EVOLVING STANDARDS OF REVIEW: THE CASE FOR PROPORTIONALITY ANALYSIS IN STATE CONSTITUTIONAL LAW

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INTRODUCTION

To the layman, almost all constitutional rights are absolute; to the scholar almost no constitutional rights are absolute.¹ To some extent, this divergence between the layman and the scholar is due to a lack of thought on the part of the layman. He has simply not considered the extremes of human behavior. For example, while the layman may at first believe in an absolute right to free speech, upon reflection, he probably would agree that the right to free speech does not protect “falsely shouting fire in a crowded theater.”² To do otherwise would cause too much harm for too little benefit.³ Thus, as the layman’s understanding of rights increases, he is less likely to view them absolutely.

However, while the layman may show a lack of understanding with regard to rights, he is not a fool, and absolute rights are not folly. Rather, absolute rights are found in many constitutions around the world. For example, Article Five to the U.S. Constitution provides that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.” The reasonableness of providing states an absolute right to equal suffrage almost goes without saying. If some states could deprive other states of suffrage, it would undermine the entire representational system upon which the U.S. Constitution is built. Similarly, Article 1(1) of the German Basic Law states: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” Given the abasement of basic human dignity under the Nazi regime, the framers of the German constitution wisely sought to make any government action that violates human dignity beyond the pale.⁴ Thus, the German right to human dignity is both absolute and eternal, i.e., it cannot be changed by constitutional amendment.⁵

There is a certain value in an absolute that at times justifies its cost. For example, under the U.S. Constitution, the national stability gained by ensuring that each state is equally
represented most likely outweighs the disparity in voting power between the citizens of large and small states. Similarly, the national healing, labor benefits, and educational benefits that an absolute right to human dignity provides likely outweighs the rare occasion when restricting the right would save lives.

Moreover, while absolutes break down at extremes, they are quite useful in everyday situations. Consider, for instance, the dilemma that parents face when teaching a young child to be honest. Should a parent teach a young child absolute honesty, i.e., “always tell the truth and never lie”? Or, should a parent teach a young child relative honesty, i.e., “never lie unless lying is necessary to maximize benefit or minimize harm”? On the one hand, if the parent teaches the child absolute honesty and a situation arises where the child should lie, the child or someone else may be seriously hurt by the child’s honesty. On the other hand, if the parent teaches the child relative honesty, the child may be incapable of determining when it is optimal to lie. Moreover, the relative value may provide the child with an excuse to lie when he should not lie. In addition, even if the child is capable and willing to only optimally lie, his behavior might encourage less capable and less willing children to lie at the wrong times. Given these risks in conjunction with the fact that children are significantly more likely to be in situations where honesty is optimal, many parents would conclude that it is best to teach a young child absolute honesty, and if relative honesty is to be taught, to teach it to an older child that no longer needs the absolute.

Like the child in the above example, who uses absolute values at a young age and relative values as he matures, legal systems, as they mature, transition from absolute rights to relative rights. As legal systems make this transition, they look for ways to turn absolute rights relative. The most obvious way to do this is through an amendment to the constitution.
There are, however, two problems with constitutional amendments – one legal and the other practical. First, constitutional amendments cannot abolish or modify “eternal” absolute rights. Second, the difficulty of the constitutional amendment process may make some non-eternal rights practically eternal.

While the amendment process is an unwieldly way to turn absolute rights relative, a more convenient approach is through the use of “interpretative tools.” In interpreting the U.S. Constitution, the United States Supreme Court (“Supreme Court”) uses two of these interpretative tools, the second of which is a topic of this paper. First, the Court uses “definitional balancing” to narrow the scope of a right. For example, in *R.A.V. v. City of Paul*, the Supreme Court determined that the First Amendment does not protect “fighting words” because these are a mode of expression rather than the content of expression. In other words, the Court limited the scope of the right to free speech by defining speech in such a way so as not to include certain harmful behaviors that could at least plausibly be considered “speech.” And, once the Court had limited the boundary of the right to free speech, there was no need for the Court to engage in additional interpretative balancing.

The second and better known interpretive tool used by the Supreme Court is categories, i.e., the levels of scrutiny. Justice Harlan Stone first articulated the concept of varying levels of review in the 1938 case, *United States v. Carolene Products Co.* Since then, the Supreme Court has applied three levels of review: (1) strict scrutiny, (2) intermediate scrutiny, and (3) rational basis scrutiny.

While each level of review has two prongs – one that examines the government’s interest and the other that examines the means used to achieve that interest – the intensity of review for
each prong varies widely. If a law is subject to strict scrutiny review, a court will strike it down unless the law uses the least restrictive means to achieve a compelling governmental interest. Under the middle tier of review, intermediate scrutiny, a law will only survive if it uses substantially related means to achieve an important governmental interest. Finally, a law subject to rational basis scrutiny will survive so long as its means are rationally related to a legitimate governmental interest. As one can see from the extreme variance in review, the level of scrutiny that a law is subjected to is arguably more important than its objective and means used to achieve that objective.

Unlike the categories framework that is central to constitutional rights adjudication in the United States, proportionality analysis is central to constitutional rights adjudication in much of the developed world. Proportionality analysis is popular because at its core, it is a “culture of justifications.” Thus, it is valued not only for its utility but also because rationality and transparency are critically important anytime constitutional rights are restricted in a democracy.

To this end, proportionality analysis has four prongs: (1) proper purpose, (2) rational connection, (3) necessity, and (4) proportionality stricto sensu. The first two prongs – proper purpose and rational connection – are threshold requirements. The first prong, proper purpose, ensures that means that interfere with constitutional rights have a legitimate aim. The second prong, rational connection, requires means that interfere with constitutional rights to actually fulfill the proper purpose. Necessity, the third prong, is essentially a “least restrictive means” test, requiring that out of all of the means that fulfill the proper purpose, the chosen means least limit the constitutional right in question. Finally, proportionality stricto sensu is a balancing test that requires the proper purpose’s benefit to outweigh the harm caused by the means’ restriction of constitutional rights.
While the application of these components is somewhat subjective, courts that use proportionality analysis draw on a robust, international cache of decisions and scholarship that apply the framework in a variety of settings. In addition, the four prongs of proportionality analysis not only ensure that courts ask the proper analytical questions but also that they consider the proper factors in their correct contexts while answering those questions.

Because of the framework’s analytical soundness and global success, in conjunction with changing conditions in the United States, this paper argues that state supreme courts should use proportionality analysis instead of categories to determine when it is appropriate to restrict a state constitutional right. In advancing this argument for proportionality analysis in state constitutional law, this paper begins by tracing the history of proportionality analysis from its foundations to modern day examples of the framework in Germany, Canada, and even the United States. Next, Part II describes the various interpretive frameworks that state supreme courts use to adjudicate constitutional rights, including some tests that are similar to proportionality analysis. After looking at this background information on proportionality analysis and the various interpretive frameworks used at the state level, Part III lays out the case for proportionality analysis, arguing that its adoption at the state level will improve the clarity and analytical soundness of decisions. Finally, Part IV of this paper responds to various arguments against proportionality analysis at the state level, including a general objection to the framework, arguments in favor of a lockstep approach to state constitutional adjudication, and specific objections to proportionality analysis at the state level.
I. BACKGROUND

While proportionality analysis originated in late 19th century Germany, one can find the principles underlying this framework throughout the ancient and modern world in a variety of contexts. In tracing proportionality’s history from its origins to modern proportionality analysis, subsections A and B of this section describe the history of these principles from ancient history to modern Germany, where they coalesced into the proportionality analysis framework that courts use today. Next, subsections C and D look at recent German and Canadian cases using the framework. Finally, subsection E examines the use of proportionality principles by U.S. courts and two Supreme Court Justices who have argued in favor of these principles.

A. Foundations of Proportionality Analysis

Ancient legal codes, religions, and philosophies all contain proportionality principles. For example, the ancient principle of *lex talionis* is a rudimentary form of proportionality that dates back over 3,700 years to the Code of Hammurabi in ancient Mesopotamia. Similarly, in Europe, the concept of a “just war” contains proportionality principles and finds its origin in pre-Christian Roman law and ritual. In the more “recent” Anglo-Saxon tradition, the Magna Carta declared in 1215 that “[f]or a trivial offence a free man shall be fined only in proportion to the degree of his offense, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood.”

Like proportionality in legal codes, proportionality in religion also has ancient roots. Specifically, Hinduism, Buddhism, Judaism, Christianity, and Islam all teach some form of proportionality. Perhaps, the best known example of proportionality in religion is the Golden Rule: “Do unto others as you would have them do to you.” By demanding reciprocity, the
Golden Rule implicates cooperation and fairness, and these, in turn, demand proportionality.\textsuperscript{51} In Eastern religious thought, the ancient Hindu epic the Mahabharata tells the story of five brothers who have an extended discussion over whether war can ever be justified.\textsuperscript{52} The result of this discussion is the establishment of proportional criteria for a just war, such as chariots can only attack other chariots and captives should be treated fairly.\textsuperscript{53} In regards to wealth and proportionality, there is the Christian story of the widow’s mite.\textsuperscript{54} In the story, Jesus watched the rich put large amounts of money into the temple treasury while a poor widow put only two small coins into the treasury.\textsuperscript{55} After observing the rich and the widow, Jesus called his disciples together and told them that the poor widow had put more into the treasury than all the others because they gave out of their wealth but she gave all that she had.\textsuperscript{56} Proportionality plays such an important role in religions around the world that religions are replete with similar stories and teachings.

