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Author(s): Dimitrios Kyritsis

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Whatever Works: Proportionality as a Constitutional Doctrine†

Dimitrios Kyritsis*

Abstract—In *The Global Model of Constitutional Rights* Kai Möller claims that the proportionality test is underlain by an expansive moral right to autonomy. This putative right protects everything that advances one's self-conception. It may of course be limited when balanced against other considerations such as the rights of others. But it always creates a duty on the state to justify the limitation. Möller further contends that the practice of proportionality can best be understood as protecting the right to autonomy. This review article summarizes the main tenets of Möller's theory and criticizes them on two counts. First, it disputes the existence of a general right to autonomy; such a right places an unacceptably heavy burden on others. Second, it argues that we do not need to invoke a right to autonomy to explain and justify the main features of the practice of proportionality. Like other constitutional doctrines, proportionality is defensible, if it is grounded in pragmatic—mainly epistemic and institutional—considerations about how to increase overall rights compliance. These considerations are independent of any substantive theory of rights.

Keywords: proportionality, balancing, human rights, autonomy, judicial review, constitutionalism

1. *Introduction*

Practical people that they are, lawyers are happy to stick to whatever works for as long as it does. For all their regular engagement with abstract principles of political morality such as democracy and the rule of law, constitutional lawyers are no different. Even a constitutional scholar as philosophical as Ronald Dworkin insisted that constitutional law should be outcome-driven.[1] The pragmatism of lawyers surely forms a significant part of the explanation for the enormous

† Review of Kai Möller, *The Global Model of Constitutional Rights* (OUP 2012), hereafter *Global Model*.

* Associate Professor in Law, University of Reading. Email: d.kyritsis@reading.ac.uk. The main claims of this essay were presented at the University of São Paulo during a visit funded by a Santander Research Mobility Award. I am grateful to the participants for their many helpful questions and comments. I am also indebted to George Letsas, Virgilio Afonso da Silva, Mark Taylor, Stavros Tsakyrakis, Dimitris Tsarapatsanis and especially Kai Möller for discussion of earlier drafts, as well as to Julie Dickson for her editorial suggestions.

[1] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (OUP 1999) 34.

success of the proportionality test in constitutional rights adjudication, whether at the national or the supranational level. Proportionality, it seems, works. Or does it?

As is well known, the proportionality test is used to determine whether interferences with fundamental rights are constitutionally permissible. When applying it, we first ask whether the right-infringing measure is suitable and no more than necessary for achieving a legitimate public aim. We then go on to inquire whether the detriment to the right the measure causes is proportionate to the benefit to the public aim it accrues. This is called the balancing stage because it involves balancing the value of the right against that of the public aim in the circumstances of a specific case. Originating in German administrative law, the proportionality test is fast becoming the standard method of constitutional rights adjudication across the world.[2] Apart from Germany and with the glaring exception of the United States, it has been adopted by national courts across Europe, in Canada, South Africa, Israel, New Zealand, as well as by the European Court of Human Rights.[3]

However, in the past few years, the confident global expansion of proportionality has begun to generate a good deal of criticism and soul-searching.[4] The critics have tended to occupy the philosophical high ground. They argue that the notion of balancing that is at the core of proportionality misconstrues the special moral importance of rights and their priority over collective goods. Consequently, the critics dismiss large swaths of human rights adjudication that applies the proportionality test as misguided. This criticism is well summarized in James Fleming's contention that talk of balancing rights 'reduce[s] claims of basic liberties or rights of individuals to mere claims of interest' or 'elevate[s] mere claims of interests of government into claims of rights'.[5] Proportionality, the critics maintain, is guilty of the same thing since it presupposes that costs and benefits to rights and other public aims are calculated on a single metric.

In the face of this criticism, proponents of proportionality have rested content to have the all but universal practice of courts adjudicating constitutional rights

[2] On the pedigree of the proportionality test see Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (CUP 2013) ch 2; Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 UTLJ 383.

[3] For recent accounts of the expansion of proportionality see Cohen-Eliya and Porat (n 2) ch 1; Alec Stone-Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008–09) 47 Colum J Transnat'l L 72. For evidence of its appeal see among others Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002); Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (CUP 2012); David Beatty, *The Ultimate Rule of Law* (OUP 2005); A Brady, *Proportionality and Deference under the UK Human Rights Act* (CUP 2012); Sujit Choudhry, 'So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1' (2006) 34 Sup Ct L Rev (2d) 50; Evelyn Ellis (ed), *The Principle of Proportionality in the Laws of Europe* (Hart Publishing 1999); Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) ch 9; Ian Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' (2002) PL 265; Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) CLJ 174.

[4] James Fleming, 'Securing Deliberative Democracy' (2004) 72 Fordham L Rev 1435; Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights' (2010) 7 ICON 468; Gregoire Webber, 'Proportionality, Balancing and the Cult of Constitutional Rights Scholarship' (2010) 23 Can JL & Jur 179.

[5] Fleming (n 4) 1446.

claims on their side. That is not to say that their accounts lack sophistication; far from it. But their sophistication has, in the main, been channelled in the elaboration of the formal features of the proportionality test.[6] That is because the advocates of proportionality view it merely as a deliberative structure that is intended to ensure the rationality of our decision-making. As such, they maintain, it does not incorporate any substantive moral commitments. The proportionality test cannot tell you what makes for a serious interference with a right; for that you may need to engage in substantive moral reasoning. But it tells you what follows from the contention that a measure constitutes a serious interference, namely that the justificatory bar that the state must clear is raised.

