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Reasonableness and Law



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empower the reviewer to strike all decisions she views as failing to maximise the total outcome with regard to all the constitutional values at stake). Nor is the best integration likely to be one in which the reviewer can strike every decision she views as failing to achieve bounded rationality (this would empower the reviewer to replace with her own decisions all the decisions she would have taken differently had she been reasoning with the information the decision-maker had at the time the decision was made).

We must therefore define a different notion of reasonableness, a notion tailored to the institutional role and competence of decision-makers and of their reviewers, and in particular a notion that takes into account the reviewer's deference space, namely, the area within which the reviewer should not attack the measure under review even though she believes a different measure should have been taken (on deference, see Soper 2002). If unreasonableness (where constitutional values are concerned) is understood as providing a sufficient ground for review, then the notion of reasonableness is not independent of deference but is rather delimited by institutionally due deference. In other terms, considerations of institutional deference enable us to identify a sufficientist reasonableness threshold, encompassing not only the decision the reviewer would have taken but also other choices which he or she considers to be faulty but not yet unreasonable (insufficiently faulty to be unreasonable). However, this means that we cannot provide a universal characterisation of deference-based reasonableness, precisely because such a characterisation will depend on institutional deference.

Figure 8 illustrates how a determination (1) that does not coincide with what the reviewer would choose (5) may still fall within the margins of the decision-maker's appreciation (as indicated by the dotted lines) and may thus escape review: though the reviewer views the decision-maker choice as imperfect (it is based on an indifference curve that in the reviewer's opinion accords too much importance to value *A*), she does not consider it to be attackable, being within the margin of reasonable appreciation.

The idea of a sufficiency threshold applies as well to a legislature's epistemic judgements, which too can determine a failure to appropriately balance the values at stake. For instance, given the factual premise that a terrible terrorist attack is imminent, and the premise that scouring all Internet traffic with data-mining techniques will probably foil the attack, a legislator may be justified in adopting such measures to the detriment of privacy. However, if there are no grounds for accepting either of those premises (no convincing evidence that an attack is underway, and little evidence that unrestricted data-mining will be able to prevent it), then sacrificing privacy may be considered unreasonable. But substituting the court's epistemic assessment for the legislature's seems to require something more than a mere mistake of the latter: it should require a mistake consisting in epistemic unreasonableness, namely, a serious and indisputably ascertainable fault. Thus, this should not be done when the legislature's fault, according to the court, only depends on the adoption of a particular economic or social theory which the court favours (viewing it as more reliable, better supported by the facts), but which other reasonable people reject (as Judge Holmes famously argued in the *Lochner* case).

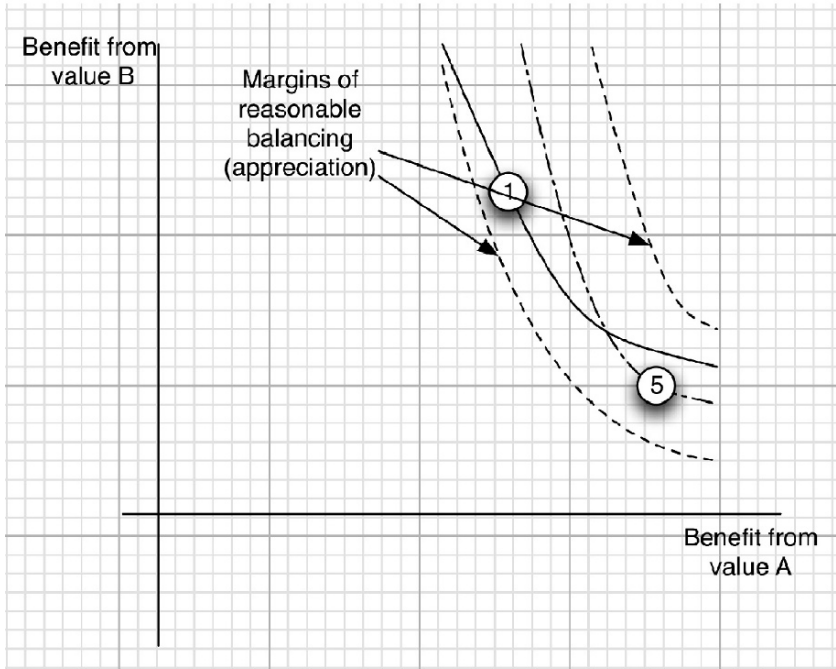


Fig. 8 Reviewer’s choice and margin of appreciation

16 A Sufficientist Understanding of Proportionality

By combining the foregoing analysis of failures in rationality with a deference-based sufficientist idea of reasonableness, we can derive the tests usually available in proportionality analysis (see, among others, Alexy 2003; Stone Sweet and Mathews 2008) as applied to determinations sacrificing constitutional rights. For this purpose, it is useful to stipulate some additional terminology.

