



2011

All Things in Proportion - American Rights Review and the Problem of Balancing

Jud Mathews
Penn State Law

Alec Stone Sweet
Yale Law School

Follow this and additional works at: http://elibrary.law.psu.edu/fac_works



Part of the [Constitutional Law Commons](#)

Recommended Citation

Jud Mathews and Alec Stone Sweet, *All Things in Proportion - American Rights Review and the Problem of Balancing*, 60 *Emory L. J.* 797 (2011).

This Article is brought to you for free and open access by the Faculty Works at Penn State Law eLibrary. It has been accepted for inclusion in Journal Articles by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

ALL THINGS IN PROPORTION? AMERICAN RIGHTS REVIEW AND THE PROBLEM OF BALANCING

Jud Mathews^{*}
Alec Stone Sweet^{**}

ABSTRACT

This Article describes and evaluates the evolution of rights doctrine in the United States, focusing on the problem of balancing. In the current Supreme Court, deep conflict over whether, when, and how courts balance rights is omnipresent. Elsewhere, we find that the world's most powerful constitutional courts have embraced a stable analytical procedure for balancing, known as proportionality. Today, proportionality analysis (PA) constitutes the defining doctrinal core of a transnational, rights-based constitutionalism. This Article critically examines alleged American exceptionalism, from the standpoint of comparative constitutional law and practice. Part I provides an overview of how constitutional judges in other systems use PA, assesses the costs and benefits of adopting it, and contrasts proportionality with American strict scrutiny. Part II recovers the foundations of proportionality in American rights review, focusing on two critical junctures: (1) the emergence of a version of PA in dormant Commerce Clause doctrine in the late nineteenth century, the core of which persists today; and (2) the consolidation of the strict scrutiny framework in the mid-twentieth century. Part III demonstrates that the "tiered review" regime chronically produces pathologies that have weakened rights protection in the United States and undermined the coherence of the Supreme Court's rights jurisprudence. PA, while not a cure-all for the challenges faced by rights-protecting courts, avoids these pathologies by providing a relatively systematic, transparent, and trans-substantive doctrinal structure for balancing. We also show that all three levels of review—rational basis, intermediate review, and strict scrutiny—have, at various points in their evolution, contained core elements of proportionality. In Part IV, we argue that the Supreme Court can and should cultivate a version of PA rooted in American constitutional traditions and values.

^{*} Visiting Assistant Professor, University of Illinois College of Law.

^{**} Leitner Professor of Law, Politics, and International Studies, Yale Law School. The authors would like to thank participants in the Yale Law School faculty workshop for helpful comments on a draft of this paper.