As a result of their different focus, the two sides sometimes talk at cross purposes. Clearly, a decision-making method can be rational in some sense and still get things wrong, if it persistently misrepresents the items that have a bearing on the decision. For instance, some theorists think that the defining feature of rights is their power to trump conflicting considerations.[7] By requiring us to balance rights and other public aims, even at the formal level, the proportionality test allegedly dilutes this feature. To trump, so the argument goes, is the opposite of being susceptible to balancing. On the other hand, the proponents deny that just by virtue of its formal structure proportionality can have the systematic distorting effect complained of by the critics. Proportionality, they insist, does not prescribe a specific metric for balancing competing values. This metric is supplied by the theories of rights that are fed into the formal structure. The structure itself remains neutral toward competing substantive theories.

With his recent book, *The Global Model of Constitutional Rights*, Kai Möller seeks to overcome the current stalemate in the debate about proportionality.[8] He wants to defend proportionality from its critics by engaging with them on their own terms.[9] That is to say, he agrees that proportionality must be

[6] In this vein see Alexy (n 3); Virgilio Afonso da Silva, 'Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision' (2011) 31 OJLS 273; Mattias Klatt and Moritz Meister, 'Proportionality: A Benefit to Human Rights? Remarks on the ICON Controversy' (2012) 10 ICON 687.

[7] Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (OUP 1984) 153–67.

[8] Following Möller I use the term 'constitutional rights' to refer to basic individual entitlements of the sort that are listed in constitutional bills of rights. These are political rights, namely rights that it is the business of political institutions to protect and promote. They are also typically considered to be equipped with heightened normative force and urgency compared to other political values such as wealth. Contemporary constitutional practice tends to take an expansive view of what falls in this category. As I will explain below, questions of considerable theoretical importance hang on how broadly we define the term, so I will refrain from begging those questions now. One more word of caution is in order at this point. 'Constitutional rights' is commonly understood to refer to rights that are owed within a national political community. I want to allow for the possibility that the term also covers similar entitlements that are enshrined in international treaties like the European Convention of Human Rights. It goes beyond the scope of this essay to determine how far this extension is warranted. Let me just note, though, that it is not incompatible with what I have just said to insist that the ECHR is in relevant respects dissimilar to other human rights treaties like, say, the Universal Declaration of Human Rights and that, therefore, the label 'constitutional rights' is appropriate to the former but not the latter.

[9] Another theorist that similarly takes up the critics' challenge but arrives at a very different justification of proportionality is Stephen Gardbaum. See his 'A Democratic Defense of Constitutional Balancing' (2010) 4 Law & Ethics of Human Rights 78.

underpinned by a substantive theory of what rights we have, morally speaking, and it stands and falls on the attractiveness of that theory.[10] However, Möller is confident that a theory can be found that vindicates the bulk of the existing practice of proportionality, and in this he parts company with the critics. Intricate, meticulously argued and balanced, the book confidently straddles moral philosophy and constitutional theory. Möller is well versed in global developments in human rights law and at the same time ably stands his ground in philosophical debates ranging from the theory of rights to the doctrine of double effect and accommodation. His appreciation for the need to inject philosophical analysis into the study of constitutional doctrine is welcome and constructive, and the boldness with which he steers the debate about proportionality in a new direction pays high dividends. He also has an excellent overview of the specialized literature on proportionality, which he summarizes fairly and informatively. But, as I will argue, his proposal does not adequately attend to the gap between the philosophy of rights and constitutional doctrine and to the special moral considerations that shape the latter. The gap is explanatorily significant and has crucial implications for constitutional rights adjudication. Conversely, if one ignores it, one is liable to misunderstand the nature of rights as well as the nature of constitutional doctrine.

My argument will have the following structure. In Section 2, I shall summarize the main claims advanced in *The Global Model* on both the substantive and the methodological front. I shall then raise some doubts about the philosophical cogency of Möller's theory of rights (Section 3). In the final section, I shall sketch an alternative account of the point of the proportionality test in constitutional rights adjudication which aims to open up a third possibility, splitting the difference between the critics and advocates of proportionality. Contrary to the critics, it allows that the practice of proportionality can be justified in its broad contours. At the same time it is sympathetic to the theory of rights espoused by them. The gist of the alternative I shall be presenting is that proportionality is a piece of constitutional doctrine and should be justified as such. I shall indicate how this change of focus recalibrates our understanding of constitutional rights practice and also helps diagnose the shortcomings of Möller's proposal. Nonetheless, I shall not develop a full-fledged positive account of proportionality. My aim here is solely to put forward a hypothesis. As I shall suggest, it takes a lot more work, including empirical work, to test it.

[10] This has been the guiding theme of his work since his early critique of Robert Alexy's 'formalist' theory of constitutional rights. See Kai Möller, 'Balancing and the Structure of Constitutional Rights' (2007) 5 ICON 453.