Like ancient legal codes and the world’s major religions, ancient and modern philosophy also teaches proportionality. For example, more than 2,300 years ago in Ancient Greece, both Plato and Aristotle taught proportionality principles. For instance, Plato defined justice as “rendering to each that which is fitting [for him].”\textsuperscript{57} In Platonic philosophy, justice is not simply a matter distributing to each person the same amount of goods.\textsuperscript{58} Rather, justice also takes into account proportionate equality (i.e., considering a person’s station in life when distributing goods).\textsuperscript{59} In Aristotelian philosophy, moral virtue is the prudent mean between opposite vices.\textsuperscript{60} This virtue extends not only to personal ethics but also to representation in the government and proportional punishment for crimes.\textsuperscript{61}

More recently, proportionality principles were critical to the development of the 18th century Enlightenment notion of the social contract.\textsuperscript{62} According to social contract theory,
people grant their ruler limited powers, which infringe on their liberty, and the ruler must only use these powers for the people’s benefit, not his own. In other words, public benefit was the only just limitation on the public’s liberty. To use the words of the 18th century English jurist William Blackstone, civil liberty is “natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.”

As the 18th century notion of the social contract evolved into the late 19th century notion of the liberal state, the concept of proportionality also evolved. Specifically, the liberal state further developed the idea that the ruler should only restrict constitutional rights when it benefits the public by adding the notion that not every public benefit justifies the restriction of constitutional rights. In other words, the public benefit had to be proportional to the harm caused by the restriction of constitutional rights. This expansion of proportionality principles eventually led to the creation of modern proportionality analysis in 19th century Germany.

B. The Origin of Modern Proportionality Analysis

Modern proportionality analysis began in 19th century Germany as a way for police to fight dangers to public safety. At first, courts gave police almost unbridled discretion to do what was necessary to ensure public safety and order. Overtime, however, the ideas of individual liberty and the rule of law limited this discretion. In its attempt to reconcile these competing values, the Prussian High Administrative Court developed this proportionality norm into proportionality jurisprudence. Under this evolved standard, any intrusion by the police had to be fit, necessary, and appropriate. In other words, courts required that the means work, that there could be no equally effective means that were less intrusive, and that the end had to justify the means.
Throughout the early 20th century and into the 1930s, German courts continued to develop the doctrine of proportionality.\textsuperscript{73} As German constitutional law scholar Fritz Fleiner noted in 1928, “You should never use a cannon to kill a sparrow.”\textsuperscript{74} This development, however, halted in 1933 with the rise of Adolf Hitler and the Nazi Party in Germany.\textsuperscript{75} It was not until after World War II that German courts would continue to develop and apply proportionality analysis.

C. Proportionality Analysis in Modern Germany

While the post-World War II German constitution\textsuperscript{76} does not contain an explicit proportionality provision, the German Constitutional Court ("GCC") has strictly applied proportionality analysis to all constitutional rights other than the right to human dignity, which is absolute.\textsuperscript{77} To illustrate the GCC’s use of proportionality analysis, consider its 2008 decision in 
\textit{Stübing v. Germany} upholding a ban on incest.\textsuperscript{78} In \textit{Stübing}, the GCC reviewed the incest convictions of German national Patrick Stübing.\textsuperscript{79} Placed in a children’s home and then adopted at the age of seven, Stübing never knew his younger sister until he was reunited with her at the age of 24.\textsuperscript{80} After the death of their mother in 2000, the siblings’ relationship intensified, eventually leading to sexual intercourse and four children.\textsuperscript{81} However, in 2002, German officials arrested Stübing for 16 counts of incest, and a trial court subsequently convicted him.\textsuperscript{82} After these initial convictions, the trial court suspended Stübing’s sentence and placed him on probation.\textsuperscript{83} However, despite probation, Stübing continued to have a sexual relationship with his sister, and so, after multiple violations, the trial court revoked Stübing’s probation.\textsuperscript{84} Facing prison, Stübing appealed to the GCC, alleging that the incest ban violated his constitutional right to personality as manifested in the right to sexual self-determination.\textsuperscript{85}
After a lengthy review of the history of incest bans, the constitutional right to personality, the government’s interests in banning incest, and the facts of the case, the GCC determined that Germany’s incest ban was constitutional, and it upheld Stübing’s convictions. The court began its lengthy analysis by tracing the history of and justifications for incest bans from antiquity to the present day German criminal code. The primary justification for incest bans around the world is the protection of the family. In addition, a second justification for incest bans is the genetic harm that may occur to a child born of incest.

Once the GCC had looked at the arguments in favor of incest bans, the court then examined the facts of this particular case and Stübing’s arguments. Specifically, Stübing had argued that Germany’s incest ban infringed his rights of sexual self-determination and equal treatment and that the harm caused by the ban outweighed its benefits. Furthermore, he contended that the purpose of the ban was merely to protect morals and that the social and genetic arguments in favor of the ban lacked empirical evidence. Moreover, Stübing claimed that an incest ban on adult siblings who no longer have a family connection did not further the ban’s purpose of protecting the family. Finally, he argued that the incest ban was disproportionate because it failed to take into account the difficult social situation that he and his sister had been in.

Applying proportionality analysis to Germany’s incest ban, the GCC first noted that the protection of the family and the prevention of genetic harm were proper purposes and that the incest ban was rationally connected to these purposes. In analyzing the third prong – necessity – the court noted that the incest ban took into account age and psychological factors and at times did not require criminal punishment. Thus, the statute was necessary, or in other words, narrowly tailored, to meet its goals. Finally, regarding proportionality stricto sensu, while the
court recognized the importance of sexual self-determination, it held that this was outweighed by the government’s interests in protecting the family and public health. In support of its decision, the GCC noted that empirical studies show that incest has numerous negative effects on familial relationships, ranging from diminished self-confidence to sexual disorders and even suicidal thoughts.

D. Proportionality Analysis in Canada

As mentioned in the Introduction, Germany is not alone in its use of proportionality analysis. Governments throughout the world benefit from the well-reasoned dialogue that the framework creates. One such country is Canada. In the 1986 case *R. v. Oakes*, the Supreme Court of Canada (“SCC”) first used proportionality analysis to interpret the Canadian constitution. In *Oakes*, the State charged the defendant with violating the Narcotic Control Act for possessing eight vials of hashish oil. Although the defendant protested that the vials were for pain relief, the Narcotic Control Act established a rebuttable presumption that the possession of a narcotic inferred an intention to traffic. Before the SCC, the defendant argued that the presumption of intent to traffic violated the presumption of innocence found in the Canadian Charter of Rights and Freedoms. In a unanimous decision, the SCC held that the trafficking presumption violated the defendant’s charter right and that this violation could not be justified under Section 1 of the Canadian Charter of Rights and Freedoms.

In its reasoning, the court acknowledged that charter rights are not absolute and at times it is necessary to limit those rights in order to achieve “collective goals of fundamental importance.” In order to determine when a charter right should be limited, the court noted that the “fundamental principles of a free and democratic society” were the ultimate standard for
interpreting Section One of the Charter. According to the court, these fundamental principles include “respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”

With these fundamental principles in mind, the court established a two-step test to justify the limitation of a charter right. First, the state’s interest must be objectively related “to concerns which are pressing and substantial in a free and democratic society.” Second, the state’s means must be “reasonable and demonstrably justified.” In order to show that the state’s means are “reasonable and demonstrably justified,” the State must prove the following:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”

Applying this test to the facts of the case, the SCC determined that the trafficking presumption did not even pass the rational connection test because possession of a small amount of narcotics does not support the inference of trafficking.

E. Proportionality in U.S. Constitutional Law

In their book Proportionality Principles in American Law: Controlling Excessive Government Actions, Professors E. Thomas Sullivan and Richard Frase identify a number of areas in federal law where American courts explicitly use proportionality principles to interpret
federal law. In civil law, courts explicitly use proportionality principles in the areas of punitive damages, land-use permit conditions, attorney’s fees in civil rights cases, congressional abrogation of state sovereignty under the Fourteenth Amendment’s Enforcement Clause, and the detection of voting rights and equal protection violations. Similarly, in criminal law, courts explicitly use proportionality principles to limit eligibility for execution, execution methods, the duration of punishment, the treatment of prisoners, and limitations on fines and forfeitures.

In addition to the above areas where courts explicitly use proportionality principles, courts implicitly use these principles in the levels of scrutiny. For example, in Planned Parenthood of Southeastern Pennsylvania v. Casey, the Court used proportionality principles to soften strict scrutiny through its use of the “undue burden” test. Specifically, the undue burden test balanced a woman’s fundamental right to end her pregnancy with the state’s interest in informing the woman seeking an abortion of its potential consequences. This balancing test is similar to proportionality stricto sensu.

