methodological choice. She or he must nevertheless admit that Hirschl takes a stand. For most lawyers, on the other side, quantitative research is a rather uncharted territory. Even while being well aware of the “astounding spread of constitutionalism and judicial review” (at 1)—from 1989/90 at the latest—and the “unprecedented comparative turn” (id.) that comes with it, lawyers may be disturbed by another outcome of Hirschl’s landmark research: the simple idea that “comparative constitutional inquiries are as much a political enterprise as they are a scholarly or jurisprudential one” (at 7). At the end of the day, whoever engages in constitutional comparison remains to a further or lesser extent a political actor. In particular, courts do make no exception. Furthermore, any comparative study carries the risk of “cherry picking.” Hirschl takes critically into account all these potential shortcomings. He reminds us that global constitutionalism consists of more than a collection of court decisions around the world. He is neither a naïve advocate of overly idealistic universalism nor simplistic contextualism. He—as elegant in his writings as convincing in his argumentation—invites the comparative lawyer to proceed methodologically beyond legal doctrine stricto sensu. Knowing that an age of legal pluralism requires a diverse and interdisciplinary, rather than rigorous but disciplinarily limited, methodology, one should follow this stimulating invitation with an open mind. And the final conclusion? Hirschl’s book sets an inspiring agenda for further research and gives proof that a roadmap can also be a masterpiece.

1. Introduction

Proportionality is unquestionably the dominant mode of resolving public law disputes in the world today. Proportionality, we might say, has assumed global proportions. High courts all over the world are adopting its methods. If not yet taken up, its methods are recommended as a salve to bring legitimacy to new and controversial modes of dispute resolution.¹ Cohen-Eliya and Porat helpfully cast doubt on claims about proportionality’s universality. They do so by focusing, Montesquieu-like, on the particularity of national constitutional cultures.

The authors offer a trans-systemic account of proportionality in constitutional law with a focus on Germany and the United States. There are additional brief excursions to Israel and Canada. Cohen-Eliya and Porat aim to help us determine the degree to which it can be said that legal systems are converging toward a single standard of review in constitutional cases. Conversely, they help us understand the extent to which distinctive constitutional cultures might stand in the way of that convergence. This is a brief book about a large subject that is admirable in its ambitions.

2. Constitutional culture in the balance

The authors claim at the outset that the German tradition of proportionality analysis and the US method of balancing are similar—that they reveal ‘no substantial analytical differences’

American balancing is focused on proportionality in the strict sense (the third consideration in German proportionality doctrine), rather than on inquiries concerning suitability or necessity (the first and second considerations). Despite superficial similarities, the authors warn, the two doctrines are embedded within entirely different constitutional contexts. They then trace the origins of proportionality in Germany (to Prussian administrative court doctrine) and of balancing in the US (to the realist response to legal formalism).

They turn to a discussion of “culture” in Chapter 3. The authors refer at times to legal culture and, at other times, to political culture. They emphasize the perfectionist and communitarian aspirations of German doctrine and the anti-perfectionist and distrust of government underlying US balancing. They deepen this discussion in subsequent chapters by focusing on the differences between impact-based (Germany) and intent-based (US) models of rights protection and optimistic (Europe) and skeptical (US) approaches, reflected in a preference for standards (Europe) over rules (US). In the penultimate chapter, they identify a variety of functional explanations for the spread of proportionality—such as flexibility, efficiency, and legitimacy—each of which they claim “fall short of the mark.” Instead, the authors prefer an account associated with Etienne Murenik’s “culture of justification.” This is an account that purports to “touch on the essence” of proportionality and which responds to a “widespread basic intuition: that governments must justify all of their actions” (111). It is the lesson the authors draw from post-war European political culture, that “popular democracy must be treated with great suspicion” (123), and undertake here a review of Israeli jurisprudence, which they characterize as a “striking example of the culture of justification” (117).

Turning to the American case, the authors downplay the distrust of democracy narrative associated with Madisonian constitutional design, and, instead, emphasize an American “culture of authority,” one that is preoccupied with limited government, properly authorized decision making, and finality (at 112–113). There is less need to justify government action according to the US culture of authority, only the need to ensure that spheres of constitutionally assigned authority are properly respected, as in the separation of powers (at 118).

