On the Limits of Proportionality

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The apparent consensus among the proponents of proportionality, as Stephen Gardbaum has recently pointed out, is that the 'triumphantly successful' constitutional law framework has few, if any, normative limits. Central to such broad understanding of proportionality is the assertion that almost any type of normative claim — whether instantiated in a legal order as an individual right or a public interest — can be fed into the algorithmic-like formula of proportionality with a view to obtain a clear and definitive answer as to which claim should take precedence. So understood, proportionality reasoning is an empty vessel, a doctrinal machine for processing normative judgements — something of a normative 'omnivore.'

The primary purpose of the present paper is to contest this received wisdom. It argues that proportionality is a content-sensitive doctrinal framework that does have inherent limitations. In particular, it can only achieve its declared goals of enhancing legitimacy, rights priority, and rationality of judicial reasoning when applied to constitutional concerns conceived as negative injunctions — i.e. concerns that in the Kantian tradition operate as "paradigmatically enforceable claims to independence from others." Conversely, when applied to positively conceived values — that is, values that entitle their holders to the provision of some services or goods — proportionality not merely remains neutral towards the foregoing triumvirate of goals, but actively undermines them. This paper explains how and why this is the case.

Le consensus apparent parmi les partisans de la proportionnalité, comme l'a fait remarquer récemment Stephen Gardbaum, est que le cadre de droit constitutionnel qui « a remporté un succès triomphal » a peu de limites normatives, sinon aucune. Au centre d'une telle interprétation générale de la proportionnalité est l'affirmation que presque tout type de revendication normative — qu'elle soit formulée dans un ordre juridique comme un droit individuel ou un intérêt public — peut être introduit dans la formule algorithmique de la proportionnalité en vue d'obtenir une réponse claire et définitive quant à la revendication qui devrait avoir la priorité. Vu ainsi, le raisonnement de la proportionnalité est un récipient vide, une machine doctrinale pour traiter les jugements normatifs, une sorte « d'omnivore » normatif.

L'objet principal de cet article est de contester cette idée reçue. L'auteure soutient que la proportionnalité est un cadre doctrinal sensible au contenu avec des limites inhérentes. En particulier, elle peut uniquement réaliser ses buts déclarés d'améliorer la légitimité, la priorité des droits et la rationalité du raisonnement judiciaire lorsqu'elle s'applique à des préoccupations constitutionnelles conçues comme des injonctions négatives, c.-à-d. des préoccupations qui, dans la tradition kantienne, opèrent comme des « revendications applicables sur le plan paradigmatique à l'indépendance par rapport aux autres ». Inversement, lorsqu'elle s'applique à des valeurs conçues comme positives — c'est-à-dire des valeurs qui donnent droit à la prestation de biens ou de services à leurs tenants — non seulement la proportionnalité reste neutre à l'égard du susdit triumvirat d'objets mais elle les sape activement. L'auteure explique comment et pourquoi il est ainsi.

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Introduction

The apparent consensus among the proponents of proportionality, as Stephen Gardbaum has recently pointed out, is that the 'triumphantly successful'[1] constitutional law framework has few, if any, normative limits.[2] Central to such broad understanding of proportionality is the assertion that almost any type of normative claim — whether instantiated in a legal order as an individual right or a public interest — can be fed into the algorithmic-like formula of proportionality with a view to obtain a clear and definitive answer as to which claim should take precedence.[3] Understood this way, proportionality reasoning is an empty vessel, a doctrinal machine for processing normative judgements — something of a normative 'omnivore.'

Such a content-agnostic account of proportionality largely comports with the practice and history of the principle's application within the traditional domain of constitutional law. Notably, Robert Alexy, one of the major authorities on proportionality, famously argues that proportionality specifically rejects the possibility of having a substantive account of constitutional rights.[4] In a similar vein, the European Court of Human Rights posits that the structural proper-

1 Matthias Klatt & Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012) at 2.

2 Stephen Gardbaum, "Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?" in Vicki C Jackson & Mark Tushnet, eds, *Proportionality: New Frontiers, New Challenges* (Cambridge: Cambridge University Press, 2017) 221 at 221-22 [Gardbaum, "Frontier"].

3 Admittedly, a limited body of the proportionality literature does explore the possibility of imposing some deontological restrictions on rights analysis; however, such literature mostly focuses on the need to screen out some normatively suspect public ends balanced against individual rights. In contrast, the idea that proportionality-based review may be incompatible with certain *structural* features of normative considerations that are being fed into its framework is seldom, if ever, explored. For some suggestions on how proportionality can accommodate some deontological commitments of the liberal democratic rights traditions, see e.g. Alan Brudner, *Constitutional Goods* (Oxford: Oxford University Press, 2004) at 22 (Brudner suggests that only goods "necessary for a life sufficient in dignity," as opposed to goods understood as the "socially optimal satisfaction of preferences," can override constitutional rights); 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: Themes from the Legal Philosophy of Robert Alexy* (Portland, Or: Hart, 2007) 131 (Kumm argues that any plausible structure of rights should be able to accommodate anti-perfectionist, anti-collectivist, and anti-consequentialist ideas); Mattias Kumm & Alec D Walen, "Human Dignity and Proportionality: Deontic Pluralism in Balancing" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) 67 at 88-89 (according to Kumm and Walen, in *certain* cases that mandate the sacrifice the rights claimant's life, physical integrity, or other fundamental interests, human dignity can insist on a "nearly absolute right not to be required to make himself an instrument for the use of others (a means to another's end)").

4 Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers (Oxford: Oxford University Press, 2002) at 11 [Alexy, *Theory*]. Importantly, Alexy's famous "weight formula" contains no structural or deontological constraints on the type of normative considerations it purports to process.

ties of the colliding considerations at hand — such as whether the claimant is invoking a positive or negative state obligation — has no bearing on the balancing — or proportionality[5] — principles applicable to the case.[6] Some commentators go even further arguing that, with the advent of new developments in the public law doctrine and with the increasing complexity of the normative dynamic between the individual and the state, proportionality will inevitably have to accommodate some novel types of constitutional considerations, which include but are not restricted to positive[7] and horizontal rights.[8]

The primary purpose of the present paper is to contest this received wisdom. As will be evinced below, proportionality is a content-sensitive doctrinal framework that does have inherent normative limitations. In particular, proportionality can only achieve its declared goals of enhancing legitimacy, rights priority, and rationality of judicial reasoning when applied to constitutional concerns conceived as negative injunctions, such as concerns that in the Kantian tradition operate as "paradigmatically enforceable claims to independence from others."[9] Conversely, when applied to positively conceived values — that is, values that entitle their holders to the provision of some services or goods — proportionality does not merely remain neutral toward the foregoing triumvirate of goals, but actively undermines them. Importantly, the proper logic of proportionality is compromised no matter whether positively conceived values enter the scene at the level of defining a right — such as through positively conceived rights — or at the level of justifying a limit on a constitutional right — such as through positively conceived public policies — or both. The rest of this paper explains how and why this is the case.

5 As Kai Möller maintains, while the European Court of Human Rights often adjudicates rights violations by employing what it calls the 'fair balance' test, any difference between the 'fair balance' test and proportionality "is largely terminological," see Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012) at 180 [Möller, *Global Mode*].

6 For instance, as the court emphasized in *Von Hannover v Germany (No 2)*, No 40660/08, [2012] I ECHR 399 at para 99, "[t]he boundary between the State's positive and negative obligations . . . does not lend itself to precise definition; the applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the relevant competing interests."

7 Katharine G Young, "Proportionality, Reasonableness, and Economic and Social Rights" in Jackson & Tushnet, *supra* note 2, 248 [Young, "Proportionality"].

8 Kai Möller, "US Constitutional Law, Proportionality, and the Global Model" in Jackson & Tushnet, *supra* note 2, 130 at 146. Horizontal rights are rights that, whether directly or indirectly, bind private actors, see Gardbaum, "Frontier," *supra* note 2 at 237.

9 Ariel Hernán Zylberman, *The Relationship of Right: A Constitutive Vindication of Human Rights* (PhD Dissertation, University of Toronto, 2013) at 5, online (pdf): *University of Toronto Library* <tspace.library.utoronto.ca/bitstream/1807/43766/3/Zylberman_Ariel_H_201311_PhD_Thesis.pd> [perma.cc/RF5A-A8WM] [Zylberman, *Relationship*].

That something is rotten in the proportionality kingdom — that proportionality is not a normative omnivore as conventionally believed — should not come as a complete surprise. Many commentators, including Stephen Gardbaum and Katharine Young, have pointed out the fact that most courts around the globe, which have embraced proportionality, largely eschew it when adjudicating positive and horizontal rights cases.[10] Similar observations abound, and a convincing explanation as to why the actual practice of proportionality does not fit its 'omnivore' reputation has yet to emerge.[11]

This paper takes this curious 'deficiency' of proportionality as its starting point and expands it into a broader claim, arguing that almost all of proportionality's supposed deficiencies — such as incommensurability,[12] rights inflation,[13] judicial policy-making,[14] irrationality,[15] epistemic uncertainty,[16] etc. — can be attributed to the improper application of the proportionality test to positively conceived concerns. Conversely, all the foregoing deficiencies disappear if proportionality is applied solely to collisions of considerations that operate as negative injunctions. All the more so because, as the historical reconstruction of proportionality demonstrates, the original version of the test as designed in eighteenth century Prussian administrative law was not meant to deal with positively conceived values; such an 'upgrade' is rather an innovation of the twentieth century and its desire to overstretch proportionality on a Procrustean bed of the ever-growing administrative state.

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10 Gardbaum, "Frontier," *supra* note 2 at 221; Young, "Proportionality," *supra* note 7.

11 Möller, for instance, argues that proportionality is incompatible with the broad positive conception of right "because in almost all circumstances the realization of those rights requires scarce resources; therefore any limitation will always further the legitimate goal of saving resources and will always be suitable and necessary to the achievement of that goal." As such, all but the very last step of the proportionality framework — proportionality *stricto sensu* — would become redundant, see Möller, *Global Mode*, *supra* note 5 at 179.

