

Proportionality's *Reductio ad Monitum*: Review Essay on Paul Yowell's *Constitutional Rights and Constitutional Design*

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This review essay focuses on Paul Yowell's recent argument against entrenching bills of rights, along with his 'second-best' case for institutionally reforming constitutional courts to resemble quasi-legislative bodies (i.e. Kelsenian courts). The essay argues that Yowell's case against entrenchment relies on the premise that constitutional rights adjudication tends to collapse into proportionality analysis. This premise is questioned by exploring how alternative techniques of rights adjudication, such as originalism and H.L. Black's textualism, could provide "internal constraints" against the judicial use of proportionality analysis. My claim is that the plausibility of such techniques qualifies Yowell's case against entrenchment and casts his argument for reforming courts to resemble quasi-legislatures in the light of a reductio. The reductio is to a monitum, or warning against the judicial use of proportionality, reasoning about rights and the need to explore techniques by which the judicial use of proportionality reasoning can be constrained. The essay first reviews Yowell's arguments (II), then critiques his thesis that rights adjudication collapses into proportionality analysis (III), and concludes by evaluating how the possibility of legally constrained rights adjudication affects his central arguments (IV).

Cet essai critique porte sur l'argument récent de Paul Yowell contre la validation des déclarations des droits, ainsi que ses arguments « de seconds rangs » pour la réforme institutionnelle des tribunaux constitutionnels afin de ressembler à des corps quasi-législatifs (c.-à-d. des tribunaux kelsenniens). L'auteur de l'essai soutient que l'argument de Yowell contre la validation part du principe que l'arbitrage des droits constitutionnels a tendance à s'écrouler en analyse de la proportionnalité. Cette prémisse est contestée en examinant comment d'autres techniques d'arbitrage des droits, comme l'originalisme et le textualisme de H.L. Black, pourraient offrir des « contraintes internes » contre l'utilisation judiciaire de l'analyse de la proportionnalité. L'auteur affirme que la plausibilité de telles techniques qualifie l'argument de Yowell contre la validation et révèle son argument pour la réforme des tribunaux afin de ressembler à des quasi-législatures à la lumière d'un reductio. Le reductio est lié à un monitum, ou un avertissement contre l'utilisation judiciaire de la proportionnalité, un raisonnement sur les droits et la nécessité d'examiner les techniques grâce auxquelles l'utilisation judiciaire du raisonnement de la proportionnalité peut être entravée. L'auteur de l'essai reconsidère d'abord les arguments de Yowell (II), puis critique sa thèse selon laquelle l'arbitrage des droits s'écroule en analyse de la proportionnalité (III) et conclut l'essai en évaluant comment la possibilité d'arbitrage des droits limité juridiquement influe sur ses arguments centraux (IV).

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I. Introduction

Modern debates about the legitimacy of the judicial review of statutes for rights compliance tend to focus on the principled democratic merits of judicial or legislative control over rights. Justifications and critiques of modern judicial review often set out principled arguments with explicit moral and empirical assumptions about the societal and institutional circumstances for which their conclusions are salient. Unfortunately, even the best of these arguments can also tend to asymmetrically polish the empirical record of the institution they favour, and to tarnish the reputation of its alternate. In his book *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review*, Paul Yowell presents the reader with an elegant, alternative argument about judicial review.¹ Instead of directly engaging with the enduring question of the democratic legitimacy of constitutional judicial review, Yowell offers a unique focus on the *institutional capacities* of courts and legislatures to specify and protect abstract moral rights. He credits Montesquieu with inspiring this approach, and characterizes the philosophical spirit of his endeavor as a matter of “recover[ing] Montesquieu.”²

In this book, Yowell is not interested in choosing examples of legislative and judicial decisions about rights to justify the democratic credentials of judicial review. Instead, he provides a philosophically sophisticated account of the moral and empirical premises of practical reasoning about abstract moral rights, and argues that legislatures are better equipped to engage in such reasoning than modern courts. The book provides an argument against constitutionally entrenched rights and judicial review as a matter of *constitutional design*. Legislatures are better designed to reason about the moral and empirical aspects of most abstract rights; therefore, constitutional framers have general defeasible reason to opt for legislative control over most rights questions. Yowell complements this argument with a surprising ‘second-best’ argument in favour of European-style constitutional courts. He distinguishes between American-Commonwealth and European-Kelsenian models of constitutional courts, and makes the case that Kelsenian courts have a superior design when it comes to reasoning about abstract rights. The book thus offers an intriguing comparative argument for the *institutional reform* of American-style constitutional courts. If constitutional reformers cannot turn back the clock on judicial review and entrenched rights, then it is better for constitutional courts to have the kind of

1 Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review* (Oxford: Hart, 2018) [Yowell, *Constitutional Rights*].

2 *Ibid* at 12.

abstract *ex ante* jurisdiction and research support featured in many European courts.

Many critics of this book will focus on defending the ‘proportionality’ approach to rights against Yowell’s characterization of this method as an extra-legal form of practical deliberation. Or, perhaps critics will level more traditional arguments claiming that his argument’s empirical and moral assumptions load the dice against courts and in favour of legislatures. I think that Yowell is well situated to defend himself against both of these criticisms. Instead of taking these less promising lines of criticism, I would like to challenge how Yowell’s conception of practical reasoning about rights has potentially underestimated the restraining power and moral importance of *legal* methods of adjudication, and has thereby mischaracterized how proportionality analysis relates to arguments for constitutional entrenchment and the design of constitutional courts. My first criticism is that Yowell is mistaken to claim that proportionality analysis better captures abstract moral reasoning about rights than legally directed forms of reasoning.³

Legally directed forms of reasoning about rights can sometimes provide the kind of normative coherence and conclusiveness that should characterize reasoning about the kinds of rights entrenched in bills of rights. The lack of these features in proportionality analysis does not necessarily take away from the moral usefulness of other legal techniques of reasoning about fundamental rights. My second criticism is that the failure of proportionality analysis to legally constrain moral reasoning about rights does not necessarily tarnish the case for entrenching constitutional rights and recommend European-style courts. This is because the use of proportionality analysis should not be taken as an inevitability of adjudicating entrenched rights. Yowell’s intriguing ‘second-best’ argument for Kelsenian courts could be correct in certain circumstances, but it must be made in relation to a more charitable account of how legally directed forms of rights adjudication could protect rights. The possibility of such an account suggests that the case for reforming courts to *legislate* proportionately is not a plausible institutional reform. Instead, Yowell’s argument for reforming courts to resemble legislatures is best read as a *reductio ad absurdum* given the possibility of adjudicating rights according to legal methods and not abstract moral reasoning.

3 The idea of ‘legally directed reasoning’ is explored in depth in Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 150-212.

This review essay will first sketch the outlines of Yowell's argument (II). It will then challenge his conclusions regarding the general nature of practical reasoning about rights and the ability of "other adjudicative methods" that eschew proportionality analysis to restrain judicial decision-making (III). Finally, it will explore some of the difficulties concerning his argument against entrenching constitutional rights and his case for Kelsenian courts (IV). I shall argue that Yowell's failure to adequately make the case that constitutional rights adjudication collapses into balancing both qualifies his argument against entrenchment and casts his 'second-best' case for Kelsenian courts in the light of a *reductio ad absurdum* against proportionality. In turn, this *reductio* is best read as *ad monitum*: a warning against abandoning techniques of rights adjudication that do not collapse into abstract moral and empirical reasoning.

