

Memo to Participants in the NYU Colloquium in Global & Comparative Public Law
From: Vlad Perju
Re: Paper “Proportionality and Freedom: An Essay on Method in Constitutional Law”

Please find enclosed my colloquium paper. This paper is part of a larger project on cosmopolitanism in constitutional law, whose general outlines I first sketched out in a companion article, “Cosmopolitanism and Constitutional Self-Government” (*I-CON* (2010), vol. 8(3): 326-353). The larger project is to articulate the ideal of cosmopolitanism in law in a bottom-up fashion by revisiting the normative foundations of domestic constitutional orders committed to equality and freedom. The object of study is the internal configuration of the independent republics that could form a Kantian world confederation. Since the enclosed colloquium paper builds an argument on constitutional method on these normative foundations, I briefly state them below:

1. The legitimacy of a political order is in large part a function of that order’s responsiveness to the claims of citizens to institutional recognition and/or action (or inaction); degrees of legitimacy are, in part, a function of normative responsiveness. In a democracy, citizens are seen as reasonable sovereigns and “the source of valid claims” (Rawls) on state institutions.
2. As Joel Feinberg wrote, “what is called ‘human dignity’ may be simply the recognizable capacity to assert claims.” Distortion effects occur when citizens formulate their claims and when institutions translate and process them; these effects threaten to undermine the legitimacy of the political order. Citizens translate their claims into the language of the institution on which, by right, they are entitled to press claims. Institutional responsiveness to a citizen’s claim is a statement about that citizen’s social standing.
3. Salient features of modern law make inevitable some distortions of constitutional claims. However, distortion effects widen when impermissible social asymmetries of freedom and equality become ossified in constitutional doctrine and discourse.
4. Political legitimacy and the promise of self-government depend on the capacity of the constitutional system to build self-corrective mechanisms as means for retaining its responsiveness capacity. Constitutional systems minimize distortion effects by developing mechanisms for deprogramming impermissible social asymmetries from legal doctrine and discourse. Determinations about legitimacy are judgments of degree that can fine-tune to the existence and efficiency of such mechanisms.

The ICON paper used this framework to argue that openness to the experiences in self-government of other political communities, for instance in the form of using foreign law in constitutional interpretation, is one strategy of self-correction. The authority of foreign law is thus grounded in the commitment to freedom and equality. The paper enclosed uses the same jurisprudential framework to discuss the problem of method in constitutional law.

I look forward to our discussion.

PROPORTIONALITY AND FREEDOM

-AN ESSAY ON METHOD IN CONSTITUTIONAL LAW -

Vlad Perju

§ Introduction

The advent of proportionality in constitutional adjudication is one of the most significant developments in contemporary law. Proportionality has become the “universal criterion of constitutionality.”¹ Its spread around the world has led scholars to describe it as the “most successful legal transplant of the twentieth century.”² However, this success is quite confounding. Proportionality’s empowerment of judges seem to bring it into tension with the ideals of democratic rule. Furthermore, this method does not guarantee the protection of constitutional rights. It is a tool that courts use to decide when conflicting public or private interests may override constitutional rights. In the proportionality machinery, these rights become mere considerations in the process of judicial reasoning – which is admittedly “not much.”³ Nevertheless, ours is the “era of proportionality.”⁴

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¹ Beatty, *The Ultimate Rule of Law* 162 (2004).

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

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

⁴ Aharon Barak, *Proportionality and Principled Balancing*, in *Law & Ethics of Human Rights*, vol. 4 (1): 1-18, 14.

Proportionality has been embraced from Germany, where it originated, to Brazil and India, to new democracies such as South Africa and in Eastern Europe and even to supranational courts like the European Court of Human Rights. With the exception of American law⁵, proportionality has colonized the imagination of constitutional jurists around the world to become “a foundational element of global constitutionalism.”⁶

No account of contemporary constitutionalism can ignore the advent of proportionality and judging by the ever-growing literature on the subject, none does. However, the explanation of its success remains elusive. The range of available accounts spans the entire spectrum from cold realism to an idealism of sorts. The realist perspective is that judges favor the proportionality method because it hides the exercise of judicial discretion more effectively than alternative methods. By giving a formal structure to the weighing of conflicting interests, proportionality implies that values can be aligned along one scale despite their incommensurability. But realist accounts leave much unanswered. Tracing the success of proportionality solely to a cover-up function is a jurisprudential shortcut to a likely dead-end. The painstaking process of proportionality-structured judicial reasoning cannot be *a priori* dismissed as merely a sham. By contrast, idealist accounts focus on that reasoning and point out its inherent rationality. As we will see, these accounts of proportionality tend to overlook shortcomings in its judicial technique. But even if they did not, they would at most justify the advent of proportionality, not explain it. Quite apart from a healthy dose of skepticism about the possibilities of pure (legal) reason in the aftermath of the mass murders and catastrophes

⁵ For a study of proportionality in the context of American law generally, see E. Thomas Sullivan and Richard S. Frase, *Proportionality Principles in American Law* (2008); Jed Matthews and Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 *Emory Law Journal* 797 (2011) and Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 *San Diego Law Review* 367 (2009).

⁶ Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *Colum. J. Transnat'l L.* 72, 160 (2008). The authors base this conclusion on the observation that “(b)y the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of proportionality analysis.” (*id.*, at 74).

of the twentieth century, rationality alone cannot fully explain this method's appeal to complex institutional actors such as courts.

My aim in this paper is to provide an additional perspective on the rise of proportionality as a constitutional method. I argue that, more than alternative methods, proportionality helps judges mitigate what Robert Cover called the “inherent difficulty presented by the violence of the state’s law acting upon the free interpretative process.”⁷ Since the state is often involved as a party in constitutional conflict seeking court permission to override individual rights, Cover’s mention of “state law” is best understood as referring to the “law of the state.” Courts apply the law of the state by rejecting the outcomes of the losing party’s jurisgenerative interpretative processes. That rejection is inherently violent. One way to capture the source of violence is the gap between the positions of the parties – whether private individuals or the state⁸ – *ex ante* and *ex post* the judicial decision. There is a discontinuity between the strength of the parties’ claims, understood as their reasonable constitutional interpretations and perceived *ex ante*, and the effects on the parties of binary statements of constitutional validity, as experienced by the parties *ex post* the decision. At least in hard cases, claims of ostensibly comparable strength are presented as the outcomes of the parties’ jurisgenerative interpretative processes that aspire to official endorsement by courts as the institutions mandated to settle disputes over constitutional meaning.⁹ However, from an *ex post* perspective, binary statements of legal validity (valid/invalid, legal/illegal) erase

⁷ Robert Cover, *Nomos and Narrative*, 97 *Harvard Law Review* 4, 48 (1983). My argument here tracks Cover’s, insofar as the emphasis is on constitutional (as a form of legal) interpretation. For an argument about law’s “homicidal potential”, by contrast - or, perhaps, in relation to - its jurispathic dimension, see Robert Cover, *Violence and the Word*, 95 *Yale Law Journal* 1601 (1986).

⁸ Constitutional rights and state interests seem to be on the same plane because, the moment constitutional rights enter the decisional calculus, they have already become “interests.” See generally Richard Fallon, *Individual Rights and the Powers of Government*, 27 *Ga. L. Rev.* 343 (1993).

⁹ For more on a Protestant vs. Catholic approach to constitutional interpretation see Sanford Levinson, *Constitutional Faith* (1988).

all traces of the chance for recognition that the losing claim had before the judicial decision was delivered.¹⁰

The rise of proportionality should be understood in the context of a lack of adequate tools to mitigate the violence that their justification of state coercion inflicts on private (non-official¹¹) jurisgenerative interpretative processes in constitutional cases. For reasons having to do both with growing awareness of law's fallibility and the challenges of social pluralist in liberal democracies, which I will discuss in this paper, constitutional judges have come to perceive the levels of violence as so high as to undermine the duties of responsiveness that courts owe to their subjects. In contrast to totalitarian regimes, whose institutions do not react to – or, worse, retaliate against – the demands of their subjects, the public institutions of a constitutional democracy have a duty to respond to the claims of a pluralist citizenry in ways that recognize and reinforce the social standing of each citizen claimant as free and equal.¹² Thomas Pogge, for instance, has identified as a defining feature of democracy “the moral imperative that political institutions should

¹⁰ As Habermas put it, “norms of action appear with a binary validity claim and are either valid or invalid; we can respond to normative sentences, as we can to assertoric sentences, only by taking a yes or no position or by withholding judgment”, Habermas, *Between Facts and Norms* 255 (1996). Dworkin refers to this as the bivalence thesis that applies to law, as to all dispositive concepts. To say that law is a dispositive concept means that “[i]f a legal concept holds in a particular situation, then judges have a duty, at least prima facie to decide some claim one way: but if a claim does not hold, then judges have a duty, at least prima facie, to decide the same claim in the opposite way.” The bivalence thesis states: “in every legal case either the positive claim, that the case deals under a dispositive concept, or the opposite claim, that it does not, must be true even when it is controversial which is true.” See also Ronald Dworkin, *A Matter of Principle* 119-120 (1985).

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

¹² I discuss the duty of responsiveness in Vlad Perju, *Cosmopolitanism and Constitutional Self-Government*, *International Journal of Constitutional Law I-CON*, 326 (2010). For now I should only mention that I don’t understand “responsiveness” as a purely procedural value. For such an approach, see the analysis in Frank Michelman, *Must Constitutional Democracy be 'Responsive'?*, 107 *Ethics* 706 (1997) (reviewing and analyzing the procedural conception of democratic responsiveness in Robert Post’s *Constitutional Domains*).

maximize and equalize citizens' ability to shape the social context in which they live."¹³ This ability to access and shape the public spaces that one inhabits requires that institutions be responsive to the claims of their subjects.¹⁴ Responsiveness thus signals the recognition, respect, and consideration that institutions give to citizens and that citizens give to one another. As I will argue, the advent of proportionality reveals the angst of constitutional judges in the face of the violence their justificatory processes inflict on the parties.