12 See e.g. Timothy Endicott, "Proportionality and Incommensurability" in Huscroft, Miller & Webber, *supra* note 3, 311; Virgílio Afonso da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision" (2011) 31:2 Oxford J Leg Stud 273; Jeremy Waldron, "Fake Incommensurability: A Response to Professor Schauer" (1994) 45:4 Hastings LJ 813; Fred D'agostino, *Incommensurability and Commensuration: The Common Denominator* (London: Routledge, 2003).

13 See e.g. George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007).

14 See e.g. Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge: Cambridge University Press, 2017).

15 See e.g. Jacco Bomhoff, "Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law" (2008) 31:2 Hastings Intl & Comp L Rev 555.

16 See e.g. Robert Alexy, "On Balancing and Subsumption: A Structural Comparison" (2003) 16:4 Ratio Juris 433; Robert Alexy, "Constitutional Rights, Balancing, and Rationality" (2003) 16:2 Ratio Juris 131; Matthias Klatt & Johannes Schmidt, "Epistemic Discretion in Constitutional Law" (2012) 10:1 Intl J Constitutional L 69.

Before proceeding, a caveat is in order. This paper argues that proportionality, contrary to the mainstream assumption, does indeed have some non-negotiable normative limits, and consequently can accommodate only certain structural accounts of constitutional rights and corresponding interests. In particular, I argue that proportionality should conceive of constitutional rights as presumptive shields against governmental interference and only allow for such shields to be pierced when the right-bearers purport to use their rights as swords against others.[17] However, such a conclusion does not license the inference that other structural accounts of rights — such as rights that have positive and horizontal dimensions — are misguided or doctrinally flawed per se. All it means is that the normative framework of proportionality cannot properly process such structural accounts of rights, and that the question of their justifiable limitation ought to be dealt with within the parameters of other argumentative techniques such as reasonableness. To impose proportionality on the structural accounts of rights that are ill-suited for such considerations is to erode even the basic protection of civil liberties that proportionality may otherwise afford. As an old proverb reminds us, he who runs after two hares catches neither. Proportionality that seeks to protect too much, protects, as a matter of fact, nothing.

One may be quick to object that such proposition is counter-factual and that the evidence of the practical application of proportionality around the globe does not bear it out. If anything, the actual application of proportionality analysis in most jurisdictions suggests that in the conflict between constitutional rights and public interests the balance frequently tilts towards rights. Yet as an increasing number of constitutional commentators admonish, this phenomenon should be credited not to the superior qualities of proportionality as a doctrinal technique, but solely to the benevolence and high moral ground held by the sitting constitutional judges, especially in the wake of the atrocities of World War II.[18]

17 Kantian theory of the justifiable state coercion captures this sentiment quite well: what justifies a coercive act of the state, according to Kant, is the necessity of "hindering . . . a hindrance to freedom," see Kant, *The Metaphysics of Morals*, cited in Alec Stone Sweet & Eric Palmer, "A Kantian System of Constitutional Justice: Rights, Trusteeship, Balancing" (2017) 6:3 Global Constitutionalism 377 at 382. For more on Kant's theory of negative autonomy maximization as a proper model for the structure of rights, see Rainer Forst, "The Justification of Basic Rights: A Discourse-Theoretical Approach" (2016) 45:3 Netherlands J Leg Philosophy 7; Frederick Rauscher, "Kant's Social and Political Philosophy" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy* (1 September 2016), online: *Stanford* <plato.stanford.edu/entries/kant-social-political/#FreBasSta> [perma.cc/3GSD-X9PV].

18 As András Sajó & Renáta Uitz explain, "[w]ithout a strong underlying commitment to uphold freedom in the face of limitations, proportionality analysis would not favour rights. In Germany, the balance was tipped in favour of fundamental rights by the political-constitutional commitment to be friendly

Part I. The 'Omnivore' Account of Proportionality

1. The Mechanics of Proportionality Review

Proportionality is normally defined as a set of rules determining the necessary and sufficient conditions for a law's limitation of a constitutional right to be constitutionally permissible. The principle is intrinsic to, and logically follows from, the bifurcated approach to judicial review. The latter differentiates between a question of whether a right has been infringed upon and an inquiry into whether the limit is reasonable.[19] Such bipartite framework is typically contrasted with the more categorical approaches to rights reasoning, such as that employed in the US jurisprudence, whereby the limits of the fundamental right is built into the right's definition.

Wherever proportionality is employed, the analysis typically begins with the assessment of the rights violation and proceeds to the four-part evaluation of the impugned governmental scheme:

Q1 *Legitimacy*. Is the measure adopted to pursue a legitimate aim?

Q2 *Suitability*. Can it serve to further that aim?

Q3 *Necessity*. Is it the least restrictive way of doing so?

Q4 [*Balancing*]. Viewed overall, do the ends justify the means?[20]

Notably, the four-part proportionality analysis is purely formal in the way it functions. Its main goal is to establish a conditional relation of precedence between the individual constitutional right and the interests of public well-being "in the light of the circumstances of the case."[21] In order to reach a conclusion about the relative weight of public and private interests that are being balanced against each other — and to "achieve a precise and complete analysis of the structure of balancing"[22] — Robert Alexy proposed his famous "weight

to individual rights after Nazi tyranny. Lacking such a strong commitment, the balance easily tips the other way, leaving liberty behind," in András Sajó & Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism* (Oxford: Oxford University Press, 2017) at 410-11.

19 Janet L Hiebert, *Limiting Rights: The Dilemma of Judicial Review* (Montréal: McGill-Queen's University Press, 1996) at 6.

20 Michael Fordham & Thomas de la Mare, "Identifying the Principles of Proportionality" in Jeffrey Jowell & Jonathan Cooper, eds, *Understanding Human Rights Principles* (Oxford: Hart, 2001) 27 at 28 [emphasis in original].

21 Alexy, *Theory*, *supra* note 4 at 52.

22 *Ibid* at 873.

formula,"[23] which entails balancing the concrete — as opposed to abstract — weight of the individual right and countervailing public interest.

Again, it is worth repeating that the orthodox proportionality formula contains no additional restrictions as to the structural features of public and private interests that can be subjected to calculation. Thus, Alexy's "weight formula" — and, indeed, all proportionality tests currently applied by constitutional tribunals worldwide — appear to be 'omnivorous': they contain no structural limitations when it comes to the types of normative considerations that can be fed into proportionality analysis. And therein, as will be demonstrated below, lies the problem.

2. Why Does Proportionality Need Justification?

In order to evince an incompatibility between the 'omnivore' account of proportionality and the proportionality's traditional justification, it may be helpful to ask the logically antecedent question of why we need to justify proportionality in the first place. Admittedly, the answer is not immediately apparent.

Indeed, the language of proportionality is so inextricably imbricated into the constitutional texture of most modern democracies that it is ingrained in its logic and its constitutional vernacular. As Alec Stone Sweet and Jud Mathews aptly observe, we tend to take the test entirely for granted.[24] The existence of the courts' settled practice of applying proportionality to cases of human rights limitations, however, does not license the inference that proportionality is a correct, or even desirable, constitutional doctrine. As David Hume warned us almost three hundred years ago, that something *is* the case does not translate into a proposition that it *ought* to be the case.

Even in jurisdictions where proportionality is a well-established doctrine, it is seldom spelled out in the text of the constitutional documents. This is particularly so when it comes to such proportionality colossi as Germany and Canada, from which the modern iteration of proportionality 'diffused' to the rest of the globe.[25] Furthermore, per salient observation of Luc Tremblay, even in some rare instances whereby the constitutional text mentions the principle of

23 Robert Alexy, "Proportionality and Rationality" in Jackson & Tushnet, *supra* note 2, 13 at 16-18.

24 Alec Stone Sweet & Jud Mathews, "Proportionality Balancing and Global Constitutionalism" (2008) 47:1 Colum J Transnat'l L 72 at 76.

25 Jud Mathews & Alec Stone Sweet, "All Things in Proportion? American Rights Review and the Problem of Balancing" (2011) 60:4 Emory LJ 797 [Matthews & Stone Sweet, "In Proportion"]; Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012) at 143.

proportionality, "it does not explicitly require balancing rights and non-rights values."[26] If anything, it is open to debate as to how to adequately interpret constitutional stipulations that require the limitation of a right to be reasonable or proportionate.[27]

One prominent line of arguments contends that proportionality is conceptually necessary or even unavoidable as a matter of constitutional adjudication.[28] Although such arguments may be attractive in the abstract, they nonetheless fall apart when subjected to closer scrutiny on the ground. Indeed, the actual practice of constitutional adjudication around the globe does not bear these arguments out: not all constitutional courts which espouse a deep commitment to constitutional rights are willing to endorse proportionality.[29]

Hence, in most constitutional jurisdictions which apply proportionality, the test itself is a textual orphan. As such, like all judge-made doctrines, proportionality is *prima facie* illegitimate and requires justification.

3. The Normative Justification of Proportionality

In most constitutional jurisdictions there are no plausible textual justifications for the invocation of a four-prong doctrinal framework of proportionality, and, as explained above, the claims about the conceptual necessity of proportionality do not withstand scrutiny.[30] Thus, the justification for the practice of pro-

26 Luc B Tremblay, "An Egalitarian Defense of Proportionality-Based Balancing" (2015) 12:4 Intl J Constitutional L 864 at 871 [Tremblay, "Egalitarian"].

27 Carlos Bernal Pulido, "The Migration of Proportionality Across Europe" (2013) 11:3 New Zealand J Public & Intl L 483 at 508.

28 As Bernal Pulido explains, this line of reasoning suggests that "wherever and whenever there are constitutional rights, judges will apply them by using proportionality," *ibid* at 504. Robert Alexy, for instance, claims that proportionality is conceptually necessary because "there is no other rational way in which the reason for the limitation can be put in relation to the constitutional right," see Alexy, *Theory*, *supra* note 4 at 74. Similarly, David Beatty posits that "[p]roportionality is a universal criterion of constitutionality" and "an essential, unavoidable part of every constitutional text," see David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004) at 162.