II. Yowell's Argument

Yowell provides a clear account of the extra-legal moral and empirical aspects of reasoning about abstract rights. His account is instructively related to important rights cases in multiple constitutional jurisdictions, while remaining rooted in a deeper philosophical argument regarding the nature of practical reasoning about rights. The book presents teachers of legal theory with an accessible summary of how critics of the 'proportionality' approach to rights adjudication understand this controversial method of adjudication in a number of constitutional contexts. Of course, in modern legal theory, the 'proportionality' approach to adjudication is most commonly associated with the jurisprudence of European and Commonwealth courts. But in a provocative move, Yowell does not hesitate to link the U.S. Supreme Court's post-Warren court use of tests layered in "tiers of scrutiny" to the proportionality approach.⁴ This contrasts with Jamal Greene's recent account of American rights adjudication as a "categorical" approach that is at odds with proportionality analysis.⁵ Yowell even locates the ancestor of the U.S. version of proportionality analysis, and its attendant utilitarian use of social science, in *Lochner v New York* (a case more often reviled for its activist defence of rights that are unpopular in the legal academy than for its use of faulty social science).⁶

4 Yowell, *Constitutional Rights*, *supra* note 1 at 20-24.

5 Jamal Greene, "Rights as Trumps?" (2018) 132:1 Harv Law Rev 28 at 34-35.

6 Yowell, *Constitutional Rights*, *supra* note 1 at 56 citing *Lochner v New York*, 198 US 45 (1905) [*Lochner*].

The legal relevance of Yowell's account of reasoning about rights does not sacrifice its philosophical depth. At its heart, the book's institutional claims turn on the philosophical argument that reasoning about abstract rights requires conceiving of rights as constitutive specifications of the common good, rather than individual interests constraining the general welfare.⁷ Reasoning about abstract moral rights as they relate to controversial issues will require both empirical reasoning assessing relevant factual information about society, technology, and science, and moral reasoning distinguishing between different values and deliberating on how they relate to a given issue. Yowell's argument is not that the 'balancing' and 'proportionality' approach to practical reasoning about rights is necessarily utilitarian. The utilitarian understanding of rights is contrasted with the idea that rights are specifications of the conditions of the common good, and certain technical *quantitative* understandings of the proportionality approach to rights collapse into utilitarian arguments.⁸ But, insofar as the proportionality approach functions as a form of practical reasoning about the meaning of rights in relation to significant empirical factors and moral values, it will resemble a deliberate kind of underdetermined legislative choice. From this characterization of practical reasoning about rights, Yowell thinks it becomes clear that legislatures are better suited to engage in such legislative choices, and that the Kelsenian courts are superior to their common-law relatives.⁹

What is proportionality analysis? Proportionality analysis is the most widespread judicial approach to evaluating how legal enactments and executive actions relate to fundamental rights. It has been formulated in different doctrines, and philosophically defended along different lines, but at its most basic proportionality analysis entails a distinctive type of two-step evaluation of how laws relate to fundamental rights. The first step involves establishing whether a right has been "infringe[d]" or "engage[d]."¹⁰ This first step establishes some kind of breach of "prima facie" fundamental rights by law.¹¹ The proportionality approach holds that "prima facie" rights are defeasible in the sense that *prima facie* conflicts of laws with rights do not require the invalidation of such laws, nor do judicial remedies addressing the conflict.¹² Rather, once rights are found to be infringed, courts will look to the (1) "*legitimacy*" (i.e. importance), (2) "*suitability*" (i.e. rational connection), (3) "*necessity*" (i.e.

7 Yowell, *Constitutional Rights*, *supra* note 1, at 107-109.

8 *Ibid* at 107-108.

9 *Ibid* at 90-130.

10 *Ibid* at 15-16.

11 *Ibid* at 16.

12 *Ibid*.

minimal impairment), and (4) “*proportionality*” (in the stricter sense of weighing interests) of the state’s ‘infringements’ of rights in particular circumstances.¹³

In light of the many doctrines and jurisdictions using proportionality analysis, Yowell has done an admirable job of analytically boiling down the elements of this approach. The terms describing the second part of the proportionality test (i.e. *legitimacy*, *suitability*, *necessity*, and *proportionality*) nicely capture the point of different technical terms and standards used in the similar doctrinal prongs of various proportionality tests used by courts around the world. Yowell notes that the (1) *legitimacy* of an infringement is usually a matter of judges making judgments of political morality to approve of a law’s purpose.¹⁴ Although Yowell is correct to note that findings of illegitimate purposes are rare, his account could do more to emphasize how important the particular legitimate purpose a court attributes to a law is in terms of how it fares on other prongs of the test.¹⁵ He correctly notes that although courts tend to distinguish their analysis of the (2) *suitability* and (3) *necessity* of a law’s infringements on rights, these prongs are logically intertwined insofar as “if the means are necessary then they are also suitable.”¹⁶ It is uncommon for courts to find that the means by which a law infringes rights are “wholly unsuited” to legislative purposes, but it is common for courts to hold that a law unnecessarily infringes rights.¹⁷

Yowell insightfully distinguishes between two ways courts tend to evaluate the necessity of laws infringing rights. The first way narrowly considers whether there is an alternative to the law that would prove less restrictive of rights while still “*fully and completely*” achieving the legitimate aim of the impugned law.¹⁸ The second approach to evaluating the necessity is less narrow because it asks whether there are alternative means to a legitimate legislative end that might not fully achieve that end, but would achieve it to “an appropriate degree, considering the effect of the means.”¹⁹ This latter approach to evaluating the (3) necessity of rights infringements is often subsumed into and indistinguishable from the final stage of the proportionality inquiry where courts (4) balance the interests of the political community against the rights of individuals.²⁰ Yowell summarizes the various formulations by which courts describe their tests for

13 *Ibid* [emphasis in original] [footnotes omitted].

14 *Ibid* at 30-31 [emphasis added].

15 *Ibid*. See Peter W Hogg “Interpreting the Charter of Rights: Generosity and Justification” (1990) 28:4 Osgoode Hall LJ 817 at 820-821.

16 Yowell, *Constitutional Rights*, *supra* note 1 at 31.

17 *Ibid*.

18 *Ibid* [emphasis in original].

19 *Ibid*.

20 *Ibid*.

evaluating the broad necessity and balance of rights infringements with a simple question: “[H]as the legislature chosen means that unreasonably impair an individual’s interest?”²¹

Why does proportionality analysis fail to legally constrain judicial reasoning about rights? Yowell thinks that proportionality analysis is the dominant form of reasoning about fundamental rights, and he contrasts the guidance it offers for reasoning about rights with ordinary legal rights.²² In a sense, this contrast demonstrates how the legal structures of fundamental rights themselves are partly to blame for the unconstrained character of proportionality analysis. Counterintuitively, ordinary legal rights such as the right to fish a local river with a fishing licence obtained under statutory conditions are often more constraining on reasoning about rights than entrenched constitutional rights subject to proportionality analysis.²³ Yowell maintains that this is partly due to the contrast between the indefeasible status and three-term jural structure of ordinary legal rights, and the defeasible two-term jural structure of fundamental rights that are the subject of proportionality analysis.²⁴

Ordinary legal rights usually involve a relationship between a right-holder A, an action ϕ , and B, a person or set of persons with no right to interfere with A’s right.²⁵ Such rights can be changed by ordinary statutes, but they are usually absolute in the sense that they cannot be infringed for considerations of general welfare.²⁶ In most common-law jurisdictions, when a fisherman has a valid fishing licence and they follow the regulations to fish a specific river in season, their right to fish that river cannot be violated because a Conservation Officer deems it to be justified in the name of the general welfare.²⁷ In contrast, fundamental rights are often enshrined in bills of rights as two-term expressions: “A has a right to X’ where X is an abstract noun or subject-matter”, and proportionality analysis holds that these rights can be justifiably infringed for the greater good.²⁸ The overly vague and simple jural structure of fundamental rights makes them less of a constraining guide to reasoning about their requirements than ordinary legal rights. Some fundamental rights might appear to be quite absolute, such as Article 5 of the Universal Declaration of Human Rights’ right that “no one shall be subjected to torture”, but even in this case

21 *Ibid* at 32.