Intermediate scrutiny is probably closer to proportionality analysis than strict scrutiny or rational basis scrutiny, and out of intermediate scrutiny concepts, the overbreadth doctrine may be the closest to proportionality analysis. Like proportionality analysis, the purpose of the overbreadth doctrine is to “strike a balance between competing social costs.” To strike this balance, courts look at a statute’s overbreadth not only in an absolute sense but also in a relative sense, weighing the real world harm of the statute with its real world benefits. This balancing is similar to proportionality stricto sensu. In addition, implicit in this determination of whether a statute is substantially overbroad is the question of alternatives, which is similar to the necessity prong of proportionality analysis.
Traditionally, out of the three levels of review, rational basis scrutiny has been the least like proportionality analysis because of its extreme deference to the government. However, the Supreme Court’s rational basis with bite decisions are a step closer to proportionality review. The Court has used rational basis with bite scrutiny to invalidate laws that discriminate against nontraditional households, people with mental disabilities, and people with nontraditional sexual orientations. While laws that discriminate against these three minority groups are arguably immoral and most likely create significantly more harm than benefit, it is difficult to argue that there is no rational basis for the laws. If nothing else, nontraditional groups can affect property values. While the Supreme Court may not admit to balancing in these decisions, they are implicitly concluding that any minor benefit from these discriminatory laws is vastly outweighed by the laws’ negative effects. However, since the Court cannot strike these laws down on the basis of proportionality stricto sensu, it instead has to strike them down as irrational.

In addition to the above explicit and implicit areas where American courts use proportionality principles, at least two past and present Supreme Court Justices favor proportionality analysis over the levels of scrutiny. For example, in the 1973 case *San Antonio Independent School District v. Rodriguez*, Justice Thurgood Marshall argued for a framework that is arguably closer to proportionality analysis than it is to the levels of scrutiny. In *Rodriguez*, the Supreme Court determined that Texas’s system of unequal public school funding did not violate the U.S. Constitution because education was not a fundamental right. In his dissenting opinion, Justice Marshall stated:

The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review — strict scrutiny or mere rationality. But this Court’s decisions in the field of equal
As is seen in the above quotation, Justice Marshall explicitly proposed replacing categories with a spectrum and balancing a statute’s harm with its benefits. In essence, Justice Marshall proposed replacing the levels of scrutiny categories with proportionality analysis.

A current Supreme Court Justice who advocates for proportionality analysis is Justice Stephen Breyer.\textsuperscript{133} In two of his earlier books, Justice Breyer argued for the framework in the contexts of campaign finance laws\textsuperscript{134} and gun control.\textsuperscript{135} In his most recent book, \textit{The Court and the World: American Law and the New Global Realities}, Justice Breyer argues for replacing the levels of scrutiny with proportionality analysis altogether.\textsuperscript{136} In making his case, Justice Breyer states: “[E]ven judges who explicitly write only in terms of categories are implicitly balancing harms and objectives. And where such is the case, I believe it is preferable to organize the balancing through a doctrine such as proportionality, thus making the calculus behind an opinion explicit so that it can be seen and criticized.”\textsuperscript{137}

\textbf{II. DIFFERENT WAYS OF INTERPRETING STATE CONSTITUTIONS}

As the final interpretive authorities for their respective state constitutions, state supreme courts are free to use frameworks other than the levels of scrutiny to determine the constitutionality of government actions that restrict state constitutional rights.\textsuperscript{138} Therefore, it is not surprising that state supreme courts use a variety of interpretive frameworks, including
(1) absolutism, (2) levels of scrutiny, (3) just and reasonable relations test, and (4) sliding scale analysis. The following subsections discuss these four frameworks.

A. Absolutism

Absolutism is the most rule based interpretive framework. At the same time, there are at least five different types of absolute rights. These types of absolute rights are as follows: (1) explicit absolute rights that cannot be changed by constitutional amendment; (2) explicit absolute rights that can be changed by constitutional amendment; (3) explicit absolute rights that can be changed by some other condition; (4) implicit absolute rights that can be changed by constitutional amendment; and (5) implicit absolute rights that can be changed by some other condition. Currently, no state constitution has an explicit absolute right. There are, however, implicit absolute rights in state constitutions. Out of these, some may be changed by constitutional amendment and others may be changed by some other condition.

An example of an implicit absolute right in a state constitution is the Washington Equal Rights Amendment ("ERA"), which states that the "[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex." While the Washington Constitution does not explicitly state that the ERA is absolute, the Washington Supreme Court interprets the ERA to be absolute, stating that "[t]he ERA mandates equality in the strongest terms and absolutely prohibits the sacrifice of equality for any state interest, no matter how compelling." In reaching this decision, the court noted that before the ERA, the Washington Constitution already provided strict scrutiny protection against gender-based discrimination. Thus, the court reasoned, the voters must have intended for the ERA to provide more protection against gender-based discrimination than strict scrutiny provided.
While the ERA is an example of an implicit absolute right that can be changed by a constitutional amendment, the Minnesota Constitution’s right to bail is an example of an implicit absolute right that can be changed by some other condition. At first glance, Article 1, Section 7 of the Minnesota Constitution does not appear to grant an absolute right to bail. It reads: “All persons shall before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great.” However, while the right to bail was not absolute when the Minnesota Constitution was written, since first degree murder is no longer a capital offense in Minnesota, the Minnesota Supreme Court has determined that “all crimes are bailable,” reasoning that “[w]here words used in our constitution have a clear and well-defined meaning, there is no room for construction.”

B. Levels of Scrutiny

The levels of scrutiny are more standard based than absolutist approaches but more rule based than the just and reasonable relations test or sliding scale analysis as described in the following subsections. Since the Introduction to this paper describes these three categories – strict scrutiny, intermediate scrutiny, and rational basis scrutiny – and since the levels of scrutiny framework is so common in American constitutional jurisprudence, this subsection does not go into great detail in addressing these commonly used approaches.

C. Just and Reasonable Relations Test

The “just and reasonable relations” test used by the Vermont Supreme Court (“VSC”) is more standard based than the levels of scrutiny categories but more rule based than sliding scale analysis, which is discussed in the next subsection.
In its well-known decision in *Baker v. Vermont*, the VSC applied proportionality principles in order to determine whether the State’s prohibition on same-sex marriage violated the Common Benefits Clause of the Vermont Constitution. The court characterized its approach as “broadly deferential to the legislative prerogative to define and advance government ends, while vigorously ensuring that the means chosen bear a just and reasonable relation to the governmental objective.” In applying its “just and reasonable relation” test, the court acknowledged that at times it used the levels of scrutiny language. However, the court noted that its application of the rational basis test was more stringent, stating that “‘labels aside,’ Vermont case law has consistently demanded in practice that statutory exclusions from publicly-conferring benefits and protections must be ‘premised on an appropriate and overriding public interest.’”

By requiring that government means be “just” and not simply “reasonable,” the VSC applied a weighing principle similar to proportionality stricto sensu. Specifically, the court stated that their approach called “for a court to assess the relative ‘weights’ or dignities of the contending interests.” In addition, the VSC’s “inclusionary principle” that informed its decision in weighing the competing interests is similar to the *Oakes* fundamental principles of a democratic society. If it were not for sliding scale analysis discussed in the next subsection, the VSC’s just and reasonable relations test would be the closest framework to proportionality analysis in state constitutional law.

D. Sliding Scale Analysis

Of the various methods of state constitutional interpretation, the Alaska Supreme Court’s (“ASC”) sliding scale analysis is the most standard based and the closest to proportionality
analysis. To illustrate this approach, in *Alaska Civil Liberties Union v. State*, the ASC used sliding scale analysis to determine that government programs that offered valuable benefits to employees’ spouses but not to unmarried employees’ domestic partners violated the Alaska Constitution’s Equal Protection Clause.

According to ASC, there are three steps in sliding scale analysis. First, the court determines the importance of the constitutional right at issue. Depending on the right’s importance, the state may have a greater or lesser burden in justifying its action. Second, the court examines the purposes served by the government action. Depending on the level of review, which the ASC characterizes as a “continuum,” the state’s burden will range from showing its objectives are legitimate to showing its objectives are compelling. Finally, the court evaluates the means used to achieve objectives. Similar to the second step, the state’s burden changes depending on the level of scrutiny “continuum.” On the low end of the spectrum, the ASC requires a “substantial relationship” between the action’s objectives and the chosen means to achieve those objections. On the high end of the spectrum, the government action must use the least restrictive means to achieve the objective.

ASC’s sliding scale analysis combines the levels of scrutiny categories and proportionality analysis. The first and second steps of sliding scale analysis are roughly proportionality stricto sensu. In addition, the third step is basically the necessity prong of proportionality analysis. Furthermore, in determining whether the government has met its burden, the court uses the language of categories, while at the same time characterizing the categories as a continuum. Perhaps, the ASC takes the best of both systems. From proportionality analysis it takes balancing and the idea of a continuum rather than strict
categories. From the levels of scrutiny, it takes a thorough analysis of the nature of the restricted right and the nature of the group that is burdened.

III. CASE FOR PROPORTIONALITY ANALYSIS IN INTERPRETING STATE CONSTITUTIONS

There are multiple, book-length justifications of proportionality analysis. Rather than try to describe every reason why courts should use the framework, this section examines six of the most important reasons for state courts to adopt this system. These six arguments are summarized in the following paragraph and discussed in more detail throughout this section.