Yet it seems counterintuitive that such violence should erode judicial responsiveness. Litigants routinely set themselves up for disappointment by miscalculating the strength of their legal claims. When that happens, their heightened expectations widen the *ex ante/ ex post* gap. Moreover, the very existence of the gap seems inevitable since judges cannot leave cases undecided: controversies must come to an end. Cover might be correct to see here a dimension of law's violence. But law *is* violent. As a constitutive feature of the legal system, it appears that violence by itself cannot be a source of judicial unresponsiveness.

Or can it? Judicial decisions have coercive effects: the state will not bring its force-dispensing machinery to protect the interests of the losing party or of similarly positioned stakeholders. In a liberal constitutional state, state coercion must be justified. That is, public institutions – in our case courts – must justify to citizens why they are “forced to be free.”¹⁵ Cover's insights remind us that the justificatory process itself is violent, albeit not politically coercive, since the state will inevitably reject at least one outcome of private jurisgenerative interpretative processes. But saying that the

¹³ Thomas Pogge, *Politics as Usual* 200 (Polity, 2010).

¹⁴ Hannah Arendt, Introduction into Politics in *The Promise of Politics* 106 (Jerome Kohn ed., 2005) (“Whenever people come together, the world thrusts itself between them, and it is in this in-between space that all human affairs are conducted.”)

¹⁵ Rousseau, *The Social Contract*. There are, however, limits inherent in the process of justification. Robert Cover refers to them as tragic limits in the common meaning that can be achieved in justifying the social organization of legal violence. See Robert Cover, *Violence and the Word*, 95 *Yale Law Journal* 1601, 1628-1629 (1986).

justificatory process is violent is not sufficient – violence is a matter of degree. Methodology calibrates degrees of violence by structuring processes of judicial inquiry and reason-giving. The proportionality method stands apart from categorical or balancing methods. How?

As Charles Tilly concluded in his sociological study of reason-giving, “whatever else happens in the giving of reasons, givers and receivers are negotiating definitions of their equality or inequality.”¹⁶ Proportionality stands out because of how its reasoning structure positions judges vis-à-vis the parties and the parties vis-à-vis one another. As one of its advocates put it, this method “shows equal respect and concern for everyone concerned.”¹⁷ More than alternative methods, proportionality give the appearance of being respectful to the public interest pursued by the state as well as to the individual interests of the right-holder.

Understanding the appeal of proportionality requires more than a study of its constitutive steps. This method is not a stand-alone legal tool but rather part of a larger configuration of patterns of constitutional doctrine and discourse. I refer to such configurations of patterns as a “constitutional style.” A style encapsulates in its methodology a comprehensive approach to constitutional rights, the role of courts and their duties of responsiveness, and generally to the substance of law’s shaping impact on the “culture of liberty”¹⁸ in a constitutional democracy. Different styles are often intertwined in practice, but my description treats them as ideal-types. Proportionality

¹⁶ Charles Tilly, *Why?*, at 24-25 (footnotes omitted).

¹⁷ David Beatty, *Ultimate Rule of Law*, at 169. Mattias Kumm argues convincingly that proportionality marks the shift from interpretation to justification: “the proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy. Or to put it another way: it provides a structure for the justification of an act in terms of public reason”, in Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, *Law and Ethics of Human Rights* vol. 4(2): 141-157 (2010), at 150. However, it is important to incorporate in a theory of proportionality the perspective of the right-holder himself. From that perspective, proportionality remains a method of interpretation. As I argue in Sections Three and Four, a virtue of proportionality is that it can integrate both perspectives.

¹⁸ I borrow this phrase from Ronald Dworkin, *A Bill of Rights for Britain* (1990).

epitomizes a particular style. Since each style can be differentiated by its peculiar approach to the positioning of different constitutional actors – that is, to the construction of constitutional space – I use an architectural metaphor to label it the Corinthian style.¹⁹ This constitutional style, like the Greek architectural order itself, has an integrative aim that combines elements of two other constitutional styles. The first is the Doric constitutional style, which is characterized by a top-down form of legal reasoning and a categorical method of constitutional interpretation of deontological rights. The second is the Ionic constitutional style that relies on a contextualized bottom-up form of reasoning and a balancing judicial methodology.

The first two sections describe the Doric and Ionic styles, respectively. A description is necessary because the Corinthian style, to which I turn in Section Three, integrates their respective approaches through the proportionality method. Proportionality places a non-deontological conception of rights within a categorical structure of formal analysis. It represents a synthesis of Doric fidelity to form and institutional structure (thesis) with Ionic “fact-sensitivity”²⁰ to contexts in which specific controversies arise (antithesis) that gives the perception of enhanced judicial responsiveness. However, the question of whether that perception is accurate is a separate one. I argue in this section that while proportionality is comparatively more responsive than alternative methods, its judicial technique has not entirely lived up to its integrative aims. Proportionality succumbs to pressures from the centrifugal forces of universalism and particularism that it seeks to integrate. These pressures give rise to a paradox in that the back-loading of proportionality analysis (the fact that, in practice, most government measures survive the first stages of the analysis), is both its flaw and the source of its appeal.²¹ It is its flaw because such back-loading raises the stakes at the later (balancing) stages of

¹⁹ For a discussion of the different orders of Greek and Roman architecture, see Fil Hearn, *Ideas that Shape Buildings* 97-133 (MIT Press, 2003).

²⁰ Philip Sales and Ben Hooper, *Proportionality and the Form of Law*, 119 *Law Quarterly Review* vol. 119 (2003), at 428.

²¹ For a general background argument about the legitimizing role of procedure, see Niklas Luhmann, *La legitimization par la procedure*.

proportionality analysis by increasing the need for principled decision-making techniques. Such formalizing techniques are no more available here than they are under the Ionic style. But the escalating stakes are also a source of proportionality's appeal because they have the perverse effect of validating both competing interests. As far as the state interest is concerned, the more stages of proportionality analysis the challenged regulation survives, the stronger the recognition of the underlying public interest becomes. On the right-holder's side, the demanding scrutiny of the state interest seeking to override the right reinforces the weight that the constitution places on the interest protected by the right. However counterintuitively, the judicial vindication of the strength of both conflicting interests narrows the *ex ante/ex post* gap to some extent and enhances the perception of judicial responsiveness.

In Section Four I take up the objection that judicial violence on private jurisprudential interpretative processes is jurisprudentially irrelevant. The discussion progresses from constitutional methodology to the broader impact of the fact of social pluralism on constitutional adjudication in late modern democracies. Pluralism opens "abysses of remoteness"²², as Hannah Arendt calls them, that challenge the fundamentals of the interaction between citizens and their institutions.²³ Pluralism widens the pool of perspectives on social and political life from which claims are drawn while, at the same time, deepening the need for justification of specific institutional responses in ways acceptable to a pluralist citizenry. I argue that the fact of pluralism, together with the critique of legal determinacy and the changing role of the state, lengthens the distance between claimants, widens the *ex ante/ex post* gap, and heightens the need for

²² Arendt, *On the Nature of Totalitarianism: An Essay in Understanding* (cited in Lisa Disch, *Hannah Arendt and the Limits of Philosophy*, at 157).

²³ Pluralism, as Rawls defined it in its "reasonable" version, is "the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime", in John Rawls, *Political Liberalism* at xviii. For an example in the form of a wide-ranging study of the impact of religious diversity in American society, see Robert D. Putnam and David E. Campbell, *American Grace: How Religion Divides and Unites Us* (2010).

mechanisms of institutional responsiveness to mitigate the violence that the law of the state inflicts on private jurisgenerative interpretative processes.

Michael Walzer described the challenge of judging not as “that of detachment, but of ambiguous connection.”²⁴ This last section analyzes the role of the imagination in how modern law constructs the ambiguous connection between judges and their audiences. Using the works of Kant and Arendt, I analyze the role imagination plays in how different constitutional styles construct the positional objectivity of decision-makers. Proportionality synthesizes the forces of universalism and particularism and relies on the role of imagination in ways that other constitutional styles have traditionally sought to avoid.

§1. The Doric Constitutional Style

Reasoning categorically on down from text or high principle, at the “emancipatory core” of the Doric style is the idea that constitutional – like all subspecies of legal – judgment should resist “subsumption under particularistic causes.”²⁵ Such causes erode the virtues of generality, universalism, and legal form. Under this view, succumbing to particularistic causes corrupts the commitment to the rule of law and undermines the responsiveness of the constitutional system to the demands of litigants *qua* citizens. Since constitutional judges decide cases “by virtue of their authority, and not because they are any more likely to be right than other people,”²⁶ judicial authority is endangered whenever judges are perceived to deliver all-things-considered decisions.

²⁴ Michael Walzer, *Interpretation and Social Criticism* 37 (1987).

²⁵ Martti Koskenniemi, *The Gentle Civilizer of Nations* 503-504 (2004).

²⁶ Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 *Harvard Law Review* 755, 761(1963).

The Doric style builds walls – the “sworn enemy of caprice, ... the palladium of liberty”²⁷ – to fragment the constitutional space into separate spheres of authority and discredit “Olympian”²⁸ standpoints. Constitutional rights are walls that carve out absolute spaces of decision-making authority.²⁹ Their method of interpretation is categorical analysis. A claim that a right has been violated requires an “assessment of the state’s justifications for action in light of the principles that defined the legitimate basis for state action in the particular sphere in question.”³⁰ That assessment is jurisdictional, so to speak, rather than substantive. For instance, burning a flag or criticizing the government’s energy policy are actions which the constitutional right to free speech shields from governmental intrusion, no matter how strong or even cogent the government’s reasons for interference might be. Rights are grounds for dismissing as irrelevant – not as weak or

²⁷ “Form is the sworn enemy of caprice, the twin sister of liberty... Fixed forms are the school of discipline and order, and thereby of liberty itself. They are the bulwark against external attacks, since they will only break, not bend, and where a people has truly understood the service of freedom, it has also instinctively discovered the value of form and has felt intuitively that in its forms it did not possess and hold to something purely external, but to the palladium of its liberty.” (Rudolf von Jhering, quoted in Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 *Harvard Law Review* 195, 208-209 (1913).