In the last chapter, the authors contemplate the consequences of the US moving away from balancing toward full-blown proportionality (despite their similarities). A methodological change in resolving constitutional disputes, the authors surmise, will likely result in changes to substantive outcomes, joining in a judicial “race to the top” in rights protection and crowding out of local legal cultures. They interrogate judicial adoption of proportionality in Canada and Israel to illustrate the point. By way of conclusion, Cohen-Eliya and Porat summarize arguments made in the previous chapters and then leave the task of weighing the pros and cons of

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2 Duncan Kennedy also assumes that European proportionality and US balancing are virtually identical. Both evince a decline in formal rationality (associated with Max Weber) and the prevalence of substantive rationality in private and public law. See, e.g., Duncan Kennedy, *A Transnational Genealogy of Proportionality in Private Law, in The Foundations of European Private Law* 185 (Roger Brownsword et al. eds., 2011). This may not be an entirely accurate assumption. 


adopting proportionality to others. Instead, they declare satisfaction if the book “has provided a more solid starting point for such work” (158).

3. The hazards of comparison

There are many perils to taking up a purportedly global phenomenon like proportionality and then testing its local effects. One has to be familiar with the origins of local constitutional law as well as the phenomenon that is gaining increasingly global acceptance. It also requires familiarity with the constitutional culture of several different national states over time. Comparative analysis is a difficult but necessary task and the authors are to be commended for (as they put it) providing a more solid foundation for future work. My concern is that the foundation is not as solid as one would have liked. Take, for instance, the authors’ use of the term constitutional culture. This is really nowhere explained. There is a small literature that addresses its meaning in the US context. Robert Post has relied upon constitutional culture to explain how the constitution is understood outside of courts while Reva Siegel has recourse to the concept to explain how constitutional understandings outside of courts get assimilated into judicial interpretation, hence, the phenomenon of constitutional change without constitutional amendment.6 Others similarly have invoked the concept in order to draw out the dominant understandings of how the constitution works, beyond merely what judges say, in which case, we should be attentive to centers of discursive power, beyond courts, regarding what the constitution means.7 What is important is to try and distinguish constitutional culture from other heuristics such as legal culture and political culture. The authors are not so careful—they use all three interchangeably.8 In this account, there seems to be little value added to having recourse to a concept like constitutional culture.

There is a further concern and it is that the constitutional cultures under discussion may not be well understood in their entirety. I confine my remarks here to only two of the jurisdictions discussed in the book, namely, the US and Canada. The authors, as have others, trace the origins of US balancing to the progressive and realist response to legal formalism.9 There may be other origins traceable back to the jurisprudence of John Marshall, who focused on a loose means-ends relationship in McCulloch. This is “Marshall’s rational connection requirement,” which has served as a minimal threshold of review for all legislative action and can be analogized to the first step in proportionality analysis (suitability).10 Justice Peckham’s discredited ruling in Lochner v. New York can be understood as having employed a “strict and skeptical means-ends analysis” in regard to the health justifications for the New York labor law.11 The alternative path signaled by Justice Harlan’s dissent in Lochner, expressing a looser and more deferential standard of review having regard to the available empirical evidence, looks like the second step in proportionality analysis (necessity). It is with reason that Lorraine Weinrib claims that Harlan’s

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8 “This book,” they write, “is more a book on legal and political cultures . . .” (at 9).


11 Laurence H. Tribe, American Constitutional Law 569 (2d ed., 1988). Aleinikoff, supra note 9, at 951. resists this proposition too, maintaining that even Justice Peckham’s discussion of the ground of health (and not on the ground of labour law) was categorical.
dissent portends the standard of review associated with the “postwar juridical paradigm.”

Overlooking historical and present-day evidence of the proportionality doctrine beyond the third stage certainly is forgivable. What is less forgivable, in my view, is the failure of the authors to make any mention of race in their discussion of US constitutional culture. Much US constitutional doctrine has been shaped by the presence and then legacy of slavery. Yet this fact is curiously absent from their account. The authors, for instance, characterize the American constitutional model as “intent-based,” which centers on “classifying the intentions or motives behind government action,” rather than impact-based (at 66). The specter of race helps to make sense of this. Speaking only of equal protection doctrine, adverse impact (or unintentional discrimination) has not been constitutionally cognizable for a simple reason: it would upset settled expectations that have grown up around race. As the US Supreme Court put it in Washington v. Davis, to include unintentional acts “would be far-reaching and would raise serious questions about, and perhaps invalidate a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to more affluent whites.” Scrutinizing actions that have a disparate impact on minorities would have intolerable effects on American society, the Court appears to be saying.