29 In fact, some regimes prefer bright-line rules to fuzzy tests in rights adjudication. The famous example, of course, is that of the United States, see Barak, *supra* note 25 at 207. While some authors contend that proportionality has some roots in American constitutional jurisprudence in general — see e.g. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford: Oxford University Press, 2019) at 97 [Stone Sweet & Mathews, *Balancing*] — the adjudication of American fundamental rights nonetheless largely relies on categorization-based review. For a detailed explanation on how *ad hoc* balancing inherent in proportionality is different from interpretive balancing in categorical review, see Barak, *supra* note 25 at 502-22.

30 For more on why proportionality is not an inescapable element of constitutional adjudication, see e.g. João Andrade Neto, *Borrowing Justification for Proportionality: On the Influence of the Principles Theory in Brazil* (Cham, CH: Springer, 2018) at 49-50, 65.

portionality, if there is one, must be normative. If proportionality offers the best means to reach certain normative goals in a manner that accommodates other constitutional meta-principles, then its application in a putative legal system is justified.[31] Thus, in the words of Luc Tremblay, our analytical point of departure here should be an inquiry into proportionality's purpose: "[w]hat values, if any, does its model serve?"[32]

While opinions on this issue vary,[33] there are certain normative goals that appear to gain the support of an overlapping scholarly and curial consensus. Robert Alexy, one of the most prominent advocates of proportionality, postulates that proportionality can be derived from the claim to correctness; more specifically, he argues that "the test produces effects that are intrinsically rational and prevent the sacrifice of fundamental rights."[34] A helpful explication of the same ideas can be found in the works of Bernal Pulido. As the author observes, the abstract justification of the use of proportionality is normally associated "with the possibility of giving a positive answer to three questions: rationality, legitimacy and priority."[35] As Bernal Pulido explains, from a theoretical perspective we can justify the use of proportionality "if there can be a rational and legitimate way of applying this standard which simultaneously preserves the priority of constitutional rights."[36]

The remainder of this section will seek to put some theoretical flesh on the conceptual bones of Bernal Pulido's approach to proportionality review. Rationality, legitimacy, and priority of rights — with particular emphasis being placed on the rationality-enhancing function of proportionality — will also guide the analysis for the rest of the paper.

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31 *Ibid* at 63-64.

32 Luc B Tremblay, "Le Fondement Normatif du Principe de Proportionnalité en Théorie Constitutionnelle" in Luc B Tremblay & Grégoire Charles N Webber, eds, *La limitation des droits de la Charte: Essais critiques sur l'arrêt R c Oakes/The Limitation of Charter Rights: Critical Essays on R v Oakes* (Montréal: Les Éditions Thémis, 2009) 77 at 87 [translated by author].

33 Tremblay himself, for instance, seeks to anchor the normative justification for proportionality in the idea of "moral equality of persons in the context of pluralism and cultural diversity," see Tremblay, "Egalitarian," *supra* note 26 at 865. Others sometimes justify proportionality as one of the necessary incidents of the culture of justification, see Kai Möller, "Justifying the Culture of Justification" (2019) 17:4 Intl J Constitutional L 1078. Stephen Gardbaum offers a democratic justification for proportionality, see Stephen Gardbaum, "A Democratic Defense of Constitutional Balancing" (2010) 4:1 L & Ethics Human Rights 77.

34 Andrade Neto, *supra* note 30 at 67-68. Similarly, Alec Stone Sweet and Jud Mathews argue that "[t]he duty of a constitutional court is to maximize the effectiveness of the charter of rights," see Stone Sweet & Mathews, *Balancing*, *supra* note 29 at 31.

35 Bernal Pulido, *supra* note 27 at 486.

36 *Ibid*.

A. Rationality

Perhaps the most common argument invoked as part of the functional defence of proportionality is that it helps to structure and rationalize otherwise opaque deliberation about constitutional rights. Proportionality, its defenders maintain, assists in translating otherwise cumbersome constitutional provisions — "what does it mean for a right limitation to be reasonable?" — into a clear, transparent, and impartial analysis. Simply put, proportionality is supposed to enhance the rationality of constitutional argumentation.

The logical corollary of this proposition is that, by structuring the judicial reasoning and channeling the ultimate interest balancing into the last stage of the review process, proportionality is supposed to reduce arbitrariness and human bias, hence reaffirming and amplifying the common perception that the courts' decisions are made according to the rule of law, and not its antithesis — the rule of men.

Furthermore, as Mattias Kumm observes, by focusing public actors on the elements of proportionality review, the test can have a "disciplining effect on public authorities and help foster an attitude of civilian confidence among citizens."[37] Indeed, by pushing public authorities to constantly justify their actions under the constitution — the process Kumm famously terms "Socratic contestation" — proportionality is destined to improve the outcomes of constitutional adjudication "because such contestation effectively addresses a number of political pathologies that even legislation in mature democracies is not immune from."[38]

These disciplining properties are achieved not only through a more coherent approach to individual rights cases, but also through bringing together aspects of the current multiple analytical approaches in a way that allows full consideration of both the individual rights and the social values present in each and every case.[39] In any particular instance, it may or may not lead to a different outcome than the currently used tests, such as reasonableness or categorization. But it avoids significant interests downplayed, if not ignored, by the tests.

This leads us to the main functional virtue of proportionality: its ability to enhance the transparency of the major trade-off the court is making as part

37 Mattias Kumm, "Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review" (2007) 1:2 European J Leg Studies 153 at 170.

38 *Ibid.*

39 Donald L Beschle, "No More Tiers: Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases" (2018) 38:2 Pace L Rev 384 at 385.

of its right limitation assessment. As Matthias Klatt and Moritz Meister posit, proportionality "clearly lays open the moral discourse indispensable in balancing, and shows us which propositions exactly a court has to justify in order to arrive at a rational judgment."[40] Even more powerfully, Stavros Tsakyrakis suggests that the reasoning of a court is clearer "the more explicit the moral considerations of a case are made."[41] Importantly, this is achieved through moving otherwise opaque interest balancing to the last prong of the proportionality test.

Implicit in this observation is yet another quality of proportionality that elevates it above all other frameworks for constitutional adjudication such as American categorization or administrative law reasonableness: once the infringement of the right has been established, proportionality has the ability to shift the burden of producing evidence from the claimant to the state. As Aharon Barak emphasizes, if we are interested in providing constitutional rights "with the proper treatment," it is 'necessary' that the state that has limited the constitutional right shoulders the burden of proof.[42] This is because "the state enjoys much better access to the information that any party claiming that their right has been limited."[43]

Of course, the claim that proportionality *enhances* rationality of constitutional decision-making does not mean that proportionality somehow renders the process completely neutral and devoid of any human element whatsoever. Indeed, as Matthias Jestaed opines, "[t]he precision of the balancing process, as well as our ability to render it logical, are highly limited. These limits are obscured rather than illuminated by the balancing formula."[44] Thus, the tenable proposition — the one this paper endorses — is that, rather than turning constitutional adjudication into a quasi-computerized exercise, proportionality works to enhance the rationality of judicial decision-making as compared to other types of constitutional doctrines.

40 Klatt & Meister, *supra* note 1 at 55.

41 Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla" (2010) 8:2 Intl J Constitutional L 307 at 310.

42 Barak, *supra* note 25 at 447.

43 *Ibid* at 448.

44 Matthias Jestaedt, "The Doctrine of Balancing — Its Strengths and Weaknesses" in Matthias Klatt, ed, *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2012) 152 at 163.

B. Legitimacy

As much as rationality is a desired condition, reason alone, as Ely aptly reminds us, "can't tell you anything: it can only connect premises to conclusion."[45] Thus, our second preoccupation shall be with the constitutional foundation which legitimizes proportionality as a constitutional doctrine.

In particular, proportionality can be legitimately applied by a constitutional tribunal if its application would epistemically cohere with the other meta-principles of constitutional law, such as the notions of constitutionalism, the rule of law, democracy, and the separation of powers. In other words, if proportionality would fit within a particular normative arrangement in a constitutional system. João Andrade Neto captures this idea even more aptly: the adoption of proportionality is justified once it is demonstrated that, as far as a putative jurisdiction is concerned, proportionality is "non-prohibited."[46] In other words, instead of looking into positive reasons militating *in favour of* proportionality — like we did with the 'rationality' justification — this argument seeks to make sure that no major reasons can be summoned counselling *against* it.

Thus, to the extent proportionality is to be 'non-prohibited,' it should not undermine or frustrate other meta-principles of constitutional law. Again, it is logical to surmise that if *any* derivative or non-interpretive legal doctrine defeats or significantly compromises any of these principles, it would be *illegitimate*.

C. Priority

Lastly, and related to the above, any plausible justification of proportionality must enhance, or at least not erode, the effectiveness of constitutional rights.[47] Indeed, it is a commonsensical proposition that an acceptable model of constitutional adjudication cannot obviate the normative force of constitutional guarantees. Thus, the use of proportionality as a standard of review can only be justified if, in the words of Bernal Pulido, it "enables courts to preserve the priority of constitutional rights within the legal system."[48]

45 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 56.

46 Andrade Neto, *supra* note 30 at 16.

47 *Ibid* at 23.

48 Bernal Pulido, *supra* note 27 at 486. For an explanation of why in a liberal democracy rights should have lexical priority over all other values, see e.g. John Rawls, *A Theory of Justice* (Cambridge: Belknap Press, 1971).