²⁸ Charles Fried, *supra* note ____ (Two Concepts of Interests), *id.* Contrast this to the balancing method, in Frank Coffin, *Judicial Balancing: The Protean Scales of Justice*, in NORMAN DORSEN (ED.), *THE EVOLVING CONSTITUTION: ESSAYS ON THE BILL OF RIGHTS AND THE U.S. SUPREME COURT* (1989) (presenting balancing as a flexible tool that can be fine-tuned to the complexity of facts and thus lead to all-things-considered and principled judgments).

²⁹ There are a number of ways in which the constitutional spaces are carved out, and here I focus on just one approach. See Stephen Gardbaum, *A Democratic Defense of Constitutional Balancing*, 4 *Law & Ethics of Human Rights* 78 (2010).

³⁰ Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 *Hastings L. J.* 711, 713 (1994).

otherwise defective – claims to the satisfaction of collective goals that conflict with the right-holder’s interests.³¹

According to the Doric style, responsiveness is owed to the allocational scheme and, through it, to the right-holder. This form of responsiveness has a systemic effect and should be understood through an institutional lens. The preservation of social order under conditions of pluralism requires constant reinforcement of the equal status of claimants and the stabilization of their expectations. Since rights protect the actions of right-holders within pre-designated spheres of authority, their judicial enforcement is not tantamount to endorsing the wisdom of their holders’ substantive choices. Rather, in enforcing individual rights, courts (re)enforce an institutional scheme that allocates to the right-holder the authority to act and decide as he thinks best.³² Does the constitution place the authority to decide whether to terminate an unwanted pregnancy with the woman and her doctor or with the state?³³ Does it leave it to the right-holder or to the state to decide if loaded handguns can be kept at home in urban areas with high crime rates?³⁴ As a further example, consider whether terminally ill patients have a constitutional right to experimental drugs. That question is not about the *wisdom* of the choice to take such a risk (i.e., whether or not it is wise or reasonable to put oneself at a heightened risk from insufficiently tested and thus potentially unsafe drugs). Rather, the question is to whom

³¹ This is the idea of exclusionary reasons. See Joseph Raz, *Practical Reason and Norms* 35-49 (1975). See also Jeremy Waldron, *Pildes on Dworkin's Theory of Rights*, *Journal of Legal Studies*, 2000, vol. 29 (1): 301, 301 (“Rights are limits on the kinds of reasons that the state can appropriately invoke in order to justify its actions”). See also Pildes, *supra* note ___ (Avoiding Balancing), at 712.

³² Howe, *Foreword: Political Theory and the Nature of Liberty*, 67 *Harv. L. Rev.* 91,91 (1953) (“Government must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign immunity.”)

³³ For this interpretation of the early abortion cases, see Laurence Tribe, *Structural Due Process*, 10 *HARV. C.R.-C.L. L. REV.* 269 (1975).

³⁴ *District of Columbia v. Heller* 554 U.S. 570 (2008)

(the patient, the doctor, the state, etc.) does the constitution allocate the authority to make the decision that the risk is or is not worth taking.³⁵

Of course, this approach allows for great diversity in answering such allocational questions. Theories of constitutional interpretation can range from moral to historical, depending on one's view of the nature of the allocational scheme. Moreover, that scheme itself may reflect substantive judgments.³⁶ But stipulating as rights the outcomes of those substantive judgments marks an epistemological break: a particular liberty interest is protected not because it is important, but rather because the constitution says so. As one scholar argues, "a litigant's reference to freedom of speech or conscience is not simply a claim for immediate satisfaction, but is the assertion of an interest which can be understood only as a reference to systemic ways of doing things, to roles, institutions and practices."³⁷ In this world, each wall "creates a new liberty."³⁸ The advantage of this framing of constitutional questions is not that disagreement will fade away – it won't – but rather that such framing allows better grasp about what the disagreement is about.

The Doric conception of rights has a deontological character that basic goods lack.³⁹ Rights are not like iPads or designer clothes or any other consumer good we might

³⁵ See *Abigail Alliance for Better Access to Experimental Drugs v. Eschenbach*, 495 F.3d 695 (D.C. Cir. 2007), cert. denied mem., 128 S.Ct. 1069 (2008) (holding that the Due Process Clause does not encompass a fundamental right of terminally ill adults to access investigational drugs, neither the common law doctrine of necessity nor that of self-defense weighs in favor of the asserted right, and that the challenged FDA policy bore a rational relation to a legitimate state interest and did not amount to a tort (of intentionally preventing necessary aid)).

³⁶ The scheme can be "the very product of [substantive] interest-balancing." 128 S. Ct. 2783 at 2821 (Scalia, J.)

³⁷ Charles Fried, *Supra* note ____ (Two Concepts of Interests), at 769. The right to free speech or conscience is a second-order reason about how the constitution allocates decision-making power within the spheres of authority that it carves out.

³⁸ Michael Walzer, *Liberalism and the Art of Separation*, *Political Theory* vol. 12 (3): 315-330 (1984), at 315. Walzer continues: "The art of separation is not an illusory or fantastic enterprise; it is a morally and politically necessary adaptation to the complexities of modern life. Liberal theory reflects and reinforces a long-term process of social differentiation."

³⁹ Jürgen Habermas, *Between Facts and Norms*, at 257.

wish to own but have no special entitlement to demand. Rather, as Ronald Dworkin put it, “if someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so.”⁴⁰ Rights have a strong anti-utilitarian animus.⁴¹ Jeremy Waldron captures this well:

“the resolution of any conflict with considerations of utility is obvious: rights are to prevail over utility precisely because the whole point of setting them up is to correct for the defects in the utilitarian arguments which are likely to oppose them. We do not stare at the utility calculus and then stare at the rights, and discover that the second is sufficiently important to ‘trump’ the importance of the first. Instead, our sense of the internal connection between the two established the order of priorities.”⁴²

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

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

⁴⁰ Ronald Dworkin, *Taking Rights Seriously*, at 269.

⁴¹ See Ronald Dworkin, *Taking Rights Seriously*, at 277. See also Jürgen Habermas, *Between Facts and Norms*, at 259 (“Insofar as a constitutional court adopts the doctrine of an objective order of values and bases its decision making on a kind of moral realism and moral conventionalism, the danger of irrational rulings increases, because functionalist arguments then gain the upper hand over the normative ones.”).

⁴² Jeremy Waldron, *Rights in Conflict*, *Ethics* vol. 99 (1989): 503-519, at 516.

Doric culture of liberty is nevertheless a culture of argument.⁴³ For one, rights themselves are not absolute. They can be overridden, presumably so long as limitations remain exceptional.⁴⁴ The Doric style uses a twofold strategy to mitigate the impact of rights limitations. First, it requires a narrow definition of rights. This is unsurprising: defining broadly rights that are understood deontologically will increase exponentially the number of instances when government policies violate constitutional rights. Such an approach would expand the constitutional domain and trigger a courts-driven alteration of the role of the modern state. The second strategy of the Doric style is to structure the typical constitutional conflict as being between individuals and the state. In situations when constitutional norms do not apply horizontally, conflicts of individual rights that could challenge the deontological conception will be infrequent. Assessing the success of this double strategy depends largely on how one defines success. If one takes a participant's perspective, the mere possibility that rights can be limited, however exceptionally, is sufficient to enable the interested party – typically the state – to argue that the case at hand warrants precisely such an exception. At the same time, as the American example shows, the constant reaffirmation through public discourse of the deontological conception of rights in a Doric culture of liberty can be a successful self-fulfilling prophecy.⁴⁵

As should be apparent by now, the Doric style denies the constitutional relevance of the *ex ante/ex post* gap. There is only one legal standpoint and that is the standpoint of

⁴³ Martti Koskenniemi, *The Gentle Civilizer of Nations*, at 502 (“To put it simply and, I fear, through a banality it may not deserve, the message is that there must be limits to the exercise of power, that those who are in positions of strength must be accountable and that those who are weak must be heard and protected, and that when professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community overriding particular alliances and preferences and allowing a meaningful distinction between lawful constraint and the application of naked power.”)

⁴⁴ For a discussion, see generally Stephen Gardbaum, *Limiting Constitutional Rights*, 54 *UCLA Law Review* 785 (2007) (discussing “internal limits” on rights).

⁴⁵ For a critical discussion in the US context, see Mary-Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (1991).

the constitutional allocation of decision-making authority. Judges are the guardians of that scheme. Constitutional responsiveness means respect for the allocational scheme and the underlying values or principles. Doric responsiveness requires that the judicial mind never becomes unmoored, for fear that, if set sail, it might drift away from the perspective of the allocation of decision-making power and toward the forbidden space of “particularistic causes.”⁴⁶

§2. The Ionic Constitutional Style

The Ionic style develops as an alternative to the detached immutability of the judicial standpoint in the Doric approach. Specifically, it is an alternative to the “impartial reason [that] aims to adopt a point of view outside concrete situations of action, a transcendental ‘view from nowhere’ that carries the perspective, attitudes, character, and interests of no particular subject or set of subjects.”⁴⁷ The attempt to move beyond “current human choices”⁴⁸ breeds estrangement and alienation. The cold aloofness of Doric judicial reason can ignore context only by detaching from social life itself. From this perspective, the quest to resist the pressures of particularistic causes misunderstands the challenge of modernity. That challenge is not how to artificially detach constitutional reason from life’s messy complexity, including the fact of pluralism. Rather, it is how to face that complexity full-on and overcome “the frictions of distance”⁴⁹ that separate us.