I shall say that α satisfies V more than β does, in formula $\alpha >^V \beta$, to mean that, the level of achievement of value or goal V resulting from action α is higher than the level resulting from action β (and I use similarly, the symbols $<^V$, \leq^V and \geq^V). For instance, if a the level of achievement of privacy resulting from legislative determination α (keeping the footings taken with street cameras for 1 day) is higher than the level resulting from determination β (keeping the footings for 1 year), I shall say that α satisfies privacy more than β does ($\alpha >^{\text{privacy}} \beta$).

By saying that α sacrifices V , I shall mean that α satisfies value or goal V less than the inaction (omitting α without replacing it with a different initiative), in formula, $\alpha <^V \emptyset$ where \emptyset denotes inaction. For instance, if a new regulation α allows for the registration of genetic data of all newborn children (which was previously forbidden), I shall say that α sacrifices privacy.

Similarly, I shall say that α *advances* V , to mean that α satisfies value or goal V more than inaction ($\alpha >^C \emptyset$). For instance, if a new regulation α prohibits processing personal data for commercial purposes without the consent of the person concerned (which was previously permitted) I shall say that α advances privacy.

I shall also say α *satisfies a set* $\{V1, \dots, Vn\}$ *more than* β *does* ($\alpha >^{\{V1, \dots, Vn\}} \beta$) to mean that the α 's compound impact on all values in the set is better (higher, more valuable) than β 's. In assessing this compound impact the relative sacrifice in one value can be outweighed by the relative advance in another (in case numerical indicators can be given, the satisfaction of a set of values would be the weighted sum of the satisfaction of each single values in the set, as we observed in section 4). Consequently, it is possible that α satisfies the value set $\{V1, \dots, Vn\}$ more than β does even though β satisfies certain values the set more than α does. This happens when α satisfies certain other values in the set more than β does, and the comparative advantage provided by α with regard to the latter values outweighs the advantage provided by β with regard to other values. Assume, for instance (see Section 4), that β consists in prohibiting street cameras, and α consist in allowing cameras and requiring the destruction of the footage after 1 day, and that the comparative advantage in security provided by α outweighs the comparative disadvantage in security provided by β . Then it can be concluded that α satisfies the set $\{privacy, security\}$ more than β ($\alpha >^{\{privacy, security\}} \beta$), even though β satisfies privacy to a higher extent than α does ($\beta >^{privacy} \alpha$).

As we observed above, a more rigid kind of comparison, excluding tradeoffs between different values, is provided by Pareto superiority. For α to be Pareto superior to β (and β Pareto inferior to α) with regard to a set of values $\{V1, \dots, Vn\}$ it is required that α satisfies at least one value in the set more than β *and* that α satisfies every other value no less than β (there exists no value in the set such that β satisfies it to a higher extent than α). This condition would not be satisfied in the latter example, where β satisfies privacy to a higher extent than α . Thus in this example, even though α satisfies the set $\{privacy, security\}$ more than β does, α is not Pareto-superior to β . The advantage of the criterion of Pareto-superiority is that it allows us to conclude for the preferability (rationality) of a choice without engaging in balancing, understood as the (usually controversial) assessment of tradeoffs between impacts on different values. However, when we have to compare choices α and β that impact different values, α satisfying more certain values and β certain others, then Pareto-superiority is not applicable, and balancing is required. Let us consider the four usual proportionality tests.

Test 1: Legitimate aim 1 (permissible intended purpose). A legislative determination sacrificing a constitutionally protected value must aim at advancing a constitutionally permissible goal. This requirement is violated when the legislature adopts a determination sacrificing a constitutional value, and does so in order to pursue a goal that it is constitutionally impermissible. Such a decision would fail to be rational (or, for that matter, reasonable) with regard to the decisional context as emended by removing the impermissible goal. In other words, when the impermissible goal is eliminated, the only relevant

intended impact of the decision is its negative impact on the constitutional right/goal, which makes that choice internally irrational (Pareto-inferior to the choice that consists in inactivity).