First, proportionality analysis is more analytically sound than the levels of scrutiny because it takes into account the proper considerations in their correct contexts. Second, proportionality analysis improves transparency by forcing judges to explicitly weigh a law’s harms and benefits. Third, this increased transparency improves communication between the judicial branch and the legislative and executive branches of government. In addition, it also improves communication between the judiciary and the citizenry, academia, and other governments. Fourth, at least in the area of positive rights, state constitutions are more similar to the constitutions of nations that use proportionality analysis than to the U.S. Constitution. Fifth, proportionality analysis is more philosophically sound than the levels of scrutiny because proportionality analysis does not break down at extremes like the levels of scrutiny. Finally, the adoption of proportionality analysis at the state level will pave the way for its adoption at the federal level.

Regarding the analytical soundness of proportionality analysis, the framework requires the judge to “think in stages.” This staged approach allows the one conducting the proportionality analysis “to think analytically, not to skip over things which should be
considered, and to consider them in their time and place.”175 The lack of analytical soundness in the levels of scrutiny is best illustrated by the rational basis with bite cases, which are described in section two of this paper.176 Those cases presented the Supreme Court with situations where discriminatory laws had rational purposes but the harm177 created by those laws significantly outweighed the laws’ benefits.178 Since the levels of scrutiny lack an explicit balancing prong, the Court had to implicitly weigh the laws’ harms and benefits. And, since the Court could not strike the laws down on the basis of balancing, it was forced to strike rational laws down as irrational.179 By considering the right thing, i.e., balancing, at the wrong time, i.e., the interest prong or the means prong, the Court corrupted its inquiry into the purposes of the laws and their rational connection to the laws’ chosen means. In addition, the Court’s balancing analysis may have been incomplete.180

The rational basis with bite cases also illustrate the second advantage of proportionality analysis – transparency. Specifically, the levels of scrutiny prevent lower courts, other branches of government, academia, and the public from fully seeing the calculus behind high court decisions. Furthermore, the levels of scrutiny also prevent Justices on our nation’s high courts from fully knowing why their fellow Justices make the decisions that they do. In addition, transparency is critical to a free and open government because it creates understanding and appreciation in the public that government officials act with fairness and integrity.181

The lack of transparency that the levels of scrutiny create also restricts communication between high courts and attorneys briefing and arguing cases, lower courts, other branches of government, academia, the public, and even other governments. Explicit analysis is a tool that enables lower courts to make proper decisions and the legislature to write constitutional laws. It educates the public, students, and even scholars. And, most importantly, explicit analysis allows
for multiple-way communication between the courts and other branches of government, academia, and the public. In a sense, it ensures that our country’s most important decisions arise from the collective wisdom of our entire nation and not simply from the minds of a relatively few, albeit wise, Justices.

A fourth reason for state supreme courts to use proportionality analysis is that state constitutions are lengthy documents that contain many positive rights. In this sense, state constitutions are similar to the constitutions of nations that use proportionality analysis and dissimilar to the U.S. Constitution. While a rules based approach may be appropriate for a short constitution that is composed of negative rights, a standard based approach is more appropriate for lengthy constitutions composed of positive rights because positive rights are more likely to come into conflict with one another. Moreover, adopting proportionality analysis will provide state supreme courts with a global body of positive rights case law to aid in making constitutional decisions.

In addition to the above practical reasons to adopt proportionality analysis, this framework is also more philosophically consistent than the levels of scrutiny because unlike the levels of scrutiny, proportionality analysis does not break down at extremes. To illustrate, assume that harms are rated on a scale of one to ten, and any harm above level five is always a compelling interest. Also, assume that the government is attempting to prevent a level six harm and the only way to do it is to create a level nine harm. Technically, using the levels of scrutiny, the prevention of a level six harm is a compelling interest, and the creation of the level nine harm is the least restrictive means of preventing the level six harm. Under the levels of scrutiny test, theoretically, the government could create a level nine harm to prevent a level six harm. On
the other hand, under proportionality analysis, a government could not create a level nine harm to prevent a level six harm.

Finally, a sixth reason for state courts to adopt proportionality analysis is that it is the best way to introduce the framework into American law. Since the Federal Constitution provides the “floor” for rights, even if state supreme courts adopt proportionality analysis, United States citizens in general, and minorities in particular, would still retain most all of the rights that they are accustomed to have under the levels of scrutiny. Adopting proportionality analysis at the state level would provide time for judges and lawyers to learn and apply the framework, and if the country continues to mature socially, eventually lead to the adoption of proportionality analysis at the federal level.

IV. RESPONSES TO ARGUMENTS AGAINST PROPORTIONALITY ANALYSIS IN STATE CONSTITUTIONAL LAW

There are four types of arguments against proportionality analysis in state constitutional law. First, there is one general objection to the framework. Second, there are objections to proportionality analysis in American constitutional law, both state and federal. Third, there are arguments in favor of a lockstep approach to state constitutional interpretation. Finally, there are objections to proportionality analysis that are specific to state constitutional law.

A. General Objection to Proportionality Analysis

There is one general objection to proportionality analysis that applies in almost all contexts; it is too vague. Justice Breyer voiced this criticism when he said that the framework “may seem in part subjective.” While it is true that proportionality analysis is more standard based than the levels of scrutiny, it does not exist in a vacuum. Rather, proportionality analysis
is the global standard for constitutional rights adjudication in the developed world. The quantity and quality of decisions applying proportionality analysis in a variety of negative and positive rights contexts act as a counterweight to the fact that the framework is vaguer than the levels of scrutiny. Furthermore, just like one could criticize proportionality analysis for being vague compared to the levels of scrutiny, one could similarly criticize the levels of scrutiny for being vague compared to absolutism. Like the example of the young child in the Introduction to this paper, as a nation matures, it will evolve from absolute rules to relative standards. The United States is arguably ready for proportionality analysis, at least at the state level.

B. Objections to Proportionality Analysis in American Constitutional Law

Some opponents of proportionality analysis in American constitutional law may argue that even if the framework is superior to the levels of scrutiny in most contexts, the levels of scrutiny are still superior to proportionality analysis in the American context.185 There are at least three possible arguments for this position. First, the levels of scrutiny evolved in America, and thus they are more suited to deal with American problems, such as racial discrimination against African Americans. Second, since proportionality analysis is foreign law, relying on it binds the nation to a framework developed by judges who never interpreted the U.S. Constitution. Finally, switching from the levels of scrutiny categories to proportionality analysis would create jurisprudential tumult.

In response, the first argument is really composed of one argument and evidence for that argument. Specifically, the argument is that the levels of scrutiny are superior to proportionality analysis in dealing with American problems, such as racism. The fact that these three tiers of review evolved in the United States is evidence for the argument. While this fact is important, it
is not determinative for at least two reasons. First, while there continues to be considerable racial division in the United States, conditions are significantly better than when the levels of scrutiny were formulated. Second, European countries and other developed nations that use proportionality analysis arguably do a better job at protecting minority rights than the United States, especially the rights of minority groups who are not suspect classes. Third, while proportionality is not as fatal as strict scrutiny, in many ways it is similar to intermediate scrutiny, which is still a taxing standard for the government. Finally, even if state high courts adopt proportionality analysis to interpret their state constitutions, minority groups that are suspect classes will continue to enjoy strict scrutiny protection from the U.S. Constitution.

A second objection to the use of proportionality analysis in American constitutional law is that American courts should not use foreign law. Justice Antonin Scalia may be the most well-known opponent to the use of foreign law to interpret the U.S. Constitution. For example, in his dissent in Thompson v. Oklahoma, in which the Supreme Court determined that the Eighth and Fourteenth Amendments prohibited the execution of a 15-year-old defendant, Justice Scalia stated that even if a view contradicts the uniform view of the rest of the world, “[w]e must never forget that it is a Constitution of the United States of America that we are expounding.” Similarly, in writing for the majority in Printz v. United States, he wrote that “comparative analysis [is] inappropriate to the task of interpreting a constitution.”

Justice Scalia is not alone in his opposition to foreign law. He is joined by Chief Justice John G. Roberts and Justices Samuel A. Alito, Jr. and Clarence Thomas. For example, at Chief Justice Roberts’ confirmation hearing, the future Chief Justice said: “If we’re relying on a decision from a German judge about what our Constitution means, no president accountable to
the people appointed that judge and no Senate accountable to the people confirmed that judge . . . and yet he’s playing a role in shaping the law that binds the people in this country.”

While taking a position opposite that of the current Chief Justice and three current Justices of the Supreme Court should give one pause, all types of foreign law are not the same. This paper is not proposing that American courts be governed by a foreign constitution or that the decisions of American courts be reviewable by a foreign court. Rather, this paper simply proposes that state courts adopt a framework that allows them to explicitly do what they are already doing implicitly. Both the proportionality framework and the levels of scrutiny have the same goal, i.e., figuring out when it is appropriate to restrict constitutional rights in a democracy. And, for the most part, the frameworks have similar results.

Given the de jure and de facto discrimination that existed in the United States during much of the 20th century, the more rule based levels of scrutiny were arguably the best approach for that time. That does not mean, however, that the levels of scrutiny are the best approach for all time. In many ways, by adopting proportionality analysis today, state supreme courts would be doing what Justice Stone did in Footnote Four, i.e., using a pragmatic test that is best suited for the present situation.