Notably, the requirement of the rights priority doubles as a functional twin of the requirement of legitimacy. The latter suggests that the adoption of a legal doctrine is justified only if it is found to be not prohibited by other constitutional meta-principles, such as, for instance, the principle of constitutionalism. In a system genuinely committed to the principle of constitutionalism, constitutional rights should normally assume priority over other policy considerations not only by virtue of their superior normative status, but also due to their higher status in the hierarchy of legal norms in the legal system. As Francisco J. Urbina explains:

> Human rights are commonly enshrined in norms of the highest legal hierarchy, as in a written constitution or in a norm of constitutional status. As such they enjoy a specifically legal priority over most other requirements imposed by the legal system, and this priority is commonly *strict*. Different jurisdictions have different ways of ensuring that this kind of priority is respected in the day-to-day operation of the legal system. Some legal systems are more aggressive in their methods for ensuring that this priority is respected, some are less.[49]

Part II. Why the 'Normative Omnivore' Account of Proportionality Undermines the Very Case for Proportionality

As explained earlier, the 'omnivore account' of proportionality presupposes the absence of any structural restrictions on the types of normative considerations that can be subjected to the cost-benefit proportionality analysis. More specifically, the 'omnivore account' does not differentiate between positively and negatively conceived constitutional values. As far as proportionality is concerned, either would do. Yet, as will be evinced below, in so far as proportionality aspires to be rational and legitimate, the incorporation of positively conceived values into an analysis is inimical to the promotion of such goals.

1. What are Positively Conceived Constitutional Considerations?

On most accounts, positive conceptions of rights are emblematic of the particular structure of rights — what Frederick Schauer describes as seeing rights as "ability-connected"[50] entitlements. According to Schauer, a right to X is vindicated when a right-holder has or does the notional X. Consequently, as

49 Francisco J Urbina, *A Critique of Proportionality and Balancing* (Cambridge: Cambridge University Press, 2017) at 225 [emphasis in original].

50 Frederick Schauer, "A Comment on the Structure of Rights" (1993) 27:2 Ga L Rev 415 at 426 [Schauer, "Structure"].

Schauer explains, "insofar as the right-holder cannot [do or have whatever the right entitles them to], then the right-holder's right has been infringed."[51] Given that the right to X is only fully effectuated when a right-bearer 'does' or 'has' X, and not when they are merely shielded from other's interference while 'doing' or 'having' X, it means that someone else should have a correlative duty to provide assistance in the right-bearer's project to 'do' or 'have' X.[52] Wesley Hohfeld famously called such entitlements rights-claims, or "rights in the sense of claims."[53]

From the practical perspective, if someone has a positive right to speak and they are not provided the 'opportunity to speak' or 'support for speaking,'[54] it follows that their positive right to speak is violated.

Public policy considerations that are fed into the proportionality analysis can also be — and, in fact, frequently are — positively conceived considerations: instead of seeking to prevent imminent harm, they are looking to achieve some positive societal goals or generate some good consequences. To use Schauer's parlance, they are ability-connected. Structurally, this means that positively conceived public interests in some notional Y — be it the enhancement of public health, commitment to social justice, or promotion of cultural and group identity — is not realized unless this same Y can be said to have been achieved. While this seems pretty emblematic of how various proportionality courts around the globe frame their analysis, accepting such views as proportionality-friendly should be viewed as premature. The rest of this paper will seek to flesh this intuition out.

2. Positively Conceived Considerations Render Proportionality Irrational

It is important to reiterate that the traditional case in favour of proportionality is that it outperforms any other forms of rights reasoning by helping to identify the exact interests the court is to balance as part of its rights limitation analysis and, subsequently, by making such analysis more rational and transparent compared to otherwise 'holistic' or 'definitional' reviews that engage interest balancing.[55] More specifically, this means that, by funneling all norma-

51 *Ibid* at 427.

52 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays*, ed by Walter Wheeler Cook (New Haven: Yale University Press, 1917) at 92.

53 *Ibid* at 73.

54 Frederick Schauer, "Hohfeld's First Amendment" (2008) 76:4 Geo Wash L Rev 914 at 915-16.

55 Pursuant to the reigning sentiment in the literature, no single framework for rights analysis can escape interest balancing. The traditional standard of reasonableness, for instance, engages in an unstructured

tive considerations into one set of interest balancing located at the very end of the proportionality test, it structures and disciplines judicial decision-making. This ability to bring interest balancing out of the epistemological 'black box' of holistic reasoning into the bright spotlight of structured analysis is not only proportionality's main claim to fame, but also a necessary condition of proportionality's legitimacy.

Yet, as the rest of this section explains, the only instance when proportionality can actually discipline judicial reasoning is when it is applied to constitutional considerations framed as negative injunctions. Conversely, by feeding into the framework positively conceived values, the reasoning becomes *even more* irrational in comparison to all proportionality's competitors, such as categorization or reasonableness.

Two phenomena associated with positively conceived values are particularly conducive to this outcome. First, the invocation of positively conceived considerations leads to multifurcation of interest balancing as part of the right-limitation analysis. Second, positively conceived considerations tend to inject the unjustifiable amount of epistemic uncertainty in constitutional adjudication. These two phenomena will be explained in turn.

A. Multifurcation of Balancing

To properly do its job, as Aharon Barak explains, all interest balancing inherent in rights limitation should be 'housed' within the last stage of the proportionality test — proportionality *stricto sensu*.[56] Yet the consequence of applying proportionality to positively conceived considerations is that balancing starts to multifurcate — it becomes Hydra-headed.

In order to articulate this latter intuition properly, it helps to recall that, prior to becoming doctrinally meaningful, all positively conceived rights should undergo definitional limitation. As an illustrative example, consider a right to health.

A positively conceived right to health is normally defined as "the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health."[57] Note that the substantive en-

balancing exercise; conversely, the American categorization test engages in interest balancing during the creation of legal categories. For an exhaustive overview of the various forms of interest balancing in rights reasoning and their structural manifestations, see e.g. Barak, *supra* note 25 at 493-527.

56 Barak, *supra* note 25 at 347.

57 UNECOSOC, 22nd Sess, UN Doc E/C.12/2000/4 (2000) at para 8.

titlements granted by the right to health are not coextensive with the colloquial definition of the term 'health': indeed, they are substantially narrower. As the United Nations Committee on Economic, Social and Cultural Rights emphasises time and again, "the right to health is not to be understood as a right to be *healthy*."[58] Instead, it takes into account "both the individual's biological and socio-economic preconditions and a State's available resources."[59] Consequently, the beneficiary of a positively conceived right to health cannot avail themselves of the highest standard of health, but only of the highest *attainable* standard of health.

Implicit in this example is the idea that the positive conception of rights cannot proceed without incorporating some methods of the definitional limitation of substantive entitlements guaranteed by rights; something that, in the words of Aharon Barak, would outline the normative boundaries of rights.[60]

As Jamie Cameron explains, a definitional limitation of the rights "assumes that the guarantees are themselves qualified by political, social and cultural values."[61] In Alan Brudner's words, "instead of defining the scope of a right … independently of considerations of common welfare and then allowing those considerations to override the right to the extent necessary to achieve a certain goal, the judge or theorist allows the common welfare to define the scope of the right."[62]

While such a take on the definition of a positively conceived right is perfectly reasonable per se, it is nonetheless absolutely incompatible with proportionality-based review. This is because such an approach would allow the courts to limit the scope of the right at *two* different stages of analysis by resorting to the same reasons for justification:[63] at the right-definitional stage *as well as* at the right-limitational stage.[64] As Stone Sweet and Mathews pointedly observe

58 *Ibid* [emphasis in original].

59 *Ibid* at para 9.

60 Barak, *supra* note 25 at 347.

61 Jamie Cameron, "The Original Conception of Section 1 and Its Demise: A Comment on *Irwin Toy Ltd v Attorney-General of Quebec*" (1990) 35:1 McGill LJ 253 at 260.

62 Brudner, *supra* note 3 at 286. It is worth noting that Brudner openly calls such definitional limitation "definitional balancing."

63 Such considerations normally pertain to some common welfare considerations, for instance, cost-effective management of scarce resources, or some variation thereof.

64 Admittedly, some qualified constitutional rights — such as the right not to be subjected to cruel and unusual punishment — do necessitate definitional balancing in order to establish their normative scope. However, as explained in greater detail in Section III.2 of this paper, below, such interest balancing would engage different normative considerations than the considerations effectuated at the stage of proportionality review.

with respect to the dangers of definitional balancing, "[p]ushed out the front door, balancing comes in through the back, where it is used to create ever more nuanced rules and exceptions."[65] Similarly, Klatt and Meister admonish that the definitional balancing always "relies on the hidden sort of balancing" which, in turn, "promotes judicial arbitrariness."[66] Hence, the Hydra-headed balancing would allow the judges to obfuscate the real considerations behind the outcome of the case and, in so doing, twist and manipulate the meaning and application of constitutional provisions.

Furthermore, not only would such 'double-dipping' compromise the advantages of proportionality as a transparent principled framework — as the courts would be able to engage in interest balancing twice, with the first set of balancing happening inside an epistemological 'black box' — but it would also run contrary to the traditional proportionality posture that the onus of proving the justifiable limitation of the scope of the right should fall exclusively on the government.[67]

B. Enhanced Epistemic Uncertainty

(i) Epistemic Uncertainty and (Ir)Rationality.

The appreciation of the pernicious import of positively conceived considerations on proportionality reasoning would not be complete without mentioning their negative effects at the stage of justifying a limitation of a constitutional right, not just the level of defining the scope of the right. In particular, positively conceived public policies tend to transform *legal* constitutional disputes into *political*[68] disputes wherein, more often than not, the right-claimants bear the risk of *intractable empirical uncertainty*. This phenomenon is particularly glaring in cases where the court has to balance enumerated constitutional rights against the long-term robustness of large-scale polycentric public policies, most of which are created "under conditions of imperfect information."[69] One Irish commentator went as far as to consider the epistemic uncertainty inherent in such disputes "[*t*]*he* central difficulty with navigating the tension between rights and governmental autonomy."[70]

65 Matthews & Stone Sweet, "In Proportion," *supra* note 25 at 869.

66 Klatt & Meister, *supra* note 1 at 22.

67 There are, of course, some exceptions to this conventional view. For a suggestion to recognize a presumption of proportionality whereby the burden of demonstrating disproportionality would rest on the right-holder at least in certain circumstances, see e.g. Julian Rivers, "The Presumption of Proportionality" (2014) 77:3 Mod L Rev 409.