⁴⁶ Koskeniemmi, *The Gentle Civilizer of Nations*, at 501 (“formalism seeks to persuade the protagonists (lawyers, decisionmakers) to take a momentary distance from their preferences and to enter a terrain where these preferences should be justified, instead of taken for granted, by reference to standards that are independent from their particular positions or interests.”)

⁴⁷ Iris Marion Young, *Justice and the Politics of Difference* 100 (1990).

⁴⁸ Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 *Yale Law Journal* 1860, 1877 (“legal positivism or objectivity that implies an authoritative basis or foundation beyond current human choices.”). See also Minow, Martha L. & Elizabeth Spelman, “In Context,” 63 *Southern California Law Review* 1597 (1990).

⁴⁹ David Harvey, *Cosmopolitanism and the Geographies of Freedom* 140 (2009).

The Ionic alternative to detachment is *situatedness*. Situated decision-making rejects “the notion that there is a universal, rational foundation for legal judgment. Judges do not ... inhabit a lofty perspective that yields an *objective* vision of the case and its correct disposition.”⁵⁰ Situatedness does not require that the judge be situated somewhere – that would be trite – but rather that he be situated in the (particularist) context of the case. As Judith Resnik put it in her study of feminist adjudication, “adjudication is one instance of government deployment of power that has the potential for genuine contextualism, for taking seriously the needs of the individuals affected by decisions and shaping decisions accordingly. Precisely because adjudication is socially embedded, it can be fluid and responsive.”⁵¹ Responsiveness here is conceptualized as respect for the rich and multilayered social meanings of the participants. A contextual, pragmatic, bottom-up approach leads constitutional analysis to reflect on the richness of the life that law aims to regulate. If the Doric divides social space into absolute spheres of authority, the Ionic constitutional space is relative; the landscape changes with the perspective of each stakeholder.⁵²

Under this view, rights are not spaces of exclusion; fellow citizens and the state are not presumed to be intruders. Dieter Grimm made the point that “the function of the constitutional guarantees of rights is not to make limitations as difficult as possible but to require special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity.”⁵³ By contrast to the deontological approach to rights, the Ionic style routinely authorizes judges to break the shell encasing

⁵⁰ Catharine Wells, *Situated Decision making*, 63 S. CAL. L. REV. 1727, 1728 (1990).

⁵¹ Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. Cal. L. Rev. 1877, 1935 (1988). The Ionic architectural order itself was associated with the feminine gender. See Fil Hearn, *supra* note ___ (*Ideas that Shape Buildings*), at 110.

⁵² Catharine Wells, *supra* note ___ (*Situated Decision-making*), at 1734 (“Understanding a controversy ... requires that it be experienced from several different perspectives as a developing drama that moves towards its own unique resolution.”).

⁵³ See Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L. J. 384, 391 (2007).

the right in order to access the background interests. Rights are understood as claims to institutional protection for select substantive needs, and not as ambits delimiting spheres of sovereignty. For instance, speech and privacy are super-valued interests that the *pouvoir constituant* selects and for whose protection and/or realization the state summons its coercive force.⁵⁴

By contrast to the Doric style, which focuses on the delimitation of the sphere of constitutional authority and interprets rights narrowly, the Ionic approach interprets rights broadly and then channels the superior quantum of the judge's interpretative energy to the question of whether their override is justified. For instance, when asked to decide whether there is a constitutional right to physician-assisted suicide, a judge first recognizes the privacy interest in these situations and then proceeds to consider whether the government has sufficiently good reasons to limit its exercise.⁵⁵ The broad interpretation of rights has a cumulative effect on the legal system.⁵⁶ Because public policies will more often interfere with broadly defined rights, the frequency with which public interest overrides individual rights will correspondingly increase, lest the government should be brought to a halt. This structure of the constitutional doctrines accordingly shapes the Ionic culture of liberty. In this culture, rights are not separating walls of a deontological cast.

So, what exactly are rights? Can they be more than “just rhetorical flourish?”⁵⁷ Since breaking the deontological shell turns rights-claims into substantive reasons for

⁵⁴ The legal recognition of interests is of course not unidirectional. Some interests do not preexist legal norms; they are, rather, a consequence of their creation. The expectation that a benefit-granting statutory scheme will not be discontinued absent change in circumstances may give rise to interests that cannot logically precede the adoption of that scheme. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁵⁵ *Washington v. Glucksberg*, 521 U.S. 702 (1997).

⁵⁶ I assume here the model of vertical constitutional conflict. This certainly isn't the only difference. On the importance of interpreting rights broadly, see Frank Michelman, the Frankfurt lectures (ask for permission to cite).

⁵⁷ David Beatty, *Ultimate Rule of Law*, at 171 (“When rights are factored into an analysis organized around the principle of proportionality, they have no special force as trumps. They are just rhetorical flourish.”). But see Alexy, *supra* note ___ (discussing rights as “optimization requirements”).

demanding a particular institutional response, it seems that “having a right does not confer much on the rights holder.”⁵⁸ The existence of a privacy interest protected by a right does not *eo ipso* entitle the right holder to rely on the state’s protection of his privacy interests. If that protection is granted, it will be as the outcome of a balancing process wherein judges deem that privacy interest comparatively stronger than conflicting interests.⁵⁹

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

The critics get one point but miss another. Yes, this style empowers courts to override rights in specific contexts. But judges do so in a culture of argument that requires them to justify their decisions. While it may be disquieting to realize that the satisfaction of rights-protected interests depends on further judicial recognition, the fact is

⁵⁸ Mattias Kumm, *Constitutional Rights as Principles*, at 582. (“Having a right does not confer much on the rights holder: that is to say, the fact that he or she has a *prima facie* right does not imply a position that entitles him/her to prevail over countervailing considerations of policy.”).

⁵⁹ The outcome of balancing can be stated in the form of a legal rule. See Robert Alexy, *Theory of Constitutional Rights*, at 56 (“the result of every correct balancing of constitutional rights can be formulated in terms of a derivative constitutional rights norm in the form of a rule under which the case can be subsumed.”).

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

⁶¹ Robert Alexy, *Theory of Constitutional Rights*, at 57. It is of course possible to devise categorical protections within the model of rights as substantive reasons. As Kumm reminds us, certain types of reasons – say, religious reasons for introducing prayer in public schools – are categorically excluded from the comparative weighting of interests in proportionality analysis. See Mattias Kumm, *Constitutional Rights as Principles*, at 591.

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

that no constitutional style – the Doric style included – can get around this problem, if a problem it is, once it is acknowledged that either public or private interests may override constitutional rights. To paraphrase a classic, the contemporary jurist who feels uneasy about leaving law to the “mercy” of argument was born in the wrong century. In our late modern age, societies develop cultures of argument to negotiate the terms of their collective self-government.⁶³

So rather than mourn the lost age of certainties, we would be better served to study just how different styles construe constitutional inquiry. This is where Ionic balancing comes up short because it fails to adequately structure the process of weighing conflicting interests. The lack of formal structure is meant to facilitate the judge’s immersion into the particular contexts of the parties.⁶⁴ Context-based analysis requires flexibility, which means there can be “no purely logical or conceptual answer”⁶⁵ to the question of how to prioritize conflicting interests. At one level, the constant resurfacing of background interests in the balancing analysis is a welcome reminder of what makes them worth protecting as rights. Contrasting balancing to rule-based categorical reasoning, Kathleen Sullivan has defended balancing on precisely this ground: “rules lose

⁶³ Rights can also alter the time-horizon in which that process unfolds. For instance, rights can be part of the *ongoing* interaction between the right-holder and social institutions over time. Martha Minow writes: “A claimant asserts a right and thereby secures the attention of the community through the procedures the community has designated for hearing such claims. The legal authority responds, and though this response is temporary and of limited scope, it provides the occasion for the next claim. Legal rights, then, should be understood as the language of a continuing process rather than the fixed rules. Rights discourse reaches temporary resting points from which new claims can be made. Rights, in this sense, are not “trumps” but the language we use to try to persuade others to let us win this round”. See Martha Minow, *supra* note ____ (Interpreting Rights), at 1875-1876 (footnotes omitted).

⁶⁴ Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. Cal. L. Rev. 1877, 1935 (1988) (“Rather than bemoan...a switch in roles, feminism teaches us to celebrate such rearrangements, to require judges to let others judge them. Such moments might better enable judges to be empathetic, to adopt the perspective of the other, to enter into the experience of the courtroom unprotected by their special status. Judge as witness can thus be understood as a profound challenge to a stable hierarchy, as a subversive act to be applauded.”).

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

vitality unless their reason for existing is reiterated.”⁶⁶ However, leaving the judicial weighing of conflicting interests completely unscripted undermines the methodic dimension of balancing. Because there is no method to follow, parties can expect from judges only the outcome of the process – and that outcome is bound to be unpredictable. Balancing opens up the constitutional space and then simply leaves it open. But a constitutional method must do more. It must be administrable in a way that makes it responsive to the requirements of the institutional structure and the legitimate expectations of future claimants. Further, it must operationalize, again in an administrable fashion, the weight and pedigree of the right-holder’s interests that enter the balancing analysis. Granted, those interests do not automatically trump state interests. But then again, nothing happens “automatically” in a culture of argument.

Somewhere along the way, the Ionic insight about the importance of context becomes a trap. The point of rights was the transcend context, yet it turns out that rights depend on context. That is the insight. But the demise of rights also erodes the protection that rights were meant to grant. It is a mistake to downplay that effect. For this reason the ex ante/ex post gap does not vanish and high levels of violence on the parties’ interpretative processes are perceived as unresponsive. The Ionic correction of Doric detachment from context and reliance on legal form swings too far in the opposite direction. The challenge becomes not how to choose between these two styles, but rather how to synthesize them.