22 *Ibid* at 24-26.

23 *Ibid* at 25.

24 *Ibid* at 26.

25 *Ibid*.

26 *Ibid*.

27 *Ibid* at 25.

28 *Ibid* at 26.

“torture” is an abstract concept that must be defined.²⁹ The indefiniteness of the Declaration’s right against torture may be less absolute than the statutory right to fish a river.

Proportionality analysis itself is not responsible for the indeterminacy of the two-term jural structures of many fundamental rights, but Yowell argues that it fails to make reasoning about these already-vague rights any more specific and absolute by insisting that they can be justifiably infringed.³⁰ The first stage of the analysis expands rights to make them less specific, while the second stage ensures that they are absolute. The first stage renders rights less specific by inflating their meaning without reference to sophisticated legal methods of textual interpretation.³¹ In the absence of three-term jural specifics, proportionality guides reasoning about rights by treating rights as *interests* and thereby defines the *prima facie* protections of the right as expansively as the semantic content of terms will allow.

The right to freedom of expression will not be limited in relation to the original public meaning of ‘expression’ at the time of its enactment, nor in relation to contemporaneous common-law uses of the term, but by the semantic right of ‘expression.’ Freedom of expression theoretically extends equally to political speeches at state-funded universities and to child pornography.³² This approach logically excludes methods of interpretation that might help specify the scope of rights and invites the confusion of rights.³³ This is why some proponents of proportionality analysis go so far as to say that the interests protected by rights can all be boiled down to one interest in autonomy.³⁴

The second stage of the proportionality approach to rights further undermines the kind of legal guidance offered by techniques of interpreting ordinary

29 *Ibid* at 25; *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71, art 5. Of course, it is possible to interpret the *Universal Declaration’s* right against torture as a *duty* obligating a smaller class of persons (e.g. “those *within my political community*” [emphasis in original]) to establish positive laws protecting against the torture of *any human person*: See Grégoire Webber et al, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge: Cambridge University Press, 2018) at 51-52. This renders many of the *Declaration’s* rights a *three-term* jural relation, and Yowell and his co-authors argue that the rights of the *Declaration* can be read this way: *ibid* at 51-52, 121-22.

30 *Ibid* at 27-28.

31 *Ibid* at 28; See also Grégoire Webber, “On the Loss of Rights” in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (New York: Cambridge University Press, 2014) 123 at 132-137.

32 See *R v Sharpe*, 2001 SCC 2 at para 78.

33 Yowell, *Constitutional Rights*, *supra* note 1 at 30.

34 *Ibid* citing Kai Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012) at 178.

rights. It does so by weakening the normative absoluteness of fundamental rights. Once a court has discovered the *prima facie* infringement of an interest protected by a right, judges must morally and empirically reason about the (1) legitimacy, (2) suitability, (3) necessity, and (4) balancing of rights. Yowell outlines how this way of thinking allows courts to use substantive moral reasoning about the requirements of justice³⁵ and empirical reasoning about the causal efficacy and side-effects of policies to override the interests that rights protect.³⁶ Assessing the (3) necessity of a law's infringement of rights in terms of other potential policies that might equally fulfill its purpose in a less rights-threatening way, or (4) in a way that better *balances* the impugned law's purpose with interests protected by rights, is not a legally constrained form of reasoning.

The conclusions of such analysis will be primarily shaped by the moral and empirical steps in its reasoning process, rather than by legal premises. This kind of reasoning offers no more guidance by formulating it as a technical legal test.³⁷ Such tests can only appear to legally calculate whether rights infringements are justified by presupposing the untenable moral premise that "a single value can be used to *commensurate* all relevant interests in a constitutional case."³⁸ To be clear, an important aspect of Yowell's argument is that he does not think it is necessarily wrong to consider the trade-offs of the interests rights protect against one another.³⁹ His point is that this approach does not legally direct reasoning about rights. The first step of proportionality analysis scrubs away the legally detailed scope of rights, while the second weakens their normative absoluteness.

Why does the nature of proportionality reasoning about rights matter? While Yowell thinks that the potential for utilitarianism is a problem with

35 Yowell, *Constitutional Rights*, *supra* note 1 at 34 citing Mattias Kumm, "Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement" in George Pavlakos, ed, *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart, 2007) 131 at 140.

36 Yowell, *Constitutional Rights*, *supra* note 1 at 34.

37 See Robert Alexy's "Weight Formula" for calculating whether a rights infringement should be upheld given how the intensity of interference with a rights interest relates to the abstract importance and probability of a policy goal.: Yowell, *Constitutional Rights*, *supra* note 1 at 32 citing Robert Alexy, "On Balancing and Subsumption: A Structural Comparison" (2003) 16:4 *Ratio Juris* 443. Alexy's Weight Formula attempts to relate all of the variables at issue in constitutional rights cases as:

$$W_i, j = \frac{I_i, W_i, R_i}{I_j, W_j, R_j}$$

38 Yowell, *Constitutional Rights*, *supra* note 1 at 32 [emphasis in original].

39 Although he does think that presupposing their value commensurability cannot be justified and leads to a *quantitative* utilitarian type of analysis that should be rejected: *ibid* at 107-109.

such reasoning, his primary concerns are institutional. For Yowell, practical reasoning about rights in general involves “balancing in a non-technical sense” of deliberatively analysing “trade-offs between different values and factors” related to rights and the common good.⁴⁰ He claims that when its pretensions of legality are set aside, proportionality analysis is roughly an approximation of what abstract practical reasoning about rights entails.⁴¹ The difficulty is that this kind of abstract reasoning is dependent on certain institutional capacities and designs. Yowell argues that common law courts are meant to reason about the legal meaning of rights in disputes between parties, and are poorly designed to engage in the empirical and moral reasoning that he thinks constitute practical reasoning about rights more generally. He claims that common law courts are particularly poorly designed to reason about the kinds of abstract rights entrenched in bills of rights.⁴² In order for an institution to reason about rights generally, it must be designed to accurately acquire and assess empirical knowledge, and to deliberatively and transparently evaluate relevant moral reasons.⁴³ Yowell’s argument concludes that common law courts are generally inferior to European-Kelsenian courts in their institutional capacity for such reasoning, while legislatures are superior to both.⁴⁴

Practical reasoning about the proportionality of rights as they relate to policy matters requires the minimization of bias and effective access to information — including empirical research about the actual causal effects of policies in specific circumstances, the nature of certain historical events, etc.⁴⁵ Common-law courts lack sufficient information for resolving general questions of trade-offs related to rights for society at large, because they are situated to make decisions based on the facts of a certain case between specific parties, and empirical research is usually only “*passive[ly]*” received as evidence by courts through Brandeis briefs.⁴⁶ Appellate common law courts are situated at the apex of a judicial system designed to resolve questions of public and private law between litigating parties in a way that artificially constrains relevant facts in order to be procedurally fair and attentive to their circumstances.⁴⁷ They are ill designed to investigate and reason about how rights relate to public policies and social issues. Yowell shows how appellate common law courts are often

40 *Ibid* at 107.

41 *Ibid* at 107-108

42 *Ibid* at 113.

43 *Ibid* at 90-130.

44 *Ibid* at 129.

45 *Ibid* at 100-104.

46 *Ibid* at 102 [emphasis in original].