68 For more on this phenomenon, see e.g. Sujit Choudhry, "So What Is the Real Legacy of *Oakes*? Two Decades of Proportionality Analysis under the Canadian *Charter*'s Section 1" (2006) 34 SCLR (2d) 501 at 524.

69 *Ibid* at 504.

70 Alan DP Brady, *Proportionality and Deference Under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012) at 20 [emphasis added].

In order to illustrate this point one should go no further than the landmark Canadian case of *Chaoulli v Quebec (AG)*,[71] whereby the Supreme Court eventually struck down a provincial ban on private health insurance. The claimants in this case argued that the delays resulting from waiting lists in the public system, in conjunction with the inability to obtain private health insurance, violated their rights to life, liberty, security, and personal inviolability. Admittedly they had a point. The Court in *Chaoulli* recognized that some patients "die as a result of long waits for treatment in the public system when they could have gained prompt access to care in the private sector."[72] Indeed, were it not for the ban, they could buy private insurance and stay alive.[73]

The declared objective of the impugned legislation was the achievement of a positively conceived social goal: "to promote health care of the highest possible quality for all Quebeckers, regardless of their ability to pay."[74] Consequently, as part of its proportionality analysis, the Court had to assess whether the prohibition on private insurance had a rational connection with the declared objective and whether, all things considered, there were less restrictive ways to promote high-quality healthcare in the province. However, as numerous commentators pointed out, the Court was presented with evidence that was inconclusive at best and seriously conflicting at worst.[75] Out of the two most comprehensive studies on the impact of a parallel private health care on public health care, one, the Kirby Committee, concluded that — *maybe* — privatization of healthcare would be relatively harmless, whilst the other, the Romanow Commission, suggested that — *maybe* — preserving the one-tier public system is a better solution.[76] The Court had no other choice than to shoot in the dark.

Putting aside some dubious moral grounds on which the case was predicated,[77] the fact-finding process in *Chaoulli* perfectly demonstrates how empirical disagreement that accompanies long-term public policy programs

71 2005 SCC 35 [*Chaoulli*].

72 *Ibid* at para 37.

73 *Ibid.*

74 *Ibid* para 49.

75 Choudhry, *supra* note 68 at 533.

76 Howard Chodos & Jeffrey J MacLeod, "Examining the Public/Private Divide in Healthcare: Demystifying the Debate" (2005), online (pdf): *Canadian Political Science Association* <cpsa-acsp.ca/papers-2005/MacLeod.pdf> [perma.cc/AN2J-VT9H].

77 As Patrick J Monahan observes, "any healthcare system which deliberately and systematically imposes pain or even death on innocent individuals in the name of improving healthcare provided to others cannot be justified either morally or legally, since it fails to treat all individuals as equally deserving of concern and respect," see Patrick J Monahan, "Chaoulli v Quebec and the Future of Canadian Healthcare" (17 January 2007), online: *The Court* <www.thecourt.ca/chaoulli-v-quebec-the-future-of-canadian-health-care/> [perma.cc/5T9C-D46V].

can often make or break the outcome of the whole case. This means that even on the most charitable interpretation, what judges are engaging in when trying to 'predict' the outcomes of various governmental policies for many decades ahead is not a rational analysis but something approximating "a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society."[78] This is a far cry from a rational and reasoned analysis that the proponents of proportionality are trying to portray as proportionality's main allure. If anything, such analysis is *tout court* irrational; it boasts no more scientific precision than flipping a coin.

This of course begs the question whether framing a public policy as a negatively conceived, as opposed to a positively conceived concern, would make any difference. The nature of a negatively conceived policy is that it is not seeking to effectuate the entitlement of the members of the society to a particular social good, such as, for instance, an efficacious healthcare system. Rather than fostering some external good consequences far away in the future, it seeks to prevent some immediate negative harm emanating from a known source, for example, to ensure the immediate physical safety of the citizens. Structurally, it operates as a negative, as opposed to positive, injunction.[79] Now, the reason why the public objective in *Chaoulli* has created so much empirical disagreement is because it was a *positively* framed objective: it sought to "promote health care of the highest possible quality," which means that the government tried to generate some good consequences in the (fairly remote) future. This, in turn, means that the Court had to assess how such a nonlinear system as public health care with multiple interdependencies and complex ecology would react — 10, 20, or 30 years from now — to a potential intervention: a task that requires an intimate understanding of multiple sets of causal associations within the system as well as sound appreciation of the series of potential cascading side effects. In short, it set the Court an impossible task.[80]

78 *McKinney v University of Guelph*, [1990] 3 SCR 229 at 304, 76 DLR (4th) 545.

79 Kant would conceive of the negative injunction against harming others as part of "a system of reciprocal limits on coercion," see Arthur Ripstein, "Kant on Law and Justice" in Thomas E Jill Jr, ed, *The Blackwell Guide to Kant's Ethics* (Chichester, UK: Wiley-Blackwell, 2009) 161 at 172. Indeed, in Kantian theory, every person has a right to be independent from the state coercion, unless the state needs to exercise its coercive power to protect the weaker parties from the coercion of others. Ripstein contends that the clearest example of this is the state's policy of prohibiting and punishing crime.

80 As Nassim Nicholas Taleb postulates, "[c]omplex systems are full of interdependencies — hard to detect — and nonlinear responses. … In such environments, simple causal associations are misplaced; it is hard to see how things work by looking at single parts," see Nassim Nicholas Taleb, *Antifragile: Things That Gain from Disorder* (New York: Random House, 2012) at 7. As Taleb further explains, "[m]an-made complex systems tend to develop cascades and runaway chains of reactions that decrease, even eliminate, predictability and cause outsized events" (*ibid*).

In contrast to positively conceived considerations, negatively conceived policy considerations are more empirically robust: whenever dealing with them, the court only needs to assess one set of causal associations. For instance, the court may have to ask if there is "cogent and persuasive"[81] evidence that the claimants' attempt to vindicate their rights would inflict direct and tangible harm on other participants in the system. This inquiry is structurally simpler and more elegant than the previously adumbrated one: all the court is required to examine is a simple cause-and-effect connection, something courts are routinely doing already as part of their criminal or torts trials.[82]

A skeptical reader may wonder if the empirical predicament in *Chaoulli* may be described as a mere aberration — a drop in a jurisprudential bucket of otherwise perfectly functional proportionality cases engaging positively conceived policies. Unfortunately, this is far from being the case. The problem of empirical uncertainty attending complex polycentric 'public good' policies reaches far beyond mere failures of judges to properly interpret the statistical findings of number-driven social science evidence,[83] which is a serious problem in its own right. If anything, the very ability of social sciences to yield empirically robust findings and predictive insights in the field of nonlinear systems with multiple interdependencies — such as 'public good' policies — must be called into question.

For one thing, uncritical judicial reliance on prognostic social science literature may be problematic due to what is known as a modern 'replication crisis' in social science and medicine. John Ioannidis decries the disconcerting state of scientific affairs in his own biomedical field, stating that "the high rate of nonreplication (lack of confirmation) of research discoveries is a consequence of the convenient, yet ill-founded strategy of claiming conclusive research findings solely on the basis of a single study assessed by formal statistical significance."[84] The current situation in the social science field is equally disconcerting.[85]

81 *R v Oakes* [1986] 1 SCR 103 at 138, 26 DLR (4th) 200 [*Oakes*].

82 Paul Yowell, *Constitutional Rights and Constitutional Design: Moral and Empirical Reasoning in Judicial Review* (Oxford: Hart, 2018) at 70-75.

83 For more on this issue, see e.g. *ibid*.

84 John PA Ioannidis, "Why Most Published Research Findings Are False" (2005) 2:8 *PLoS Medicine* 696 at 696.

85 For a comprehensive overview of the problem, see e.g. Fiona Fidler & John Wilcox, "Reproducibility of Scientific Results" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy* (3 December 2018), online: *Stanford* <plato.stanford.edu/archives/win2018/entries/scientific-reproducibility> [perma.cc/4NAU-FAE9].

And for another thing, as Ronald Dworkin argued, it is wrong to condition the analysis of constitutional rights on causal inferences derived from observations of behavioural patterns — something that social sciences routinely do — because the latter can undergo rapid transformation. In Dworkin's own words: "[c]orrelations of social phenomena are fragile in the sense that the data, the behaviour which forms the correlation, can change very quickly."[86]

The above discussion, of course, does not suggest that all causal judgements must be banished from constitutional analysis. Dworkin himself provides a helpful distinction between physics and similar sciences that can provide "some notion of the mechanics that translate the cause to the effect"[87] — judgements yielded by such sciences are, according to Dworkin, allowed to enter constitutional adjudication — and social science, which "usually is only able to provide correlations without the mechanics."[88] The latter, according to Dworkin, must be deplored whenever "constitutional rights are at stake."[89]

Thus, the forward-looking public policies that rely on complex judgements of social science — such as positively conceived policies — must be contrasted with empirically robust 'negative' policies that require the court to examine a simple cause-and-effect connection within a known 'mechanical model.' The latter can be accommodated by the proportionality test because it would not inject an unjustified amount of empirical uncertainty into the analysis. Indeed, the prevention of a concrete harm is more empirically robust than the achievement of an abstract good.

Thus, paradoxically, David Beatty was both right and wrong when it comes to his unalloyed trust in facts:[90] facts are *making* proportionality analysis in cases of negatively conceived values and *breaking* it when dealing with positively conceived ones.

(ii) Epistemic Uncertainty and Deference.