§3. The Corinthian Constitutional Style

Like the Corinthian architectural order itself, which combines Doric and Ionic elements, this constitutional style integrates fidelity to legal form and institutional structure with versatile “fact-sensitivity”⁶⁷ to the contexts in which controversies arise. This style adjusts

⁶⁶ Kathleen Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. COLO. L. REV. 293, 309 (1992) (footnotes omitted).

⁶⁷ Philip Sales and Ben Hooper, Proportionality and the Form of Law, 119 Law Quarterly Review vol. 119 (2003), at 428

the Ionic correction of the Doric style just enough to enhance judicial responsiveness to actual context and fulfill the demand of systemic predictability and administrability that are associated with the rule of law in complex democracies. The proportionality method epitomizes this integrative ethos. The method frames a non-deontological conception of rights within a categorical structure of formal analysis. Proportionality analysis consists of one preliminary step, where courts ask about the purpose of challenged regulation, followed by three “proper” steps: suitability, necessity, and (Ionic-style) balancing where courts weigh the gain from satisfaction of the goal against the loss that results from the intrusion on the constitutional right.⁶⁸ Limitations on rights that fail any one of these steps are invalidated as violations of constitutional rights. Measures that survive the proportionality test are allowed to override constitutional rights.

The previous sections have identified two approaches to the *ex ante/ex post* gap. I have argued that the Doric style does not perceive the gap as a problem; the Ionic approach does perceive it as such but lacks the resources to address it. The Corinthian constitutional style attempts a more satisfactory approach. The key is its integration within the judicial standpoint itself of what Hannah Arendt called, in the context of judgment in general, the “plurality of diverging public standpoints.”⁶⁹ Rather than assign judges to an immutable standpoint “above the melee”⁷⁰ or immerse them into the standpoint of each participant, the Corinthian style gives them a method – the proportionality method – to transcend by integrating the perspectives of the parties. The plurality of those perspectives, and its relevance for constitutional judgment, is neither denied, as in the Doric style, nor extolled, as in the Ionic, but simply acknowledged as a fact of social life. Proportionality guides the judge to move back and forth between his position and that of the claimants, thus enlarging the judge’s own standpoint by

⁶⁸ I use here Alexy’s standard “balancing” formula: “[t]he greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other.” In Robert Alexy, *Theory of Constitutional Rights*, at 102.

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

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

integrating different perspectives. This constitutional space is neither absolute nor relative, but relational.⁷¹

The next sections dwell on the “positional objectivity”⁷² of the judicial standpoint in proportionality analysis. For now I am interested in the details of this method’s structure and application. Attention to detail reveals a disconnect between its integrative aims and judicial technique. Proportionality aims to integrate universalism and particularism. Of course, it fails. It inevitably succumbs under the centrifugal pressures exerted by these two poles. While its success can be traced to the perception of enhanced judicial responsiveness, that perception is not fully supported by constitutional practice. However, it remains important to take a phenomenological approach to proportionality and ask what about it allows judges to perceive it in the way they do. For instance, only from such a standpoint does the distinction between proportionality and balancing become clear. It is hard to spot relevant differences at a purely analytical or conceptual level.⁷³ The two methods rely on a similar approach to rights. However, judges who apply the proportionality method adamantly deny that balancing and proportionality are two names for the same method. The perception that proportionality is a method apart needs to be studied in both its doctrinal and theoretical roots. We begin with doctrine.

Consider the tensions deriving from the formalization of the different steps of proportionality analysis. The distinctiveness of these steps aims to enhance the

⁷¹ I borrow this classification (absolute, relative, relational spaces) from David Harvey, *Cosmopolitanism and the Geographies of Freedom* (2009), although I should point out that my use does not completely track Harvey’s. For more on relational space, see Lefebvre, *The Production of Space* (1992).

⁷² This phrase is Amartya Sen’s. Sen argues for conception of objectivity that is positional-dependent and person-independent. Observations and beliefs are objective if any subject could reproduce them when placed in a position similar to that of the initial observer. The challenge then becomes how to define the position-dependent. See Amartya Sen, *Positional Objectivity*, *Philosophy and Public Affairs*, Vol. 22 (2) 126-145 (1993). The article was reprinted, and expanded, in Amartya Sen, *Rationality and Freedom* (2003). The text was originally delivered as the Storrs Lectures on “Objectivity” at Yale Law School (September 1990).

⁷³ Stephen Gradbaum

administrability and legal certainty⁷⁴ of the proportionality method in contrast to the more ill-structured balancing process. Concerned with applications of proportionality that blur the line between the “necessity” and the balancing stages of the test, Dieter Grimm has warned that “a confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable.”⁷⁵ Arbitrary and unpredictable is how critics describe balancing. The formalization of the different steps is supposed to placate these worries.⁷⁶

But formalization replicates the tensions between the Doric and the Ionic styles. Consider the analysis of legislative purposes at the preliminary stage. Courts’ demand that legislators provide such reasons for their review is an important challenge to the legislative prerogative. It signifies that the pedigree of a statute enacted by the people’s elected representatives is insufficient ground for upholding its validity; further justification is necessary. This demand introduces a Doric element into the Corinthian style: the idea that the government may not coerce right-holders in pursuit of impermissible goals. Its exact significance depends on how it is applied. This requirement can be quite demanding. For instance, judges may request that the purpose be specified at a certain level of generality or they may request evidence that the stated purpose is the real purpose, rather than an *ex post facto* rationalization.⁷⁷

In the practice of proportionality, however, legislation is virtually never invalidated at this early stage. It turns out, unsurprisingly, that legislators – or, rather, their lawyers – can almost always come up with some permissible goal for the challenged

⁷⁴ Many legal systems expressly recognize the value of legal certainty. For instance, the European Court of Human Rights held that “a norm cannot be regarded as ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.” *Sunday Times v. UK*, 2 E.H.R.R. 245 (1979), para. 49.

⁷⁵ Dieter Grimm, *Supra* note ____ (Proportionality in Germany and Canada), at 397.

⁷⁶ The idea is also to avoid the twin risk of what the South African Constitutional Court called the “mechanical adherence to a sequential check-list,” S. Manamela, 2000 (3) SA 1 (CC), at 20 (cited in Stephen Gardbaum, *Limiting Rights*, at 841.

⁷⁷ *United States v. Virginia*, 518 U.S. 515 (1996)

statute. Courts can strike down legislation at this stage only by pushing back, as discussed above. But pushing back has not been their strategy of choice. Judges have preferred to defer to the legislature on separation of powers grounds: the democratically elected branch has the right to set its policy agenda.⁷⁸ To be sure, structural deferral does not make the preliminary stage meaningless. Even without close judicial scrutiny of legislative goals, the stated goals will shape the lines of argument available at later stages. However, asking for legislative reasons but failing to question their soundness is no doubt an odd combination.⁷⁹ It is a combination that veils the unease of courts keen to be perceived as actors responsive to the overall constitutional structure.

Structural deference at the preliminary step sets in motion a sliding scale toward the later stages of analysis which threatens to collapse proportionality into balancing. The back-loading of proportionality analysis inevitably puts heightened pressure on the balancing stage. The greater the deference of courts at the first stages of proportionality analysis, the more the substance of their review is pushed back to the latter stage. Paradoxically, herein lies both proportionality's great flaw and the source of its irresistible appeal. On the one hand, the ever-escalating stakes require a judicial

⁷⁸ See Dieter Grimm, *supra* note ___ (Proportionality), at 388. Canadian courts initially tried to impose a higher threshold on the government by asking that the governmental objective be “pressing and substantial” (Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. Toronto L.J. 369, 371 (2007) concern or “sufficiently important to justify overriding a Charter [constitutionally protected] right” See Barak, *Proportional Effect*, at 371 (quoting PETER HOGG, *CONSTITUTIONAL LAW OF CANADA*, student ed. (2005) at 823. Over time however, as the other steps in the analysis have become more substantial, even Canadian courts have begun to defer more and more to the legislature. See generally Sujit Choudhry, *So What Is the Real Legacy of Oakes?*, (2006) 34 Sup.Ct.L. Rev. (2d) 501).

⁷⁹ Some advocates of proportionality – including judges writing extra-judicially – have argued for a more incisive judicial involvement at this stage. President Barak has expressed doubts about the wisdom of deferring to the legislator. See Aharon Barak, *Proportional Effect*, at 371 (“Despite the centrality of the object component, no statute in Israel has been annulled merely because of the lack of a proper object [or purpose]. A similar approach exists in German constitutional law ... This is regrettable. The object component should be given an independent and central role in examining constitutionality, without linking it solely with the means for realizing it. Indeed, not every object is proper from the constitutional perspective. This is not the expression of a lack of confidence in the legislature; rather it is the expression of the status of human rights.”) (footnotes omitted).

technique for principled balancing. As we will see, it is questionable if such a technique is available. On the other hand, the escalating stakes have the perverse effect of legitimizing the strengths of the competing interests. As far as the state interest is concerned, the more stages of proportionality analysis the challenged regulation survives, the stronger the recognition of the underlying public interest becomes. On the right-holder's side, this analytical structure ensures that demanding scrutiny awaits any attempts to override the individual interest, given its importance under the overall constitutional scheme. However, counter-intuitively this judicial vindication is the source of responsiveness as respect that bridges the *ex ante/ex post gap* and mitigates the violent dimension of judicial decision.

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

The distinction between the core and the periphery of rights is a widely used formalizing technique. Its aim is to confine tradeoffs in the balancing process to the periphery of rights. As former President of the Israeli Supreme Court Aharon Barak put it, judges "must aim to preserve the 'core' of each ... libert[y] so that any damage will only affect the shell."⁸⁰ Once an interest has been identified as at the core of a right – for instance, the interest in self-defense at the core of the Second Amendment right to bear arms or the interest in political speech in a right to freedom of expression – that interest must not be balanced away.