2. *Rights, Tailor-Made*

We care about constitutional rights because they matter morally. So it makes sense to turn to moral philosophy to explain their significance. This belief lies at the heart of Möller's project. By and large, he aligns himself with the philosophical tradition that sees autonomy interests as the moral foundation of constitutional rights. Thus, he writes that his account 'takes the importance of these interests as the reason for protecting them'.[11] By autonomy interests we mean interests in effectively exercising our faculty to choose and live out a self-conception. We protect them by giving those who have them a right which Möller calls the *right to autonomy.* Paradigmatic constitutional rights, say, to freedom of speech, religion collect together some of the more salient and specific aspects of that basic right. However, in order to give full effect to the right to autonomy we should not get distracted by the pigeon-holes of traditional rights such as those mentioned above. Rather, we must privilege the first-person perspective: as Möller insists, 'the point of reference for assessing the weights of autonomy interests [is] the importance of the act or resource in question *from the point of view of the self-conception of the agent*'.[12] Given that different people may have very different self-conceptions and, accordingly, very different rankings about what is worthwhile in life, we must adopt an expansive understanding of the scope of activities covered by the right to autonomy. Otherwise, we risk utterly disregarding the autonomy interests of those, whose self-conception prizes an activity that would fall outside a more restrictive understanding. In this sense, then, it is not implausible to speak of autonomy grounding a 'right to everything'.[13] Following on from this, Möller vehemently rejects attempts to attach a 'morality filter for evil activities' to the right to autonomy, one that precludes activities advancing the self-conception of misogynists, racists and paedophiles.[14] Such attempts, he thinks, are based on judgments about what is a worthwhile life, and that is something that respect for individual autonomy condemns.

Saying that we have a right to engage in some kind of activity in this broad sense is not the same as saying that, when all is said and done, this right will be protected. In other words, the right to everything is a *prima facie* right. This does not mean that it lacks bite, however. What one has by virtue of this *prima facie* right is a demand that it be taken seriously when it conflicts with other rights and public goals. Accordingly, 'the state is under *a duty to ensure that the personal autonomy interests of each person are adequately protected at all times*'.[15] The state may decide that a certain autonomy interest must be sacrificed.[16]

[11] ibid 57.
[12] ibid 58 (emphasis in the original).
[13] ibid 85.
[14] ibid 79.
[15] ibid 85 (emphasis in the original).
[16] I do not discuss whether different conditions apply to denials of negative and positive liberty.

Even so it does no wrong, provided that it offers an adequate justification for its choice to the person whose autonomy interest is at stake. So, the *prima facie* right to everything boils down to a right to justification. This may sound weak but it should not be underestimated. Recognition of such a right evinces an attitude of 'respect for persons':[17] everyone who has suffered a setback in her autonomy interests has a right to a justification, just because of that setback. Even a serial killer properly invokes this right to demand a justification for the state's prohibition on murder. The fact that in the specific instance it may be an easy hurdle for the state to clear is neither here nor there.

How does the state discharge its duty to justify its acts to those whose right to autonomy has been interfered with? It does so by balancing their rights against the rights of other people in a *reasonable* way, such that it 'respects their status as equals'.[18] Möller devotes some of the finest pages of the book to unpacking the notion of balancing that is involved in the resolution of conflicts between the rights of different persons and between rights and other interests. This has always been the Achilles' heel for proponents of proportionality, and Möller addresses the challenge head-on. Assuming a generally objectivist moral framework, his account marks a sharp departure from the simplistic views that have given balancing so much bad press among its critics. Such views treat rights balancing as little more than a cost-benefit analysis. By contrast, Möller warns that balancing means different things in moral discourse. Specifically, he distinguishes four types of balancing, which he calls respectively autonomy maximization, interest balancing, formal balancing and balancing as reasoning. He invites us to imagine them operating in concentric circles, with the last type encompassing all the rest. The simplistic view does not go beyond autonomy maximization, whose sole criterion is the relative weight of different autonomy interests from within the self-conception of different individuals. According to this method, the reason we ought not torture is because the autonomy interest not to be subjected to torture is stronger than the autonomy interests of those who stand to benefit from the use of torture, say, as a means of extracting information. Unlike autonomy maximization, interest balancing 'acknowledges that there may be moral reasons which require the adjustment of the weight ascribed to an autonomy interest'.[19] Sometimes, that weight will be zero. Noteworthy examples of such discounted interests are the autonomy interest in restricting other people's pursuit of lifestyles that I disapprove of (which Dworkin famously dubbed 'external preference'),[20] and the autonomy interest in winning in a competition. Möller defends the former type of weight adjustment, arguing that giving effect to an external preference negates

[17] *Global Model* 87.
[18] ibid 112 (emphasis omitted).
[19] ibid 137.
[20] Ronald Dworkin, 'Do We Have a Right to Pornography?' in *A Matter of Principle* (Harvard University Press 1985) 335–72.

personal freedom.[21] In turn, he explains the radical discounting of competition harm by saying that 'it is part of my personal responsibility to accept competition and any harm to my autonomy flowing from it'.[22] Formal balancing, again, includes interest balancing and autonomy maximization, but it also refers to cases involving 'a moral argument which does not necessarily rely exclusively on the importance or weight of the respective autonomy interests'.[23] In such cases, formal balancing does away with 'the image of scales';[24] nevertheless, inasmuch as none of the competing interests 'takes unconditional priority'[25] over the other, it is appropriate to talk of balancing here as well. Möller gives the following example. We ought not to torture someone, even if by doing so we will save lives. But this prohibition may be overturned if the lives that are going to be saved are many. Here, the tipping point cannot be determined in terms of the relative weight of the two values. Neither does one value always prevail. Thus, formal balancing is at work. Finally, Möller acknowledges that sometimes when we say we balance the moral reasons bearing on a situation, we don't balance at all, literally speaking. What we do is engage in plain moral reasoning. Within this broadest form of moral deliberation, Möller also includes assigning one good or value unconditional priority over another. The kind of case that exercises critics of proportionality, where a right trumps competing considerations, presumably falls in this category.

