

A DEMOCRATIC DEFENSE OF CONSTITUTIONAL BALANCING

Stephen Gardbaum *

We all live in the age of constitutional balancing. Abstracting away—for present purposes—differences of nuance and doctrinal detail, balancing is a common feature of the structure of constitutional rights analysis not just in the United States but across contemporary constitutional systems everywhere.¹ Indeed, abstracting just a little further still, balancing is an inherent part of the near-universal general conception of a constitutional right as an important *prima facie* claim that nonetheless can, in principle, be limited or overridden by non-constitutional rights claims based on conflicting public policy objectives.

It is not surprising, then, that a significant literature about constitutional balancing has developed at both domestic and comparative levels. What is surprising is that so little of this literature has attempted to present the normative case for constitutional balancing or the general structure of rights analysis of which it is an inherent part.² Rather, the existing scholarship has

* Professor of Law, UCLA. This draft paper was prepared for the roundtable on proportionality and balancing to be held in Tel Aviv on January 3-5, 2009. Please do not cite or quote without permission.

¹ In the U.S., the term balancing commonly refers to the entire process of determining whether or not a constitutional right has been justifiably limited; elsewhere, it sometimes refers specifically to one part of this process; namely, the third prong of proportionality analysis: proportionality (or balancing) *stricto sensu*. See *infra* note 13.

² Only a few non-critical works have considered balancing from a normative perspective at all. Mattias Kumm has recently provided an important and impressive normative analysis of the principle of proportionality, as employed primarily in Europe, from the perspective of whether it adequately coheres with the conception of rights inherent in political liberalism. As a normative evaluation of proportionality from this perspective, it is part defense and part critique, as the subtitle of his essay suggests. Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in *LAW, RIGHTS, DISCOURSE: THE LEGAL PHILOSOPHY OF*

mostly focused on five other tasks: (1) describing first-order practices of balancing and/or the extent to which it has become the dominant mode of constitutional rights jurisprudence;³ (2) providing second-order conceptual analyses or “rational reconstructions” of balancing and/or the general structure of rights analysis;⁴ (3) explaining how and why balancing has become dominant and with what consequences for judicial power,⁵ (4) presenting critiques of balancing;⁶ and (5) attempting to rebut certain parts of these critiques.⁷ And yet, at least for those who don’t oppose it, providing an affirmative justification for constitutional balancing would appear to be an important and urgent task. This would not be true if there were no available or conceivable

ROBERT ALEXY 131 (George Pavlakos ed., 2007). David Beatty has presented a more unqualified normative justification of the principle of proportionality as providing the best account of why judges should have the power of Judicial review and how they should exercise it. That is, as compared with rival theories of constitutional interpretation, proportionality is a neutral, rational methodology that is able to reconcile democracy and rights in a way that optimizes each. DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159-188 (2004). Although overlapping, my normative justification of balancing generally differs from Beatty’s defense of proportionality in not being primarily focused on judicial methodology and the question of the best mode of constitutional interpretation, but rather on (what to my mind are) the prior issues of the general conception of a constitutional right and the allocation of decision-making authority between courts and legislatures about rights and their limits within a democracy.

³ See, for example, NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY* (1996); RICHARD H. FALLON, *IMPLEMENTING THE CONSTITUTION* 82-85 (Harv. Univ. Press 2001); David S. Laws, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 688-690 (2005).

⁴ Perhaps the preeminent example of this type of scholarship is ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers trans., Oxford Univ. Press 2002) (described by its translator as “a rational reconstruction of German constitutional rights reasoning,” *id.* at xvii, and by its author as “[t]he classical term for it [the book] would be the general part of constitutional rights doctrine,” *id.* at 3). Alexy argues that balancing is a necessary implication of the German conception of constitutional rights as principles to be optimized (rather than rules). Other notable works of this general type, focusing on U.S. constitutional rights jurisprudence, include Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1 (1998), Richard H. Fallon, *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993), and Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415 (1993).

⁵ Alec Stone Sweet and Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, (forthcoming 2008).

⁶ In the U.S., a highly influential critique of balancing is T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943 (1987). In Germany, Jürgen Habermas has been a major critic; see JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 254-259 (William Rehg trans., Polity Press 1996); Jürgen Habermas, *Reply to Symposium Participants*, in *HABERMAS ON LAW AND DEMOCRACY* 429-30 (Michel Rosenfeld & Andrew Arato eds., Univ. of Calif. Press 1998).

⁷ For example, Robert Alexy has attempted to rebut Habermas’ (and others’) critique of balancing in Alexy, *supra* note 2, at 388-394 and also in Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 I.CON 572, 572-577 (2005).

alternatives to balancing or to this conception of a constitutional right but, as critics have made increasingly clear, there are.

In this essay, I attempt to contribute to this underexplored task by suggesting one particular normative justification for constitutional balancing and the general conception of a constitutional right that underlies it; namely, a democratic justification. I argue that (most) constitutional rights should in principle be limitable or overridable when in conflict with (certain) weighty and important public policy objectives for democratic reasons. This conception of a constitutional right, of which balancing is an inherent part, appropriately bolsters the role of majoritarian decision-making about rights within a system of constitutional democracy. Before presenting this argument in Part II, it is first necessary to clarify the connection between balancing and the dominant general conception of a constitutional right and to explain why balancing should not be understood exclusively or even primarily as a self-contained judicial methodology of constitutional adjudication but more broadly as an inherent part of this conception (Part I). After presenting the normative argument, I will consider its significant implications for how courts should exercise their powers of judicial review in Part III.

I. BALANCING AND THE COMMON CONCEPTION OF A CONSTITUTIONAL RIGHT

The dominant general conception of a constitutional right throughout contemporary Western legal systems is that such rights are important prima facie claims that can, in principle, be limited or overridden by non-constitutional rights claims, specifically by certain conflicting public policy objectives.⁸ In this essay, I use the term constitutional balancing to refer to the

additional feature that, within this general conception, whether the prima facie case has been rebutted and so a given right validly limited or overridden by a conflicting public policy objective is determined not by applying an automatic or categorical priority rule (for example, that a right will not be validly overridden unless the legislature makes its intent to do so clear and manifest, or that a right will be validly overridden as long as the legislature avoids an “excluded reason” for acting⁹) but, at least in part, by assessing the relative strengths or merits of the two claims in the particular factual and legal circumstances in which they are raised.¹⁰ Balancing is this process of determining whether or not a conflicting public policy objective outweighs¹¹ an implicated prima facie constitutional rights claim and, in this way, is an inherent part of the general conception.¹²

My use of the term balancing is thus in line with the broader or more general, rather than the narrower, meanings it has been given in the literature.¹³ My reasons for this are two-fold.

⁸ For Germany, *see, e.g.*, Alexy, *supra* note 4, at 192 (“The principled nature of constitutional rights gives rise not only to the idea that constitutional rights are limited and limitable in the light of countervailing principles, but also that their limiting and limitability is itself limited.”). For the United States, *see, e.g.*, Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L.REV. 415, 443 (1993) (characterizing constitutional rights in the U.S. as “shields” rather than “trumps” against conflicting public policy objectives). By referring here and throughout the essay to the “dominant” general conception of a constitutional right and contrasting it below with the “rights as trumps” and “excluded reasons” conceptions, I acknowledge that both of these alternative conceptions may apply to or best explain certain rights in certain constitutional systems. In other words, my claim is one of dominance not exclusivity. For an example, *infra* note 25.

⁹ *See infra* text accompanying notes 23-26.

¹⁰ As Robert Alexy puts it, in the context of Germany: “A limitation of a constitutional right is only permissible if principles competing with the principle underlying the right have greater weight in the circumstances of the case.” Alexy, *supra* note 4, at 192.

¹¹ As discussed in *infra* note 35, to say that balancing involves “weighing” constitutional rights claims against conflicting claims based on certain public policy objectives is *not* to say that the weighing process involves only quantitative reasoning to the exclusion of qualitative.

¹² Indeed, Robert Alexy argues that balancing is a logical implication of the structure of constitutional rights as principles to be optimized rather than rules. *See supra* note 4, at 66-69.

¹³ In the United States, there is some ambiguity in the literature about the term “balancing,” which is sometimes given either a broader or a narrower meaning. *See FALLON, supra* note 1, at 82-85. The broader meaning refers to

First, from a comparative perspective, this is by far the more common usage of the term; in this context, the narrower meaning sometimes employed in the United States is idiosyncratic.