⁸⁰ See *Shavit v. The Chevra Kadisha of Rishon Le Zion*, C.A. 6024/97 (1999) (Supreme Court of Israel), at § 9.

The centrifugal jurisprudential forces that structure proportionality analysis are apparent. By contrast to the deontological conception of rights, this conception authorizes judges to break the shell encasing the right in order to gain access to the underlying interests. The assumption is that a state measure – or conflicting individual right, as the case may be – affects only some interests protected by the right.⁸¹ However, those interests are prioritized. The corresponding gradation of degrees of difficulty matching the hierarchy of protected interests reflects the centrality of legal form. Assuming a vertical constitutional conflict, the state will find it more difficult, perhaps almost impossible, to justify overriding the core of a constitutional right. The more onerous the justification becomes on that scale of difficulty, the more categorical the protection that the core of the right receives. This is how the Corinthian style integrates a Doric dimension within a non-deontological, Ionic conception of rights.

There are, however, difficulties. Some rights do not have cores: disability rights, for instance, which in many jurisdictions have constitutional stature.⁸² How to delimit core from periphery is also a matter of dispute. The delineation will depend upon the methodology one uses, as well as upon how any given methodology is used. As the U.S. Supreme Court debate in *District of Columbia v. Heller* showed, the distance between the majority’s originalist analysis and the dissenters’ proportionality method was much shorter than either side acknowledged. In that case, the dissenting justices used historical analysis to distinguish core and periphery (or central and ancillary purposes) of the Second Amendment right to bear arms and found the challenged regulation constitutional because it affected only the ancillary interest in individual self-defense, rather than the

⁸¹ The assumption, as Dieter Grimm put it, is that: “It is rarely the case that a legal measure affects a fundamental right altogether. Usually, only a certain aspect of a right is affected...The same is true for the good in whose interest the right is restricted. Rarely is one measure apt to give full protection to a certain good.” Dieter Grimm, *Proportionality*, at 396.

⁸² Samuel Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 406 (2000) (arguing that disability rights do not have a “core”). There are as many ways of defining the “core” of disability as there are disabilities. For a discussion in the context of social and economic rights, see Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 Yale J. Int’l L. 113 (2008).

interest in partaking in a militia that was at the core of the constitutionally-protected right.⁸³ The central disagreement between the majority and the dissent was about the correct historical interpretation. Furthermore, there are many situations, most obviously connected to freedom of religion, where identifying the core of a right is almost impossible.⁸⁴ Critics have argued forcefully that it is often impossible to identify the core of a right without reference to competing public interests.⁸⁵ These difficulties have led some courts, such as the South African Constitutional Court, to stop relying on this technique at the balancing stage of proportionality analysis.⁸⁶

A more comprehensive study would be required to present the definitive case that judicial technique does not live up to proportionality's integrative aims. But even a partial account should suffice to establish that technique alone cannot adequately explain the

⁸³ See *Heller*, supra note ____.

⁸⁴ Consider freedom of religion. If judges may break the institutional shell of a right, then they may look for the "core" of the free exercise right in the beating heart of the belief and practice of a religious experience, but this is a notoriously sticky enterprise. "It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field." *Employment Division, Dep't of Human Resources v. Smith*, 485 U.S. 660 (1988). See also *Shavit v. The Chevra Kadisha of Rishon Le Zion, C.A. 6024/97* (1999) (Supreme Court of Israel) (Judge England) (deciding whether Jewish burial societies, which customarily administered cemeteries throughout the country, had the right to prevent family members from inscribing on the deceased's tombstone her birth and death dates according to the standard Gregorian calendar (as well as the Hebrew calendar).

⁸⁵ For these reasons, the distinction between core and periphery raises more questions than it answers. See also, Julian Rivers, *Proportionality and Variable Intensity of Review*, *Cambridge Law Journal* vol. 65 (1): 174-207 ("The problem with the 'very essence' of a right is that it is almost impossible to define it usefully without reference to competing public interests."), at 187.

⁸⁶ To be specific, the constitutional provision in the South African Interim Constitution followed the essentialist paradigm of the German style. The Court's discussion of its shortcomings can be found in *S. v. Makwanyane*, (1995) (3) SALR 391 (CC), para. 132 (The difficulty of interpretation arises from the uncertainty as to what the 'essential content' of a right is, and how it is to be determined. Should this be determined subjectively from the point of view of the individual affected by the invasion of the right, or objectively, from the point of view of the nature of the right and its place in the constitutional order, or possibly in some other way?).

success of proportionality. The next section looks at that success in a broader jurisprudential perspective.

§4. Constitutional Method in 3-D

Constitutional conflict is not only a conflict of interpretation, but this is the form it takes before courts. Each party brings a claim as to why, in its interpretation, the constitution extends its protection in the given context to a specific interest. The role of courts is thus to create law as much as it is to suppress it. After mentioning the “inherent difficulty presented by the violence of the state’s law acting upon the free interpretative process,” Cover continues: “It is remarkable that in myth and history the origin of and the justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.”⁸⁷

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

⁸⁷ Robert Cover, *Nomos and Narrative*, 97 *Harvard Law Review*, 4, 48 (1983)

⁸⁸ Hobbes, *The Leviathan*.

law.⁸⁹ Judicial interpretation therefore supersedes private interpretation – that is, interpretation anchored in the citizens’ legal imaginaries⁹⁰ –, just as the law of the state trumps private law-making more generally. State law by necessity crushes private jurisgenerative processes and that inevitably disappoints the hopes that the eventually losing party had *ex ante* the judicial outcome. Why, then, is the violence that courts inflict on the private laws or legal interpretation a problem?

To see why, let us first note that an account of the nature of political authority explains precisely that – the nature of political authority. Not all the questions about public life in a polity concern the nature of political authority. As Bernard Williams reminded us, there are questions about politics that are not first-order questions about its foundations.⁹¹ This simple point is relevant to our purposes. The issue of the nature of judicial authority is conceptually distinct from that of the effects of judicial decisions, which itself is distinct from how courts reach those decisions. An account of the foundations of political or constitutional authority is not, without (much) more, also an account of constitutional methodology. While it is true that a theory of the foundations offers a lens for assessing methodological approaches, even that perspective is just one among many.

An alternative is the perspective from reality. The starting point here is not the foundations but a fact of social life or legal practice, for instance the advent of proportionality around the world. One then places the explanandum within a larger framework – constitutional styles, in the case of proportionality – and then works one’s way upwards, so to speak, to a normative reconstruction of the principles that underlie

⁸⁹ The Supreme Court delivers final statements of legal validity. Justice Jackson: “We are not final because we are infallible, but we are infallible only because we are final”, *Brown v. Allen* 344 US 443, 540 (1953) (Jackson J., concurring). See Larry Alexander and Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 Harv. L. Rev. 1359 (1997).

⁹⁰ I use the idea of “legal imaginary” by analogy with Charles Taylor’s conception of the social imaginary, in Charles Taylor, *Modern Social Imaginaries* (Duke, 2007). Taylor defined the social imaginary as “a largely unstructured and inarticulate understanding of our whole situation... (.) an implicit map of the social space.” (at 25)

⁹¹ Bernard Williams, *In the Beginning Was the Deed* at ____.

it.⁹² But there is no Archimedean standpoint from which to approach the facts of social or legal practice.⁹³ Since legal practice and theory are in a dialectical relationship, then it is critical to choose – however tentatively – the theoretical lens that will make it possible to “see” the phenomenon. Cover’s emphasis on “the violence of the state’s law acting upon the free interpretative process” is a helpful lens because it brings to light a crucial distinction between violence and coercion. I explain below.

Judicial decisions have coercive effects: the state will not bring its force-dispensing machinery to protect the interests of the losing parties and/or of other similarly positioned stakeholders. In a liberal democratic state, such instances of state coercion must be justified.⁹⁴ That is, the state should be able to give citizens reasons why it forces them to be free.⁹⁵ That justificatory process is itself violent, albeit not coercive, since in that process the state will inevitably crush the outcomes of private jurisgenerative interpretative processes. The rise of proportionality, I submit, should be understood in the context of judges’ shared uneasiness about the lack of adequate tools to mitigate the violence that the justification of state coercion inflicts on private jurisgenerative interpretative processes. Put more straightforwardly, proportionality is an answer to the lack of available methods sufficiently attuned to the need to justify interpretative violence and judicial coercion.

The rise of proportionality can be understood as one indication that courts perceive as insufficient – more exactly, insufficiently responsive –justifying violence by reference to the need for an allocational constitutional scheme that gives judges the final

⁹² This is a methodology similar to Rawls’s in *Political Liberalism*, see supra note ____.

⁹³ I assume arguendo this to be the case. See Ronald Dworkin, *Hart’s Postscript and the Character of Political Philosophy*, 24 *Oxford Journal of Legal Studies* 1 (2004).

⁹⁴ See also Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, *Law and Ethics of Human Rights* vol. 4(2): 141-157 (2010), at 157 (“any coercive act in a liberal democracy has to be conceivable as a *collective judgment of reason* about what justice and good policy require.”).

⁹⁵ The types of reasons can (perhaps, must) be understood in the context of a legal culture’s embeddedness in a larger political, social and cultural context. See J.H.H. Weiler, *Fundamental Rights and Fundamental Boundaries*, in *The Constitution of Europe*, pp. 105-107.

word over what the law is. Moreover, it is also insufficient to invoke, in the way of the Doric style, not a need for but the nature of that allocational scheme. The reasons why appealing with the nature of the allocational scheme is perceived as inadequate to mitigate the impact of interpretative violence have as much to do with the perception of that violence as with the allocational scheme itself. First and foremost is the fact of social pluralism. Pluralism makes it significantly more difficult to justify exercises of political power that coerce subjects into compliance with norms which they, as individuals holding diverging life plans, can – and often do – reasonably challenge on substantive grounds of fairness as they understand it. Pluralism puts particular pressure on judicial responsiveness. The fact of pluralism widens the pool of perspectives on social and political life from which claims are drawn while at the same time deepening the need for justification of specific institutional responses in ways acceptable to a pluralist citizenry. How can the free institutions of a constitutional democracy retain an appropriately high degree of responsiveness to the claims of a citizenry that holds deep, reasonable, yet incompatible comprehensive doctrines of the good?