There are things to quibble about in the scheme just presented. To begin with, Möller does not explain why autonomy maximization is rather idle at the balancing stage (it is hardly ever invoked in the relevant chapter), despite the fact that the idea of furthering one's self-conception from the first-personal perspective played a constitutive role in the explanation of the right to autonomy. There is a mismatch here. One would think that if the value of furthering one's self-conception is as important as to ground a right, it would play out in balancing as well. For Möller it seems that its force is all but exhausted in delivering the right to justification. Second, the distinction between interest and formal balancing is somewhat elusive. At the metaphorical level, it is not counter-intuitive to say in cases of formal balancing that we have put the two interests on the scales—ordinary usage is not particularly helpful for making the distinction in the first place. Besides, insofar as interest balancing adjusts the weight of an autonomy interest by reference to some other moral idea (like personal freedom, and responsibility), it also relies on

[21] *Global Model* 187–89. Similar constraints on balancing have been proposed by Mattias Kumm, 'Political Liberalism and the Structure of Rights: On The Place And Limits of the Proportionality Requirement' in Stanley Paulson and George Pavlakos (eds), *Law, Rights, Discourse: Themes of the Work of Robert Alexy* (Hart Publishing 2007) 131; Iddo Porat, 'The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law' (2006) 27 Cardozo L Rev 1393.

[22] *Global Model* 138.

[23] ibid 171.

[24] ibid 139.

[25] ibid.

more than that interest's weight. Möller seems to suggest that there still is a difference: interest balancing focuses solely on the competing interests and their (adjustable) weight, whereas formal balancing can also capture other morally relevant aspects such as the propriety of the means for the promotion of those interests.[26] This formulation does not take us far either. When we are discounting my interest in winning a competition, we can just as well say that we are bringing a further feature of the situation (my responsibility) to bear on the issue. Möller also writes that in the case of formal balancing one interest normally prevails, yielding only in extreme circumstances.[27] But of course, there is nothing specific to formal balancing about that. It is easy to come up with particularly weighty interests that are only exceptionally outweighed. Take my interest in choosing which books to read. There will be few circumstances, if any, where it is appropriate for you to frustrate it, possibly because the weight of your interest in frustrating it must be heavily discounted.

Even with these reservations, however, Möller's message is well taken: the resolution of rights conflicts does not rely solely on the weight of the underlying autonomy interests from the first-person perspective. It must employ all four types of balancing, depending on which is appropriate in each case. But, fending off the common objection that balancing is 'hopelessly ad hoc',[28] Möller puts forward a number of wide ranging prescriptions that rights balancing, properly conducted, yields. Here it is impossible to do justice to the complexity of Möller's analysis, so I shall limit myself to highlighting some core ideas that will be taken up again in what follows. Möller breaks ranks from a common view (both in political philosophy and in constitutional rights law) that the specification of our all things considered rights proceeds on a right by right basis. For instance, some theorists claim that the right to freedom of expression is incompatible with most content-based restrictions. This, they think, follows from the nature of that right but does not apply to others. Möller's prescriptions abstract from specific rights. Echoing old-fashioned German constitutional scholarship, we might say that they belong to the general theory of constitutional rights. What enables him to develop such general prescriptions is his commitment to an overarching right to autonomy. If interferences with more concrete rights can always be cashed out in terms of harms to our autonomy interests, then perhaps we can reasonably ask under what conditions such harms may or should be prohibited, regardless of the specific autonomy interest they are setting back. To this question Möller answers that we have a duty to refrain from inflicting harm on others, whether

[26] ibid 139, n 8.
[27] For example ibid 147.
[28] Tsakyrakis (n 4) 483.

or not we are thereby using them as means. (He calls this the harm principle.)[29] This duty is curbed only in cases where the harm others suffer is caused by a scheme aimed at accommodating a certain weighty interest of mine. To repeat, this is not out of a commitment to autonomy maximization. The moral weight or significance of some of these harms may have to be adjusted or discounted, as required by interest and formal balancing. But this, for Möller, does not undercut the value of the principle.

One of the main selling points of Möller's theory of rights is that it does a good job at motivating central features of contemporary constitutional rights practice. Specifically, he lists the following four features, which he associates with an emerging *global model* of constitutional rights. Möller draws from a number of jurisdictions (eg Germany, Canada, South Africa, Council of Europe) to demonstrate their pervasiveness.[30] First, constitutional rights practice under the global model tends to include a very wide range of activities, even trivial ones, within the ambit of *prima facie* rights, so much so that according to some critics it risks devaluing rights and cheapening our commitment to them.[31] An oft-cited example is the right to feed the pigeons in the park recognized by the German Federal Constitutional Court.[32] Second, it equips rights with horizontal effect, that is, it grants individuals rights against other individuals rather than solely against the state (such as a right to privacy against journalists).[33] Of course, not all rights have horizontal effect. Even when they do, the effect is often indirect. That is, rather than ground a self-standing cause of action, the relevant right informs the interpretation of private law causes of action like breach of confidence. Third, the global model expands the notion of constitutional rights to encompass socio-economic and other positive entitlements of individuals to be provided by the state with a certain resource, protection, or facility.[34] Finally and importantly, it rejects the idea that constitutional rights as a general matter enjoy a heightened moral force by virtue of which they can trump other public goals in cases of conflict; by contrast, it recommends that we resolve such conflicts by balancing the rights and the public goals. Different jurisdictions employ slightly different formulations of this requirement. For instance, the European Court of Human Rights has put it thus:

> Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest', but there must also be a reasonable relationship of proportionality between the means employed and the aim

[29] cf Mattias Kumm and Alex Walen, 'Human Dignity and Proportionality: Deontic Pluralism in Balancing' <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2195663> accessed 20 September 2013.
[30] *Global Model* 2–15.
[31] George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2009) 126.
[32] BVerfGE 54, 143.
[33] *Douglas and others v Hello!* [2001] 2 WLR 992.
[34] *Osman v UK* (2000) 29 EHRR 245.