One may wonder, of course, whether the problem of empirical uncertainty engendered by positively conceived policies is indeed as intractable as this article portrays it to be. True, the argument goes, navigating the treacherous waters of

86 Ronald Dworkin, "Social Sciences and Constitutional Rights — The Consequences of Uncertainty" (1977) 6:1 JL & Educ 3 at 6.
87 *Ibid* at 5.
88 *Ibid.*
89 *Ibid* at 6.
90 Beatty, *supra* note 28.

conflicting scientific evidence is not easy;[91] however, the courts have ostensibly mastered this task by consistently relying on a sophisticated and well-established doctrine of curial deference.[92]

We shall see, however, that deference provides a dubious solution to the issue of epistemic uncertainty. Not only is it manifestly problematic from the doctrinal point of view, but it also introduces its own degree of uncertainty and unpredictability into adjudication. Guy Davidov calls this phenomenon one of deference's main paradoxes: by trying to provide an answer to the problem of subjective judicial reasoning and judicial overreach, deference in fact "only exacerbate[s] the problem and lead[s] to more subjectivity."[93] Thus, as far as the problem of uncertainty in adjudication is concerned, it is no exaggeration to say that the medicine of deference has been worse than the disease it purported to cure.

Unfortunately, in order to solve the problem described above, it would not be enough to jettison the practice of deference altogether. Deference is a mere symptom of the underlying institutional conflict between the courts and the legislature pertaining to the allocation of the risk of factual uncertainty in policy-laden constitutional disputes.[94] Hence, the root cause of the problem needs

91 As has been established earlier, the reviewing courts seeking to analyse the long-term robustness of the large-scale polycentric public policies that circumscribe constitutional protections inevitably run into the problem of intractable epistemic uncertainty, because most, if not all, public good policies are created under the conditions of imperfect information. Furthermore, it is not immediately apparent whether it is unelected generalist judges, as opposed to democratically elected legislatures, that should be entrusted with the task of handling such epistemic uncertainty and, in so doing, shaping the contours of various public policies for many years ahead. See e.g. Cora Chan, "A Preliminary Framework for Measuring Deference in Rights Reasoning" (2016) 14:4 Intl J Constitutional L 851 at 854; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 108-09; TRS Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65:3 Cambridge LJ 671 at 672.

92 The notion of deference in constitutional adjudication serves as an umbrella term for a variety of rhetorical schemes and methodologies that determine the degree of judicial restraint on the part of the court in overseeing the decisions of the legislature whose acts are impugned as contrary to the Constitution. In short, deference operates by lowering the legal standards that the government would otherwise have to satisfy in seeking to uphold rights violation. See e.g. David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997) 279 at 286; Aileen Kavanagh, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory*, (Cambridge: Cambridge University Press, 2008) 184 at 188; Lawrence David, "Resource Allocation and Judicial Deference on Charter Review: The Price of Rights Protection According to the McLachlin Court" (2015) 73:1 UT Fac L Rev 35.

93 Guy Davidov, "The Paradox of Judicial Deference" (2001) 12:2 NJCL 133 at 147.

94 In the apt summary of Sujit Choudhry, the "central question" of proportionality jurisprudence today is "how the Court should allocate the risk of factual uncertainty when governments legislate under conditions of imperfect information," see Choudhry, *supra* note 68 at 503-04.

to be fixed: judges should not apply proportionality to positively conceived policies as it is the only way to ensure that the epistemic uncertainty inherent in constitutional disputes does not reach an intolerable degree, meaning that the very need for deference would be obviated.

For a taste of how problematic the practice of deference can become, consider the application of curial deference in Canada, the jurisdiction which is the poster-child for the migration of proportionality worldwide.[95] "Deference may be appropriate," the Supreme Court reasoned in *Canada (AG) v JTI-MacDonald Corp*,[96] in cases of epistemic uncertainty, such as cases whereby "the outcome may not be scientifically measurable" and where there is "room for debate about what will work and what will not."[97]

Two points merit note here. First, the idea that courts should be willing to afford more weight to the government's arguments if such arguments are evidentially problematic is constitutionally suspect. Indeed, if courts adopt a deferential posture in the face of conflicting or uncertain empirical evidence, the practical implication of such a move would be effectively ceding constitutional ground to the thinly justified governmental positions.[98] Relatedly, the practice of rewarding poor evidentiary input creates a perverse incentive for the government to underplay, underreport, or even deliberately obfuscate empirical foundations underlying its policy choices because, as far as the government is concerned, the muddier the evidentiary waters get, the better.

Second, the growing body of the Supreme Court's deference jurisprudence has made clear that judges had been unable to stick to any single 'deferential' category of cases carved out in the proportionality framework. Moreover, as numerous exceptions to the original categories of deference proliferated, so did the actual instances of judicial extension of deference to the legislative decision-making.[99] As a result, under the current deference framework in Canada it is

95 *Ibid* at 502.

96 2007 SCC 30 at para 41.

97 *Ibid.* According to *Thompson Newspapers v Canada (AG)*, [1998] 1 SCR 877, 159 DLR (4th) 385, which outlines the current Canadian framework for curial deference in proportionality cases, empirical uncertainty is one of the four contextual factors militating in favour of judicial restraint in proportionality cases.

98 According to Ronald Dworkin, deference is a form of judicial self-restraint in which "political institutions other than the courts are responsible for deciding which rights are to be recognized," see Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 138

99 For instance, back in 1991 Don Stuart decried "a clear trend of judicial deference to legislative choices," see Don Stuart, "Will Section 1 Now Save Any Charter Violation? The Chaulk Effectiveness Test Is Improper" [1991] 2 CR (4th) 107 at 108. For an observation that there had been a 'tendency' of increasing the level of judicial deference in resource allocation cases under the McLachlin Court, see

virtually impossible to predict the outcomes of proportionality cases.[100] Such fractured jurisprudential landscape threatens not only the *rationality* of proportionality review, but the integrity of the Canadian constitutional rights regime *as a whole*.[101]

Arguably, such unprincipled body of jurisprudence — as well as the matrix of perverse incentives whereby a weak argument for infringing rights may be strengthened by the absence of a good evidentiary record — would less likely be created under the regime of proportionality review which would only admit of negatively conceived policies. In such a regime, the doctrine of deference would simply not be needed.

I do not want to be misunderstood on this last point. There is no real doubt that epistemic uncertainty attends absolutely all public policies, positive and negative alike. However, the difference is in degree. The general uncertainty associated with the negatively conceived policies — e.g., the need to prevent some negative consequences by, for instance, protecting the public from some immediate and present harm[102] — normally allows the government to tender evidence that would meet the traditional civil standard of proof.[103] Conversely, the causal hypotheses underlying the 'public good' policies — such as the abovementioned reform of the healthcare system — normally cannot meet the traditional civil standard of proof because the analysis of their far-reaching effects amounts to nothing more than predictions and speculations.

David, *supra* note 92 at 39. On the Court becoming more and more deferential in election law cases, see Yasmin Dawood, "Democracy and Deference: The Role of Social Science Evidence in Election Law Cases" (2014) 32 NJCL 173.

100 For some pertinent discussion, see e.g. David Kenny, "Proportionality and the Inevitability of the Local: A Comparative Localist Analysis of Canada and Ireland" (2018) 66 Am J Comp L 537 at 559; Danielle Pinard, "Institutional Boundaries and Judicial Review — Some Thoughts on How the Court is Going About Its Business: Desperately Seeking Coherence" (2004) 25:1 SCLR (2d) 213 at 221; Andrew J Petter & Patrick J Monahan, "Developments in Constitutional Law: The 1986-87 Term" (1988) 10 SCLR (2d) 61 at 95.

101 For some poignant criticism of the Canadian doctrine of deference and its negative implications for the system of rights review, see e.g. Alyn James Johnson, "Abdicating Responsibility: The Unprincipled Use of Deference in *Lavoie v Canada*" (2004) 42:2 Alta Law Rev 561; Choudhry, *supra* note 68; Thomas MJ Bateman, "Legal Modesty and Political Boldness: The Supreme Court of Canada's Decision in *Chaoulli v Quebec*" (2005) 11:2 Rev Const Stud 317; Dawood, *supra* note 99; Stuart, *supra* note 99.

102 Such protective policies are 'negatively conceived' because they can be reconceptualised as the negative injunctions towards the rights-holders to abstain from using their rights entitlements in order to harm others.

103 *Oakes*, *supra* note 81 at 138. Elsewhere the court uses the term "a preponderance of probability … applied rigorously" (*ibid* at 137).

C. There is Irrational and There is Irrational

The foregoing discussion demonstrates that incorporation of positively conceived considerations into proportionality analysis renders the latter liable to various deviations from the standard of rationality, such as an increased epistemic uncertainty and double-balancing. One might — justifiably — object, however, that a mere deviation from the standard of rationality is of little import in and of itself; after all, as emphasized in the section on Rationality (Section I.3.A), no single rights framework can be completely rational and devoid of subjectivity.

It would seem, therefore, that in order to bring home the point that the 'omnivore' account of proportionality undermines its own justification, one needs to show that it renders proportionality not simply *irrational*, but *more* irrational than other types of constitutional doctrines, such as reasonableness or categorization. Yet is it necessarily so? What is it about proportionality's major rivals that makes them structurally immune to, or at least normatively compatible with, positively conceived considerations?

A sensible point of departure for thinking about this issue is the observation that all analytical frameworks designed to resolve issues of rights adjudication — whether proportionality-based or not — are predicated on interest balancing. The difference is in the way such balancing is operationalized. Generally, as Aharon Barak explains, two recurrent alternatives are available: one is *ad hoc* interest balancing, operationalized though proportionality and reasonableness frameworks, the other is interpretive balancing.[104] The latter is often described as a categorical method, whereby interest balancing "operates at the interpretive level determining the scope of the categories in question and their boundaries."[105] For instance, in order to determine the boundaries of the right to freedom of speech, one would need to engage in interest balancing that would lead to "taking a stand on the question of whether the right to freedom of speech may cover instances of racist speech or obscenity."[106] Similarly, in order to establish what falls within the ambit of the positive right to healthcare, one would need to balance the interests of the citizens in maintaining and ameliorating their health against the natural ability of the state to indulge such needs.