Add to this the critique of legal determinacy in modern jurisprudence. While jurisprudential debates around these issues remain as vigorous as ever, many legal cultures have become sufficiently permeated with the view that law is under-determinate and that interpretation is necessary: “general propositions do not decide concrete cases.”⁹⁶ This is especially so in the case of open-ended constitutional provisions where it is assumed that there will be a multiplicity of interpretative options and (often reasonable) disagreement about the correct interpretation. This critique of determinacy has heightened the perception of fallibility of legal justification. Calls for transparency and candor must be understood in this context.⁹⁷

Another explanation why reference to the constitutional scheme is insufficient has to do with the complexity of the relations between individuals and the modern state. The role and functions of the modern state have expanded in the course of the twentieth

⁹⁶ See generally Mark Tushnet, *Essay on Rights*, 62 *Texas Law Review* 1363 (1984).

⁹⁷ See Vicki Jackson, *Being Proportional about Proportionality*, 21 *Constitutional Commentary* 803 (2004).

century and the dynamic of the relationship between its institutions and citizens has become accordingly complex. As far as the law's task is concerned, this complexity can cut both ways. Its task can be understood as counterbalancing that complexity and preserving the polyphonic simplicity of the Doric style: constitutional rights are insuperable side-constraints on the satisfaction of state interests, no matter how strong they might be.⁹⁸ Or, conversely, the state's functions might require its law to reflect the intricate dynamic of the relations between the state and its citizens. This approach, encapsulated by the Corinthian style, sees law as lacking real ground on which to pretend that conflicts between the state (that is, us) and the individual right-holders are any less complex than we know them to be. Much can be said for both approaches, although the advent of proportionality shows constitutional practice taking the latter route.

The question remains why proportionality is perceived as more attuned to the need to justify interpretative violence and judicial coercion. I have already suggested that part of the answer has to do with respect. In hard cases, where the indeterminacy of the interpretative choice makes it both harder and more necessary to mitigate the *ex ante/ex post* gap, proportionality enhances judicial responsiveness by enabling judges to show "equal concern and respect for everyone involved."⁹⁹ As Alec Stone Sweet and Jed Mathews note, this method makes clear that "a priori, the court holds each of the (parties') interests in equally high esteem... [and] provides ample occasion for the court to express its respect, even reverence, for the relative positions of each of the parties," enabling the court to "credibly claim that it shares some of the loser's distress in the outcome."¹⁰⁰

The attention it gives to the claims before it, its substantive engagement with them, the respect with which it treats them – all of these validate the claims and make proportionality a respectful and thus responsive method. Proportionality aims to place the

⁹⁸ Robert Nozick, *Anarchy, State and Utopia* at ____.

⁹⁹ David Beatty, *Ultimate Rule of Law*, at 169.

¹⁰⁰ Alec Stone Sweet and Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *Colum. J. Transnat'l L.* 72, 88, 89 (2008). The authors see this feature as part of proportionality's strategic dimension.

impartiality of the judicial standpoint without denying the objectivity – tantamount in this context to the strength – of the claimant’s positions. As David Beatty put it, “Because it is able to evaluate the intensity of people’s subjective preferences objectively, [proportionality] can guarantee more freedom and equality than any rival theory has been able to provide.”¹⁰¹ As we have seen, the back-loading of proportionality analysis escalates the stakes by heightening the need for a method that will allow judges to measure and ultimately decide which of the conflicting interests will be allowed to prevail. As far as the state interest is concerned, proportionality treats legislation with all the deference possible in a system of assertive judicial review. Judges do not reject out of hand the public interest as understood by the people’s elected representatives. Rather, they put it through a series of steps and are deferential to it up to and including the point when a decision needs to be made. The more stages of the analysis a claim survives, the more its legitimacy is confirmed and the stronger it becomes. By the same token, this method reaffirms the importance of the right-holder’s interest by ensuring that only important public interests will override the very high level of legal protection given to the individual’s rights. Of course, deciding remains inescapable. It would be unreasonable for the members of pluralist societies to imagine they can go through life without having to compromise with the other free and equal members of their communities. As Arendt put it, we share the world with men, not man. But against the horizon of that necessary act of coercion, proportionality does more than alternative methods to make judges treat the parties with respect.

We can now place the three constitutional styles along a spectrum. The Doric style reserves the stamp of objectivity for a judicial standpoint that transcends the “subjective” perspectives of the participants. The Ionic denies the possibility of objectivity altogether, which it understands as requiring “an authoritative basis or foundation beyond current human choices.”¹⁰² By contrast, the Corinthian style constructs the judicial standpoint to incorporate a plurality of perspectives of claimants and acknowledges the objectivity of

¹⁰¹ See David Beatty, *supra* note ___ (*The Ultimate Rule of Law*), at 172.

¹⁰² See Martha Minow, *supra* note ___ (*Rights Interpretation*), at 1877 (italics added)

their claims leading up to and including the moment of decision.¹⁰³ The last section takes a closer look at how different constitutional methods articulate the positional objectivity of the judge.

§5. Freedom and Imagination: The Critique of (Constitutional) Judgment

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

Hannah Arendt, *The Human Condition*¹⁰⁴

Public life requires citizens to bridge the abysses that separate them and experience the world from the perspectives of others. Because we cannot visit other people’s standpoints in reality, we must do it in thought. Imagination plays a crucial role. When one “tries to imagine what it would be like to be somewhere else in thought,” one becomes “liberated from one’s own private interests” and “one’s judgment is no longer subjective.”¹⁰⁵ The power of imagination thus becomes the precondition of our enlightenment.¹⁰⁶ Imagining the world from other people’s perspectives – that is, imagining the people we have not become – unveils dimensions of one’s own identity that routine and thoughtlessness would otherwise have continued to conceal. Only the person that has trained his imagination “to go visiting”¹⁰⁷ and discover the vastness of social space can be trusted to be free.

¹⁰³ As Hannah Arendt wrote referring to judgment in general, “impartiality is obtained by taking the standpoints of others into account: impartiality is not the result of some higher standpoint that would then settle the dispute by being above the melee.” Arendt, *Lectures on Kant*, at 42.

¹⁰⁴ Arendt, *The Human Condition* (1958), at 57-58.

¹⁰⁵ Arendt, *Lectures on Kant*, 105-106.

¹⁰⁶ See generally Paulo Barrozo, *Law as Moral Imagination: The Great Alliance and the Future of Law* (unpublished dissertation, Harvard University)

¹⁰⁷ Arendt, *Lectures on Kant*, at 43.

Yet, imagining other people is difficult. We can hardly imagine what it is like to be the people we know and love, much less a stranger, a political opponent or an adversary in the courtroom. Reliance on imagination as a guarantor of political generosity is a dangerous gamble.¹⁰⁸ Why then would such reliance in the context of constitutional methodology be any different?

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

Like Kant's transcendent idealism, the Doric style enlarges the judicial perspective by detaching the judge from contingent particulars – including his own – to a universal position from which independent judgment is possible. Kant wrote: “However small the range and degree to which a man's natural endowments extend, it still indicates a man of enlarged mind: if he detaches himself from the subjective personal conditions of his judgment, which cramp the minds of so many others, and reflects upon his own judgment from a universal standpoint (which can be done by shifting (one's) ground to the standpoint of others).”¹⁰⁹ The objectivity and impartiality of the Doric judicial standpoint are functions of the judge's capacity to transcend the perspectives of the claimants. But before transcending, the judge must imagine the position of the claimants – he must represent them. Representation is an essential faculty of constitutional judgment: the judge bridges “the abysses of remoteness that separate him from the parties by representing them.”¹¹⁰

¹⁰⁸ Elaine Scarry, *The Difficulty of Imagining Other People*, in Martha Nussbaum, *For Love of Country?* 98-110 (2002).

¹⁰⁹ Kant, *The critique of Judgment*, at 153

¹¹⁰ Emphasis on representation of others in judicial reasoning, in the best understanding of the Doric or any of the other styles, is not meant to replace or supplement political representation. The disreputable history of such an approach is told in Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck's Messianic World*, 35 *New York University Journal of International Law and Politics* 471 (2003).

However, the process of representation-imagination is scripted. The script – namely, judicial method – has the role of filtering out elements of the context whose relevance law does not recognize. And law does not recognize most elements of context. Legal form de-robes people of their contingencies; as Elaine Scarry’s nicely put it, “constitutional strategies rely on a strategy of *imagined weightlessness*, since they define rights and powers that are independent of any person’s personal features.”¹¹¹

Access to the universal standpoint requires detachment from the particulars of context and thinking in the place of “any other man.”¹¹² Presumably, this task is not peculiar to judges only. Representation is not a one-way street. The parties too must imagine themselves in the standpoint of their judges.¹¹³ They must make the effort to see whether the judgment by which they are required to abide is the same as the judgment they would have reached if they themselves had been in the position of the decision-maker. The burden of representing the standpoint of judges is significant. It requires parties to bracket away the desire to satisfy the interests that brought them to court. That position places the claimants behind a veil of ignorance where awareness of their positions and the certainty of their own rightness no longer shape their perspective.¹¹⁴ This cognitive ability to grasp the mutability of social roles by learning how to detach oneself from the contingencies of one’s own social position is a defining characteristic of a Doric constitutional culture. There are far-reaching consequences for a political culture when citizens come to understand their social roles as being the result of fortune as much

¹¹¹ Elaine Scarry, *supra* note __ (The Difficulty of Imagining Other People), at 106 (my italics).