Test 2: Legitimate aim 2 (legitimate outcome). A legislative determination sacrificing a constitutional value must effectively advance a constitutionally permissible goal. In other words, if a constitutional value C is sacrificed by α , there must exist a legislative goal G that is advanced by α , where the pursuit of G is constitutionally permitted. Assuming that requirement 1 is met, i.e., that a permissible goal G is pursued, the *legitimate-outcome* requirement is violated when the legislature adopts a determination α that sacrifices a constitutional value without advancing the pursued legislative goal (e.g., a useful medical therapy is prohibited assuming, on the basis of wrong medical information about the effects of this therapy, that it damages patients' health). This determination will be unreasonable when the legislature's epistemic mistake is very serious and indisputable (unreasonableness can also involve retaining the new legislation when new indisputable evidence is made publicly available showing the previous choice to be mistaken). It seems to me that the reviewer's consonance and the legislature's dissonance with regard to the scientific community's evaluations should often play a decisive role in justifying the reviewer's intervention.

Test 3: Pareto-necessity. A legislative determination that advances a certain goal while sacrificing a constitutional value, must not be Pareto inferior (where constitutional values are concerned) to any determination that equally advances the goal with a smaller sacrifice of the constitutional value. This requirement is violated when the determination α —while respecting requirements 1 and 2, i.e., pursuing a permissible goal G through effective means—sacrifices a constitutional value C , and there exists an alternative determination β that advances G at least to the same extent, sacrifices C to a lesser extent and imposes no additional burden on any another constitutional value. Under such conditions, we may that α is not necessary to advance G , since β rather than α could have been taken (avoiding the unnecessary sacrifice at no cost). Thus, when Pareto-necessity is violated, the following conditions hold: α sacrifices C , and there exists an alternative choice β such that β satisfies C more than α does, and β is Pareto-superior to α with regard to a value set $\{C, C1, \dots, Cn, G\}$ comprising all constitutional values $C, C1, \dots, Cn$ plus the pursued legislative goal G . Note that for β being Pareto-superior to α it is necessary that β satisfies each of $C1, \dots, Cn, G$ no less than α . Consequently, if satisfies any of the $C1, \dots, Cn, G$ more than β does then β fails to be Pareto-superior to α , which means that α satisfies Pareto-necessity (as far as β is concerned). For instance, a law α requiring DNA samples being taken of all citizens (for their use in future police investigation), would stand the test of Pareto-necessity as compared with the choice β of getting samples only from suspects for particular crimes: even though α sacrifices privacy to a very high extent, if satisfies the value of security more than β does, and this is sufficient to exclude that β is Pareto-superior to α . Failure to

satisfy Pareto-necessity may depend on an epistemic mistake in assessing the impacts of α and β (e.g., the mistaken belief that α sacrifices C less than does β), or it may depend on a heuristic failure to identify determination β . When such mistakes overstep the unreasonableness threshold, review is justified.

Test 4: Comparative balancing. A legislative determination sacrificing a constitutional value must satisfy the set of all constitutional values no less than inaction (\emptyset) would do. Let us assume that a determination α sacrificing constitutional value C meets all requirements 1–3, i.e., that α effectively pursues a permissible goal G and α is not Pareto-inferior to any other possible determination β . Under these assumptions, α complies with the requirement of Test 4 if α satisfies no less than \emptyset the value set $\{C, C1, \dots, Cn\}$, including all constitutional values. Given that α sacrifices value C , this requires that α advances other values, to an extent offsetting C 's sacrifice. Conversely, failure to satisfy Test 4 would mean that C 's sacrifice is not offset by the advancement with regard to other values. For instance, the conclusion that a law requiring DNA samples being taken from all citizens fails to meet the requirement of comparative balancing (as compared to the current state of affairs when samples are only taken on suspects) requires that the advance this law provides with regard security is outweighed by the sacrifice it imposes on privacy. Failure to satisfy Test 4 may derive from the legislators' practical mistake in assessing the relative importance of two or more values at issue (giving too much importance to some values advanced by α or too little importance to some value sacrificed by it), or from their epistemic mistake in assessing the impact of their decision on those values. In either case, in order for α to be unreasonable, these practical or epistemic mistakes must also have been unreasonable.