104 Barak, *supra* note 25 at 508. See also Kathleen M Sullivan, "Post-Liberal Judging: The Roles of Categorization and Balancing" (1992) 63:2 U Colo L Rev 293 at 293.

105 Barak, *supra* note 25 at 508.

106 *Ibid* at 508-09.

Now, from the methodological standpoint, it is crucial that the normative trade-off between the principles underlying the right and the principles opposing it — the latter normally taking the shape of the public interest — would only be effectuated once. Otherwise not only would the disciplining effects of the rights framework dissipate, but the reviewing courts would end up chipping away at the constitutional guarantees twice, without any principled account of it, and often without even realising it.

Naturally, for such a problem of double-balancing to afflict a rights framework, the putative framework would have to be characterised by a bifurcated review model of judicial scrutiny, with the court first establishing whether the impugned provision has the rights-infringing effect and, if so, whether the infringement can be upheld. Only proportionality review fits such a model. Other frameworks — such as a holistic reasonableness test or categorisation — are predicated on the 'single-laned' model of review and therefore are by default structurally immune to double-balancing.

As for epistemic uncertainty, it would appear that other approaches, too, are structurally less prone to succumb to its ill effects. Consider categorization. By relying on the creation of predetermined legal categories[107] — the boundaries of which are established in advance by engaging in interpretive balancing[108] — categorical review is inherently more conservative and circumspect with respect to what policy considerations it is willing to entertain in order to set the boundaries of such categories. Again, once the definitional boundaries of each particular category are set, policy considerations cannot be 're-examined.'[109] In the words of Alec Stone Sweet and Jud Matthews, this approach seeks to determine, "once and for all, on which side of a line a particular class of cases falls, or where to draw the lines separating rules from exceptions in the first place."[110] This stands in sharp contrast to a flexible, adventurous *ad hoc* balancing built-in into proportionality.

This paper speculates that it is no coincidence that most policy considerations used in American jurisprudence to determine the scope of fundamental rights are, as will be demonstrated below, negatively conceived. Such considerations are more empirically robust than the positive ones, which is a great advantage when creating inflexible predetermined categories which are very hard to revisit.

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107 *Ibid* at 504.
108 *Ibid.*
109 *Ibid.*
110 Stone Sweet & Mathews, *Balancing*, *supra* note 29 at 123.

Take for instance freedom of speech. The full measure of First Amendment protection in the United States typically does not extend to a relatively limited list of such negatively conceived and, hence, empirically robust considerations as protecting the public against fighting words,[111] obscenity,[112] or advocacy of imminent lawless action.[113] The court cannot 'rebalance' values and interests underlying these qualifications to freedom of speech without having to replace one relatively rigid hierarchy with another,[114] so it has to choose wisely before creating each qualification. Not only does such approach narrow the evidentiary demands on constitutional cases, but it also ensures some degree of stability and predictability in adjudication. Conversely, as Stone Sweet and Matthews observe, "proportionality balancing has an uneasy, still unsettled, relationship with notions of precedent."[115]

It is worth repeating, as argued throughout this article, that proportionality performs worse than its major doctrinal rivals only when applied to positively conceived considerations. Conversely, when applied to negatively conceived interests, proportionality outperforms all other frameworks: it enhances the rationality of judicial decision-making, allows the judges to make sure that no significant normative or empirical consideration has escaped the analysis, and overall "usurps the role of the legislator less than proportionality's main alternatives."[116]

Part III: Negatively Conceived Values and Proportionality: A Step (Back) in the Right Direction?

1. What Does One Have by Virtue of Having a Negative Right?

Having repudiated the ability of the 'omnivore' account of proportionality to enhance — or at least not undermine — the traditional justificatory goals of proportionality — namely, rationality, legitimacy, and priority of rights — it may be prudent to demonstrate how these goals are in fact fostered by applying proportionality to the conflicts between negatively conceived values. Before delving into the pertinent analysis, however, it may be worthwhile to ask what one can have by virtue of having a negative interest. Let us start with negatively conceived rights.

111 *Chaplinsky v New Hampshire*, 315 US 568 (1942).
112 *Roth v United States*, 354 US 476 (1957).
113 *Brandenburg v Ohio*, 395 US 444 (1969).
114 Stone Sweet & Mathews, *Balancing*, *supra* note 29 at 51.
115 *Ibid* at 40.
116 *Ibid* at 108.

Frederick Schauer outlines the formal-structural properties of such rights by contrasting them with positive rights, arguing that what we commonly view as a right to X, is not actually a right *to* X, but rather a right not to have the ability to X "infringed without the provision of a justification of special strength."[117] From the perspective of Hohfeldian incidents, we can frame the negatively conceived right to X as a legal right-claim against the government to abstain from interfering with X. It follows, thus, that the government, who is to abstain from interference, "is under a correlative duty to do so."[118] By springing from the principle that every person has a basic claim right to independence,[119] negatively conceived rights operate like negative injunctions and give rise to categorical duties.

At first blush, such architecture of rights may appear counterintuitive as it does not anchor a putative right to X in an external interest of actually having or doing X, like other rights theories do. However, as Schauer explains, removing the ability to X from the right to X is far from making the right hollow,[120] "[r]ather, this reconception now sees rights as *shields* against governmental interests."[121] Situating this proposition in the context of proportionality review, one can observe that the government cannot pierce these shields unless it has a very compelling justification which it is willing to publicly demonstrate. In other words, the government is normally prohibited from trespassing onto the compartments of personal liberties framed as constitutional rights unless it has a good reason to do so.

2. Negatively Conceived Interests and Elimination of Double-Balancing

The outlined structural construal of constitutional rights has a number of advantages over the one explored earlier. Foremost among them is its ability to enable the courts to differentiate between normative propositions that should give rise to actual rights entitlements and those that should not without engaging in double-balancing, that is, balancing of the same normative considerations at the definitional *and* justificatory stages of the analysis. Double balancing is pernicious to principled rights reasoning because it fosters an unbridled normative analysis during a definitional limitation of a right and does not contain

117 Schauer, "Structure," *supra* note 50 at 429.
118 Nikolai Lazarev, "Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights" (2005) 12 Murdoch UEJL 7.
119 Ariel Zylberman, "Why Human Rights? Because of *You*" (2016) 24:3 J Political Philosophy 321 at 322.
120 Schauer, "Structure," *supra* note 50 at 430.
121 *Ibid* [emphasis in original].

any principled restraints upon whatever personal preferences judges may wish to channel through their preferred definitions.

Consider the claim that negative construal of rights allows us to avoid double-balancing.[122] If we reject the idea according to which a constitutional right is grounded in some entitlement to external intelligible good, then it follows that a right and its grounding value must co-entail each other.[123] This would shun the need to adopt a definition of the right that would include a built-in interest balancing at the definitional stage of analysis, thus halting an unconstrained normative analysis during a definitional limitation of a right and imposing some principled restraints upon whatever normative choices judges may wish to channel through the seemingly neutral language of definitional analysis. Grégoire Webber explains the advantages of viewing rights as negative injunctions as opposed to positively conceived entitlements, that is, rights 'to' abstract things, in the following way:

> [T]he negative injunctions help *define* the right in a way that formulations of rights to abstract things do not. This is not to deny that the meaning of 'torture' or 'cruel and unusual punishment' or 'servitude' is open-ended in some respects. It is. But the interpretive exercise proceeds on the understanding that the right has been defined by the terms in need of interpretation.[124]

On this account, an unqualified interpretation of any given word or any given collocation of words incorporated into the Constitution would be exhaustive of the sphere of freedom secured by such right. If, for example, the Constitution guarantees the freedom of 'speech,' a carved out sphere of autonomy fixed within a constitutional fabric by such guarantee would be coextensive with everything that falls within the ambit of 'speech,' however trivial or controversial it may be. Thus, in an important respect, proportionality is conducive to what is known as "the broad understanding of rights."[125]

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122 Admittedly, such double-balancing would only be avoided if the text of the constitutional right itself does not contain definitional limitations, such as the constitutional prohibition of *unreasonable* search and seizure, or the prohibition of cruel *and unusual* punishment. Yet even if the text itself would prompt the court to engage in the interest balancing, such balancing would be of a different nature than the one the courts normally deal with as part of proportionality analysis. Rather than balancing the individual and public interests, such balancing would presuppose different relational categories, for example in the context of the cruel and unusual punishment, the balance would have to be struck between the severity of the individual punishment and the gravity of the individual offence, not between public and individual interests.

123 Zylberman, *Relationship*, *supra* note 9 at 60.

124 Grégoire Webber, "Proportionality and Absolute Rights," in Jackson & Tushnet, *supra* note 2, 75 at 78 [emphasis in original].

125 Möller, *Global Mode*, *supra* note 5 at 4.

One could easily envision an objection to such broad and general understanding of rights, arguing that it is unjustifiably abstracted from all particular circumstances of the constitutional order — that is, that it is *acontextual*. However, as Friedrich Hayek has famously retorted, that is precisely the point. According to him, the only way constitutional freedoms can be meaningfully cultivated in any given society is by being abstract, general, and acontextual; that is exactly what distinguishes "abstract rules that we call 'laws'" from "specific and particular commands."[126] As Hayek explains, the conception of freedom under the law "rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free."[127] In other words, the only way to forestall arbitrary exercise of power, which as Hayek explains is rather an "instrument of oppression,"[128] is to make sure that "the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it," with the judge's coercive will, of course, being no different than that of a legislator.[129]

From this, the main benefit of a broad negative understanding of a right is that, as mentioned above, the *prima facie* definition of a right can be incorporated into proportionality analysis as is, without any definitional limitations, because it would be already intelligible and, more often than not, capable of immediate effectuation to the full extent of its scope. This logic stands in sharp contrast with the idea to conceive of the right in positive terms, wherein the putative entitlement — for instance, the aforementioned right to health — would have to be qualified on a number of grounds even prior to reaching the proportionality stage of analysis. The difference is telling.