Second, the anti-balancing critique to which I am in part responding (albeit positively rather than negatively) has largely relied on the broader meaning.¹⁴ But to any who may reject my usage despite the precedents and believe that I am not really discussing “balancing” at all, I say let’s avoid the terminological issue and move on: the article may then be read simply as presenting the democratic case for the dominant general conception of a constitutional right.

This common general conception of a constitutional right as an important *prima facie*, but nonetheless rebuttable, claim is, to be sure, both instantiated and operationalized in various ways in different Western constitutional systems. In terms of instantiation, at least three different concrete forms exist. First, express limits on constitutional rights specifying the particular public policy objectives that can, in principle, override them.¹⁵ Second, express limits that do not

any doctrinal test which “requires courts to assess whether a statute [or other state action] ought to be upheld, in light of the governmental interest that it serves, despite its impact on” a constitutional right. *Id.* at 83-4. Such tests may contain stronger or weaker presumptions of constitutionality or unconstitutionality, or involve either “weighted” or “evenhanded balancing.” The narrower meaning tends to refer only to this latter: a doctrinal test that requires courts to engage in a more evenhanded weighing of multiple factors on a case by case basis. The difficulty of drawing this line, however, is arguably revealed by Professor Fallon’s inclusion of “intermediate scrutiny” in the narrower category. *See id.* at 83.

Outside the U.S., “balancing” is sometimes used synonymously with “proportionality” and sometimes as a distinct subpart of proportionality analysis. Thus, in those countries adopting the conventional three-step proportionality analysis (rationality, necessity, proportionality *stricto sensu*), balancing often refers specifically to the third and final prong of the test for limiting rights. *See Alexy, supra* note 4, at 67 (“The principle of proportionality in its narrow sense, that is, the requirement of balancing...”). *See also Stone Sweet, supra* note 5 (referring to this third prong as “balancing in the strict sense.”). By contrast, in those countries and regimes that have adopted a more holistic or gestalt version of proportionality analysis, “balancing” and “proportionality” are commonly employed interchangeably to refer to the entire process of adjudicating limits on rights, as, for example, in the case-law of the European Court of Human Rights.

¹⁴ Although Professor Fallon believes that “more illumination is lost than gained” by employing the broader meaning of balancing in the U.S., he acknowledges that those making the anti-balancing critique rely -- indeed, have to rely, as far as their descriptive claim about the pervasive role of balancing tests is concerned -- on this broader meaning (“That claim depends on a broader characterization of balancing – one that encompasses suspect-content and non-suspect-content tests.”). FALLON, *supra* note 1, at 83 (citing Aleinikoff, *supra* note 3, at 946, asserting that compelling state interest tests “exemplify” a “form” of balancing)).

specify particular public policy objectives capable of overriding constitutional rights but rather the general criteria for such overrides.¹⁶ These first two in practice tend to overlap with the distinction between specific and general limitations clauses, but there is no necessary connection between them: it would be perfectly possible for a general clause to specify which public policy objectives are capable of overriding constitutional rights; and for specific clauses to state the general criteria, as is in fact true of the European Convention on Human Rights.¹⁷ Third, implied limits on constitutional rights. Some constitutions, such as that of the United States, rely almost exclusively on judicially implied limits; others, such as the German Basic Law, rely on a mixture of express and implied limits on constitutional rights.¹⁸

In terms of operationalization, different systems employ somewhat different concrete or doctrinal tests for determining whether, in the particular circumstances, the (express or implied) limit on a constitutional right has been validly employed.¹⁹ These tests may or may not

¹⁵ Examples of such express limits include the second paragraphs of Articles 8-11 of the European Convention on Human Rights (specifying, for example, public safety, protection of health or morals, protection of reputation as potentially overriding public policy objectives) and Article 13 (3) of the German Basic Law contains a list of public policy objectives that can potentially override the right to inviolability of the home.

¹⁶ For example, section 1 of the Canadian Charter of Rights and Freedoms states: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits as can be demonstrably justified in a free and democratic society.” Part I of the Constitution Act, 1982, § 1. The South African Constitution also contains a general limitations clause, which states that: “The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including —(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.” S. AFR. CONST. 1996 § 36(1).

¹⁷ Thus, Articles 8-11 referred to in *supra* note 7 also each include the general criterion for a valid override: limits must be “prescribed by law and [are] necessary in a democratic society in the interests of [public safety, etc.]”

¹⁸ See Alexy, *supra* note 4, at 178-192.

¹⁹ Since, in my (broad) usage, this is the part of constitutional rights adjudication that involves balancing, this means that a range of slightly different balancing tests are employed.

themselves be expressly included in the constitutional text.²⁰ Thus, as is well-known, there are several slightly different formulations of the proportionality test²¹ and perhaps two significant variations: what Julian Rivers has referred to as the “common law” and the “continental European” conceptions of proportionality.²² Equally well-known is the fact that the United States officially rejects the (single) concept of proportionality in favor of separate tiers of means-end scrutiny—strict scrutiny, intermediate scrutiny, undue burden, and so on—incorporating different presumptions and tests depending on the particular right at issue.

Notwithstanding these variations, in terms of structure there is a common two-stage process of rights analysis, which expresses and manifests the general conception: the first stage determining whether a prima facie case of rights infringement has been made out; the second stage determining whether the right is validly limited or overridden by a conflicting public policy objective in the specific factual and legal circumstances. The second stage concerns what can usefully be thought of as external limits on rights: when can a right that, as interpreted, is implicated and does apply in the specific situation nonetheless be limited or overridden by conflicting public policy objectives. And it is this second stage of rights analysis that mandates balancing. By contrast, where they exist, internal limits on rights operate at the first stage: what is included within a constitutional right that is claimed to be implicated, what is its meaning and scope?²³ It is at this slightly higher level of abstraction that I refer to balancing and the general

²⁰ Thus, the South African general limitations clause quoted in *supra* note 16 states the various prongs of the test to be used. By contrast, section 1 of the Canadian Charter only states the general criterion for limits but the concrete operationalization, in the form of the three-prong proportionality test, has been judicially implied. The general proportionality test applying to all rights in Germany is also the product of judicial implication.

²¹ For example, in Canada, the terminology of the tripartite test is rationality, minimal impairment, and proportionality; whereas in Germany, it is suitability, necessity, and proportionality *stricto sensu*.

²² Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 Cambridge L.J. 174, 177-182 (2006).

conception of constitutional rights as essentially universal among contemporary constitutional systems, including the United States.²⁴

It is important to appreciate that central to this general conception is not merely that constitutional rights have limits but they are *limitable by the political institutions*. In other words, the second stage of rights analysis incorporates the proposition that the political institutions are constitutionally empowered (but not, of course, required) to place limits on and override constitutional rights in the face of conflicting public policy objectives when the relevant substantive criteria under the applicable doctrinal test have been satisfied.²⁵ Accordingly, the dominant general conception of a constitutional right should be understood as granting the political institutions a limited power to override rights, and external limits on rights specify the parameters of this power.²⁶ This limited override power contrasts with the type of unlimited power that is granted by a handful of contemporary constitutional systems, most notably under Section 33 of the Canadian Charter of Rights and Freedoms.²⁷

Rivers argues that the courts of several common law countries are somewhat uncomfortable with the third and final prong of proportionality analysis (proportionality in the strict sense) and so in practice tend to employ only a two-stage proportionality test: rationality and necessity/minimal impairment.

²³ For more extensive discussion on the distinction between internal and external limits on rights, see Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L.REV. 789, 798-810 (2007); see also Alexy, *supra* note 3, at

178-181. Although the first stage of rights adjudication can involve a type of balancing (sometimes referred to as definitional balancing), it is neither the type of balancing that I am discussing nor is such balancing necessary, as it is with the second stage.

²⁴ A similar descriptive claim is made in both DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159-188 (Oxford Univ. Press 2004) -- although Beatty uses the terminology of the "principle of proportionality" and eschews the term "balancing" -- and David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 689 (2005) ("variations in text and terminology do not appear to engender deep dissimilarities in the analytical structure of rights adjudication.").

²⁵ Typically, although not always, this limited power is granted to both the legislature and the executive. However, for reasons discussed below, the democratic justification for this power that I present in Part II applies more strongly to the legislature than the executive, as does the consequent standard of judicial review for its exercise that I propose in Part III. See *infra* text accompanying notes 43 and 66.