Special care is required in Test 4, especially when unreasonableness depends on a mistaken evaluation of the comparative importance of the constitutional values (goals) at stake. Here the court's interference with the legislature's political autonomy would be highly controversial (given that disagreements over matters of fact tend to more easily be resolved than disagreements over matters of value). Such an interference can be more easily justified (considering the democratic derivation of the legislature's power) when the judges' evaluation appears to comport with people's assessment of the relative importance of the values (or with the assessment of the people who are interested in the matter and have been discussing it), namely, when it appears that the legislature has failed to take duly into account the idea of reasonableness as agreement or consonance with general opinion (see Section 2).

The way in which balancing in a strict sense has been characterised in Test 4 above does not exhaust all possibilities. Let us consider two variations, the first one making judicial balancing *less* intrusive and the second one *more* so.

The first variation consists in admitting the relevance of non-constitutional goals pursued by the legislature. This is excluded by the Test 4 as characterised above, which only contemplates constitutional values: a diminution (meeting the required seriousness threshold) in the combined satisfaction of constitutional values

is sufficient to strike down legislation regardless of any increase in the satisfaction of non-constitutional values. This means that constitutional values are viewed as lexically superior to non-constitutional values (no achievement of any level of a non-constitutional value can justify a diminution with regard to constitutional values, that is, non-constitutional values are irrelevant to constitutional balancing).

Let us say that a choice α *outbalances* β with regard to values V_1, \dots, V_n , to indicate that α satisfies the values set $\{V_1, \dots, V_n\}$ more than β , to an extent sufficient to make it unreasonable to prefer β over α . On the approach under Test 4, if C, C_1, \dots, C_n are all the constitutional values involved in the case, and inaction (\emptyset) outbalances α with regard to those values, α fails the test, regardless of α 's impact on non-constitutional values. For instance, let us assume that privacy and security are constitutional values, while cutting down on spending is not. Let us also assume that choice α (e.g., introducing body-scanning in airports) impacts with a negative combined outcome on both privacy and security (and on no other constitutional value besides), but that implementing α is much cheaper than implementing the previous policy (which entails costly inspections by airport customs). It then follows, on the approach under Test 4 above, that if a judge believes that inactivity (maintaining the previous policy) outbalances α with regard to the set $\{privacy, security\}$, this judge should disregard the older policy's higher costs (assuming that cost-effectiveness is not a constitutional value) and should accordingly strike down α . The same judge could reach a different conclusion if non-constitutional values were also relevant in the comparison. In the latter case, then α could stand the review if the judge believed that α 's gain with regard to the non-constitutional legislative goal (cost-cutting) would balance α 's loss with regard to the constitutional values (or at least would keep the imbalance within the unreasonableness threshold). This leads to the following weaker version of Test 4.

Test 4.1: *Comparative balancing* (weaker version). A legislative determination α to achieve a certain goal G sacrifices a constitutional value C , it must not be outbalanced by \emptyset as concerns both the impact on constitutional values $\{C, C_1, \dots, C_n\}$ and the impact on the larger set $\{C, C_1, \dots, C_n, G, L_1, \dots, L_m\}$, comprising the goal pursued plus any other objectives L_1, \dots, L_m valued by the legislature. This requirement can be considered unfulfilled only when both \emptyset outbalances α with regard to both sets.

For instance, in the example above, it would be possible for Test 4.1 to be satisfied even when \emptyset outbalances α with regard to $\{privacy, security\}$, i.e., when Test 4 fails to be satisfied. This would happen when the outcome of the comparison would change by also including the goal of *cost-cutting*. In other terms, while under Test 4, the only condition that needs to met in order for a legislative determination α to be struck down is that \emptyset outbalances α with regard to $\{privacy, security\}$, Test 4.1 also requires that \emptyset outbalances α with regard to $\{privacy, security, cost-cutting\}$.