47 *Ibid* at 90-96.

bound by the empirical findings of lower trial courts; even when these findings are questionable, they lack the research expertise and procedural flexibility to actively scrutinize Brandeis briefs.⁴⁸

In contrast, European constitutional courts are separated from other courts in the legal system and enjoy direct jurisdiction over matters of constitutional law. This general jurisdiction allows them to directly address questions of how rights relate to public policy, as they are not tied to the circumstances and facts arising from the need to settle legal questions contested by litigants. Such courts are not as passively reliant on Brandeis briefs as they are often granted research services that they can use to directly interact with scientific experts.⁴⁹ Yowell claims that even the stronger capacity of European-style courts to engage in empirical reasoning pales in comparison with the ability of legislatures to gather information from representatives who possess policy expertise informed by diverse backgrounds and who are electorally incentivized to gather information from constituents affected by policy.⁵⁰ Legislatures also have the superior ability to delegate responsibility for specific empirical research on policy areas to specialized committees, allowing subsets of legislators to “acquire and assess empirical research on a daily basis and gain a level of proficiency superior to that of judges.”⁵¹

There is an important moral dimension to practical reasoning about the ‘proportionality’ of laws relating to rights and policy matters. Practical reasoning about rights is not only a matter of empirically discovering what a law has done in the past, or what the effects of a law will be, but also what *should* be done given how certain aims relate to other goals and empirical findings. Yowell argues that the comparative capacities of courts and legislatures to reason about the moral dimensions of rights follow a similar ranking to their empirical capacities. Common law courts are comparatively weaker in moral reasoning than Kelsenian courts, and both of these types of courts are generally inferior to legislatures. Common law courts are comparatively impoverished in their capacity to reason about moral rights because they are bound to deliberate confidentially; they are further hampered by the pressures of fitting moral arguments within the constraints of legal rules to avoid the political pressures of public criticism.⁵² Kelsenian courts are superior insofar as their ability to reason about cases in the abstract brings moral reasoning about policy trade-offs more

48 *Ibid* at 57-72, 154.

49 *Ibid* at 152-154.

50 *Ibid* at 98-104.

51 *Ibid* at 103.

52 *Ibid* at 109-114.

transparently to bear on rights questions, or at least has more potential for such transparency.⁵³ Legislatures are better situated for transparent and deliberative moral reasoning than *either* common law or Kelsenian courts because they are “open to every kind of reason in [their] deliberation ... including moral reasoning”, and are designed to transparently accommodate contrasting chains of moral reasoning about rights as they relate to enacting changes to the law.⁵⁴

The legislature is thereby better situated to transparently integrate moral *and* empirical reasoning into its deliberation on the proportionality of laws as they relate to rights. Yowell's comparisons lead to the conclusion that *if* courts are to engage in practical reasoning about vague rights, then it will be better for them to be designed as centralized, separate Kelsenian courts with the specialized task of engaging in proportionality analysis about abstract constitutional rights claims with the support of a research service. But, the ideal institutional design of an institution undertaking proportionality analysis will have the features of a legislature, a conclusion that cuts against the entrenchment and judicial review of constitutionally vague rights.⁵⁵

III. Practical Reasoning about Rights

My first criticism of Yowell's argument is that it is too quick to equate proportionality analysis and practical reasoning about rights in general, and thereby understates the role that legally constrained forms of adjudication can play in reasoning about rights. The result is that it insufficiently recognizes the role of adjudication in practical reasoning about ordinary and constitutional legal rights. My second criticism follows from the first, as the potential role that legally constrained forms of reasoning can play in practical reasoning qualifies Yowell's argument against entrenched rights and turns his 'second-best' case for Kelsenian courts into a *reductio* argument against adjudicative proportionality analysis. I suspect that Yowell might agree with these criticisms, as they are, in truth, friendly amendments to his admirable project of encouraging legislative and adjudicative responsibility for the specification of rights.

Why should we be cautious in drawing an equivalence between proportionality reasoning, shorn of its technical pretensions, and abstract moral and

⁵³ *Ibid* at 113.

⁵⁴ *Ibid* at 113 citing Richard Ekins, *The Nature of Legislative Intent*, 1st ed (Oxford: Oxford University Press, 2012) at 118-127. The legislature's membership is also more diverse in their backgrounds and skill sets and, unlike judges, legislators are selected for their perceived acumen in moral and empirical reasoning about matters outside of the meaning of the law — matters that are relevant to proportionality analysis.

⁵⁵ Yowell, *Constitutional Rights*, *supra* note 1 at 131-146.

empirical reasoning about rights? I argue that this equivalence risks playing down important aspects of reasoning about rights that do not involve proportionality judgements. There are important aspects of legislative and adjudicative reasoning about rights that do not involve proportionality judgements. Legislative deliberation about the values rights protect does not necessarily involve proportionality reasoning. More importantly, adjudication about the *legal* meaning of fundamental rights in particular cases and circumstances can serve a critical role in reasoning about rights without any reference to ‘proportionality.’ Indeed, such technical adjudication is part of what makes the ordinary legal rights elaborated in statutes and private law so much more specific and absolute than constitutional rights subject to proportionality analysis. Yowell’s own insights into the ability of courts to reason about the meaning of statutory and common law rights support the idea that adjudication can play a key role in ensuring two of the desiderata of practical reasoning about rights: specificity and normative absoluteness. While his argument against the legally directed nature of reasoning about fundamental rights may prove correct as a matter of *practice*, it fails to give the possibility of such reasoning its due.

Can proportionality reasoning about rights in a non-technical sense be equated with practical reasoning about rights generally? Yowell writes that proportionate balancing can be thought of as:

practical deliberation that involves conflicting considerations and reasons of varying strength, and that recognizes that there are trade-offs between different values and factors relevant to a decision. In this loose sense many of our everyday decisions, and most legislative decisions, involve ‘balancing.’⁵⁶

Balancing the conflicting considerations and reasons of varying strength in decisions regarding rights is just a description of abstract practical reasoning, and not necessarily a matter of reasoning ‘proportionately.’ This is the first problem with equating proportionality and practical reasoning about rights. Proportionality can have a much more abstract sense than it is given in the adjudicative analysis of rights, but as a concept, it presupposes some prior judgements about ends that reason uses to calibrate a further proportionality judgement. Aristotle might have thought that we cannot deliberate about ends, but whatever he meant by that exactly, insofar as we judge the worth of some ends as basic goods, these evaluations do not appear to be judgments of proportionality.⁵⁷ Rather, they are the judgments that ground the incommensurability

⁵⁶ *Ibid* at 107-108.

⁵⁷ Aristotle, *Nicomachean Ethics*, translated by WD Ross, Book III Chapter 3, online: *The Internet Classics Archive* <classics.mit.edu/Aristotle/nicomachaen.3.iii.html>.

of certain goods and render arbitrary any proportionality analysis seeking to aggregate their relation to one another. For example, it is not *disproportionate* to fail to judge friendship a basic value in life, although in my view it would nevertheless be a grave failure of practical judgement.⁵⁸ This failure would not be a failure in judging the proportionality of a good as it relates to other ends and specific circumstances, but of practical reasoning about ends. It is not a failure of proportionality reasoning to fail to see that certain ends are important and justify specific rights, but it can be a failure of legislative deliberation. Thus, Yowell must be careful not to simply equate proportionality reasoning in the loose sense with practical reasoning about rights, as at least one dimension of abstract practical reasoning about rights (viz. reasoning about the ends that justify certain rights) does not necessarily involve the idea of proportionality.