The third argument – that adopting proportionality analysis will create jurisprudential tumult – is probably the strongest argument against proportionality analysis in American law. To summarize this argument, adopting proportionality analysis will create significant, initial uncertainty on whether established rules and standards still apply. Not only does this have the potential to bog courts down in unnecessary litigation but it may even affect the economy. On the other hand, the argument that adopting proportionality analysis will create jurisprudential
tumult should not be overstated for the following reasons. First, both proportionality analysis and the levels of scrutiny lead to the same decisions most of the time. Second, in the few areas where the frameworks differ, e.g., gun control, the outcome may be determined by the U.S. Constitution rather than the state constitution. Finally, while there may be more litigation in the short term, there will probably be less litigation in the long term because the additional transparency and communication with the legislature will arguably lead to laws that are more likely to conform to the state constitution.

C. Arguments In Favor of a Lockstep Approach to State Constitutional Law Interpretation

While proportionality analysis should be viewed as an improvement to and not a radical departure from the levels of scrutiny, it is undeniable that the adoption of proportionality analysis would be a more significant change in state constitutional law than reaching a different conclusion than the Supreme Court on a particular issue, e.g., whether a “stop” occurs when a police officer’s blue lights come on.\(^{194}\) Since adopting proportionality analysis is a greater change, arguments in favor of a lockstep approach to state constitutional law are even more relevant to whether state supreme courts should use proportionality analysis to interpret their state constitutions. These arguments in favor of a lockstep approach to interpreting state constitutions are as follows: (1) States are not really distinct constitutional entities; (2) National values are important to constitutional interpretation; (3) Reliance on federal precedent preserves judicial resources; (4) Reliance on federal precedent minimizes confusion for state officials; and (5) Reliance on federal precedent fosters judicial restraint.\(^{195}\)

While there is some merit in these arguments, there are also weaknesses. For instance, one weakness common to all of these arguments is that state constitutions, unlike the Federal
Constitution, contain many rights that have no federal counterpart. Moreover, when it comes to positive rights, state constitutions have more in common with the constitutions of other nations than with the Federal Constitution.

In addition to this general criticism of a lockstep approach to state constitutional interpretation, there are also criticisms of the individual arguments themselves. For example, one weakness in the first argument that states are not distinct constitutional entities is that it takes an all-or-nothing approach to distinctiveness. While states are not completely distinct from the federal government, states are distinct to a certain extent because states are sovereign and their constitutions are a separate source of rights for their citizens. Furthermore, federalism itself demands that there be some distinction between the federal government and the states or else what would be the point of federalism? Moreover, many of the world’s “distinct constitutional entities” are subject to supranational and international law (e.g., German Constitutional Court decisions are subject to review by the European Court of Human Rights). It is therefore difficult to see why states must be completely distinct for state supreme courts to diverge at all from the Supreme Court.

This all-or-nothing approach also creates problems for the argument that since national values are important to constitutional interpretation, state supreme courts should follow the Supreme Court in lockstep. While it is true that national values are important to state constitutional interpretation, it is unclear why this demands a lockstep approach. While national values are a factor in interpreting state constitutions, they are just one of many factors, including the text of the constitution, original intent and meaning, the values of the citizens of that state, and the economic conditions of the state. Thus, while national values may factor into a
state court’s decision and favor a lockstep approach, it does not demand a lockstep approach because it is just one of many considerations.

The third argument in favor of a lockstep approach to state constitutional law – that it conserves judicial resources – is more compelling than the first two arguments. Divergence forces judges and attorneys to master more law and will lead to longer briefs, less depth in oral arguments, and possibly a backlog in cases.\textsuperscript{201} Furthermore, some judges and attorneys who spread themselves too thin may fail to actually master all of the law.\textsuperscript{202} Moreover, overworked judges may begin to converge these different systems into one, corrupting both systems in the process. In addition, these dangers are heightened in the case of using proportionality analysis in state constitutional law because it is not just that the conclusions are different but that the methods of getting to those conclusions are different.

While not seeking to understate these dangers, as has been emphasized earlier, the two systems are not \textit{that} different. The primary difference between the two systems is that judges who use proportionality analysis explicitly weigh a law’s harms and benefit, whereas judges who use levels of scrutiny implicitly weigh a law’s harms and benefits. As far as attorneys are concerned, they already focus on balancing.\textsuperscript{203} In addition, if both frameworks are used, attorneys will likely focus on whichever framework provides them with the strongest argument for a particular issue. For example, an attorney challenging a law that is subject to rational basis scrutiny under the U.S. Constitution will rely on proportionality analysis and the state constitution. On the other hand, an attorney challenging a law that is subject to strict scrutiny under the U.S. Constitution will rely on the U.S. Constitution.
The fourth argument – reliance on federal precedent minimizes confusion for state officials – is arguably less of a concern with proportionality analysis. Regarding bright line rules, e.g., when does a stop occur, state officials will likely just memorize whichever rule provides the most protection for the state’s citizens. So, the fact that the courts reached that rule by a different method does not increase the workload of many state officials. Furthermore, to the extent it increases the workload of legally sophisticated state officials, they are likely more intellectually capable of handling that increased workload. Moreover, the transparent nature of proportionality analysis may actually decrease their workload since they will know exactly what state justices and judges are looking for when they balance the harms and benefits of government actions. Also, even if there is a slight increase in the workload of state officials, this is not a sufficient reason to abdicate the court’s role to protect constitutional rights.

The fifth and final argument in favor of a lockstep approach is that reliance on federal precedent fosters judicial restraint. The problem with this argument is that judicial restraint is not good for its own sake. It is only good for some other reason. In addition, in some sense, proportionality analysis restrains judges more than the levels of scrutiny. Specifically, as has been mentioned previously, proportionality analysis forces judges to explicitly consider the proper factors in their correct contexts. This discipline is arguably more “restraint” than implicitly determining that a certain decision is just and then proceeding to tell no one the reasons for that decision.

D. Objections to Proportionality Analysis Specific to State Constitutional Law

Some objections to proportionality analysis are specific to the state constitutional law context. There are at least three such objections. First, some may argue that the framework is
too taxing of a standard for state constitutional law because of the residual plenary authority that states have. On the other hand, others may argue that proportionality analysis is too lenient of a standard for state constitutional law because of direct democracy ratification. A third and final objection is that because state constitutions were often developed with the Federal Constitution in mind, proportionality analysis goes against the original intent of the framers of the various state constitutions.

Regarding the first argument, opponents of proportionality analysis note that while the federal government can only act where authorized by the Federal Constitution, a state government may act in any way not prohibited by the Federal Constitution or the state constitution. Thus, since the state government has broad authority to act, proportionality analysis is too taxing of a standard to review the government’s actions. The problem with this argument, however, is that proportionality analysis is not concerned with when a government can act in general but instead is only concerned with when a government can restrict a constitutional right. Thus, the fact that a state government has broader authority to act than the federal government is informative at best and irrelevant at worst to proportionality analysis in state constitutional law.

In regards to the argument that proportionality analysis is too lenient of a standard because of direct democracy ratification, opponents of proportionality analysis could add that since many amendments to state constitutions are more recent than amendments to the U.S. Constitution, a literal reading of the amendments is more likely to reflect the will of the people. Moreover, while it is one thing for judges to limit centuries old constitutional rights that were ratified by long-dead representatives, it is another thing for judges to reinterpret a recent constitutional right that was ratified by living citizens. In response to this line of argument, one
should consider that proportionality analysis takes these factors into account when it weighs the harm and benefits of a government action. Thus, a judge should consider whether allowing the government to restrict a recent constitutional right ratified by the voters would cause so much political turmoil that the harm of the government action outweighs its benefit. 209 Finally, adopting proportionality analysis does not preclude the citizenry from explicitly protecting a constitutional right with the levels of scrutiny or as an absolute right if they so desire.

A third objection to proportionality analysis in state constitutional law is that because many state constitutions were developed in light of the Federal Constitution, proportionality analysis goes against the original intent or meaning of the framers of the state constitutions. In response to this objection, it is useful to keep in mind that the levels of scrutiny used to interpret the Federal Constitution only go back to 1938 with Justice Stone’s famous footnote in *United States v. Carolene Products Co.* 210 By 1938, forty-eight states already had state constitutions. Thus, at least the initial framers of the vast majority of state constitutions did not intend for their constitutions to be interpreted with our modern levels of scrutiny.

On the other hand, one could respond that while the framers of the state constitutions did not intend for their constitutions to be interpreted with levels of scrutiny, supporters of more recent state amendments did intend for their amendments to be interpreted by the levels of scrutiny. While it is undoubtedly true that some of the supporters of many state amendments intended their amendments to be interpreted with levels of scrutiny, it is also true that many supporters of state constitutional amendments intended for their provisions to be interpreted absolutely. Furthermore, others may have desired for their amendments to be interpreted with a just and reasonable standard. Moreover, others may have not considered the issue at all. This
illustrates the general difficulty with trying to determine an original intent that is not explicitly stated.

As was mentioned earlier in this subsection, adopting proportionality analysis does not preclude other types of review. The people are free to enshrine everything from an eternal, absolute right to a right subject to rational basis review in their constitution. However, for those times when the people do not explicitly state the intensity of review, proportionality analysis is almost always the best framework for determining the constitutionality of a government action that restricts a state constitutional right.

**CONCLUSION**

This paper has argued that state supreme courts should use proportionality analysis to determine the constitutionality of laws that restrict state constitutional rights. By adopting proportionality analysis, state supreme courts would join high courts from throughout the developed world in explicitly balancing the harms and benefits of government actions that restrict constitutional rights. This explicit balancing would not only improve the analytical soundness of decisions but would also increase communication between the state high courts and lower courts, other branches of government, academia, and the public. Finally, if proportionality analysis is as successful at the state level as it has been throughout the world, its adoption at the state level will pave the way for its adoption by the Supreme Court.