A different, more intrusive variation of Test 4 would consist in substituting the requirement that inaction (\emptyset) not outbalance α with the requirement that there be

no alternative determination β outbalancing α : the reviewer would strike down α not only when α worsens the preexisting combined achievement of constitutional values but also when α , while resulting in a combined achievement of constitutional values higher than (or equal to) the outcome afforded by \emptyset , falls short of a maximal combined achievement of the constitutional values at stake, since there is an alternative determination β that would provide an even better outcome. Let us consider the following hypothetical example (which follows to some extent the case *S. and Marper v. the United Kingdom*, decided by the European Court of Human Rights on 4 December 2008). Suppose that non-voluntary storing of genetic data was prohibited under a preexisting legal framework r_1 , and that a new rule is issued making it possible to store genetic data collected in the course of a criminal investigation: this would yield a new regulatory framework r_2 . Suppose now that a reviewer agrees that framework r_2 , while sacrificing privacy to security, yields an outcome (a combined satisfaction of the two values of privacy and security) better than the outcome yielded by r_1 (the loss of privacy being outweighed by the advance in security). And suppose, finally, that the reviewer also believes that a different framework r_3 (e.g., making it possible to store data but requiring deletion in case charges are dropped) would more suitably balance privacy and security. The reviewer will thus conclude that that r_3 outbalances r_2 , and that r_2 outbalances r_1 ($r_3 \gg r_2 \gg r_1$). However, r_3 is not comparatively-superior to r_2 , since r_2 satisfies security more than r_3 does, though, in the reviewer's judgment, r_3 provides an advantage in privacy that outweighs the advantage in security provided by r_2 . In such a case, then, the reviewer's decision to strike down r_2 would not pass any of the previously listed proportionality tests (it will fail Test 3, since r_3 is not Pareto-superior to r_2 , and it will fail Test 4, since r_2 is not comparatively-inferior to r_1 , which would have resulted from inaction). If we are to justify striking down r_2 , we have to introduce the following additional test.

Test 5: Comparative counterfactual balancing. A legislative determination sacrificing a constitutional value must not be outbalanced, with regard to the set of all constitutional values by any alternative determination the legislature could have taken. A legislative determination α violates this requirement when α sacrifices a constitutional value C and there exists an alternative determination β that would produce a lesser sacrifice of C and would outbalance β with regard to the set of all constitutional values. This would be the case of the last example, where r_2 sacrifices privacy advancing security, and r_3 would provide a lesser sacrifice in privacy and a better compound achievement of all constitutional values at stake (including both privacy and security).

The application of this last test seem to me particularly problematic in the cases where Test 4 is not satisfied, i.e., in the cases where the contested decision α satisfies the set of all constitutional values more than the preexisting state of affairs (the outcome of inaction), though less than the alternative measure β being considered. If the reviewing court can only act as a negative legislator, that is, its only power

is to remove α from the legal system on the basis of Test 5, the court would bring back the preexisting state of affair, worsening the compound achievement of the constitutional values (as would happen in the previous example, if r_2 was cancelled, reinstating r_1). This paradoxical effect can be avoided if the court can strike down α without cancelling all of its effects (e.g., it can impose β as a particular interpretation of the language of text α , as has happened with certain interpretive decisions of the Italian Constitutional Court, or it can rule that the government pay out compensation for the injury owed to by α , all the while preserving α 's legal validity, as has happened with decisions of the European Court of Human Rights). However, it seems that deference to legislative authority requires that such interventions only take place in extreme cases: β 's advantage over α must be truly uncontroversial (or at least there must be broad support for this view in public opinion), and β must be obtained through a modification of α (by introducing an exception or extension to it), reframing α 's content rather than going to the extreme measure of striking down α . A variant of Test 5 could be obtained by also including non-constitutional values, as in Test 4.1.