A more important reason to be cautious about Yowell's equivalence between practical reasoning about rights and proportionality is that it understates the role that adjudicative techniques that do not involve proportionality can play in reasoning about rights. This does not mean that Yowell is wrong to draw a connection between abstract proportionality analysis and legislative reasoning about rights. On the contrary; while Yowell goes a bit too far in equating the looser sense of proportionality reasoning with practical reasoning about rights, he convincingly argues that proportionality can be used in a looser sense to describe many legislative choices about rights. Although legislative deliberation can involve judgements about the basic goods justifying specific rights, it will often accompany these kinds of judgments with deliberation on the relationship between such rights and empirical factors.⁵⁹

In my view, he is correct to conclude that general legislatures feature a superior institutional capacity to engage in such abstract proportionality reasoning about rights. Yowell's examples of faulty judicial uses of proportionality reasoning, such as the Canadian Supreme Court's invalidations of criminal prohibitions on medically assisted suicide, compare quite unfavourably with examples of legislative judgments of proportionality, such as the UK Parliament's debate over whether to permit medically assisted suicide.⁶⁰ But, this superior ability of legislatures to proportionately specify rights is complemented, and often reliant on, forms of adjudication that do not involve proportionality analysis. These forms of adjudication deserve a distinctive place of

58 See Richard Ekins, "Legislating Proportionately" in Huscroft, Miller & Webber, *supra* note 31, 343 at 347 for discussion of this distinction.

59 *Ibid* at 345-347.

60 Yowell, *Constitutional Rights*, *supra* note 1 at 113-114 citing UK, HC Deb (11 September 2015) vol 599 cols 655-724.

honour alongside legislation in our abstract ideal of practical reasoning about rights.

The point I'm making is that when we reason about the meaning of rights in the abstract, we cannot only take on the internal view of the legislature seeking to balance rights considerations to achieve the common good. We must not only reason about the meaning and trade-offs between different rights when we consider *changes* to the law, but also how these changes might *apply* to other past laws, and unforeseen future circumstances entangling particular individuals.⁶¹ We must reason about how to change laws specifying rights, the primary function of the legislature, but also about how changes will be applied to relate to other laws and particular cases, the primary function of courts.⁶²

This application of law is a part of assessing the proportionality of rights in the loose sense of consistently specifying trade-offs between different rights and values, but not in the technical sense of balancing interests. The role of courts in ensuring the specificity and absoluteness of ordinary legal rights suggests that adjudicative reasoning *without* proportionality analysis (in the technical sense) complements proportional legislation as a key aspect of constrained practical reasoning about rights. I shall argue that there is a case to be made that adjudication can play this role with regard to both ordinary and constitutional rights. As I will show in the following section of this essay (IV), the possibility that adjudication can play in these roles has consequences for Yowell's argument against entrenchment and his 'second-best' case for Kelsenian courts.

As I've mentioned above, Yowell favours the specificity and absoluteness of ordinary legal rights created by private law and statutes (e.g. a statutory fishing licence scheme), but he fails to highlight the role of adjudication in creating the consistency and absoluteness of *ordinary rights* and is dismissive of the possibility that *constitutional rights* could be adjudicated in a way that grants them a similar measure of specificity and absoluteness. The result is a potential distortion of the role of adjudication in practical reasoning about rights. The role of adjudication in protecting ordinary legal rights complicates Yowell's portrait of practical reasoning about rights proportionately by providing an example of a non-proportionately oriented form of practical reasoning about rights in certain cases and circumstances.

61 See Grégoire Webber, "Past, Present, and Justice in the Exercise of Judicial Responsibility" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019) 129.

62 See HLA Hart, *The Concept of Law*, 2nd ed (Oxford: Clarendon, 1994) at 95-99.

Part of what makes ordinary legal rights specific and absolute is their application to specific cases and circumstances by judges making use of interpretive techniques of statutory and common law. When the legislature grants the right to a class of persons (e.g. a fishing licence granted to citizens aged 16 and over), for a specific period of time, with special privileges, immunities, terms and conditions, it makes its own proportionality judgement that is reliant on courts using techniques *other* than proportionality analysis to make sense of these legal rules in relation to other laws and specific circumstances. Adjudication helps make such ordinary legal rights more specific and absolute by using legal techniques of reasoning to apply their meaning across different parties and empirical facts (e.g. holding the licences of 15-year-olds caught lying about their age invalid; or holding valid the licences of 17-year-olds accused by fisheries officers of lying about their age). Not only does this ensure that changes to the law specifying rights in the past are consistently applied and not overridable by certain interests, but it contributes to the resolution of 'hard cases' by providing answers to questions about the relationship of past changes to the law to more recent changes or circumstances the legislature may not have foreseen (e.g. is a "fish" a "tangible object" for purposes of another act?).⁶³

I think that Yowell would readily agree with this claim, but even so, he does not give due credit to the role of adjudication in practical reasoning about rights in his case against constitutional methods of adjudication. For Yowell, most forms of constitutional rights adjudication appear to collapse into proportionality analysis. He notes that most of the methods of adjudication that are alternatives to proportionality analysis, such as the 'living tree' technique of updating the meaning of constitutional rights to reflect changes in society's political morality, fail to restrain judicial reasoning any more than proportionality analysis.⁶⁴ I tend to agree with Yowell regarding these methods. But he is also unimpressed with techniques of reasoning about constitutional rights that explicitly purport to restrain judicial discretion, such as originalism.

Yowell claims that most originalists reject Justice Black's view that "the task of the interpreter is to fix a clear meaning of the constitutional right and apply it without considering whether some governmental interest requires limiting the right."⁶⁵ Because originalist methods fail to abolish the possibility

63 See *Yates v United States*, 83 USLW 4120 (US 25 February 2015).

64 Yowell, *Constitutional Rights*, *supra* note 1 at 35-36.

65 *Ibid* at 36.

of overriding rights in relation to governmental interests, in the wake of their historical analysis of original meaning, “judges relying on originalism often proceed to apply a balancing test, via an established category within the tiered scrutiny framework or sometimes in a looser way.”⁶⁶ While in many jurisdictions Yowell’s arguments about originalism may ring true as a matter of constitutional practice, in my view, they fail to credit the possibility that judicial methods of discovering original meaning, respecting long-standing practices and even judicial deference, can help judges resist the temptations of balancing rights as defeasible interests. The importance of Yowell’s failure to address the potential tension between originalism and balancing is not that originalism is a “constitutional truthmaker” or ultimate criterion for adjudicating entrenched rights.⁶⁷ In the following section, I will argue that if techniques of adjudication such as originalism can constrain reasoning about rights without recourse to proportionality, then Yowell must qualify his critique of entrenchment and recommend that judges interpreting entrenched bills of rights redouble their efforts to practice such constrained adjudicative techniques.

To hit home his point about constitutional adjudication, Yowell cites a number of cases in which purportedly originalist judges have, in his view, failed to resist the lure of proportionality.⁶⁸ Originalism is just one method of restraining judicial discretion, but it is a useful method for testing Yowell’s claims because, in many cases, it is among the most aggressive methods for resisting balancing. Unless the original meaning of rights provisions itself entails proportionality, judges seeking to discover and apply the original meaning of rights provisions will undermine their own historical project by allowing uncovered meaning to be overridden by contemporary interests.⁶⁹ If originalism cannot constrain the impulse to balance rights as interests, then Yowell’s argument against the consistency and absoluteness of adjudicating constitutional rights would seem to be quite strong. But Yowell’s case against originalism is unconvincing, partly because he does not adequately explore cases of originalist rights jurisprudence, and partly because he conflates ‘originalism’ as it has been labelled in practice with originalism as it should be practiced.

⁶⁶ *Ibid* at 36-37.

⁶⁷ See William Baude, “Originalism as a Constraint on Judges” (2017) 84 U Chicago L Rev 2213 at 2216 citing Christopher R Green, “Constitutional Truthmakers” (2018) 32:3 Notre Dame JL Ethics & Pub Pol’y 497.

⁶⁸ Yowell, *Constitutional Rights*, *supra* note 1 at 36-37.

⁶⁹ See e.g. Michael B Rappaport “Is Proportionality Analysis Consistent with Originalism” (2017) 31:3 *Diritto Pubblico Comparato Ed Europeo* 627. I discuss the relevance of this possibility to Yowell’s argument in note 106.