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1. See Aharon Barak, Proportionality: Constitutional Rights and Their Limitations 27-32 (2012). As Professor Aharon Barak notes, scholars are divided on whether a right without limitations exists. Id. at 28. While the debate over absolute rights is often couched in extreme hypotheticals (e.g., should a son have a right not to torture his mother even if it would prevent a terrorist group from detonating a nuclear bomb in a peaceful city), the theoretical nature of these questions has “unfortunately turned very practical due to the increasing number of terrorist attacks on peaceful communities around the world.” Id. at 29.


3. See id.
5. Bendor & Sachs, supra note 4, at 31.
7. For example, the German Constitutional Court has held that a law that allows the military to shoot down an airplane in a situation like 9-11 violates the right to human dignity, even if the shooting down the airplane would save more lives. See Bendor & Sachs, supra note 4, at 32.
   On the other hand, even if a government did not have the right to restrict the absolute right to human dignity, a government may have power to restrict the absolute right to human dignity in an extreme situations. Since an extreme situation is unlikely to arise, and even if it does, the government would have the power to restrict the absolute right to human dignity, the nation gains the benefits that come from absolute values and rights while giving up almost nothing.
9. One could argue that if the child was perfect at maximizing honesty, he would know that his peers could “not handle the truth” of maximizing honesty, and thus, he would lie to the other children and tell them “not to lie.” As noted above, absolutism breaks down at extremes, and this is an extreme.
10. See generally Joyce F. Benenson, Do Young Children Understand Relative Value Comparisons?, PLOS ONE (Apr. 15, 2015), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4398488/. Even a value such as human dignity does not need to be an absolute right under a perfectly mature system. From a utilitarian perspective, there are times when the human dignity of one person should be limited to save the human dignity of many people. It is only because of the misuse of the relative right to human dignity that nations have to make human dignity an absolute right. In this sense, nations are like the young child with respect to human dignity.
11. See generally BARAK, supra note 1, at 30.
12. Id. at 31.
13. Id.
15. BARAK, supra note 1, at 31. One could argue that for rights that are explicitly absolute in a constitution, interpretive tools cannot be used to turn this type of absolute right relative. To a certain extent, this is true. For example, a court cannot use categories or balancing to turn an explicit absolute right relative. On the other hand, a court can use “definitional balancing” to narrow the scope of the absolute right. With that said, whether a court should do this is another question.
16. BARAK, supra note 1, at 546.
18. See BARAK, supra note 1, at 546-47.
19. See generally BARAK, supra note 1, at 509-12.
20. United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938). Footnote 4 states: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.” Id.
22. These prongs are quite similar to prongs one through three of proportionality analysis. Like the proper purpose prong of proportionality analysis, the governmental interest prong of the levels of scrutiny categories looks at the nature of the interest and its urgency. Similarly, like the rational connection test of proportionality analysis,
the means prong of the levels of scrutiny categories requires that there be a rational connection between the governmental interest and the chosen means to achieve that interest. Finally, strict scrutiny’s least restrictive means mirrors proportionality analysis’s necessity prong.

The only prong of proportionality analysis explicitly missing from the levels of scrutiny is proportionality stricto sensu. However, some argue that judges engage in an implicit balancing anyway. See Stephen Breyer, The Court and the World: American Law and New Global Realities 257 (2015).

23. See Chemerinsky, supra note 21, at 551-54.
24. See id.
25. See id.
26. For example, a law subjected to rational basis scrutiny can have severely inefficient means and yet still be upheld as constitutional. On the other hand, a law subjected to strict scrutiny may have an important objective and highly efficient means and yet still be held unconstitutional.

27. Julian Rivers, The Presumption of Proportionality, 77 Modern L. R. 409, 409 (2014). Currently, the European Union, Western European states, the United Kingdom, Ireland, Canada, New Zealand, Australia, South Africa, South Korea, and Hong Kong all use proportionality analysis. See Barak, supra note 1, at 178-201. Moreover, proportionality analysis is the “general concept of international law.” Id. at 201. In addition, a number of countries that have not adopted proportionality analysis in its entirety use proportionality principles in certain areas of the law (e.g., interpreting the 8th Amendment to the U.S. Constitution). Id. at 197-209.
28. Id. at 458 (citation omitted).
29. See id.
30. See Francisco J. Urbina, A Critique of Proportionality, 57 Am. J. Juris. 49, 49 (2012); Barak, supra note 1, at 131.
31. Barak, supra note 1, at 246, 315.
32. Id. at 249-51. There are two components to proper purpose – correct nature and sufficient urgency. Id. Regarding the first component, the purpose must be one that may justify the limitation of a constitutional right. Id. Regarding the second component, even if the purpose may justify the limitation of the constitutional right in the abstract, it must also have a sufficient degree of urgency to justify the limitation. Id.

The proper purpose prong does not consider the harm caused by the purpose, only whether it is legitimate and of sufficient urgency. Id.
33. Id. at 303-06. The suitability prong does not consider whether there are more efficient means that are capable of achieving the law’s proper purpose. Id. at 304.
34. Id. at 316. One could question the wisdom of the necessity or least restrictive mean prong in cases where overturning the law would cause more harm than good. While it is nice to think that the legislature can go back to the drawing board and craft a law with more efficient means, sometimes that is not politically feasible.

On the other hand, even if striking down a beneficial law on the basis of the necessity prong may cause more immediate harm than benefit in some situations, this requirement may still produce more benefit overall because the legislature’s awareness of this requirement will likely influence how it writes legislation.
35. Id. at 339.
36. Breyer, supra note 22, at 257.
37. See generally Barak, supra note 1, at 179-210.
38. Barak, supra note 1, at 463.
39. Like the rule “don’t lie,” which is appropriate for a young child, this paper recognizes that a “fatal in fact” type of review may be necessary for some nations to protect minorities. However, just like as the child matures he no longer needs the absolute value, as the United States matures it may no longer need this quasi-absolute level of review.
41. Evan Andrews, 8 Things You May Not Know About Hammurabi’s Code (Dec. 17, 2013), http://www.history.com/news/history-lists/8-things-you-may-not-know-about-hammurabis-code. At first glance, the lex talionis principle of an eye for an eye is the most literal form of proportionality. However, lex talionis is rudimentary because it fails to take into account the variables influencing the original offense.
42. BENJAMIN STRAUMANN, ROMAN LAW IN THE STATE OF NATURE: THE CLASSICAL FOUNDATIONS OF HUGO GROTIO'S NATURAL LAW 143-44 (Belinda Cooper trans., 2015).
44. Torkel Brekke, The Indian Tradition, in THE ASHGATE RESEARCH COMPANION TO MILITARY ETHICS 421 (James Turner Johnson & Eric D. Patterson eds., 2015).
45. Tessa J. Bartholomeusz, In Defense of Dharma: Just War Ideology in Buddhist Sri Lanka, in THE ETHICS OF WAR IN ASIAN CIVILIZATIONS: A COMPARATIVE PERSPECTIVE 151-52 (Torkel Brekke ed., 2006). Like in other religions, there are Buddhists who believe that war is never just. Id. at 153. This, however, does not negate the point that for Buddhists who believe in a just war, that war must be proportional. Id. at 151-52.
Given that many people who oppose all war support a criminal justice system, one wonders if their conscious or unconscious objection to war is the potential (or inevitability) that it will be disproportionate, unlike a criminal justice system. Granted, a number of criminal justice systems are also disproportional. Perhaps, the difference is in the likelihood that it will be disproportionate and the extent to which it is disproportionate.
46. See Jonathan K. Crane, With a Mighty Hand: Judaic Ethics of Exercising Power in Extraordinary Warfare, in ENEMY COMBATANTS, TERRORISM, AND ARMED CONFLICT LAW: A GUIDE TO THE ISSUES 184, 190 (David K. Linn ed., 2008) (stating that Judaism recognizes the proportionality principle in the realm of self-defense); See generally Norman Solomon, Judaism and the Ethics of War, 87 INT’L REV. RED CROSS 295, 295-99 (2005) (stating that while there is some overlap between Talmudic Judaism’s concept of war and the Roman notion of just war, the Talmudic rabbis were more concerned with whether war was obligatory or optional rather than just or unjust).
48. See FARHAD MALEKIAN, PRINCIPLES OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE SEARCH 308-09 (2011) (stating that proportionality is an important principle in Islamic international criminal law and noting that Ali, who is held in high respect by both Sunni and Shia Muslims, told Muslims not to strike a attacker with a weapon other than one used against oneself and not to strike an attacker more times than one was struck).
49. Luke 6:31. While the New Testament states the Golden Rule in directive form, the rule did not originate with the New Testament. Consider, for example, the Babylonian Talmud, Shabbat 31a, which states the rule in prohibitive form: “That which is hateful to you, do not do to your fellow.” Additionally, one can find similar statements of the Golden Rule from ancient religions throughout the world. See Jonathan Glenn Granoff, Interfaith Imperatives Post 9/11: Sovereign Value of the Golden Rule, in PERSPECTIVES ON 9/11 158-59 (Yassin El-Ayouty ed., 2004); see generally THE GOLDEN RULE: THE ETHICS OF RECIPROCITY IN WORLD RELIGIONS passim (Jacob Neusner & Bruce Chilton eds., 2008).
63. Id.
65. See Barak, supra note 1, at 176.
66. See id.