Let us now go back to Test 3, namely, Pareto-necessity. As we have observed above, the idea of Pareto necessity does not involve an assessment of tradeoffs between impacts on different values (as included in Test 4). This matches the use of the term "necessity" in some legal context, but does not correspond to the way in which this term is used in other contexts. For clarifying this issue, I shall identify, besides the Pareto necessity a different notion of necessity, which I shall call *balanced-necessity*. We must firstly consider that for the purpose of proportionality—in assessing whether a measure α , sacrificing a constitutional value C , is necessary to achieve a goal G —we cannot use the notion of necessity in its common sense, namely, as meaning that α is a *conditio sine qua non* of G , i.e., that unless α is adopted, then G will not be achieved (at a level equal or higher to that which it would be achieved though α), i.e., that there is no alternative measure β such that, if β had been taken instead of α than G would have been achieved to the same extent. This understanding of necessity would be too restrictive for the purpose of proportionality: it would lead us to conclude that α fails to be necessary to achieve G whenever there exists another measure β that achieves G , even though β sacrifices C more than α does. It could then could be argued, for instance, that body scanning is not necessary for security in airports since there is an alternative measure—namely, having people stripped of all their clothes—which would achieve the same level of security (even though the latter measure would sacrifice privacy more than body-scanning). To avoid such absurdities, when evaluating whether α , involving C 's sacrifice, is necessary in order to achieve G , we must only consider those alternative measures that, while achieving G entail a lower sacrifice of C . This is done with the notion of Pareto-necessity as characterised in Test 3 above, which extends considerably the scope of necessity. When evaluating the Pareto-necessity of a measure α sacrificing value C , the alternative measures to be considered are restricted to those that would not entail a lesser satisfaction nor of the goal been pursued nor of any other constitutional value: α fails to be Pareto-necessary only if there exists any alternative measure β that besides

sacrificing C less than α , also satisfies no less than α does the pursued goal as well as all other constitutional values.

The notion of Pareto-necessity, however, is too permissive to match the way in which the notion of necessity is used in certain legal contexts. Consider for instance Art. 8 of the European convention on human rights, stating that limitations of the right to privacy must be necessary “for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. In the application of this norm, necessity has been denied even with regard to legislative choices that would satisfy Pareto-necessity (since the alternative choices available to the legislator were indeed inferior, under certain regards, to the legislative choice considered non-necessary by the judges). For a certain measure α to be necessary for achieving a goal G , in the sense assumed by Art. 8, it seems indeed that there must be no alternative measure β that, while achieving G to a satisfactory extent (though possibly less than α would do), sacrifices C to a lesser extent, and provides better combined impact on all relevant values at stake (including C and G). In other words, this decision β must be such that the advantage it gives with regard to the sacrificed value C is not offset by α 's advantage with regard to G and other relevant values.

Test 3.1 Balanced necessity. A legislative determination α sacrificing a constitutional value C to achieve a goal G , must be such that there exists no alternative determination β , such that β satisfies G to a satisfactory extent, sacrifices C less than α does, and outbalances α with regard to the set including all constitutional values and goal G .

So, the balanced-necessity test seems to be an instance of Test 5 (comparative balancing), qualified by the additional requirement that the alternative determination β still satisfies the legislative goal up to a satisfactory level, while sacrificing less the value diminished by α . This seems the idea of necessity adopted by the European Court of Human Rights adopted in case *Marper v. the United Kingdom*. In fact the attacked measure (preserving all DNA samples taken from suspects, even after acquittal), provides a higher level of security (maintaining more data potentially useful for future investigations) as compared with the alternative measure considered by the Court (preserving only the samples taken from convicted persons), and thus appear to meet Pareto-necessity. By excluding that the preservation of all samples is necessary for security, the Court assumes that necessity may fail even when the less interfering measure satisfies the legislative goal (security) less than the contested legislative measure does. Obviously, this understanding of necessity allows for a more intrusive judicial control than mere Pareto-necessity, a control that is based on assessing tradeoffs between different values. Thus review based on violation of the standard of balanced-necessity needs to be constrained appropriately though sufficientist considerations (by requiring that the legislative goal to which the legislative measure α was directed really is satisfactorily achieved also by the alternative measure β , that the advantage provided by β with regard to other values

at stake strongly outweighs β 's lower achievement of the legislative goal, that β is obtained by conveniently extending or restricting α 's content).

17 Constitutional Teleology and Implied Constitutional Norms

Constitutional rights, as inputs of legal reasoning, can be viewed in two complementary ways. The first view understands them as entitlements directly deriving from the unqualified recognition of the corresponding (individualised) values. Accordingly, a constitutional right primarily operates, with respect to the legislature, as a guide for the legislature's teleological reasoning: the legislature has the goal-duty advance the corresponding value (freedom of speech, privacy, participation in science and culture, etc.) taking it into account in legislative determinations. And so, where judicial review is concerned, rights operate as criteria (values) for assessing the reasonableness (proportionality) of legislative choices.