The discussion of the Canadian cases also is curious. The object of inquiry in Chapter Seven is to illustrate the effects of incorporating proportionality into local law. The Keegstra case, concerning the constitutionality of Canada’s hate speech law, is discussed as illustrative of these effects. The Supreme Court of Canada found that, while infringing the guarantee of freedom of expression in section 2(b) of the Canadian Charter of Rights and Freedoms, the limitation was reasonable by applying the three-pronged proportionality inquiry. Yet the authors claim that the Court simply balanced competing values and, in particular, “considered which of the values are most closely connected to the paramount value of Canadian multiculturalism, similar to the human dignity perspective in constitutional law” (at 141). This does not capture well what happened in this case. The reference to “multiculturalism” in the Canadian Charter is limited to an interpretive clause: section 27 mandates that the Charter be interpreted “in a manner consistent with Canada’s multicultural heritage.” It is not a central organizing theme of the Charter as is human dignity in the German basic law. It consequently plays only a small part in the Court’s decision. Instead, the competing equality rights of individuals harmed by hate speech (a right guaranteed in section 15 of the Charter) plays a much more prominent role in the Court’s limitations analysis.

The Quebec Secession Reference is taken up next, which seemingly has little to do with proportionality. The case, the authors acknowledge, is not so much about “balancing,” rather, it echoes the “underlying values” approach found in the “German and Continental organic conception of the state” (at 141). The outcome in the Secession Reference is offered, in other words, as an instance of the knock-on effects of adopting proportionality in the Charter’s limitations analysis. The argument seems to be that other aspects of the continental approach will be welcomed into local law once proportionality


14 A focus on means-ends generates “an evidentiary tool to smoke out hidden illicit government motives” (at 68). They turn to first amendment law and to an 1873 law targeting Chinese immigrants to illustrate.

is embraced. Yet the authors do not acknowledge that these influences are at work irrespective of the presence of proportionality. Canada is a bijural jurisdiction, with both the civil and common law operating in differing sub-national jurisdictions and both influencing the development of Canadian public law (hence the requirement that there be three judges from Quebec appointed to the Supreme Court). The scholarly authority they rely upon in support of their argument authored by Professor Jean-François Gaudreault-Desbiens makes no such claim. Gaudreault-Desbiens offers, instead, an alternative reading: that the civil law tradition is fusing with common law constitutionalism to produce novel trans-systemic constitutional results.\(^\text{16}\) He helpfully points us in the direction of identifying some of the distinctive elements of Canada's constitutional culture, something they seemed to have missed.

In these and other instances the authors do not fully realize their ambitions. Is it sufficient for comparative constitutional scholars laboring in the field to elide, even misread, aspects of constitutional systems under study? Though there is a real effort made at cross-constitutional understanding, we should expect more. Where a scholarly work aims to capture two dominant traditions, in addition to a couple of subsidiary ones, we should reasonably expect deeper engagement. This is not to say that the authors have not captured nicely some of the dominant trend lines in the jurisdictions they discuss, only that they have omitted vital parts of them. I suspect this helps to explain why the strongest parts of the book appear to be those where Israeli legal developments are discussed. This is when the authors speak authoritatively about constitutional developments in a single locale.

We are left, at bottom, with an ambivalent tale about the adoption of proportionality in jurisdictions with distinct constitutional cultures. Should the US adopt proportionality doctrine wholesale? The benefits seem salutary in Israel and Canada. The authors seem less certain about this in the US context, anticipating significant distortion of a distinct American political/legal/constitutional culture. Scholars like Gregory Alexander, however, have argued that, as regards constitutional property rights, the adoption of proportionality would not redirect US doctrine onto a different path than it is already on. It might, instead, ameliorate some of takings law’s muddled state. “It can hardly make things worse,” Alexander concludes.\(^\text{17}\)

The authors have chosen to produce a “value free” study—preferring facticity over validity—and so steer clear of any determinate prescription. Yet by choosing to appropriate a characterization of proportionality as a “judicial race to the top,”\(^\text{18}\) have they not tipped their hand?

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\(^{16}\) Jean-François Gaudreault-Desbiens, *Underlying Principles and the Migration of Reasoning Templates: A Trans-Systemic Reading of the Quebec Secession Reference*, in *Migration of Constitutional Ideas*, supra note 12, 178. Cohen-Eliya and Porat appear to be referring to the Supreme Court’s invocation of unwritten constitutional principles, central to the reasoning in the *Quebec Secession Reference*. Claims relying upon unwritten constitutional principles have not fared so well in later cases and suffered a severe setback in Quebec (Attorney General) v. Canada (Attorney General), 2015 S.C.C. 14. The Supreme Court of Canada theredeclined to find that the unwritten principle of “cooperative federalism” was a constraint on federal legislative power (¶ 20).