²⁶ For more on this argument, see Gardbaum, *supra* note 23.

Moreover, understood in this way, balancing rights against conflicting public policy objectives is not primarily or essentially a self-contained judicial methodology of constitutional adjudication, to be contrasted with other interpretive techniques or more formal/categorical methodologies. Rather, balancing is part of the broader structure of constitutional rights in which the political institutions have a limited override power. Indeed, balancing is an *intrinsic* part of this power and, as such, primarily an exercise performed by the political institutions. The task of the courts in reviewing exercises of this power, as any other, is to ensure that its scope has not been exceeded.

Although this general conception of a constitutional right—of which balancing at the second stage is an inherent part—is very widely adopted among contemporary constitutional systems, it is not the only possible or available one. There are at least two alternative conceptions, both of which reject balancing. The first, sometimes referred to as the immunity conception or the conception of rights as trumps, holds that where properly at issue and implicated, constitutional rights cannot be limited or overridden by non-rights claims at all.²⁸ It was in contrast to this conception, and in the context of describing the structure of constitutional rights in the United States, that Fred Schauer referred to constitutional rights as “shields” rather than “trumps,”²⁹ and this helpfully captures the basic notion not just in the United States but, as I have argued, generally in the West.

²⁷ “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 [the substantive rights provisions] of this Charter.” CANADIAN CHARTER OF RIGHTS AND FREEDOMS, section 33(1). For discussion of this general model of an unlimited override power, see Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

²⁸ This conception of constitutional rights is, in effect, accepted for those relatively few rights in various modern constitutions that are deemed in principle non-overrideable; e.g., the right against cruel and inhumane (or unusual) punishment. The slogan of rights as trumps is often associated with Ronald Dworkin, although there is much academic dispute as to whether or to what extent Dworkin himself ever did or does endorse this first conception. See for example, the exchange between Jeremy Waldron and Richard Pildes in the *Journal of Legal Studies*. Jeremy

By contrast, the second alternative, usually termed the “structural” or “excluded reasons” conception of constitutional rights, permits a right to be limited or overridden but not because (or where) it is outweighed by the competing public policy claim but rather because (or where) the state has acted for a permissible—rather than an excluded—reason in the relevant sphere.³⁰ On this structural view, rights are not essentially individualistic in function but are rather “the tools constitutional law uses to maintain appropriate structural relationships of authority,”³¹ and rights adjudication becomes a categorical exercise that does not require or permit balancing but turns on the nature or type (not the weight) of the state’s justification for acting. If the state “infringes”³² or “qualifies”³³ a right for a permissible reason, its action is automatically constitutional; if for an excluded reason, it is automatically unconstitutional.³⁴ Although I believe that certain alleged differences between this excluded reasons conception of rights and the more dominant conception that affirms and highlights balancing are generally false,³⁵ this

Waldron, *Pildes on Dworkin’s Theory of Rights*, 29 J.LEGAL. STUD. 310 (2000); Richard H. Pildes, *Dworkin’s Two Conceptions of Rights*, 29 J. LEGAL STUD. 309 (2000).

²⁹ Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 443 (1993).

³⁰ See Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); Richard H. Pildes, *Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998).

³¹ See Pildes, *Why Rights are not Trumps*, *id.*, at 734.

³² *Id.*, at 734 (“Government can infringe on rights for reasons consistent with the norms that characterize the common goods that those rights are meant to realize, but when government infringes rights for reasons inconsistent with these common goods, it violates individual rights.”)

³³ *Id.*, at 761 (“Because rights are not trumps over the common good, they can be qualified when the state acts on the basis of justifications consistent with the character of the relevant common good in question. This is what makes a state interest compelling, not its ‘weight.’”)

³⁴ “When government acts for reasons that are impermissible, its objectives are not weighed in an all-things considered balance against the interests individuals have in their own autonomy, or dignity, or liberty. Rather, government action that rests on an impermissible justification simply is unconstitutional.” *Id.*, at 735.

³⁵ These are primarily: (1) that balancing presumes an atomistic or individualistic notion of rights as protecting and promoting the autonomous self, and (2) that balancing involves an exclusively quantitative weighing of such rights against competing state interests. As for the first, in defining balancing, I have intentionally used the agnostic or

categorical nature of state authority does point to a real difference between them. Whereas for the excluded reasons conception, which focuses exclusively on the kind or type of purpose the state offers in justification for its action, acting for a permissible reason is sufficient for a valid limitation of a right, for the more dominant modern conception it is necessary but not sufficient; other factors must be taken into account, precisely those that require a weighing or balancing of the competing claims.

The critical point is that this common conception of a constitutional right, of which balancing is an inherent part, is in need not only of identification and specification but also of normative justification. That is, beyond the important work involved in (a) the conceptual clarification needed to provide a “rational reconstruction” of this general conception of a constitutional right, (b) the mapping of differences and similarities in doctrinal tests, and (c) explaining the causes and consequences of its dominance, it must also be explained why constitutional rights should be balanced against, and potentially overridden by, non-constitutional rights claims. It may well be that (at least, absent a normative hierarchy) in conflicts between two constitutional rights claims, balancing is unavoidable or inherent, but *between a constitutional rights claim and a non-constitutional rights claim, it surely isn't.*³⁶

neutral language of “important prima facie claims” to describe rights, which can certainly include the type of collective goods (such as the proper boundary lines between different spheres of political authority) or group rights that proponents of the excluded reasons conception properly call attention to. As for the second, it is not true that the process of “weighing” rights against competing public policy objectives necessarily involves only quantitative reasoning to the exclusion of qualitative. If we say, for example, that there are strong or weighty reasons for (or a compelling interest in) protecting Holocaust survivors from the psychological harm caused by Holocaust denial or by an American Nazi Party march, or African-American families from the harms caused by the KKK burning crosses in their backyards, we are not necessarily saying that the strength or weight of these interests is purely quantitative; part of the weight may be qualitative, relating to the kind of harm involved.

³⁶ Here, Dieter Grimm’s observation, referring to the Federal Constitutional Court, that “[t]he principle of proportionality was introduced as if it could be taken for granted” is apposite and, indeed, generalizable. Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 UNIV. TORONTO L.J. 383, 387 (2007). In this context, Robert Alexy’s rational reconstruction of the structure of constitutional rights in Germany may perhaps be viewed as presenting a *conditional* justification of balancing: *if* constitutional rights are

Accordingly, the existence of alternative conceptions of constitutional rights that do not—or rarely—permit such balancing renders justification imperative.³⁷ There have certainly been serious normative, and other, critiques (along with many mischaracterizations) of balancing and yet, apart from a few notable attempts to rebut certain parts of them, there has not been very much by way of presenting the affirmative case.

II. TOWARDS A NORMATIVE JUSTIFICATION

A. The Democratic Case for Balancing

What, then, is the justification for this dominant, yet under-theorized, position? Why should constitutional rights be balanced against, and overridable by, “mere [governmental] interests,” whether textually enumerated or not?³⁸ Or, more precisely after the previous section, why should the political institutions be granted a limited power to override constitutional rights when they conflict with, and are outweighed by, certain public policy objectives? The case needs to be made because there is surely nothing obvious or self-evident, to say the least, about granting this power. After all, at root, isn’t at least one basic function of constitutional rights to provide countermajoritarian protection of very important interests (individual or collective) against majoritarian conceptions of the public good?

There are several different normative justifications that could be attempted. One is a first-order justification focusing on the substance of public policy outcomes. That is, at least

conceptualized as principles to be optimized, and *if* certain non-constitutional rights claims are also granted this same status, *then* balancing is unavoidable or necessary. Of course, the task of justifying the conditions remains.

³⁷ I am, of course, referring to normative, not interpretive, justification. Accordingly, even where constitutions contain express limits on rights, the normative question of whether such limits are justified still arises.

³⁸ See Schauer, *supra* note 21, at 1525.

with respect to some rights and in some contexts, a limited override power is justified because it results in either generally superior policy outcomes or superior outcomes in particular cases.³⁹ For example, genuine national security alarms and emergencies are conventionally understood as situations in which in principle at least some rights may justifiably be overridden. Sometimes, all things considered, there are compelling reasons for limiting or overriding a right. A different type of normative justification is a second-order one focusing on whether balancing rights and conflicting public policy objectives is consistent (or more consistent) with other, deeper normative values and commitments. For example, is this general conception of a constitutional right compatible (or most compatible) with political liberalism,⁴⁰ or with properly valuing human dignity in a social state?