> sought to be realised... The requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden'.[35]

UK courts have embraced this approach when adjudicating claims under the Human Rights Act. Thus, in *International Transport Roth v Home Secretary* Simon Brown LJ stated 'that not merely must the impairment of the individual's rights be no more than necessary for the attainment of the public policy objective sought, but also...it must not impose an excessive burden on the individual concerned'.[36]

At first blush, this is all hard to square with the theory of rights championed by the critics of proportionality. Recall Fleming's warning that we should not treat rights as on a par with other state interests. Judges around the world who are prepared at any given point to balance the two seem to be doing just that. In addition, due to the increased normative force that the critics bestow on rights, there is a pressure to define them restrictively. Although this by itself does not entail that the critics oppose horizontal and positive rights, it does have the effect of making them draw their scope rather narrowly and thus once again puts them at odds with global judicial trends.

By contrast, the phenomenology of constitutional rights practice seems comfortably to be accommodated in Möller's autonomy-based theory of rights with its expansive *prima facie* right to autonomy, which only yields enforceable concrete rights after it has been properly balanced with the rights of others. What is more, Möller can make sense of positive rights as guaranteeing the preconditions for the exercise of autonomy. Last, he can explain why some rights have horizontal effect. This follows naturally from Möller's harm principle. At the same time, Möller's theory maps onto a plausible division of labour between the courts and the political branches of government. It only licenses judicial intervention with political decisions that fall outside the range of reasonable responses to a conflict of autonomy interests. Thus, it offers a morally defensible reconciliation of individual and political autonomy. According to it, it is up to the state institutions that give expression to citizens' political autonomy to balance divergent autonomy interests in the first instance, provided that they do so reasonably.

Why would fit with the practice give a theory of rights the edge over its competitors? To answer this question, we must delve into Möller's methodology, which he labels moral reconstruction. The aim of the reconstructive methodology is not to identify the philosophically optimal conception of this or that concept. Rather, it is to morally vindicate a standing legal practice. The point of this exercise is to give us a moral reason, if we have any, to take pride in that practice and to carry on with it. Just as we may plausibly take pride in our child's science project, even if it is not a fully operational space ship, so we

[35] (1986) 8 EHRR 123, 144–45.
[36] (2002) EWCA Civ 158, [2002] 3 WLR 344.

may vindicate a practice of ours, even if it falls short of the standards of perfect justice, as long as it instantiates a genuine moral value. Now, how do we know whether a value is attributable to the practice? Möller is here following Ronald Dworkin's interpretive theory of law, according to which accounts of law are judged along the dimensions of moral appeal and fit with institutional history. As he puts it, adherence to the reconstructive approach requires that we 'take the features of constitutional rights... as a given and ask which theory of judicial review fits these specific features *and* is morally coherent'.[37] Accordingly, a theory of rights would fail as a moral reconstruction of constitutional rights practice if it discarded or ignored too much of the practice. It would look more like an invitation to abandon the practice than a vindication of it.

That is not to say that moral reconstruction must take as fixed every aspect of the practice. Like Dworkin, Möller contends that a theory still counts as a reconstruction of a practice, even if it treats as mistaken or non-essential some of the things that go under its name. Those who participate in a complex discursive practice are bound to commit errors, some of which they themselves will in hindsight recognize as such. Surely, being true to the moral point of the practice does not require sticking to them. In fact, at various places in the book Möller registers the divergence of his approach from the outcome or the reasoning of specific cases.[38] Although Möller does not specify how to make comparative assessments of fit, he clearly thinks that, despite those incongruities, his account fares far better along this dimension than the account put forward the critics of proportionality. Allegedly, the latter are forced to dismiss too much of the practice that is salient and significant.

3. *Rights, Justification and Autonomy*

Whether or not Möller's theory of rights respects the practice, it cannot be a good reconstruction of it unless it is also plausible on philosophical grounds. I shall thus start its critical exploration by raising some questions about its philosophical plausibility. In particular, I shall challenge the idea of a right to autonomy that is meant to protect everything that furthers one's autonomy interests. Now, I do not wish to dispute that in fleshing out the content of constitutional rights we will at least sometimes make reference to the important interests these rights serve to protect and promote, and Möller's account provides an elegant analysis of those interests that fits them into an integrated theory of the self. Neither do I want to take issue with the claim that what individuals value about their autonomy is their ability to further their

[37] *Global Model* 99.

[38] See his cautious reconstruction of decisions that assess measures with a moralistic element (*Global Model* 189–93): *Dudgeon v UK* (1982) 4 EHRR 149 (prohibition of sodomy); *Laskey, Jaggard and Brown v UK* (1997) 24 EHRR 39 (prohibition of sadomasochism).

self-conception, as Möller argues. However that may be, I shall suggest that the relationship between the rights and the interest in autonomy is more oblique than he allows.