68. Id.
69. Id.
70. Id.
71. Id.
72. Id.
73. See Barak, supra note 1, at 179.
74. See id. (citation omitted).
75. See id.
76. Germany’s constitution is called the Basic Law. See generally id. at 267.
77. See Barak, supra note 1, at 179. In Germany’s constitution, all rights are relative except for the right to human dignity. Id. As Barak notes, even absolute constitutional rights may be restricted, although this may require a new constitution. Id. at 466.
79. Id.
80. Id. at ¶ 22.
81. Id.
82. Id.
83. Id. at ¶ 3-20. Included in the court’s analysis was a discussion of Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005), cert. denied, 126 S. Ct. 575 (2005), in which the Seventh Circuit Court of Appeals determined that the Supreme Court’s decision in Lawrence v. Texas, 539 U.S. 558 (2003), which legalized sodomy by consenting adults, did not legalize all sexual conduct by consenting adults. BVerwG, 2 BvR 392/07 at ¶ 17.
84. Id. at ¶ 33.
85. BVerwG, 2 BvR 392/07 at ¶ 29.
86. See Id. at ¶ 29.
87. Id. at ¶¶ 9-10. The protection of family is itself justified by empirical studies that show its importance to the psychological wellbeing of children. Id.
88. Id. at ¶ 10.
89. Id. at ¶¶ 21-23.
90. Id. at ¶ 24.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id. at ¶¶ 41, 51.
96. Id. at ¶¶ 48, 51.
97. Id.
98. Case of Stübing v. Germany, no. 43547/08, ¶ 63, ECHR 2012. In reviewing the GCC’s decision and lengthy opinion, the European Court of Human Rights (“ECHR”) noted that the German court had carefully weighed the arguments. Id. at ¶ 66. Given the harm that incest may cause and the lack of agreement between European Union States on the issue, the ECHR reasoned that the government has a wide margin of appreciation in confronting the issue. Id. at ¶¶ 61, 66.

Interestingly, in September 2014, the German Ethics Council recommended decriminalizing incest, arguing that the fundamental right to sexual self-determination carried more weight than the abstract protection of the family. Lizzie Dearden, German Ethics Council Calls for Incest Between Siblings to Be Legalised by Government, UK Hum. RTS. Blog (Wed. 24, 2014), http://www.independent.co.uk/news/world/europe/german-ethics-council-calls-for-incest-between-siblings-to-be-legalised-by-government-9753506.html. Regardless how this particular
issue is resolved, the value of judicial transparency to creating a dialogue between the academy, the legislature, and
the judiciary is apparent. See generally BARAK, supra note 1, at 462-66.

99. BVerwG, 2 BvR 392/07, at ¶ 44.
101. Dieter Grimm, Proportionality in Canadian and German Constitutional Jurisprudence, 57 UNIV. TORONTO
L. J. 383, 383 (2007). Canada’s constitution is called the Canadian Charter of Rights and Freedoms. Id.
103. Id.
104. Id.
105. Id. at 142-43.
106. Id. at 136.
107. Id.
108. Id.
109. Id. at 138-39.
110. Id.
111. Id. at 139.
112. Id.
113. Id. at 141-42.
114. See E. THOMAS SULLIVAN & RICHARD FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW:
CONTROLLING EXCESSIVE GOVERNMENT ACTIONS passim (2009)
115. See id. at 67-89.
116. See id. at 129-52.
117. See id. at 53-65.
119. See SULLIVAN & FRASE, supra note 114, at 55; see also Mark S. Kende, Free Exercise of Religion: A
120. Casey, 505 U.S. at 874-78. On the other hand, one could argue that the undue burden test is a threshold test
rather than a balancing test because there are burdens so great on a woman’s right an abortion that almost any
amount of information cannot overcome these burdens. For example, suppose a state required women to read and
comprehend all of the latest medical and psychological information about abortion. Assuming that this was
possible, it would make the woman’s choice significantly more informed. However, it is almost certain that the
Supreme Court would strike down such a policy.

In response, one could argue that the above example really shows proportionality principles at work. Even
assuming that, hypothetically, it was practical for all women seeking an abortion to read and comprehend all of the
relevant literature, at some point, there would be severe diminishing returns to this requirement. These diminishing
returns would decrease the value of continuing to study the literature to the point where it made no sense as an
opportunity cost. There would be a plethora of better ways to spend one’s time. In that sense, the burden would no
longer be proportional, and, thus, would be an undue burden.

On the other hand, if we could really know all of the consequences of aborting a child (e.g., would the child
be the next Einstein or Dahmer), one could see a court holding that the three month requirement would be worth it.
In fact, one could even see the Supreme Court violating human rights and forcing someone to have a child. For
example, suppose the Court knew with perfect certainty that a child would one day cure all cancers and that this
would not have other negative side effects (e.g., increased global warming from overpopulation). Also, suppose that
the Court knew that if this child was not born, the world would have to wait two centuries before another person
with this capability would be born. At least from a utilitarian perspective, the Court should force the mother to have
the child. Now, I suppose that one could argue the negative side effects of forcing someone to have a child or
forcing one person but not others to have a child would outweigh a cure for all cancers. However, even assuming
that it does, one only need to assume that this child would do even more grand things in order to eventually reach a
point where the Court should refuse to uphold the right to privacy (e.g., the child would discover immortality for all
conscious beings and a way for life to populate and thrive throughout the entire universe and multiverse and prevent
a devious human from discovering immortality and choosing to torture all conscious beings for eternity).
121. See SULLIVAN & FRASE, supra note 114, at 58-60.
123. Id. at 292, 301-02.
124. See SULLIVAN & FRASE, supra note 114, at 61.
Arguably, most moral positions have non-moral justifications. From an evolutionary perspective, religion exists not because its teachings are true but because it provides an evolutionary benefit. See generally Alix Spiegel, Is Believing in God Evolutionarily Advantageous, NPR (Aug. 30, 2010, 9:00 PM), http://www.npr.org/templates/story/story.php?storyId=129528196. While it is beyond the scope of this paper to analyze the extent to which religion and morality is a “mask” for more mundane differences between people groups, it is hard to argue that there is no rational, non-religious reason behind morals legislation. That is, unless, one is actually balancing the benefit and harm within the rational basis. But, if one is balancing within the rational basis test, why not do it explicitly? San Antonio Indp. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting).

To “simplify,” some absolutes are more absolute than other absolutes. An example of this type of right is the German right to human dignity. This type of right, however, can be changed by adopting a new constitution or narrowing the scope of the right through definitional balancing. If the German right was changeable by constitutional amendment, it would be an example of this type of right.

As mentioned in the introduction, even “absolute” rights may be limited by definitional balancing. Depending on one’s perspective, the Washington Supreme Court narrowed the ERA’s absolute right against gender discrimination by stating that “[t]he absolute mandate of equality does not, however, bar affirmative governmental efforts to create equality in fact.” Id. at 1102 (citing Marchioro v. Chaney, 582 P.2d 487, 491-93 (Wash. 1978)). One could argue that this policy is merely correcting past discrimination by the Washington government. Of course, it is likely that the reason behind this policy is to correct past and current discrimination by the Washington government and private citizens, which brings up the interesting discussion of whether and why discrimination by private citizens should affect what is equality under the law.
determined that the statute failed the intermediate scrutiny test and was thus unconstitutional. 152

In applying strict scrutiny to the facts of the case, the court first determined that there was a compelling interest for the curfews. 153 Second, the court was deeply troubled by the fact that the curfews imposed criminal sanctions “for second and subsequent violations of the curfew” because these criminal sanctions were “antithetical to the stated interests of protecting juveniles from victimization.” 154

However, while the curfews made it past the compelling interest prong of the strict scrutiny test, they did not make it past the narrowly tailored prong of the test for two reasons. 155 First, the court stated that the curfews were too broad, prohibiting legal, wholesome activities from minors who have the permission of their parents. 156 Moreover, the curfews applied throughout the cities without “any showing of a city-wide need.” 157 158

In applying the first prong of intermediate scrutiny, whether the law furthers an important interest, the court noted that the Supreme Court, in Lawrence v. Texas, 539 U.S. 558, 582 (2003), made it clear that moral disapproval did not justify a law that discriminates against groups of people. 159 Regarding the government’s interest in “responsible procreation and child-rearing,” the court noted that this interest was “not supported in the history of New Mexico’s marriage legislation.” 160 161 Furthermore, while this interest is important, the court stated that it failed “to see how forbidding same-gender marriages will result in the marriages of more opposite-gender couples for the purpose of procreating, or how authorizing same-gender marriages will result in the marriages of fewer opposite-gender couples for the purposes of procreating.” 162 In addition, the court also noted that the prohibition on same-sex marriage was under-inclusive “because the statutes do not prohibit opposite-gender couples from marrying, even if they do not procreate because of age, physical disability, infertility, or choice.” 163 Finally, the court was also confused by what was even meant by “responsible procreation,” as if childless same-gender couples recklessly go through “lengthy and intrusive adoption procedures or assistive reproduction.” 164

