

**Moshe Cohen-Eliya & Iddo Porat, The Hidden Foreign Law Debate in Heller**  
**Comments by Stephen Gardbaum**

(prepared for panel at international conference on proportionality and balancing)

I think this is a highly insightful paper, which exhibits broad and deep knowledge, excellent analytical skills, and sophisticated methodological sensibilities. I learned a great deal from it. The essential thesis is that despite relatively superficial doctrinal similarities between German/European proportionality and U.S. balancing, there are fundamental differences between them at the deeper, contextual level of historical, cultural, and institutional characteristics.

There is, of course, no doubt -- as the authors document -- that there are important differences between German and American constitutionalism, reflecting broader differences in dominant background political theories and cultures. There is also no doubt that one would expect these differences to manifest themselves in many specific areas of constitutional law, including proportionality and balancing. I also entirely agree that, as a discipline, comparative constitutional law must include a methodological focus on both difference and similarity, on contextual and universal factors – without general precommitment to, or victory of, one over the other. That said, the general thrust of my comments – if there is one -- is to question whether you have perhaps slightly overstated some of the contextual differences between German proportionality and U.S. balancing. (My specific questions and points that follow are listed in the order in which they appear in the paper, not in order of importance).

1. I start with a tangential point. On page 17, you state that “balancing was developed in the U.S. in the early twentieth century to limit rights accorded absolute protection by the *Lochner Court*.” Yet, wasn’t *Lochner* itself a case involving balancing? The court first held that the employer’s (and employees’) freedom of contract had been infringed by the state maximum hours law and then focused most of its analysis on the second-step issue of whether the limitation of this right was justified in the particular context. It engaged in means-end of whether the maximum hours law promoted a legitimate interest (labor law no, health yes) and whether the law rationally and closely enough promoted it. There was no “absolute protection” afforded the constitutional right to freedom of contract as both the court’s analysis in the case and its upholding of several other state regulations (maximum hours for women, miners, and factory workers) during the *Lochner* era make clear.

2. On page 24 and in several other places, as part of the differences in background political culture between Germany and the US, you discuss “the great suspicion with which...the judiciary are regarded [in the US].” This suspicion in turn, you argue, leads to skepticism about giving courts the broad discretion required by balancing. As I mentioned yesterday, I don’t believe there is great suspicion of the judiciary in the U.S. I think judicial review is, and always has been, relatively popular among the citizenry – which is why it has been around for so long – if not among a certain strand of the legal academy (perhaps this is partly because legal academics are appointed to the German Constitutional Court but not the U.S. Supreme Court!). I wonder whether the German Court would have decided *Bush v. Gore* if it had come to it via constitutional complaint? And if so, would the German public have been as accepting of it as the American?

I think skepticism towards judicial balancing in the U.S. is significantly (though not totally) explained, like much else besides, by the absence of express limits on constitutional rights.

3. Rights as trumps, page 25. As another example of the suspicion-based conception of the state you write that “formulating constitutional rights in absolute terms was preferred to the complexity of allowing limitations on rights...” And elsewhere you refer to a more categorical conception of constitutional rights in the U.S. Of course, as just mentioned, you are right that textually most rights in the U.S. are absolute as there are no express limits on rights. But this formal point has long since (at least as far back as *Lochner* itself) lost its hold in practice as the courts have implied limits on virtually all constitutional rights – hence, the common second stage of rights analysis. Moreover, I think the conventional view that constitutional rights are generally weightier, or more categorical, in the U.S. than elsewhere is too simplistic. For example, the rights to practice an occupation and to religious liberty are currently weightier in Germany than in the US, as arguably are the general rights to liberty and equality (because the necessity and proportionality *stricto sensu* tests, while leniently applied, are still more significant than the US rational basis test). And there is no US equivalent to the German essential core doctrine. Moreover, as Moshe argues in his first paper, lack of a formal proportionality *per se* prong may arguably sometimes permit rights to be limited in the US that would fail this test in Germany.

4. Page 26: the Marbury/Hamiltonian argument that judicial review simply involves the courts acting as the agents of We the People and enforcing the limits that the people originally placed on government. As I mentioned yesterday, apart perhaps from Jed Rubenfeld, I don’t think anyone is persuaded by this democratic argument for judicial review. No one believes, for example, that We the People decided to enshrine the constitutional right to abortion, or the undue burden test that limits it, in 1868, or that the 5 to 4 result of *Bush v. Gore* was decided in 1789.

5. Page 26. I think the criticism of balancing as involving too much judicial discretion that you mention here is not at all distinctive to the U.S., but is a standard criticism of proportionality in Germany and elsewhere. Indeed, Moshe makes this point in his first article for the conference and Prof. Alexy responds to this criticism in his.

6. Page 28: Balancing as smoking-out. I think the “smoking-out” function, where it applies, is part of balancing in the US, and elsewhere, and not part of a more categorical exercise. It relates to the ends test of whether the government is pursuing a sufficiently important objective, or rather an end that is “illegitimate” in the specific context of justifying an override.

7. Page 30: Balancing as the exception Rather than the Rule. Balancing is part of the second-stage analysis for *all* constitutional rights in the U.S., not only those subject to strict scrutiny.

8. Page 32-33: rights are considerably broader in definition and scope in Germany than in the US.

(1) General rights to liberty and equality in Germany (riding horses in the woods, etc.). There are similar rights in the US: all governmental restrictions of “liberty” and “equality” (equal protection) are subject to rational basis scrutiny. As in Germany, it is typically very easy for governments to justify such restrictions.

(2) In Germany, too, certain categories of speech are excluded from protection under Article 5: misquotations, demonstrably false statements of fact, perhaps even all false statements outside the political context. Moreover, these are generally protected speech in the U.S.

9. Page 34: The U.S. Constitution does not apply to private law. As you know from my Myth and Reality article, I disagree with this conventional wisdom. To my mind, *New York Times v. Sullivan* affirms what the Supremacy Clause makes clear: the Constitution applies to the common law at issue in private litigation.

Once again, I very much enjoyed reading your excellent paper and learned a great deal from it. I hope these very brief comments are helpful.