Do I have a claim-right—albeit a *prima facie* one—to everything that advances my self-conception as an agent? Möller acknowledges that we can say of a claim that it is a matter of right, only if someone else thereby acquires a corresponding duty.[39] This is an important constraint and it helps distinguish rights from other normative concepts such as well-being. I ought to brush my teeth because it is good for me, but clearly this prescription applies to me only. Möller, recall, does identify a duty corresponding to the right to everything. It is a duty that others take my claim seriously and justify themselves if they choose to frustrate it. So the question becomes: is it morally appropriate to demand that others take into account my interest in my ability to further my self-conception, even in this limited sense, just because I have that interest? The difficulty in accepting this should be familiar from criticisms of utilitarianism. The existence of a certain interest may figure in the explanation of a right but it does not ground the right without appeal to a moral principle that makes that interest pertinent. To use TM Scanlon's classic example, the fact that you have a very important interest to please your god does not of itself give me a moral reason, let alone a duty, to help you build a temple to him/her.[40] If such a duty exists at all, there must be a moral principle, independent of the interest, which grounds it. As Scanlon puts it, 'insofar as we are concerned with moral claims that some interests should be favored at the expense of others in the design of distributive institutions or in the allocation of other rights and prerogatives, it is an objective evaluation of these interests, and not merely the strength of the subjective preferences they represent, that is relevant'.[41] We have to find 'a basis for appraisal of a person's level of well-being which is independent of that person's tastes and interests, thus allowing for the possibility that such an appraisal could be correct even though it conflicted with the preferences of the individual in question'.[42] In other words, we must relate the setback that someone suffers as a result of our action to an independent moral concern about what we owe each other. But to do that, we must go beyond the first-person perspective favoured by Möller.

Here are some illustrations of this point. Start with John Rawls. Rawls pegs his theory of what rights we have in a political society onto the idea that a political society is a fair system of social co-operation between free and equal citizens, whose terms are coercively imposed. It follows that we only have a duty to care for the interests of our fellow-citizens, to the extent required under

[39] ibid 85.
[40] TM Scanlon, 'Preference and Urgency' (1975) 72 J Phil 655.
[41] ibid 658.
[42] ibid.

the terms of the relationship in which we stand to them.[43] We have to ask ourselves which liberties, resources and opportunities are owed free and equal participants in a fair system of social co-operation. This question displaces the evaluation of interests from the first-person perspective. Further, when answering this question we are to abstract from our personal characteristics and conceptions of the good life. (That is why we decide behind a veil of ignorance.) Instead, we are to measure the share that each citizen may reasonably demand from the political community in terms of all-purpose social goods. In Scanlon's words, we bring our various interests in having this or that resource 'under familiar general categories'.[44] There is no guarantee that this share will make every life-style equally easy to pursue. In fact, it is likely that some particularly expensive life-styles will turn out to be beyond our reach. But there is no sense in which those who find themselves wanting the expensive life-style, once the veil is lifted, have a right to it. Like everyone else, they have no rights except those allocated under a fair system of social co-operation between free and equal citizens. Here, too, we move away from the varied self-conceptions of individual persons towards a more 'objective' criterion of what we owe each other.[45] Even Rainer Forst, whose work championing a right to justification Möller draws on, does not derive that right from a basic right to autonomy.[46] For Forst the order of explanation goes the other way. We, as rational agents, have a general right to be treated in a way that is justifiable to us. This idea, Forst claims, supplies an inter-subjective criterion that a demand must satisfy to be elevated to the status of a right. It is the specification of this deontological idea, rather than any interest agents might have, that yields the more concrete and familiar rights to bodily integrity, freedom of conscience and the like. In fact, Forst rejects what he labels *ethical* justifications of human rights, like James Griffin's, which ground human rights in certain important human interests. Tellingly, he maintains that such justifications cannot adequately explain why one's subjective good generates claims on others.[47]

It will not do to say that this critique exaggerates the differences between Möller's account and these other accounts because one's right to autonomy can be and typically is limited at the balancing stage. Either the right to autonomy is a genuine one or it is not. If it is, then we are owed an account of what constitutes it. Insofar as Möller derives the duty of the state to justify its autonomy-restricting actions from this right, he must think that it is genuine, even before the balancing stage. If it were not genuine, it would not have this

[43] John Rawls, *Justice as Fairness: A Restatement* (Erin Kelly ed, Harvard University Press 2001).

[44] Scanlon (n 33) 660.

[45] Remember that I am using the term 'objective' in Scanlon's technical sense, whereby an objective criterion of the moral weight of an interest is one that is, at least in part, independent of its subjective valuation. The term is not meant to carry much meta-ethical baggage. It is compatible with all but the most subjectivist moral theories. I am grateful to Julie Dickson for urging me to make this qualification.

[46] Rainer Forst, 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (2010) 120 Ethics 711.

[47] ibid 721–24.

very real impact on the normative landscape. To appreciate just how real the impact is, consider that on the expansive view of autonomy interests espoused by Möller, for whatever act we perform which restricts the ability of someone else to pursue his or her self-conception, we have a duty to justify ourselves to him or her. This is a formidable burden and only an important moral principle—like a genuine right—can ground it.