The answer I will pursue is of this second general type but it considers conceptions of constitutional rights through the lens of our normative commitment to democracy.⁴¹ In particular, it focuses not on outcomes but on process, and on the proper allocation of decision-making power within a democracy that constitutionalizes rights.⁴² In a nutshell, my argument is

³⁹ I do not mean to ignore the fact that there might be textual, historical, or other interpretive reasons for denying (or affirming) that rights are overridable in a particular constitutional system. I am offering a more general, external argument about why a constitutional system might choose to have overridable rights in the first place – and not an interpretation of what a particular constitution has in fact chosen.

⁴⁰ See Kumm, *supra* note 2 [keep in case I omit footnote 2 above *What Do You Have in Virtue of Having a Constitutional Right? The Place and Limits of the Proportionality Requirement*, in S. PAULSEN, G. PAVLAKOS EDS., *LAW, RIGHTS, DISCOURSE: THEMES OF THE WORK OF ROBERT ALEXY* (Eleven International Pub., 2007)] (arguing that proportionality is in part incompatible with political liberalism’s conception of rights).

⁴¹ Of course, the strength of this normative commitment to democracy – relative to other such commitments--may vary from one constitutional system to another, in which case so presumably will the potential power of my justification.

⁴² By “constitutionalized” rights, I am referring to a particular legal form that rights may be given, which contrasts primarily with statutory and common law rights. This legal form typically involves (a) granting rights constitutional status as supreme law, (b) entrenching them against ordinary legislative amendment or repeal, and (c) enforcing them through judicial review; that is, granting one or more courts the power to decline to apply a statute (and often other laws or government action) on the ground that it violates a constitutional right. My normative case concerns

that balancing and a limited override power render a system of entrenched constitutional rights enforced by the power of judicial review more consistent with certain enduring democratic concerns. Moreover, as a response to these concerns, a conception of constitutional rights that includes balancing and a limited override power transcends the traditional either/or nature of judicial review and the binary choice of judicial versus legislative supremacy by focusing instead on alternative and intermediate allocations of power between courts and political institutions.

At the outset, I should clarify that although in fact both legislatures and executives are often (although not always) granted the same limited override power,⁴³ my democratic justification applies primarily, or far more strongly, to the former. Briefly, legislatures represent more collective and participatory modes of decision-making than executives, are directly rather than mostly indirectly elected,⁴⁴ and the underlying issue at stake – who decides what the law of the land is—seems to have only two plausible candidates: courts and legislatures. Accordingly, in what follows, I will be discussing the democratic justification of specifically legislative balancing and the limited legislative override power.

This limited override power enhances citizen self-government within a system of constitutionalized rights in three ways. First, compared to a (hypothetical⁴⁵) system of judicial

the democratic argument for granting a limited legislative override power within a system of constitutionalized rights. It does not directly concern whether to constitutionalize rights in the first place.

⁴³ In Germany, express textual provisions, such as Article 5(2) concerning limits on the right to freedom of expression, sometimes permit constitutional rights to be limited only by statute. By contrast, Canada, South Africa, and the ECHR have provisions requiring limits on rights to be “prescribed by law,” which have been interpreted to include not only statutes but delegated legislation (and the common law), although there are also requirements of general applicability and accessibility to be met. In the United States, cases like *Korematsu v. United States*, 323 U.S. 214 (1944), which concerned a Presidential executive order and a military commander’s internment order authorized by it, stand for the proposition that the executive as well as the legislature may limit constitutional rights, as do the current Guantanamo Bay cases, now that the U.S. Supreme Court has held that the Constitution applies to alien detainees.

⁴⁴ That is, in parliamentary systems, members of the government are generally indirectly elected; in presidential systems, apart from the president who is directly elected, they are typically appointed and not elected at all.

review without this power, it reflects a better, more appropriate balance between the competing claims of (1) majoritarian decision-making and (2) the limits on such decision-making embodied in the legal form of constitutional rights. Let me explain.

It is undoubtedly inherent in the concept of a constitutional (i.e., constitutionalized) right that it places limits on ordinary democratic majoritarian decision-making procedures, but what is not inherent is the *type* of limit involved. The conception of constitutional rights as trumps demands that such limits be preemptory or categorical; that in the face of a valid constitutional rights claim, majoritarian decision-making is totally disabled. But constitutional rights entail only that there are limits on ordinary majoritarian decision-making; they do not necessarily require that the particular limit take this form. Analytically, there is space for different types of limits, and the argument from democracy supports a conception of constitutional rights that is less disabling of popular self-government.

Constitutional rights as shields is this conception. Balancing and the limited override power, as the distinctive features of this conception, reflect such a less extreme limit on majoritarian decision-making. In the face of a valid constitutional rights claim, the political institutions are neither totally disabled nor totally empowered. Rather, they are put to a special burden of justification that typically constrains both the objectives pursued and the means of pursuing them; and will never be satisfied by a mere majoritarian desire not to respect the right. This contrasts, of course, with the normal situation where no constitutional right is implicated, in which the political institutions are legally free to act for any reason or objective. Accordingly, the limited override power steers a middle course between the two polar positions of: (1) the absolute disabling of ordinary democratic majoritarian procedures in the face of a constitutional

⁴⁵ Charles Fried has proposed a system of narrowly defined but absolute constitutional rights (that is, in my terms, with no override power at all). Charles Fried, *RIGHT AND WRONG* (1978).

right, and (2) the absolute empowering of ordinary democratic majoritarian procedures when a constitutional right is not in play. By thus employing a special, non-ordinary constraint on majoritarian decision-making, it satisfies the essential requirement of a constitutional right, but does not totally disable popular self-government.⁴⁶

A slightly different way of expressing this argument is that by rejecting the preemptory status of constitutional rights, constitutional rights as shields acknowledges the democratic weight attaching to other competing claims asserted by the majoritarian institutions. This conception of constitutionalized rights, I suggest, better reflects democratic values than the absolute, disabling conception. To be sure, those specific things we believe governments should never lawfully be able to do regardless of the circumstances or conflicting objectives can be singled out for absolute protection without accepting that this inheres in all constitutional rights at all times—or that constitutional right have no relevance to other situations. It is unnecessarily and unjustifiably restrictive of both democratic decision-making procedures and the role of constitutional rights for the latter to have such a totally disabling effect.

The second way in which balancing and the limited override power enhance democratic values within a system of constitutionalized rights is by reducing the intertemporal tension between the set of entrenched rights established by a past majority and the consequent disabling of today's citizens from deciding how to resolve many of the most fundamental moral-political issues that they face. The limited power grants the current citizenry a deliberative role, through consideration of whether they wish to and can invoke it, that provides an intermediate alternative

⁴⁶ My argument is consistent with “representation reinforcement” reasons for skepticism towards certain aspects of majoritarian decision-making; that is, limits on majoritarian decision-making that enhance democracy. Where they arise, such concerns may be one reason for putting the political institutions to a special burden of justification.

in between the two options of either complete exclusion of the current citizenry and formally changing rights through the (typically cumbersome) amendment process.⁴⁷

Finally, my argument so far applies equally to fully determinate and indeterminate constitutional rights: (1) the limits that rights impose on democratic decision-making need and should not be absolute; and (2) acknowledging this reduces the democratic tension between past and current citizenry. That is, up to this point my argument for balancing does not depend on the existence of reasonable disagreement about what rights there are and what they include among and between judges, legislators, and citizens. Rather, it is about the power to limit or override a right *as or however interpreted* in the face of conflicting non-rights claims.

In reality, however, there is an additional democratic problem posed by the fact that many constitutional rights in many constitutions are indeterminate in their meaning, scope, and application.⁴⁸ In the face of such indeterminacy, the traditional argument that, in being given the final word on whether rights have been infringed, courts are simply subjecting the political institutions to the democratic will of the people as enshrined in the constitution⁴⁹ is rendered additionally problematic. As Michael Perry puts it: “Democracy requires that the reasonable

⁴⁷ Of course, (1) the more recent the constitution and (2) the easier the constitution is to amend – i.e., the closer to ordinary democratic decision-making procedure – the less important or relevant this argument becomes.