For these reasons, the court determined that the statute failed the intermediate scrutiny test and was thus unconstitutional. 165

The Tennessee Supreme Court’s analysis in Gallaher v. Elam, 104 S.W.3d 455 (Tenn. 2003), is an example rational basis scrutiny’s application. In Gallaher, the court determined that a child support guideline that treated “obligors who have children for whom there are no orders of support differently from obligors who have children subject to court-ordered support” did not violate the Tennessee Constitution. 166

The case involved a married doctor with children who conceived another child through an affair. 167 The state child support guidelines based the doctor’s child support obligation solely on his income and did not take into account his other children. 168

Although the doctor argued that strict scrutiny should apply to the case, the court rejected this argument because the guidelines did not disadvantage a suspect class nor interfere with a fundamental right. 169 And, after determining that intermediate scrutiny did not apply either because the guidelines did not disadvantage a quasi-suspect class, the court applied rational basis scrutiny. 170

In applying rational basis scrutiny, the court noted that the state legislature is given considerable latitude in determining what is “different” and what is “the same,” and thus, the legislature “may discriminate in favor of a certain class, as long as the discrimination is founded upon a reasonable distinction or difference in state policy.” 171 (citation omitted). Moreover, the legislature does not need to state its rational basis for discriminating against a certain class, so long as the court “can conceive of some rational basis.” 172 (citation omitted). Applying this lenient standard to the guidelines in question, the court reasoned that it made sense for the guidelines to only take into account children with orders of support so that the court could ensure “that the obligor is legally liable for the amount of the child support claimed as a deduction.” 173

In addition, the court noted that children who live with the obligor benefit from household expenditures, while children who do not live with the obligor do not receive this benefit. 174 For these reasons, the court upheld the guidelines as constitutional. 175


Id. at 871.
157. *Id.* at 872.
158. *Id.* at 843 (citing State v. Ludlow Supermarkets, Inc., 448 A.2d 791, 795 (Vt. 1982)).
159. See generally *Id.* at 871.
160. *Id.* at 879 (citation omitted).
161. *Id.* at 878.
164. Alaska Civil Liberties Union, 122 P.3d at 789.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. See generally PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING passim (Grant Huscroft et al. eds., 2014); MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE passim (2013).
177. Discriminatory laws not only cause harm to the individuals discriminated against but also to the broader society because law shapes public opinion. Thus, upholding discriminatory laws “teaches” the public that it is acceptable, or at least that it is not too bad, to discriminate against certain minority groups. While this is often bad enough, a discriminatory attitude against one minority group may cause discrimination against other minority groups. As Dr. Martin Luther King said, injustice anywhere is injustice everywhere. WOLFGANG MIEDER, “MAKING A WAY OUT OF NO WAY”: MARTIN LUTHER KING’S SERMONIC PROVERBAL RHETORIC 141 (2010). Thus, discriminatory laws may cause significant harm to society.
178. As discussed in section two of this paper, at the very least, discrimination against nontraditional groups likely has an effect on property values.
179. By rational, this paper simply means that there was a legitimate government purpose, e.g., maintaining property values, and the means were rationally related to that purpose, e.g., preventing non-traditional groups from moving to the area because that might affect property values. In some sense, laws’ whose harms significantly outweigh their benefits are not rational. That, however, is not the sense which the rational basis test uses the word “rational.” If it is, then courts are implicitly balancing in the wrong context.
180. See generally Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797, 844 (2011). In fact, even if the Supreme Court tried to analyze the balancing issue completely, it is difficult to do so if balancing is not explicit so that attorneys on both sides can explicitly brief and argue the issue.
181. See BARAK, *supra* note 1, at 463.
182. An area where this happens is flood prevention. Should a government flood a suburb or farmland? Technically, the prevention of both is a compelling interest. Unlike proportionality analysis, the levels of scrutiny provide little guidance on what to do.
One could respond that if the government had to create a level nine harm to prevent a level six harm, then preventing the level six harm would not be proportional. However, this simply inserts proportionality stricto sensu
into the compelling interest test. And, as Justice Breyer argued, if judges take into account proportionality, it is better that this is done explicitly rather than implicitly. Breyer, supra note 22, at 257.

183. In this paper, “American” refers to both the U.S. federal government and the individual U.S. state governments. This paper recognizes that normally “America” and “American” refer to a much broader category of people.

184. Breyer, supra note 22, at 257.

185. See footnote 183 for how “American” is defined in the context of this paper.

186. See generally Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness passim (2012); Margaret Myers, Race Relations in the U.S. at a Low Point in Recent History, New Poll Suggests, PBS NEWSHOUR (Sept. 21, 2015, 5:00 AM), http://www.pbs.org/newshour/rundown/race-relations-low-point-recent-history-new-poll-suggests/; Jamelle Bouie, Still Separate and Unequal: Why American Schools Are Becoming Segregated Once Again, SLATE (May 15, 2014, 4:37 PM), http://www.slate.com/articles/news_and_politics/politics/2014/05/brown_v_board_of_education_60th_anniversary_america_s_schools_are_segregating.html (noting that “minority students across the country are more likely to attend majority-minority schools than they were a generation ago”).

187. For starters, de facto segregation is arguably better than de jure and de facto segregation. Moreover, while there is still too much de facto segregation in the United States, there is less of it than there was when there was also de jure segregation. Moreover, while it is cliché, the President of the United States is black. As likeable as President Obama is, it is unlikely that he would have been elected before the Civil Rights Movement. The point is that while there is still too much suffering on the account of race and discrimination, race relations are still drastically better than they were for much of the 20th century.

188. One may argue that this protection is not necessarily due to proportionality analysis and that until recently Europe has not had levels of diversity as the United States has had. While a full-blown comparative analysis between the United States and Europe on the topic of racial discrimination and its causes is obviously outside the scope of this paper, one should note that it is not simply the decisions of the nation’s highest courts that shape public opinion but also the reasoning behind those decisions. Moreover, past decisions that emphasize liberal values, such as diversity and equality, will be up for review by future generations. Furthermore, future generations will have their own unique decisions to make (e.g., genetic engineering), and they will look for guidance from not only the decisions of past generations but also the reasoning behind those decisions. Thus, while it is impossible to say whether proportionality analysis is superior to the levels of scrutiny at protecting minorities, or vice versa; generally, explicit reasoning is preferable to implicit reasoning.


193. Id.

194. If nothing else, differences on particular issues are easier for government officials to apply to the situation. For example, it is not difficult for a police officer to apply the rule that in Tennessee he “stops” a car when he flashes his blue lights, even though this is not the Federal rule. See generally State v. Williams, 185 S.W.3d 311 (Tenn. 2006); State v. Randolph, 74 S.W.3d 300, 335-37 (Tenn. 2002). On the other hand, the fact that changing a framework involves considerable nuance and fact specific inquiry will make it more difficult for government officials to learn and apply both proportionality analysis and the levels of scrutiny. With that said, regardless of which system courts use, courts will continue to employ many bright lines rules. Thus, it will not be that different for most government officials.


196. Id. at 1494.


199. See generally Usman, supra note 195, at 1460-61.
A state supreme court may want to take into account the behavior and values of citizens in other states when interpreting its constitution. For example, all other things being equal, a state prefers that its laws be uniform with its neighbors. This is for a variety of reasons, not the least of which is economic.

For example, suppose an attorney gets 30 minutes to argue his positions in front of the state supreme court. An attorney with one main argument can go into more depth than an attorney with two equally important arguments. As the old saying goes, a jack of all trades is a master of none.

See generally Ross Guberman, Point Made: How to Write Like the Nation’s Top Advocates 32-38 (2d ed. 2014) (showing how attorneys can best argue that their position is just “for the parties, the public, and the development of the law”) (quoting William Eich, Writing the Persuasive Brief, 76-FEB Wis. Law. 20, 57 (2003)).

This already occurs under the present system. In Tennessee, a police officer knows that as soon as he turns his blue lights on he has “stopped” the car under state law. See generally State v. Williams, 185 S.W.3d 311 (Tenn. 2006); State v. Randolph, 74 S.W.3d 300, 335-37 (Tenn. 2002). Since the state constitution provides more protection for the citizen than the U.S. Constitution, there is no need for him to also learn the Federal rule (there may be some need to learn both rules because of the federal and state evidence rules).

Examples include instances where judicial activism would lead to a harmful conclusion or where the appearance of judicial restraint is needed.

Usman, supra note 195, at 1478.

Id. at 1481.

Id. at 1478.

One could object that it is improper for political pressure to influence constitutional decisions. However, political pressure already does influence constitutional decisions. And, as Justice Breyer pointed out, it is better to state the reasons for the decision on the record so that they can be reviewed and criticized.

Still, one could argue that even if political pressure influences decisions, it may not be best to state this on the record because it could delegitimize the court. To use a colloquial phrase, we may not want to know how the sausage is made. Or, rather, we may not want the average citizen to know “how the sausage is made.”

However, the above argument would be stronger if it were not for the fact that most first world countries use proportionality analysis and the citizens of those countries continue to view their courts as legitimate. In addition, given that judges are in many ways masters of rhetoric, it is not as if judges will be writing opinions that state they are caving in because of political pressure. Rather, their opinions will emphasize the importance of a right to the people. Thus, it is not as if the judiciary is going to be feeding soundbites to those that seek to criticize the courts.