Perhaps Möller will try the following counter-argument. He may say that he, too, espouses an objective criterion in accordance with Scanlon's desideratum. That is, the right to everything protects only those activities which are manifestations of one's autonomy, and autonomy is something that we not only value for ourselves but should also respect in others. This counter-argument gives the account the right shape but does not rescue its plausibility. The reason is that Möller's notion of autonomy is far too generous to furnish a criterion of what we owe to each other, even *prima facie*. Put plainly, I cannot be under a duty to care about your projects, just because by pursuing them you realize your autonomy. The problem is, of course, best dramatized by cases where others have fanciful or deeply evil self-conceptions. Whatever we owe these people, it cannot be the case that we have a duty to assist them in pursuing such conceptions. So it seems entirely appropriate to apply at the prima facie stage the kind of morality filter that Möller objects to. This filter is not necessarily aimed at passing judgment on the ethical worth or worthlessness of different self-conceptions. It is best understood as reflecting (and it is probably only warranted when it reflects) a moral judgment about the extent to which we have a duty to care for each other's autonomy in the context of a political society. Note that the problem is not restricted to such extreme cases. It infects more prosaic situations as well. Take competition harm. This seems to be a clear case that involves the causing of harm to someone, though not by using him as a means, and should thus be governed by Möller's harm principle. Nevertheless, it seems either capricious or completely redundant to insist that a right to justification is engaged, whenever someone loses out in a fair competition. This must be because, when we compete for the same thing, I do not have a duty to care about the fact that you have made that thing a central piece of your self-conception.[48]

Needless to say, autonomy interests are far from untamed in Möller's theory of rights. In taming them at the balancing stage, Möller appeals to the very considerations that are capable of furnishing an objective criterion. In fact, as we have seen, sheer autonomy maximization rarely figures as a criterion of balancing in Möller's analysis. To begin with, one's right to autonomy is constrained by everyone else's *equal* claim to consideration. Furthermore, the

[48] Of course, I have a duty to compete fairly and you have a right that I do. But this duty is not directly sensitive to the advancement of your self-conception. We can imagine that you want the thing we are competing for much more strongly than I, and that, whether I compete fairly or unfairly, you do not stand a chance of winning. Neither of these facts changes my duty.

weight attached to an interest in cases of conflict is often insensitive to the degree to which promoting it will further one's self-conception. Sometimes, it will be assigned zero weight, say, because it reflects an external preference. With these further considerations added in, the initial emphasis on the first-personal perspective seems out of place. If autonomy is just one of the relevant moral considerations, why should it be given a privileged position among them? Why should it, alone, ground a distinct right, albeit one that is then qualified? And why should the rest of the moral considerations come in a second wave? Why not say instead that the only rights we have are those that the balancing exercise produces, once all relevant moral considerations are taken into account? Again, competition provides a good example. Möller insists that my autonomy interest in the thing that we are competing for counts for zero in the determination of my rights, because I have to take responsibility for it. If so, then surely I ought not to wait until the balancing stage to own up to my responsibility. I should not press a demand for justification to begin with. As I said above, this is not just a verbal quibble. The right to everything is supposed to be a real right, grounded in a certain conception of the moral value of autonomy. If I am right, this conception is false. Hence, a stand-alone right to everything does not exist.

Alternatively, it might be suggested that Möller's account wins by default. This suggestion starts from the thesis that there is no plausible way to distinguish the interests that are truly important and thus merit protection from the merely trivial ones. Interests that appear trivial to one may turn out to be central to the self-conception of another. If that is so, it may be best to err on the side of caution and protect them all.[49] But this comeback would miss the point of the objection I have mounted. It may be difficult to weigh or rank the autonomy interests of different people, or at least do so in a uniform way, but this difficulty does not plague objective criteria. Typically, such criteria do not just report areas of convergence of first-person assessments of importance. It is more the simplistic conceptions of balancing which appeal only to autonomy maximization that fall prey to this difficulty, precisely because they have nothing else to rely on apart from our disparate and conflicting subjective valuations. To be sure, objective criteria will sometimes make reference to human interests. But if the comeback is that just by virtue of that fact objective criteria are indeterminate, then it suffers from overkill. Were it true that we are unable to rank the moral relevance and weight of those interests, Möller's account would be stung by this problem as much as its competitors. His analysis of balancing is awash with such rankings and weightings.

[49] ibid 74–77.

4. *In Praise of Shallowness*

It is tempting to draw the following conclusion from the criticism I have just rehearsed: assuming that the criticism is sound, it only shows that Möller's theory of right is not optimal, philosophically speaking. But it may still be thought of as the best reconstruction of the global model of constitutional rights. Remember that according to the reconstructive approach, theories of constitutional rights must be judged along two dimensions, the extent to which they fit the practice of constitutional rights adjudication and the extent to which they show that practice to be morally appealing. To reach the desired equilibrium between fit and justification, we may need to settle for the ascription of a moral point to the practice, which, though morally defensible, is sub-optimal as far as political morality is concerned. It could then be suggested, along these lines, that the fact that Möller's theory has a superior fit with the practice makes up for its philosophical shortcomings.

I believe we should resist this suggestion. I am by no means denying that practices of constitutional rights adjudication, in the shape that they have actually assumed, need moral vindicating. These practices govern the exercise of state coercion regarding matters of the most urgent nature, and state coercion gives rise to a grave concern which calls for moral justification. Thus, I share the Dworkin-inspired reconstructive methodology. But I doubt that it recommends Möller's preferred route. At any rate, it does not force us to build a grand-scale philosophy of rights that closely tracks the features of those practices. In this section, I shall argue that we can and probably should look elsewhere for their justification. More specifically, I shall sketch a different possibility, namely that some features of the practice have a *shallow* justification; they are what they are by virtue of considerations of institutional design, not the best or a morally defensible theory of rights. To put it in a nutshell, I shall propose that, in order to vindicate constitutional rights adjudication on the global model, it is true that we need to resort to political morality, but we do not need to go, as it were, straight to political morality.[50] If this proposal makes sense of the global model, we have no reason to prefer Möller's theory on grounds of fit.