Two of his main suspects are the U.S. constitutional rights cases of *District of Columbia v Heller* and *Citizens United v Federal Election Commission*.⁷⁰ Yowell's use of *Heller* fails to acknowledge the majority opinion's opposition to mixing originalist analysis with balancing rights, and his use of *Citizens United* does not deal with the originalist elements of the case, nor does it acknowledge prominent originalist arguments against what might be taken to be the Court's use of balancing in the case. *Heller* involved a five-justice majority opinion holding that the District of Columbia's ban on handguns violated the founding-era original meaning of the Second Amendment's protection for citizens' rights to bear arms.⁷¹ Yowell indicates that although the case featured originalist disagreement about whether the "right to bear arms" protects an individual right to possess a firearm unconnected with the right to firearms in the context of "[a] regulated Militia", in his view, this case ultimately turned on a balancing test.⁷²

This use of *Heller* bizarrely passes over Justice Scalia's argument against Justice Breyer's separate dissenting claim that "interest-balancing inquiry results in the constitutionality of the handgun ban."⁷³ Scalia, in fact, excoriates the idea of balancing, arguing that:

the very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.⁷⁴

That's not exactly a claim supporting a synthesis between originalism and proportionality analysis. Whatever one makes of the originalist claims in *Heller*, its explicit arguments against balancing deserve some attention from an argument characterizing the case as a clear exercise of proportionality analysis.⁷⁵

70 *District of Columbia v Heller*, 554 US 570 (2008) [*Heller* 2008]; *Citizens United v Federal Election Commission*, 558 US 310 (2010) [*Citizens United*].

71 *Heller* 2008, *supra* note 70 at 576-626.

72 Yowell, *Constitutional Rights*, *supra* note 1 at 36-37; US CONST amend II.

73 *Heller* 2008, *supra* note 70 at 634-35, Breyer J, dissenting.

74 *Ibid* [emphasis in original].

75 Yowell does pursue a deeper analysis of *Heller* in Paul Yowell, "Proportionality in United States Constitutional Law" in Liora Lazarus, Christopher McCrudden & Nigel Bowles, eds, *Reasoning Rights* (Oxford: Hart, 2014) 87. He argues that notwithstanding Scalia's "expressed distaste" for balancing "because the majority both (i) acknowledged that the right to bear arms is limited and (ii) did not rely on a particular tier of scrutiny, it is difficult to escape the conclusion that the Court's decision involved some kind of implicit evaluation or weighing of the goals of the legislation against the interference with the right." *ibid* at 100. I don't understand how acknowledging that rights can be "limited" or eschewing use of the tiers of scrutiny renders rights adjudication a matter of balancing. Presumably statutes "limit" rights in the specificationist sense and insofar as Yowell thinks the

Yowell also uses the case of *Citizens United* to make the argument that, *in practice*, originalist constitutional adjudication devolves into balancing interests. *Citizens United* was a widely reviled U.S. Supreme Court decision holding that the First Amendment's right to "freedom of speech" protects against the suppression of "political speech on the basis of the speaker's corporate identity."⁷⁶ The case involved a non-profit corporation that received some funding from for-profit corporations and produced and distributed a documentary film criticizing then-Senator Hillary Clinton while she was a candidate running for President of the United States. The Court held that the impugned campaign finance law restricting the political expenditures of corporations and unions (the *Federal Bipartisan Campaign Reform Act*) discriminated against political speech on the basis of corporate identity.⁷⁷ The government's reasons for these restrictions ("antidistortion",⁷⁸ "anticorruption",⁷⁹ and "shareholder protection"⁸⁰) failed to justify a compelling interest for the law under the strict scrutiny demanded by speaker-based restrictions. Ultimately, the clearest question at stake in the case was "whether a group outside of the news industry is constitutionally entitled to disseminate to the public through mass communications media a commentary about a candidate for public office within a certain number of days before an election."⁸¹

While *Citizens United* could be interpreted as involving a form of balancing, Yowell does not demonstrate how the specific originalist elements of the majority opinion in the case collapse into interest balancing. The most originalist argument in the majority opinion addresses whether the original meaning of the First Amendment permitted the suppression of speech by media corporations as a means of preventing "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the

tiers of scrutiny *entail* balancing avoiding it is a sign that they are not engaged in a proportionality inquiry. A stronger argument might be that *Heller* 2008 left room for balancing, but even that possibility is questionable given the reception of *Heller* 2008 by originalist minded judges. Note that the in the sequel to *Heller* 2008 considering an automatic weapons ban at the D.C. Circuit Court Then-Judge Kavanaugh explicitly argued that *Heller* 2008 bound lower courts with the implicit "clear message" that "Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulations.": *Heller v District of Columbia*, 670 F (3d) 1244 (DC Circ 2011) at 1271, Kavanaugh J, dissenting [*Heller* 2011].

76 *Citizens United*, *supra* note 70 at 365; US CONST amend I.

77 *Ibid* at 340-42, 364-65.

78 *Ibid* at 349-56.

79 *Ibid* at 356-61.

80 *Ibid* at 361-62.

81 See Michael W McConnell "Reconsidering *Citizens United* as a Press Clause Case" (2013) 123:2 Yale LJ 412 at 422 [McConnell, "Reconsidering *Citizens United*"].

corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁸² Then-Justice Kennedy's majority opinion argued that the antidistortion rationale for discriminating against corporate speech would allow Congress to suppress the speech of wealthy media corporations to prevent distortions, and that the original meaning of the First Amendment does not authorize such suppression.⁸³ Originalism was thereby used to overturn a precedent that could *invite* balancing.

This originalist argument did not collapse into balancing; rather, it potentially became an *accessory* to it when Kennedy J moved on to assess two other compelling interests that could justify the government suppressing political speech in a way that discriminates on the basis of corporate identity: anti-corruption and shareholder protection. It is possible that these non-originalist assessments of whether the restrictions on corporate speech are justifiably tailored to the government's interest in preventing corruption and protecting corporate-shareholders devolve into balancing. For example, in assessing the anticorruption rationale, the majority opinion assesses evidence that independent expenditures might ingratiate politicians to specific groups; it ultimately rejected this evidence but, on one reading, implicitly countenanced this as a rationale for justifying restrictions on political speech.⁸⁴ This is arguably a form of proportionality analysis, but it does not stem from originalist methods of interpretation. Every methodology can be abused, and the fact that the judge writing the opinion calls himself an originalist does not itself taint originalism with the sin of balancing.⁸⁵

Yowell also fails to explore how what might be thought of as the balancing approach to corporate speech could be taken as a failure of originalist methodology *on its own terms*. Michael McConnell has convincingly argued that former Justice Kennedy's proposed category of strict scrutiny for speaker-specific restrictions on political speech logically challenges restrictions on corporate contributions to political campaigns that have long been accepted as constitutional.⁸⁶ He proposes that this difficulty could be resolved if the speaker-based category is drawn not from the free speech clause of the First Amendment, but rather from the original meaning of the press clause found

82 *Citizens United*, *supra* note 70 at 348. That is, the majority made originalist arguments to assess the compelling interest in preventing distortion as grounds for suppressing corporate speech, an interest raised in the precedent of *Austin v Michigan Chamber of Commerce*, 494 US 652 (1990) at 660.

83 *Citizens United*, *supra* note 70 at 353-356.

84 *Ibid* at 356-61.