Admittedly, a counter-argument may be summoned according to which the right-as-a-negative-freedom paradigm is not a panacea against the evils of double-balancing. This point is brought into sharp relief in the context of the so-called 'qualified rights.' Qualified rights are constitutional guarantees, either negatively or positively conceived, that have "built-in qualifications which facilitate dialogue between the judicial and legislative branches of government."[130] Take, for example, the right to protection against 'cruel and unusual punish-

126 Friedrich A Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1978) at 149.
127 *Ibid* at 153.
128 *Ibid* at 155-56.
129 *Ibid* at 153.
130 Peter W Hogg & Ravi Amarnath, "Understanding Dialogue Theory" in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 1053 at 1058.

ment.' The inclusion of the term 'cruel and unusual' suggests that the right in question is qualified — that is, it does not guarantee protection against *any* punishment, but only punishment which has been defined as 'cruel and unusual.' Now, the determination of what constitutes 'cruel and unusual' is ineluctably context-dependent and, as such, requires a balancing exercise of its own. However — and this is crucial for the purposes of analytical clarity — such definitional balancing would engage a different set of conflicting interests than balancing at the right limitation stage.

For instance, in order to determine what qualifies as 'cruel and unusual punishment,' the reviewing court would have to balance the severity of the punishment imposed against the gravity of the crime committed; conversely, at the rights limitation stage of the analysis, the constitutionally protected interests of the accused would have to be balanced against the actual interests of the community, for example, imminent safety needs of the public. This trade-off would arise, for instance, in the context of preventive detention of dangerous offenders.

As is evident from this discussion, the need to engage in interest balancing twice does not necessarily entail double-balancing of the *same* normative considerations. And in situations when it does, the court is advised against using proportionality. The issue, however, is that very few negative rights are qualified rights, and even fewer negative rights would have to be *both* defined *and* limited by resorting to identical public interests considerations. In contrast, *all* positive rights are necessarily qualified rights that engage the same public interest considerations at both the definitional and the limitational stages of analysis — such considerations normally pertaining to the just allocation of scarce resources.

3. The 'Shield-Sword' Theory

Yet another example of the superior performance of negatively conceived considerations in the context of proportionality can be summoned. Not only does framing constitutional rights and public policies in negative terms[131] helps to avoid double-balancing and narrow the evidentiary demands on constitutional cases, but it does so in a way that preserves rights' resistance to consequentialist trade-offs.

131 That is, as negative injunctions against the state qualified only by negative injunctions against the right-holders to use their rights as means to visit harm on others.

Allow me to elaborate. On a negative categorical account, the use of force on another is normatively impermissible unless such force is used proportionately to the force of the attack, such as in self-defence. So understood, the theory of proportionality proposed here equips rights with categorical normative force and blocks any trade-offs of constitutional rights against other important positive values, such as the abstract bettering of the society. For instance, it would preclude the government from hastening "the death of a terminally ill patient" if a doctor can save "the lives of three or four others by way of transplanting the organs of the terminally ill person to those others."[132]

The 'shield-sword' metaphor encapsulates the idea. In particular, proportionality conceives of constitutional rights as presumptive shields against governmental interference and only allows for such shields to be pierced when the right-bearers purport to use their rights as swords against their fellow right-bearers.

The explanatory power of this 'shield-sword' theory should not be underestimated. For instance, one of the most often used illustrations in the literature on the non-absolute character of constitutional rights is Justice Holmes's famous injunction against falsely shouting "fire" in a crowded theater. In this hypothetical, the right-holder, by discharging their rights in a manner that treats other persons as a means inflict on these persons serious harm. It is exactly the same rationale that can also vindicate the proportionate limitation of constitutional freedoms in situations whereby the right-holder engages in harmful defamatory speech. In such instances, the state should be justified in foreclosing the right-holder's opportunity to avail themselves of the benefits of their freedoms because they purport to use what is supposed to be a 'shield' against the state as a 'sword' against their fellow citizens.

4. The Shield-Sword Theory and the Historical Origins of Proportionality

It is important to note that historically, the conceptual parameters of proportionality followed the 'shield-sword' theory fairly accurately. The doctrine of proportionality emerged in the nineteenth century German administrative law "as a reason for overturning coercive measures that excessively limited individual rights"[133] and was originally used to curb the otherwise untrammelled

132 Kumm & Walen, *supra* note 3 at 71. As Kumm and Walen explain, the standard analytical framework of proportionality, employed without adding any extra deontological restrictions, would permit such a trade-off (*ibid* at 70-71).

133 Bernal Pulido, *supra* note 27 at 492.

police search power, though soon expanded onto the broader administrative landscape.

In that context, the courts mostly engaged in the business of balancing negative — as opposed to positive — considerations, as is evident from the early case law on the subject. For instance, Moshe Cohen-Eliya and Iddo Porat document an important administrative court decision in which proportionality was used to strike down a Berlin ordinance that banned the construction of buildings that blocked city views of a national monument, with a conclusion that the government could only act to prevent danger to public safety — a negatively conceived consideration — and could not impose its own aesthetic judgement — a positive concern.[134] In a different decision, the same court ruled that the government was not justified in violating the citizens' right to assemble and demonstrate, unless the need for such violation was "based on concrete facts" that could demonstrate a 'real,' as opposed to remote and speculative, "danger to public order."[135]

Thus, the original version of proportionality permitted restrictions of individual liberties in situations where the exercise of such liberties could have been proven to result in an actual damage to other individuals. In other words, it imposed a negative injunction on the rights-holders who sought to use the protective shields afforded to them by their rights as swords against their fellow citizens.

Conclusion

This paper argues that proportionality, contrary to the orthodox view, is content-sensitive to the types of normative considerations it can accommodate. While the proportionality test is amenable to processing negatively conceived considerations, it appears to be in irreconcilable tension with positively conceived ones. Why so? What is that about positively conceived considerations that makes them unamenable to proportionality review?

First, positively conceived considerations — understood as furthering some abstract public good goals and values — carry an inextricable risk of definitional overbreadth. Methodologically, such definitional overbreadth can only be salvaged by multiple sets of interest balancing being administered in the course of one proportionality-based review: such as a built-in interest balancing

134 Moshe Cohen-Eliya & Iddo Porat, "American Balancing and German Proportionality: The Historical Origins" (2010) 8:2 Intl J Constitutional L 263.

135 *Ibid* at 273.

at the definitional stage in conjunction with a balance of interests analysis as part of proportionality *stricto sensu*. Such double-dipping, however, enfeebles the very point of proportionality review whose main 'claim to fame' is pushing the balancing exercise to the end of the analysis and, in so doing, making such balancing as transparent and principled as possible.

Consequently, the injection of positively conceived considerations into proportionality reasoning fails one of the necessary conditions of proportionality's legitimacy as an unwritten constitutional principle — namely, the supposition that proportionality enhances the rationality of rights deliberation in constitutional tribunals. If anything, not only does the multifurcation of interest balancing disrupt the traditional allocation of the burden of proof in constitutional adjudication, but it also removes the much-needed structure, predictability, and the appearance of doctrinal constraint, thereby making the standard of review *even less rational* if compared to other rule-based or standard based methods of right limitation.

Secondly, and related to the first, the irrationality of the 'omnivore' version of proportionality is particularly pronounced at the level of constitutional fact-finding. Specifically, epistemic uncertainty that accompanies most positively conceived long-term public policy programs renders proportionality reasoning unamenable to rational formulation and profoundly alters the scope of constitutional rights in an *ad hoc* manner.

The way out of this 'irrationality conundrum' is to construe rights and competing public objectives not in positive terms — as non-relational categories operating in the service of some laudable *external* goals such as the right 'to' something, or the interest 'in achieving' something — but to ground rights and their limitations in the relational considerations[136] *internal* to rights. Such deontologically conceived rights would be amenable to reasonable limitations not by virtue of such limitations 'emanating' from elsewhere — for example, from the will and interests of the broader public — but because such limitations would be intrinsic to the deontological parameters of the constitutional rights themselves.

On this account, to say that one, structurally, has a right, would be to say, following Frederick Schauer, that one is equipped with "*shields* against governmental interests,"[137]meaning a licence to be free 'from' government interference. In this regard, a public interest claim would be able to pre-empt a claim

136 Zylberman, *Relationship*, *supra* note 9 at 3.
137 Schauer, "Structure," *supra* note 50 at 429.

of right only when the right-claimant would purport to use what is supposed to be a normative 'shield' as a 'sword' — that is, to vindicate their rights in order to inflict a tangible harm onto the public. Perhaps the most paradigmatic examples of this would be falsely shouting "fire" in a crowded theatre or practicing human sacrifice under the pretence of promoting one's religious freedom. In this respect, the reason why one would not be able to avail themselves of constitutional protections in such cases is not because one would be attenuating some governmental policies by doing so — which they, of course, would — but due to the fact that the putative bearer of rights would be weaponizing their constitutional safeguards against the public at large in a manner that is clearly disproportionate to the normative value of the interests they would seek to vindicate.

The debate can be shifted into the higher philosophical register by pointing out that, on a broader constitutional plane, proportionality as a structured analytical template has a limited application within the realm of constitutional adjudication and has any redeeming values solely when applied within the liberal democratic — as opposed to teleological — models of constitutionalism.

On a concluding note, it appears that both proponents and opponents of proportionality were correct in their respective praise and criticism of the test. When proportionality is used to arbitrate positively conceived considerations, it does indeed display all the typical weaknesses for which it is commonly criticized, such as irrationality, incommensurability, epistemic uncertainty, and the loss of rights. Conversely, when applied to negatively conceived considerations, proportionality improves, as opposed to impairs, constitutional adjudication. It is fair to infer that, in the apt observation of Franz Kafka, sometimes correct understanding of something and misunderstanding of the same thing are not entirely mutually exclusive.[138]

138 Franz Kafka, *The Trial*, translated by Mike Mitchell (Oxford: Oxford University Press, 2009) at 156.