The second view understands constitutional rights as articulating a set of normative positions established by more-specific norms, which are not expressly set forth in the constitution but whose implied existence can be teleologically argued for with reference the rights (values) explicitly so recognised: given the constitutional values, their relative importance, and the social and institutional conditions for their implementation, more detailed right-conferring norms are extracted through interpretative arguments affirming that the application of these norms is likely to provide an appropriate balance of the values at stake. In particular, norms can be devised that unconditionally prohibit certain interferences with a right (these being interferences encroaching upon the core of the right, interferences that consequently cannot normally be balanced by the need to satisfy other values) the, or norms can be devised stating that a right may not be limited by certain values (whose increased satisfaction is unlikely to justify a limitation of that right). In this way, a right's normative content can be characterized in a more casuistic way (but still in general terms, concerning classes of cases) by introducing norms to be used as "trumps" against competing values, it being assumed that the protected right outbalances the competing values in the cases identified in these norms themselves (e.g., "The right to private and family life includes self-determination as concerns sexual orientation and reproductive choices, within the following limitations: . . . This right includes in particular . . . and can only be constrained with respect to the following cases: . . . It also includes the right to exercise control over one's personal data, specifically as it pertains to . . . under the following limitations: . . . This right includes the right to access pornographic materials, with the exclusion of child pornography," and so on).

Different legal systems may place a different emphasis on the two perspectives I have described. Some systems may focus directly on constitutional rights in the abstract, thus entrusting the judges with the task of directly evaluating particular legislative decisions in view of their impact on those constitutional values. Other systems may rely instead on the judicial and doctrinal definition of lower-level rules constraining legislative decision-making, thus entrusting the judges with the

task of framing and applying such rules, and then evaluating the legislative decisions on that basis (see Nimmer 1968, who introduced the term “definitional balancing” to describe this idea; for some criticism, see Aleinikoff 1987, 979). The first approach seems to correspond to some extent to the practice of European constitutional courts, while the second is more often used by the U.S. Supreme Court.

Which strategy (or which combination of them) is most appropriate depends on different institutional structures and legal traditions, but these two strategies may be considered to some extent as functionally equivalent. In common-law jurisdictions, based on the idea that judicial decisions produce binding *rationes decidendi*, constitutional judges may feel conformable with explicit rule-making. Consequently, rather than attacking a legislative determination for its failure to appropriately balance constitutional values, common law judges may prefer to extract from the constitutional recognition of such values (e.g., the right to free speech) some general rules (e.g., the rule that no content-based restrictions on speech are admissible, unless conditions of strict scrutiny are met; or the rule that child pornography is not covered by freedom of speech) whose application will likely lead them to strike down the legislative determinations failing to effect an appropriate balance. They will then be able to decide cases (e.g., striking down a law that establishes a content-based limitation on free speech, or not striking down a law that makes child pornography illegal) by evaluating legislation in light of implied constitutional rules rather than in light of the underlying values to be balanced.

But it will still be necessary to rely on the underlying values in justifying and interpreting the implied constitutional rules or in working out conflicts between them (by giving priority to the rule whose application, in the case at hand, leads to a higher combined satisfaction of the values at stake: for instance, in cases involving hate speech, freedom of speech can prevail on dignity and non-discrimination, or vice versa). Moreover, when application of the implied rules fails to provide an appropriate outcome (it would lead to striking down a legislative norm providing an appropriate balance, or to preserve an unbearably unbalanced one), the judges would need to reformulate such rules or to supplement them with exceptions.

I cannot consider here advantages and disadvantages of the two approaches (greater contextual flexibility as against greater predictability, a clearer perception of the interests at issue as against an incremental refinement of precedent-based choices), for this would in turn have us compare rule-based decision-making with a more casuistic style of decision and weigh the pros and cons (see Schauer 1991; and for a discussion of some problems involved in case by case balancing, see Kumm 2007). We should bear in mind, finally, that both perspectives recognise the important role that teleological reasoning plays where constitutional values are concerned, and that this role is framed in different ways in the two approaches, which in this respect can be considered complementary (the constitutional judge/interpreter can go back to goal-norms when implied rules are not applicable, or can revise rules when they fail to appropriately balance the constitutional goals).