¹¹² *Id.*

¹¹³ They must do so as part of their duties of citizenship. For the idea of citizens as office-holders, see Rawls, *Political Liberalism*, at __.

¹¹⁴ See Koskeniemmi, *The Gentle Civilizer of Nations*, at 501 (“formalism seeks to persuade the protagonists (lawyers, decisionmakers) to take a momentary distance from their preferences and to enter a terrain where these preferences should be justified, instead of taken for granted, by reference to standards that are independent from their particular positions or interests.”)

as of virtue or vice. It is a failure only of imagination, and not of possibility, if one cannot conceive of one's life taking a different turn in "the yellow wood."¹¹⁵

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

One possible critique of empathy concerns its inherent instability. When conducted properly, empathy runs the risk of blurring the lines between oneself and others.¹¹⁶ The discovery of humanity in others ultimately threatens to transgress the boundaries of our inherent separations. For this reason empathy can be considered "assimilationist."¹¹⁷ Its object assimilates it. The one who loses himself in another cannot be said to remain situated anywhere: he is always at the mercy of his object of attention. If the Doric approach positions judges in ways that are too aloof and distant, the Ionic

¹¹⁵ Robert Frost, *The Road Not Taken* in *Selected Early Poems* 141 (Thomas Fasano ed., Coyote Canyon Press)(2008).

¹¹⁶ Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. Cal. L. Rev. 1877, 1935 (1988) ("Rather than bemoan ... a switch in roles, feminism teaches us to celebrate such rearrangements, to require judges to let others judge them. Such moments might better enable judges to be empathetic, to adopt the perspective of the other, to enter into the experience of the courtroom unprotected by their special status. Judge as witness can thus be understood as a profound challenge to a stable hierarchy, as a subversive act to be applauded.")

¹¹⁷

correction errs in the opposite direction: the judicial standpoint melts under the heat of empathy. This is no doubt a rather drastic approach to the mutability of institutional roles.

This critique is only partly sound. The risk that the empathetic self can become entirely assimilated to its object is illusory.¹¹⁸ For the same reason why Doric transcendence cannot shake off its formative contexts before setting out to judge, so here the immersion into another person's perspective does not wipe out all previous traces of one's own personality. But it is true that the Ionic style lacks a synthesis formula, so to speak, to show how the judicial standpoint grows and expands as its object of empathy keeps shifting from one object to the next. Without such a formula, the judge runs the very real risk of becoming assimilated – or “locked,” as Kant put it¹¹⁹ – into other people's prejudices and biases. Without critical distance and a method, a judge might end up trading one set of prejudices to another.¹²⁰

But there is another and related difficulty with Ionic empathy. This one has to do with the fact of pluralism. While this style embraces (indeed, extolls) pluralism, it also tends to miscalculate its depth. Its friendly attitude results from the questionable belief that distances between people are shorter than they appear. In fact, the depth of our differences is very great indeed and the line that separates reasonable from unreasonable conceptions of the good is itself the object of dispute. The need for a judicial mind that does not just travel but can also synthesize the resulting information is paramount to then apply constitutional law in a way that coordinates social interaction. Synthesis of that sort requires detachment to an impartial – that is, objective – judicial standpoint.

¹¹⁸ See Robin West, *The Anti-Emphatic Turn* (2011), available at (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1885079)

¹¹⁹ Kant, *Critique of Judgment*, at 160.

¹²⁰ See Disch, 162 (discussing the risks of shifting “(others’) prejudices for the prejudices proper to (one’s) own station.”). It can be said, with respect to proportionality analysis, that the division into four distinct steps imposes a “mental double-check” aimed precisely at creating the distance necessary to identify and counter possible prejudice. For a discussion of mental double-checks and the psychology of judging, see Dan H. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. (2009).

Like all legal judgments, constitutional judgment must be impartial. Impartiality reflects the decision makers' distance from any claimants' private interests: the judge should speak from the perspective of the citizenry and its laws.¹²¹ The Corinthian style seeks to construct an empathetic yet impartial judicial standpoint somewhere in the "middle ground between cognitive truth claims and mere subjective preferences."¹²² We have already seen why and how it goes about doing it, and have reflected on its limited success.

Arendt's work on the critique of judgment eloquently captures the task of the Corinthian style. Arendt famously framed this analysis as an explanation of Kant's Lectures on Political Philosophy. Commentators have noted that there is more Arendt than Kant in those explanations.¹²³ Yet, it is telling that Arendt herself did not see it that way. I believe the reason is that she saw her interpretation as solving the instability inherent in the concept of representation in the only way it can be solved, hence Kant's only possible implied solution. The instability has to do with how much detachment judgment requires. As one commentator formulates the problem, "representation is principally oriented toward creating distance. It detaches me from the immediacy of the present where there is no space in which to stop and think. Representation is a limited withdrawal that makes the present less urgent and the familiar strange but stops sort of disengaging me to the point that I no longer care to wonder what a situation means."¹²⁴

¹²¹ Judicial decisions, like all acts of state authority, are coercive acts. And "any coercive act in a liberal democracy has to be conceivable as a collective judgment of reason about what justice and good policy require." See Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, *Law and Ethics of Human Rights* vol. 4(2): 141-157 (2010), at 157.

¹²² Nedelsky cited in Salyzyn, *The Role of Agency in Arendt's Theory of Judgment: A Principled Approach to Diversity on the Bench*, 3 *J. L. & Equal.* 165 (2004) at 174.

¹²³ Amy Salyzyn, *The Role of Agency in Arendt's Theory of Judgment: A Principled Approach to Diversity on the Bench*, 3 *J. L. & Equal.* 165 (2004) --- at 169 ("while she seeks to appropriate many of the core concepts of Kant's theory, she rejects his transcendental universalism and moves away from his formalism to situate judgments in real, particular communities.")

¹²⁴ Disch *Hannah Arendt and the Limits of Philosophy*, at 158

Now, the problem is the same we have encountered in the discussion between Doric universalism and Ionic particularism.

Arendt's way out is to emphasize plurality as an alternative. She starts by rejecting approaches similar to what I labeled as the Doric approach: "[I]mpartiality is obtained by taking the standpoints of others into account: impartiality is not the result of some higher standpoint that would then settle the dispute by being above the melee."¹²⁵ By the same token, the process of representation "does not blindly adopt the actual views of those who stand somewhere else, and hence look upon the world from a different perspective: this is a question...of empathy."¹²⁶ As one of Arendt's commentators put it, empathy requires to "'be or to feel like somebody else,' while in representation – of the kind that Arendt has in mind – visiting is hypothetically to think and to feel as myself in a different position."¹²⁷ Rather, the standpoint gives the judge sufficient distance from a controversy to gain the perspective on which impartiality depends but not so much as to become disconnected and aloof.¹²⁸

The situated impartiality of the (Corinthian) judicial standpoint, as Arendt describes it, is the outcome of "a critical decision that is not justified with reference to an

¹²⁵ Arendt, *Lectures on Kant*, at 42.

¹²⁶ Arendt, *Lectures on Kant*, Interpretative essay, at 107.

¹²⁷ Disch at 168

¹²⁸ Arendt, *On the nature of totalitarianism: An Essay in Understanding* (quoted in Lisa Disch, *Hannah Arendt and the Limits of Philosophy*, at 157) ("Only imagination is capable of what we know as "putting things in their proper distance" and which actually means that we should be strong enough to remove those which are too close until we can see and understand them without bias and prejudice, strong enough to bridge the abysses of remoteness until we can see and understand those that are too far away as though they were our own affairs. This removing some things and bridging the abysses to others is part of the interminable dialogue for whose purpose direct experience establishes too immediate and too close a contact and mere knowledge erects an artificial barrier.")

abstract standard of right but by visiting a plurality of diverging public standpoints.”¹²⁹ In this relational constitutional space, moving back and forth enlarges the judicial standpoint by integrating different perspectives. And that integration of the different perspectives within the judicial standpoint – as constitutional interpretations whose objectivity is undisputed – enhances the perception of judicial responsibility.

The presence of social pluralism in the form of a plurality of standpoints in constitutional methodology is a defining feature of proportionality. At one level, this development is unnerving. The purpose of law is to solve disagreement, not replicate it.¹³⁰ At the same time, the success of proportionality shows that legal doctrine and method do not implode under the pressures of pluralism. Exactly why not is a different matter but the mere indication that some legal practices might withstand such pressures is sufficiently noteworthy.

Conclusion

My aim in this paper has been to offer an additional – though by no means exclusive – explanation why proportionality has become the method of choice for constitutional judges around the world. I have argued that this method enhances judicial responsiveness by renegotiating the relationship between judges and their audiences. It is worth recalling in this context that proportionality is a staple of global constitutionalism. In that context, the question becomes how the building blocks of my argument with respect to proportionality (the idea of constitutional responsiveness, the role of constitutional

¹²⁹ Disch (162). Arendt goes on. As she describes it: “I form an opinion by considering a given issue from different viewpoints, by making present in my mind the standpoints of those who are absent: I represent them. ...The more people’s standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and valid my final conclusions, my opinions.” Arendt, *Lectures on Kant*, Interpretative essay, at 107.

¹³⁰ Jeremy Waldron, *Kant’s Legal Positivism*, 1535 *Harvard Law Review* 1535, 1540 (1996) (“law must be such that its content and validity can be determined without reproducing the disagreements about rights and justice that it is law’s function to supersede.”)

imagination, the self-understanding of judges, the construction of constitutional space) relate to other practices of global constitutionalism, from doctrines of standing to the use of foreign law in constitutional interpretation. Answering that question will take us closer to articulating the project of cosmopolitanism in constitutional law.