85 See Michael W McConnell, "Time, Institutions, and Interpretation" (2015) 95:6 BUL Rev 1745 at 1761.

86 See McConnell, "Reconsidering *Citizens United*", *supra* note 81 at 449-450.

in the same amendment.⁸⁷ The original meaning of the right to freedom of the press did not merely protect the right of established media such as newspapers and printers to write and publish their opinions, as both the British Blackstonian and American Jeffersonian interpreters of the clause agreed that it extended to “every citizen.”⁸⁸ The press clause was meant to prevent a state licencing scheme from restricting the publication of opinions in newspapers, but also in books and pamphlets.⁸⁹

The freedom of the press was invoked and understood to apply to libel and sedition cases involving non-professional journalists, and even the purchasing of advertisements.⁹⁰ This originalist argument fits well with relevant precedent and pragmatic concerns relating to campaign finance laws, and it provides a basis for holding restrictions on campaign contributions to be constitutional, while protecting individual expenditures taking the form of published advocacy for or against a political candidate.⁹¹ While McConnell is not concerned in his article with the problem of balancing, his originalist solution to this problem also potentially guides the court away from balancing by directing courts to assess the *content* of individual expenditures as they relate to the *scope* of the right to freedom of the press. On this approach, “abridgements” of the First Amendment would not be infringements that cannot be justified by government interests, but violations of “*the*” original meaning of rights such as “the freedom of the press” *antedating* the founding.⁹²

In addition, there is tension between the claim that originalism and other methods of adjudication collapse into proportionality analysis and Yowell’s approval for the rights jurisprudence of former U.S. Supreme Court Justice Hugo Black.⁹³ Black is praised for advancing the view that rights are absolute.⁹⁴ He interpreted the right to freedom of speech under the First Amendment as excluding any laws limiting the content of speech but allowed for restrictions

87 *Ibid.*

88 *Ibid* at 436.

89 *Ibid* at 437.

90 *Ibid* at 438 citing Eugene Volokh “Freedom of the Press as an Industry, or for the Press as a Technology? From the Framing to Today” (2012) 160:2 U Pa L Rev 459 at 483-98.

91 McConnell, “Reconsidering *Citizens United*”, *supra* note 81 at 453-454.

92 *Ibid* at 435 [emphasis added]. Incidentally, the historical significance of “abridgements” as pointing to pre-founding terms is at odds with former Justice Black’s textualist insistence that that “Congress shall make no law’ means Congress shall make no law.” Hugo LaFayette Black, *A Constitutional Faith*, 1st ed (New York: Knopf, 1968) at 45. On the originalist view, Black’s textualist naively fails to make sense of the historicizing effect of the word “abridgements”. My thanks to Michael McConnell for waking me from my Black slumbers.

93 Yowell, *Constitutional Rights*, *supra* note 1 at 24.

94 *Ibid.*

on the time and place of speech by distinguishing between speech (protected) and conduct (not protected).⁹⁵ In Yowell's view, the end of the 1960's, and presumably Black's retirement in 1971, spelled the end of the view that rights were absolute in American constitutional adjudication.⁹⁶ Perhaps originalism is unable to reliably direct adjudication as law establishing absolute limits on rights due to the indeterminacy of the original meaning of constitutional language.⁹⁷ But even if originalism collapses into balancing, Yowell's approval for Black's approach to rights adjudication suggests that it could constitute an alternative method that does not collapse into balancing. Unfortunately, the relationship between Black's absolutism and the originalist understanding of rights is left unexplored, as is the possibility of reviving Black's approach to rights adjudication.

Yowell's failure to adequately make the case that originalism and alternative methods of adjudication will collapse into proportionality analysis suggests that we should at least be open to the possibility that certain methods of rights adjudication can play a role in specifying the meaning of constitutional rights without recourse to balancing. When we reason together about the meaning of rights, the looser idea of proportionality tracks our deliberation on the trade-offs relating to changes to the law specifying the meaning of rights. But, in modern legal systems, this deliberation will be incomplete without considering the techniques of adjudicative reasoning by which our choices will be applied to other changes to the law and specific circumstances.

My own critique of Yowell's claims indicates that these techniques of adjudication could help complete our practical reasoning about rights in the contexts of both ordinary and constitutional rights. What those techniques should be, and how they have been employed in existing constitutions, is a separate and deeply important question. I shall conclude this essay by arguing that this more complete image of practical reasoning about rights, an image Yowell would likely endorse, poses difficulties for his argument against constitutional entrenchment and his 'second-best' argument in favour of Kelsenian courts employing proportionality analysis.

95 *Ibid* citing Hugo L Black, "The Bill of Rights" (1960) 35:4 NYUL Rev 865 at 866.

96 Yowell, *Constitutional Rights*, *supra* note 1 at 24 citing T Alexander Aleinikoff, "Constitutional Law in the Age of Balancing" (1987) 96:5 Yale LJ 943.

97 See e.g. Jud Campbell, "Natural Rights and the First Amendment" (2017) 127:2 Yale LJ 246.

IV. A Qualification and a *Reductio*

Yowell might very well agree with the idea that practical reasoning about rights includes the adjudication of ordinary legal rights, but still object to constitutional rights adjudication in practice given the widespread popularity of proportionality analysis as an adjudicative technique. On this reading, he is not interested in showing that originalism collapses into proportionality analysis as a method but simply that ‘originalist’ judges do not reliably employ originalism or other methods of adjudication in a way that avoids balancing. But, if Yowell were to agree with the possibility that methods of adjudication *could* play a salutary role in practical reasoning about constitutional rights without recourse to proportionality, then this would complicate his case against constitutional entrenchment and his ‘second-best’ case for Kelsenian courts.

Recognizing this possibility would require his comparative case against constitutional entrenchment to do more to assess how methods of adjudication that do not involve proportionality can help render constitutional rights specific and absolute. For systems already featuring entrenched rights, non-proportionality oriented methods of rights adjudication such as originalism may provide a better ‘second-best’ option than institutional reforms allowing courts to more effectively engage in proportionate legislation. Yowell’s arguments against entrenchment remain cogent warnings against the risk of planting the tree of a constitutional bill of rights in an environment where adjudicative proportionality analysis is widely taken to be the best means of tending to its growth. But this warning is due to the tendency of this technique to undermine what it was meant to protect: rights as just relations, or incipient attempts to chart just relations, between persons entrenched in fundamental law. The conclusion that ameliorating the flaws of proportionality reasoning about rights could be *institutionally* resolved by turning courts into quasi-legislatures should encourage us to explore methods of adjudicative reasoning that could provide “internal constraints” on rights adjudication.⁹⁸

Yowell’s comparative case against constitutional entrenchment is on firmer ground than his ‘second-best’ argument for Kelsenian courts, but must be qualified by the inadequacy of his account of legally constraining methods of constitutional adjudication. The argument is on firmer ground because the possibility of legally directed constitutional rights adjudication remains implausible in many contexts due to the global popularity of proportionality analysis. Aside from some hints about the influence of post-war constitutional theory, Yowell does not tell a causal story about how proportionality was a historical result of

⁹⁸ See Baude *supra* note 67 at 2226.

rights entrenchment. His analysis treats proportionality oriented rights adjudication as the *fait accompli* of entrenchment. This allows him to cogently argue against entrenchment insofar as the adjudication of constitutional rights inevitably functions as a deficient and disguised form of legislative changes to the law. But as Yowell himself notes, notwithstanding the use of empirical research and balancing he finds in the *Lochner* era of U.S. constitutional history, the rise of proportionality analysis is largely a development constituting part of post-WWII European constitutionalism.⁹⁹

The incompleteness of his argument against the plausibility of non-proportionality oriented forms of rights adjudication and the contingency of proportionality analysis both qualify his case against entrenchment. For example, Yowell applauds Alexander Hamilton's opposition to entrenching the "liberty of the press" in *The Federalist* No. 84 on the grounds that the term was too vague and would "sound much better in a treatise of ethics than in a constitution of government."¹⁰⁰ Yet as we've seen in the interpretation of *Citizens United* as a press clause case above, the original public meaning of the term "freedom of the press" may have had more determinacy and relevance to future disputes than Hamilton cared to admit. Again, Yowell would probably agree with this tepid qualification.