⁴⁸ This problem of *legal* or interpretive indeterminacy -- of what rights have in fact been constitutionalized -- is distinct from the problem of more general *political/moral* or substantive disagreement among citizens about what rights there are and what they amount to. Both problems, but particularly the latter where it exists, may be reasons for rejecting the constitutionalization of rights and judicial review in the first place, *see* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006). At the same time, however, the limited legislative override power is an alternative solution to both problems. Consistent with the normative aim of this essay, which is to present a democratic justification for the dominant structure of rights that we actually have, I focus in what follows on the problem of legal indeterminacy; i.e., the problem that assumes rights have already been constitutionalized. But what I say about the limited override power as a solution and democratic response to this problem could also be said about the problem of general moral/political disagreement among the citizenry about rights. The reasons for legal indeterminacy are, of course, quite varied and depend in part on one’s adopted theory of constitutional interpretation. Thus, there may be textual indeterminacy, indeterminacy in original intent or precedent, value indeterminacy and so on.

⁴⁹ This argument goes back at least to Alexander Hamilton in Federalist 78.

judgment of electorally accountable government officials, about what an indeterminate human rights forbids, trump the competing reasonable judgment of politically independent judges.”⁵⁰ Under a traditional system of judicial review,⁵¹ where constitutional rights are the only relevant claim, the outcome of constitutional adjudication necessarily turns exclusively on the meaning, scope, and application of the right to the situation. In this context, the consequence of indeterminacy is that many of the most fundamental, important, and divisive moral and political issues confronting a society are decided by courts to the exclusion of citizens and their representative institutions, even though the courts are often divided along the same lines as the citizenry about the existence and scope of many rights.⁵²

Balancing and the limited override provide an alternative solution to this democratic problem than that of rejecting judicial supremacy, or ultimacy, in interpreting constitutional rights.⁵³ It also, of course, provides an alternative to rejecting judicial review of constitutional rights altogether.⁵⁴ They grant a role to the representative institutions in the decision-making process, not by challenging final judicial authority to determine the meaning and scope of an implicated constitutional right, but by introducing *a second relevant claim*: a discretionary and noninterpretive claim concerning the importance and weight of conflicting public objectives.

⁵⁰ Michael J. Perry, *Protecting Human Rights in a Democracy: What Role for the Courts?*, 38 WAKE FOREST L. REV. 635, 661 (2003).

⁵¹ That is, by contrast with the newer forms of weak judicial review discussed in the following section.

⁵² See Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18, 28 (1993).

⁵³ That is Michael Perry’s solution to the problem of constitutional indeterminacy. See Perry, *supra* note 36. Larry Kramer, among others, has also argued against judicial supremacy although primarily on historical grounds rather than as a solution to the problem of indeterminacy. See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

⁵⁴ The problem of general moral/political disagreement among citizens about rights leads Jeremy Waldron to reject judicial review, at least where the following two other conditions apply: (1) democratic and judicial institutions in reasonably good working order, and (2) a commitment to the idea of individual and minority rights. See Waldron, *supra* note 48, at 1359-1369.

The function of the limited override power is precisely to inject this essentially and inherently legislative role into the process of constitutional adjudication, even if the courts still ultimately decide who wins the case. Constitutional adjudication is thus split into the two separate stages of (1) rights interpretation and application, and (2) assessment of competing public policy objectives. In short, balancing and the limited override power counter the judicial monopoly in constitutional decision-making that typically occurs where rights conclusively determine constitutional outcomes within a system of judicial review; a finality that is rendered highly problematic by the indeterminate nature of many of the relevant rights. Because their indeterminacy raises the democratic problem in perhaps its most acute form, constitutional rights should not be the only relevant claim in a case in which they are implicated.

B. The Limited Override Power and Judicial Review

A system of judicial review with the limited override power that I have been attempting to justify is quite different from a system of judicial review without. They are obviously different doctrinally and institutionally, and, as I have just argued, different in terms of their accommodation of certain enduring democratic concerns about judicial enforcement of constitutionalized rights—implicitly incorporating the conceptions of rights as shields and trumps respectively. The important role of the limiting power in understanding and justifying the system of judicial review that most contemporary countries actually have has, however, been largely overlooked by all sides in the current robust debates about the merits of both the existence and the various forms of judicial review. In effect, the system we do *not* have has acted as both standard-bearer and target.

These debates have focused on the respective claims of three institutional options: two traditionally conceived polar alternatives and a newer third position that has attracted much recent attention. The first polar alternative is to reject rights-based judicial review altogether.⁵⁵ Here, as courts cannot decline to apply statutes they have no say on whether the legislature has violated any rights. Typically within such systems, not only is the power of judicial review rejected, but rights are neither granted the legal status of supreme law (they have statutory or common law status instead) nor entrenched against ordinary legislative amendment and repeal, and so are not constitutionalized at all.⁵⁶ This package reflected the traditional position in most Western countries prior to 1945, and is usually referred to as legislative supremacy or parliamentary sovereignty -- because statutes are the highest form of law known to the legal system. In such a regime, statutory infringements or reductions of preexisting rights and liberties may, for political reasons, require a stronger burden of justification compared to other legislative actions, but this will not be a legal requirement.

The opposite polar position is that of a system in which rights are enforced by the power of judicial review: the power to determine the substantive validity of a statute and to disapply invalid ones. Analytically, this does require that such rights as are protected by the power have the status of supreme law; entrenchment is perhaps not necessary but usual. Accordingly, this position typically involves full constitutionalization of rights. Compared to the previous model, a notable characteristic of this second option is judicial supremacy (or ultimacy) in the sense that courts not only have a say but the final word on the validity of a statute in the context of a

⁵⁵ Jeremy Waldron has repeatedly argued for this position in recent years, *see supra* notes 48 & 54.

⁵⁶ Although “typical,” both analytically and in practice it is possible to combine the rejection of judicial review with the constitutionalization and entrenchment of rights. The Netherlands Constitution, for example, contains individual rights which, like the rest of the Constitution, can only be amended by a special super-majority process but it also (in Article 120) expressly denies courts the power of judicial review.

justiciable constitutional rights claim, and thus, on what the law of the land is. Since 1945, of course, many countries have switched from the first option to the second, and most of the new constitutions written in a great burst of activity around the world since 1989 have firmly adopted this model.

The newer, third position is an intermediate one that grants courts some power to enforce rights but gives the legislature the final word in the form of an *absolute* override power. In practice, this option is most directly and straightforwardly enshrined in section 33 of the Canadian Charter of Rights and Freedoms (1982),⁵⁷ although more recent variations on the theme have been enacted in New Zealand (1990), the United Kingdom (1998)⁵⁸ and, sub-nationally, in the Australian Capital Territory (2004) and state of Victoria (2006).⁵⁹ This partial move away from the traditional Westminster model of parliamentary sovereignty in these culturally related common law jurisdictions is why I initially termed this position “the new Commonwealth model of constitutionalism,” although others have, with no less justification, subsequently referred to it as “weak” or “weak-form judicial review.”⁶⁰ This position at least partially constitutionalizes rights,⁶¹ and adds a potential or actual⁶² round of judicial review to

⁵⁷ “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 to 15 [the substantive rights provisions] of this Charter.” CANADIAN CHARTER OF RIGHTS AND FREEDOMS, §33. The renewable override power operates for a period of five years.

⁵⁸ Albeit in the context of statutory rather than constitutionalized rights. For discussion of both Section 33 and the British and New Zealand variations on this theme, see Gardbaum, *supra* note 27, at 719-39.

⁵⁹ The Australian Capital Territory Human Rights Act, 2004 and The Victorian Charter of Rights and Responsibilities Act, 2006.

⁶⁰ See Mark V. Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813 (2003); Waldron, *supra* note 48.

⁶¹ For the differing ways in which the United Kingdom and New Zealand have given rights more than ordinary statutory status, see Gardbaum, *supra* 27, at 727-39.

the first position; however, like it, no special majoritarian procedures are legally required for a subsequent legislative decision to override rights.⁶³ Moreover, such an override is not subject to any substantive constitutional criteria or limits; there is no legally required burden of justification for pursuing public policy objectives that conflict with the recognized rights. It is in this precise way that such an absolute override power contrasts with the limited override power that I have been discussing in this Article.

