts to a usurpation of judicial power by allowing judges far too much discretion in their decisions. Proportionality, for its part, has a very different place within European, and particularly German, constitutional law than balancing has in the United States. It does not raise as much suspicion on the part of rights activists as balancing does, and, more importantly, it has gained the status of a central and noncontroversial doctrine, which does not have to fight for its legitimacy. Historical reasons are, undoubtedly, in part responsible for this state of affairs.