The possible role of legally direct adjudication in practical reasoning about rights does more than just qualify Yowell's intriguing argument in favour of centralized, separate Kelsenian courts with the power to review abstract questions of rights. It directly challenges this 'second-best' alternative to avoiding entrenchment, especially in the common law countries lacking courts with Kelsenian designs. It challenges the argument because these reforms will not improve courts' ability to engage in legally directed adjudication, and it is unclear why the aim of these reforms is superior to measures that could help realize such adjudication. Empirically, Yowell follows Kenneth Culp Davis in thinking that courts will better address proportionality questions with an independent research service and the ability to directly remedy the policy implications of rights questions without struggling to tie them to specific legal issues raised by the artificial world of a trial between litigating parties.¹⁰¹

99 Yowell, *Constitutional Rights*, *supra* note 1 at 2-4.

100 *Ibid* at 149 citing *The Federalist* No 84. The author recommends the following edition: George W Carey & James McClellan, eds, *The Federalist: The Gideon Edition* (Indianapolis: Liberty Fund, 2001).

101 Yowell, *Constitutional Rights*, *supra* note 1 at 154 citing Kenneth Culp Davis "Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court" (1986) 71:1 *Minn L Rev* 1.

Morally, Yowell follows Adrian Vermeule's suggestion that because proportionality analysis is not an especially legal technique, rights adjudication will be ethically improved by appointing judges without formal legal training.¹⁰² In effect, Yowell's argument suggests that because courts faced with adjudicating rights claims will inevitably slip into proportionality analysis, reforming them to directly address proportionality rights claims with an independent research service is preferable to encouraging courts to employ techniques to enforce the determinate meaning of rights in particular cases and circumstances. In the end, Yowell admits that reforming courts along such Kelsenian lines mean that "the argument for *judicial* review of legislation is better thought of as an argument for review by a quasi-legislative body that resembles a legislature in all important respects but one: crucially, it is not elected."¹⁰³

Advocating the reform of courts to resemble legislatures is not a 'second-best' alternative to avoiding entrenchment, but a *reductio ad absurdum* of the counter-majoritarian arguments in favour of proportionality analysis as "Socratic constestation" and public reason.¹⁰⁴ The argument holds that the capacity of courts to assess rights questions of proportionality will be improved with extensive research expertise and deliberations and by reforming courts to resemble legislatures in their ability to directly engage with rights questions without tailoring their reasoning to the technical facts of disputes between particular parties.¹⁰⁵ This is simply founding a new legislature to undermine the deleterious effects of entrenchment. Embracing proportionality as the proper mode of practical reasoning about rights effectively requires embracing the institution that proponents of proportionality analysis distrust: the legislature. The argument that courts should practice proportionality analysis in order to counter the pitfalls of legislative protections for rights turns out to be an institutional argument for designing courts to legislate better. The *reductio* exposes the elitist pretensions of many counter-majoritarian arguments in favour of judicial review, because accepting reforms to improve the *legislative* capacity of courts entails abandoning any attachment to the special function of adjudication beyond its independence from the plebeians. Although this is a *reductio*, its recommended institutional reforms could be advisable in polities lacking the political and legal culture to reinvigorate practices allowing for legally constrained rights adjudication.

102 Yowell, *Constitutional Rights*, *supra* note 1 at 155-156 citing Adrian Vermeule, "Should We Have Lay Justices?" (2007) 59:6 *Stan L Rev* 1569.

103 Yowell, *Constitutional Rights*, *supra* note 1 at 163.

104 Mattias Kumm "The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review" (2010) 4:2 *L & Ethics of Human Rights* 140 at 170.

105 See Yowell, *Constitutional Rights*, *supra* note 1, at 147-166,

Where rights have been constitutionally entrenched, a better option may be to revive legislative and judicial responsibility for the legally directed specification of rights. Yowell's 'second-best' argument cannot be conclusive as long as such a revival remains plausible.¹⁰⁶ It could be that originalism, and even Black's old fashioned absolutism all collapse into proportionality analysis due to the indeterminacy of legal rights. But Yowell's praise for Black's approach suggests otherwise. Exploring how these methods could constrict or eschew proportionality analysis holds the promise of containing its spread within and across jurisdictions featuring entrenched bills of rights. The shape this project takes will depend on specific contexts. For example, in the U.S. it could involve investigating the extent to which Yowell's alleged use of balancing within the tiers of scrutiny analysis of rights should be rejected, reformed, reconciled, or constrained by originalism, textualism, etc.¹⁰⁷ In Canada, it could involve exploring such methods and questioning the conflation of rights "infringements" and "limitations" in jurisprudence concerning section 1 of the *Charter*.¹⁰⁸ But, even if such methods fail completely or partially, it is unclear why more traditional forms of judicial restraint and respect for long-standing legislative constructions of rights would not prove a better option than simply encouraging and reforming courts to function as legislatures.¹⁰⁹ This would allow legislatures to specify the meaning of rights using the changeable yet absolute ordinary rights that Yowell approves of.¹¹⁰

106 Of course, as Stephen Gardbaum has noted, courts could be legally directed to employ the proportionality by the texts of bills of rights (e.g. by their limitations clauses) as an intentional choice made by a political community: Stephen Gardbaum "Proportionality and Democratic Constitutionalism" in Huscroft, Miller & Webber, *supra* note 31, 259 at 280-82. In that case, Yowell's 'second-best' argument would apply, as courts would be legally directed to perform a kind of legally undirected reasoning better suited to legislatures. My thanks to the thoughtful anonymous reviewer who suggested that I address this important argument. In my view, the original legal direction of the "limitations" of right in Commonwealth documents such as in section 1 the *Canadian Charter of Rights and Freedoms* do not determinately direct courts to employ proportionality analysis: *Canadian Charter of Rights and Freedoms*, s 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Other bills of rights, such as the *European Convention on Human Rights*, more clearly lend themselves to proportionate thinking: *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*European Convention on Human Rights*].

107 See e.g. *Whole Woman's Health v Hellerstedt*, 84 USLW 4534 (US 27 June 2016), Thomas J, dissenting.

108 See e.g. *Frank v Canada (AG)*, 2019 SCC 1 at para 120-125, Brown & Côté JJ, dissenting; *Charter*, *supra* note 104, s 1.

109 Although Yowell does admit the value of deference, he does not indicate how it might cut against his 'second-best' argument: Yowell, *Constitutional Rights*, *supra* note 1 at 165.

110 See Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights*, (Cambridge: Cambridge University Press: 2009) at 208-212.

Yowell has himself contributed to this cause in his excellent recent book, *Legislated Rights: Securing Human Rights Through Legislation*, that he has co-authored with Grégoire Webber, Richard Ekins, Maris Köpke, Bradley Miller, and Francisco Urbina.¹¹¹ In that book, he argues that national legislatures can help specify and protect even the broad rights found in the Universal Declaration of Human Rights.¹¹² He goes on to say that “[j]ust as the day-to-day work of legislating is indispensable for protecting human rights, so is the day-to-day enforcement of legislated rights in courts.”¹¹³ If legally directed adjudication is indispensable for protecting human rights using ordinary legislation, then so is the project of investigating clear and reliable means of adjudicating constitutional rights. In constitutional orders with entrenched bills of rights, this task for adjudication is all the more indispensable because the Kelsenian alternative does not reform but replaces the function of courts. If adjudication possesses its own value in reasoning about rights, then this is an absurdity. But this absurdity is useful for thinking about the different aspects of practical reasoning about rights. This is because it admonishes us to recognize and inquire about the virtues of adjudication insofar as we sense the absurdity of seeking to realize it by replacement. In truth then, proportionality’s *reductio* is to an absurdity that functions as a *monitum* (warning).

111 Webber et al, *supra* note 29.

112 *Ibid* at 151-152.

113 *Ibid* at 152.