Curiously, despite the fact that the vast majority of modern constitutional systems adhere in practice to a specific version of the second option—“strong” judicial review with a limited legislative override power—this version has not been identified or distinguished from the generic model in the recent scholarly debates about the merits of judicial review or of its various forms. That is, these debates have proceeded as if the issue is either judicial review or no judicial review, with the absolute override power as a novel new option, but with no reference within a system of judicial review to the distinctive role of balancing and the limited override power.⁶⁴

I am not attempting to argue in this essay that a system of judicial review with a limited legislative override power is ultimately better than either no judicial review at all or weak judicial review. Rather, I am attempting to identify and present the missing normative case for the particular version of strong judicial review that most Western countries actually have. One of my goals in so doing is to respond to an influential internal critique of this version—the anti-

⁶² It has been held by the Canadian Supreme Court that the unlimited override power may be used either preemptively or in response to a Court decision. See *Ford v. Quebec*, [1988] 2 S.C.R. 712.

⁶³ Although there could be. A supermajoritarian requirement would therefore constitute a type of limited override power with a different limit.

⁶⁴ Michael Perry is a partial exception to this statement, although he discusses the role of a general limitations clause, such as South Africa’s, only in the context of its adding to overall constitutional indeterminacy, see *supra* note 50.

balancing critique—which, at least in some versions, argues in effect for a stronger version of judicial review: one without balancing and the limited override power.

At the same time, however, a second aim is to try to ensure that the debate concerning the respective merits of the three institutional options focuses on the proper, accurate, and (arguably) most defensible version of strong judicial review. Unlike the anti-balancing critics who focus on the non-rights side of the ledger (that is, the second stage of rights adjudication) and mostly reject it, the critics of strong judicial review tend to overlook the role of limits and take constitutional rights as conclusive of outcomes. By incorporating the limited override power into the analysis, however, the normative case for the existing structure renders (at least this version of) judicial review less vulnerable to the democratic critiques at the heart of the first and third positions on the spectrum. For the purposes of this essay at least, it may still ultimately be the case that either no judicial review at all or weak judicial review is the better way to resolve the claims of democracy and rights protection to the extent they conflict with each other.⁶⁵ But by identifying and justifying the version of strong judicial review with which they should be compared, I may have reduced the “democratic deficit” between them.

III. THE IMPLICATIONS FOR CONSTITUTIONAL RIGHTS ADJUDICATION

If, as I have argued, overriding rights when they conflict with certain important public policy interests is a limited power that we have good reason to grant the legislature, then how should subsequent judicial review of its exercise be conducted? What implications does this democratic justification of constitutional balancing and the limited override power have for the

⁶⁵ Jeremy Waldron, for one, argues that they do not necessarily conflict because majority decision-making is sometimes a more effective way to respect rights than judicial review. *See supra* note 48.

standard of review to be applied by courts in determining whether the substantive constitutional criteria for limiting rights have been satisfied in a given case?

This framing of the question underscores that there is an important distinction between (1) the substantive constitutional criteria for a valid limitation or override of a constitutional right, and (2) the standard of judicial review for determining whether the legislature has satisfied these criteria.⁶⁶ The first specifies the constitutional limits on the legislative override power; the second how courts should perform their task of adjudicating whether the legislature has conformed to or exceeded these limits. Analytically, these two issues are independent of each other in that, for example, the substantive criteria may be strict and the standard of judicial review less so. In this section, of course, I am focusing on this second issue and specifically as it applies to legislative (rather than executive) overrides. Because, for the reasons stated above,⁶⁷ the democratic justification applies primarily or more strongly to the legislature, the standard of judicial review to determine whether the substantive criteria have been satisfied need not, and should not, be the same in both cases. In what follows, I consider only the standard of judicial review for legislative overrides. Moreover, unlike the logically prior questions of which rights are overridable and what are the constitutional criteria for overriding them, the issue of the proper role of the courts in reviewing measures to determine if these constitutional criteria have been satisfied—the question of judicial review strictly speaking—is, as far as I am aware, nowhere specified in a constitutional text.

In beginning to think about this issue, let's start with basics. On the one hand, a major difference between a legally limited and a legally unlimited override power is the existence of

⁶⁶ In Mitchell Berman's helpful terminology of constitutional doctrine, the former involves an "operative rule" and the latter a "decision rule." See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

⁶⁷ See *supra* text accompanying note 44.

substantive judicial review of its exercise.⁶⁸ On the other, if the limited power is granted at least in part to temper the democratic tensions that judicial enforcement of (often indeterminate) constitutional rights creates, then those tensions should not be reproduced or aggravated by the way in which courts review exercises of the power. A standard of judicial review that effectively transfers the power of decision to the courts by wholly displacing legislative judgment would seem to be clearly counterproductive.

Moreover, review of the limited override power potentially increases the tensions because it adds a step to constitutional rights adjudication that raises special concerns about judicial legitimacy and integrity over and above the standard ones.⁶⁹ As exemplified by the recent U.S. affirmative action cases of *Grutter v. Bollinger*⁷⁰ and *Seattle School District*,⁷¹ both decided by five votes to four, the outcomes of many constitutional rights claims are rendered indeterminate by the second step issue of the justification for overriding rights, independently of the first step issue of whether a right is implicated and infringed.⁷² And yet, this part of the adjudicative

⁶⁸ That is, judicial review for compliance with the substantive constitutional criteria for a valid exercise of the limited override power. Where there are no substantive limitations, there is nothing to subject to judicial review. However, even an unlimited power will likely have procedural requirements, which may be subject to judicial review. This is the case with Canada's Section 33 override power, the procedural limitations on which were explored by the Canadian Supreme Court in *Ford v. Quebec*, [1988] 2 S.C.R. 712.

⁶⁹ Here, I agree with the critics that *judicial* balancing creates special problems of legitimacy and integrity over and above the standard ones associated with judicial review. As I will argue, unlike them, I take this point to be an argument in favor of greater judicial deference to legislative balancing.

⁷⁰ 539 U.S. 306 (2003).

⁷¹ *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738 (2007).

⁷² In these two particular cases, the first step issue was not (legally) indeterminate in that the previous majority holding that all governmental uses of race are subject to strict scrutiny was not questioned or at issue. In this way, the override power adds to overall constitutional indeterminacy. One might conclude from this that if indeterminacy is the source of the democratic problem, the problem can be reduced by abolishing the override power. That is, far from being an argument in favor of the power, indeterminacy could be construed as an argument against the power. However, as discussed in the previous section, the indeterminacy argument for the power revolves around indeterminacy in *interpreting and applying* constitutional rights, tasks that are primarily the court's function. Even though creating external limits may thus add to overall indeterminacy, the democratic justification of the limited

function is inherently non-interpretive. It is not about interpreting and applying a constitutional provision but assessing the importance and fit of conflicting public policy objectives. As we have seen, balancing starts where the infringement and inconsistency begin. Under the second stage of rights adjudication, whether the constitutional criteria for exercise of the override power have been satisfied involves such quintessentially policy and factual questions as how important is the particular legislative objective in the precise circumstances, are there any practical alternatives that would achieve the objective to the same extent, and how do the benefits and burdens of the rights infringement compare?

So, to the extent my justification in the previous part is accepted, the standard of judicial review must respect these two features of contemporary constitutional rights adjudication: (1) what is being reviewed is the exercise of a power (to balance and override rights) that has been granted to the legislature at least in part to enhance the role of democratic decision-making where rights are involved, and (2) review by the courts of legislative balancing raises special concerns about judicial legitimacy and integrity. The proper role of the courts must be assessed in this light and determined in a way that coheres with the overall point of reducing democratic tensions rather than adding to them.

In essence, the only standard of judicial review that coheres with these two features of constitutional balancing is one that is relatively deferential to the necessary legislative judgment. The substitution of judicial for reasonable legislative judgment on whether the substantive criteria for a valid override have been satisfied fails to accommodate the democratic basis for the limitability of constitutional rights. This primary, democratic argument for a relatively deferential standard of review for exercises of the override power is thus deeply rooted in the

override power is to neutralize a judicial monopoly that is especially unjustified in the face of interpretive indeterminacy. Moreover, the standard of judicial review proposed in this section significantly reduces second-step indeterminacy.

justification for having a second-stage of rights adjudication at all. By contrast, the secondary—although more familiar—argument for relative judicial deference to legislative balancing assumes the existence of this second-stage and focuses on the nature and reduced legal content of the relevant issues involved in its application. To be clear, this secondary argument is not that nondeferential review is inappropriate because a court is applying rather than interpreting a constitutional rule (here the override criteria)—courts do this all the time in deciding constitutional cases; rather, it is inappropriate because of the particular type of questions involved in the second stage of rights adjudication. These are quintessentially policy and factual questions rather than legal ones. In short, both the purpose and nature of the limited override power require some significant degree of deference by courts to the legislative judgment as to whether the constitutional criteria for an override have been satisfied.

Although differing in details, the substantive constitutional criteria for valid limitations of constitutional rights—the second step of rights analysis—typically focus on both legislative ends and means. With respect to ends, where objectives capable of overriding rights are not specified in the constitutional text, the usual criterion is that the conflicting public policy objective be sufficiently important or pressing to justify overriding a right. With respect to means, the constitutional criteria are commonly provided by the three prongs of the single and near-universal proportionality test (suitability, necessity, and proportionality *stricto sensu*), although certain regimes—including the ECHR— apply the proportionality test in a more gestalt rather than a *seriatim* manner. By contrast, in the United States, one of the three separate tiers of rational relationship, substantial relationship, or necessity will typically apply, depending on the specific right at issue.

For the reasons stated above, the basic standard of judicial review attaching to both these ends and means criteria should be a form of clear error or reasonableness rule.⁷³ Let me provide a little more detail and argument by moving fairly quickly through these criteria, from the more abstract to the more particular. Where permissible overriding objectives are not textually specified and a substantive criterion such as “sufficiently important,” “pressing social need,” or “compelling state interest” applies, the first issue implicating the appropriate standard of judicial review is whether a particular end, such as educational diversity, protecting life, or morality, is *in principle* capable of satisfying the relevant criterion. This issue is not clearly one that suggests nondeferential review, as it seems like a mixed question of law and policy or political judgment. On the one hand, whether, for example, educational diversity is in principle a compelling objective (if this is the relevant criterion) for purposes of the override power seems less the sort of question that, absent a textual list, legal analysis can resolve than one that reasonable citizens acting in good faith, and on the basis of broader moral and political considerations, can genuinely disagree about. In these circumstances, it seems particularly appropriate that this question should be resolved by the normal process of self-governing decision-making. On the other hand, this is clearly not true of any end or objective that emerges from this process. Some ends are just not plausibly compelling ones for the purposes of satisfying the constitutional criterion.

⁷³ In making reference here and later in this section to a “clear error rule,” I am necessarily (and intentionally) invoking the famous and highly influential theory of judicial deference associated with James Bradley Thayer. See James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); JAMES BRADLEY THAYER, JOHN MARSHALL 106-110 (1901). The one twist I believe I am giving the Thayerian argument is in its application. Unlike Thayer and subsequent Thayerians, I am not arguing that judicial deference and the clear error rule apply across the board or to legislative versus judicial interpretations of the Constitution. I am proposing deference only to the distinct, second-stage issue of legislative judgment about whether the constitutional criteria for an override have been met. More generally in the essay, of course, I am also

highlighting and justifying this override power – and rooting judicial deference primarily in this justification. For a recent defense of a general Thayerian approach to judicial review, see Michael Perry, *What Role for Courts*, *supra* note 47.

Accordingly, I suggest that the standard of judicial review on this first issue (where it applies) should be a version of the reasonableness or clear error rule. Specifically, the test should be whether a legislature's judgment that a particular objective is in principle compelling (or pressing, sufficiently important etc.)—so that it is worthy of potentially overriding a constitutional right— is a reasonable one.⁷⁴ Under this test, diversity, national and personal security, protecting potential life and public health would presumably all pass; administrative convenience and economic benefit would not. To hold that the latter ends are compelling is to misconceive the presumptive weight of constitutional rights. Public morality is a trickier case, as its textual presence in some of the comparative lists but not in others attests.⁷⁵

Continuing to descend the scale of abstraction, the second issue concerning ends is what standard of judicial review applies to the question of whether an asserted objective, acceptable in principle, is sufficiently pressing, important, or compelling in the particular context raised. Indeed, in most cases, this will be the only judgment about ends that a legislature is likely to make. Here, the respective legal and policy components seem to pull even further in the direction of the latter. Is educational diversity, for example, not just capable of being a compelling objective but in fact compelling in the actual context of, say, (1) the sole public law school in a megalopolis with a majority-minority population, or (2) a state with several public law schools and little ethnic or racial diversity among its population? Once again, and for the same reasons, the nature and reduced legal content of this question seem well-suited to a reasonableness or clear error rule, with the role of judicial review to bar decisions of the

⁷⁴ This is consistent with Berman's suggestion that one of the benefits of his distinction between operative and decision rules is that courts *can* select deferential decision rules in order to accommodate democratic concerns. *See* Berman, *supra* note 51. In effect, I am presenting an affirmative argument here for why they *should* so choose.

⁷⁵ It is also attested by the obvious controversy in the United States surrounding the issue of whether morality is (even) a legitimate public interest for substantive due process purposes in such cases as *Bowers v. Hardwick*, 478 U.S. 186 (1986) and *Lawrence v. Texas*, 539 U.S. 558 (2003).

legislature that appear objectively unreasonable in terms of justifying an override of a constitutional right. While obviously not as stringent a test as one that effectively asks is this the same decision that the court itself would make, it is undoubtedly not equivalent to the proposition that a compelling interest is whatever the legislature says it is.

A final potential issue regarding judicial review of legislative ends concerns motives and pretext. If, as I have argued, the proper question for judicial review should be the reasonableness of the legislature's judgment that a public policy objective satisfies the relevant constitutional criterion, then should a court evaluate the legislature's stated public policy objective in justification of limiting a right, or the actual motive or purpose where this is different? Given that the bare purpose to deny a right does not satisfy the constitutional standard for an override, it seems appropriate that attempting to conceal this purpose beneath a legitimate but pretextual justification should not succeed. Accordingly, as under the existing standard for heightened scrutiny in the United States, courts should evaluate actual purpose where the evidence clearly suggests this differs from the stated reason for acting. On the other hand, as the ECtHR has found in interpreting and applying article 18 which contains a similar rule,⁷⁶ there will rarely be justiciable "reason to doubt" that the actual purpose diverges from the proffered public policy justification.

Turning from judicial review of the objective to the even more universal focus on the means selected by the legislature, the same combination of primary (democratic) and secondary (legitimate function/expertise) reasons also suggest a reasonableness standard should be applied to the legislative judgment on the substantive issues. Regarding this secondary reason, the

⁷⁶ "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed." ECHR, Art. 18. The ECtHR has tended to merge this inquiry into the deferential ends inquiry under the relevant limitation clause.

constitutional criteria for means are most essentially about assessing policy alternatives and their impact and effectiveness on both rights and applicable objectives. And once again, this suggests that the relevant questions are far more factual and policy oriented than legal in nature. As a result, a reasonableness or clear error rule seems again to be the most appropriate standard for judicial review of whether the means part of the constitutional override test has been satisfied. And this, of course, also accords with the basic reason of democratic accommodation for the power itself.

Accordingly, where a version of the proportionality test supplies the substantive criteria, reviewing courts should ask whether a legislature's assessment that the chosen means are (1) suitable/rationally related to the end, (2) necessary/minimally impair the right, and (3) do not impose disproportionate burdens on it is a reasonable one. Moreover, in addition to the by now familiar reasons concerning both the purpose and the nature of the exercise, the issues involved tend to be relatively indeterminate in the sense that there is usually no one right answer but (a) a range of reasonable ones and (b) one or more wrong or unreasonable ones. Particularly in this context, the task of judicial review should be limited to weeding out the latter.

The Supreme Court of Canada [SCC] has perhaps come closest to acknowledging these arguments both in its general approach to judicial review under section 1 of the Charter and in its specific approach to the second prong issue of minimal impairment. In describing its role in non-criminal cases under section 1, the SCC stated:

Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line....If the legislature has made a reasonable assessment as to where the line is most properly drawn...it is not for the court to second guess.

Democratic institutions are means to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's

deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature’s representative function....⁷⁷

And in specifying its standard of review under the second prong of the proportionality test, the SCC held that: “[A] failure to satisfy the minimal impairment test will be found only if there are measures ‘clearly superior to the measures currently in use.’”⁷⁸ This standard was subsequently reaffirmed and clarified as follows: “It was argued after *Oakes* that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion....It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be *reasonably* tailored to its objectives; it must impair the right no more than *reasonably* necessary....”⁷⁹ The ECtHR’s “margin of appreciation” doctrine in applying the proportionality test, which accords a certain (although varying rather than fixed) deference to the national judgment under review, also properly reflects both federalism and democratic reasons for adopting a reasonableness approach.⁸⁰

Similarly, under the U.S.’s separate tiers of review, the question for the courts should be whether a legislature’s judgment that its chosen means satisfies the relevant constitutional criterion (i.e., rationally related, substantially related, or necessary) is a reasonable one. The U.S. Supreme Court [USSC] has acknowledged in the very general context of rational basis review that it is required to judge the underlying legislative assessment “not directly, but at one

⁷⁷ *Irwin Toy Ltd. v. Quebec (Att’y Gen.)*, [1989] 1 S.C.R. 927, 990-94.

⁷⁸ *Libman v. Quebec (Att’y Gen.)*, [1997] 3 S.C.R. 569, 607 (quoting *Lavigne v. Ont. Pub. Serv. Employees Union*, [1991] 2 S.C.R. 211, 296).

⁷⁹ *R. v. Sharpe*, [2001] 1 S.C.R. 45, 102 (emphasis in original).

⁸⁰ On the margin of appreciation doctrine, and its critics and supporters, see *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22 (1976); Sir Humphrey Waldock, *The Effectiveness of the System Set Up by the European Convention on Human Rights*, 1 HUM. RTS. L.J. 1, 9 (1980); Paul Mahoney, *Marvelous Richness of Diversity or Invidious Cultural Relativism*, 19 HUM. RTS. L.J. 1, 2, 6 (1998); Steven Greer, *Constitutionalizing Adjudication Under the European Convention on Human Rights*, 23 OXFORD J. LEG. STUD. 405, 433 (2003).

remove.”⁸¹ So, for example, under the interstate commerce clause power, it asks not whether the activity Congress is regulating in fact has a substantial effect on interstate commerce but rather whether Congress’s judgment that there is such a substantial effect is a reasonable one.⁸² What the USSC has not acknowledged, however, and this essay proposes it should, is that its judgment be similarly one step removed *under all three substantive standards* for means and not only where the lowest standard—the rational basis test—applies. In other words, where these criteria apply, the question the courts should ask is whether a legislature’s judgment that a means is substantially related to, or necessary for, the given objective is a reasonable one.

Under the proposed standard of judicial review, a legislature’s decision that overriding a right is necessary to promote the relevant objective would not be reasonable if, for example, it had simply not considered, or considered with insufficient seriousness, alternative policies for promoting its objective. Similarly, it would not be reasonable if other relevant jurisdictions had achieved the same goal with a clearly lesser restriction of the right—or, of course, without restricting the right at all.⁸³ A legislature’s decision to override a right would also be unreasonable, and therefore unconstitutional, if, whether or not it has considered them or other jurisdictions have implemented them, there are obviously less restrictive means of promoting the objective to the same degree.

By contrast, judicial review of a legislature’s balancing should not require it to prove that every conceivable alternative policy would have been less effective, for this drags a court too far

⁸¹ *United States v. Lopez*, 514 U.S. 549 (1995) (Breyer, J., dissenting).

⁸² *See Katzenbach v. McClung*, 379 U.S. 294 (1964) (“[W]here we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”).

⁸³ Note that “the same goal” here means achieving the goal to the same degree. The fact that State A promotes its interest in protecting (potential) life after viability by mandatory counseling rather than by prohibiting abortions does not thereby mean that State B’s policy of prohibiting post-viability abortions is unreasonable.

into the realm of policy analysis and evaluation. For a court, and particularly an appeals court, to substitute its judgment for that of the political institution on the question of whether the latter's measure was in fact necessary for promoting the relevant objective, where the political institution's judgment is reasonable, is (1) for that court to decide an inherently political question, and (2) to act inconsistently with the democratic argument for the override power in the first place.

Finally, my argument presumes, of course, that there is such a legislative judgment to which the courts should reasonably defer. If, as I have argued, the dominant general conception of a constitutional right empowers the legislature to balance rights and conflicting public objectives, it also requires them to do so if the override is to be valid. The argument for the power that I have made is one of democratic *process* and the process itself may not be overridden.

Accordingly, as part of their legitimate and appropriate review function, courts should ensure that the legislature has in fact made a judgment that pursuing objectives that conflict with constitutional rights is justified under the constitutional criteria. They are not required—and should not—defer to a post hoc legal argument made in the context of litigation or to conclusory, boilerplate legislative statements. Evidence of such a judgment may be inferred by the courts from the presence or absence of legislative drafts, findings and debate. Similarly, courts should not defer to an unintentional override; for example, where the evidence suggests that a legislature pursued a qualifying objective mistakenly believing it did not conflict with a right and would not have chosen to do so if it had. As a form of “hard look” review, this helps to ensure that the

democratic benefits of the override power, such as responding to the citizen debilitation problem, actually ensue.⁸⁴

In sum, the limited override power requires a legislature to engage in a form of constitutional balancing: to determine whether a constitutional right unavoidably conflicts with an interest it reasonably deems sufficiently important (or pressing, compelling, etc.) in the particular circumstances. Judicial review of this balancing should not require any further balancing on the part of the court. Determining whether the legislature's balancing satisfies the constitutional test for exercise of the limited override power is a matter of the reasonableness of its political judgment. For a court to do more than this is to cross two lines: first, into legislative rather than judicial territory (that is, policymaking), and second, into the field left for popular self-government rather than delegation to unaccountable elites.

IV. CONCLUSION

It is sometimes suggested—and not only by courts acting without clear textual basis—that it is simply in the nature of constitutional rights that they have limits. At least as far as external limits are concerned, however, there is nothing natural about them. We may or may not choose to empower the political institutions sometimes to promote important public policy objectives even when they conflict with constitutional rights. If we decide to empower, we do so for a reason and not from necessity.

⁸⁴ There may potentially be some constitutional issues surrounding the imposition on Congress of a “hard look doctrine,” as Justice Breyer noted after citing with approval the suggestion made by me and others that this might be a useful approach to certain federalism issues. See *U.S. v. Morrison*, 529 U.S. 598, 662 (2000) (Breyer, J., dissenting: “Of course, any judicial insistence that Congress follow particular procedures might itself intrude upon congressional prerogatives and embody difficult definitional problems. But the intrusion, problems, and consequences all would seem less serious than those embodied in the majority’s approach”).

Despite the voluminous literature on the near-universal practice of balancing constitutional rights against non-constitutional rights claims, I believe these reasons have not yet been adequately identified and explored. In this essay, I suggest one important reason for granting this power: it renders a system of entrenched constitutional rights enforced by judicial review more consistent with principles of citizen self-government and democratic decision-making than a system without this power. If you will, it balances the competing claims of majoritarianism and the limits on majoritarianism in a better way than does a system of non-overrideable, court-enforced constitutional rights. I have also sought to identify the implications of this reasoning for judicial review of the power. If courts adhere to their proper role in assessing the validity of particular exercises of the override power, they do not themselves engage in balancing but in assessing the reasonableness of legislative balancing.

Indeed, even the political institutions engaging in balancing do so only in a specific sense and not in an all-things-considered weighing of public policy costs and benefits as sometimes portrayed in the anti-balancing critique.⁸⁵ Rather, the general steps in the required legislative judgment are: (1) is there a sufficiently important public policy objective it collectively wishes to pursue that unavoidably conflicts with a constitutional right; i.e., cannot be promoted without infringing the right; (2) will the objective likely be achieved; (3) can the objective be achieved (or to the same degree) in a way that is less restrictive of the right; and, in many cases, (4) are the overall burdens associated with overriding the right proportionate to the benefits. This first step involves a type of qualitative (not quantitative) balancing concerning the relative importance of the objective: is it so important that we should override a right? The third step involves

⁸⁵ See, e.g., Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 782 (2001) (characterizing balancing as involving quantitative cost-benefit analysis and permitting the override of a constitutional right wherever the harms or costs exceed the benefit).

assessing alternative policy options in terms of their relative effectiveness and burdens on rights.

Where present, the final step may involve *either or both* quantitative and qualitative balancing.

In sum, balancing is not primarily a judicial methodology but a methodology the political institutions are required to employ by the substantive constitutional criteria for a valid exercise of the override power. This is a power we do and should grant to the political institutions at least in part for democratic reasons.