What opens up the space for what I have called shallow justifications of proportionality is the fact that proportionality is, first and foremost, a constitutional doctrine. This is hardly a ground-breaking assertion. What might make it more interesting—and controversial—is a certain view about the function of constitutional doctrine. This view has been advanced by a number of US constitutional scholars such as Richard Fallon and Mitchell Berman.[51]

[50] The seeds of this way of thinking about proportionality are contained in TM Scanlon, 'Adjusting Rights and Balancing Values' (2004) 72 Fordham L Rev 1477.

[51] Richard Fallon, 'Foreword: Implementing the Constitution' (1997) 111 Harv L Rev 56; Mitchell Berman, 'Constitutional Decision Rules' (2004) 90 Va L Rev 1.

According to it, constitutional doctrine is there to mediate between constitutional meaning, that is, the substantive content of constitutional norms, and specific judicial decisions. A central insight of this school of thought is that constitutional doctrines of this sort are not themselves dictated by the constitution. Though doctrines are unlikely to fulfil their purpose unless they remain relatively stable over time, it does not necessarily signify betrayal of the constitution to abandon them. Since the justification of constitutional doctrine is outcome-oriented, we always have reason to switch to a more consequential doctrine. If the requirement to issue the Miranda warnings no longer operates as a good enough proxy for the constitutional prohibition against self-incrimination, there is nothing in the Fifth Amendment of the US Constitution stopping the court from scrapping them.[52]

Judges develop doctrines to assist them in the project of implementing constitutional meaning, that is, giving effect to constitutional norms. This project does not take place in a vacuum but within a complex social and institutional reality. In order to be successful, its pursuit must take into account 'empirical, predictive and institutional considerations'.[53] This is the role of doctrines. For example, doctrines can help address the epistemic and other shortcomings faced by the judiciary, say, in policy-heavy issues. They can also specify the content of constitutional norms, which often make reference to lofty moral ideas such as fairness, democratic society, or degrading treatment. To this effect, they create bright-line rules that are designed to improve overall adherence to constitutional meaning. Doctrines can also operationalize a certain division of labour between different state institutions. A good example of this is the rational basis standard of review employed by US courts. This standard operates by way of a presumption, which embodies the conviction that, when the political branches do not make classifications on suspect grounds, they must be given free rein to design public policy. A presumption is much easier for courts to administer than a standard of review requiring the exercise of substantive judgment on an ad hoc basis; arguably, the latter standard brings with it a heightened risk that judges administering it will stray beyond their proper sphere or just get it wrong.

I submit that proportionality is a constitutional doctrine in this sense. That is, it is a method for implementing constitutional rights. It is instructive that many of the more popular arguments for the use of the proportionality test have little to do with what rights we have at all; rather these arguments stress proportionality's institutional virtues. For example, they praise the clarity, structure or alleged neutrality of the proportionality test.[54] In a similar vein,

[52] *Miranda v Arizona* 384 US 436 (1966).
[53] Fallon (n 51) 62.
[54] See among others Beatty (n 3); P Craig, *Administrative Law* (6th edn, Sweet & Maxwell 2008) 637–38.

Mattias Kumm has persuasively argued that the proportionality test sustains a practice of 'Socratic contestation' among institutional actors.[55] Their roles in this practice are tailored to their institutional competence. Courts can ask questions and evaluate justifications, but they lack the expertise to initiate policy. No theory of rights can tell us all this. This is the domain of institutional design.[56] What is more, the underpinning of proportionality by institutional design is no happy accident. There is ample evidence to the effect that the architects of the proportionality test are consciously sensitive to institutional considerations. Thus, Robert Alexy has proposed that setbacks to rights and other public goals should be ranked according to a triadic model of intensity: light, moderate and serious. He readily concedes that we can make our ranking much more fine-grained than that. However, he argues against pursuing this option because he thinks that this would make the proportionality test unwieldy.[57] Again, what is driving the cart here is a concern for the amenability of the proportionality test to effective judicial application, which is independent and may in fact be at the expense of precision on a case by case basis.

On this conception of the proportionality test, the *prima facie* right to everything takes on a different character. It becomes a gatekeeper for judicial supervision. Why, though, is it not particularly discriminating? Why, for instance, does it allow trivial activities such as feeding the birds? Perhaps it is because we have good institutional reasons to facilitate the judicial challenge of government measures. Imagine that the legislature has a very bad record in rights compliance, and as a result there is need for a standing check on its power. If so, what Tsakyrakis has called the 'definitional generosity'[58] of the proportionality test serves to shore up the veto power of the judiciary. Or we may want to encourage individuals to bring their complaints to court for epistemic reasons (say, because government has insufficient resources to collect population-wide information about the quality of rights-protection), and we fear that a more restrictive criterion of admissibility will have a chilling effect. These two examples indicate that our assessment of the institutional merits of the proportionality test is bound to vary from one jurisdiction to another. There may be legal systems where the legislative record and data-collection capacity are satisfactory. In them, there will be less pressure to adopt

[55] Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2011) 1 Eur JLS 1.

[56] Despite the obvious fit between his account and a plausible conception of institutional division of labour, Kumm insists that '[t]he proportionality test is not merely a convenient pragmatic tool that helps provide doctrinal structure for the purpose of legal analysis. If rights as principles are like statements of value, the proportionality structure provides an analytical framework to assess the necessary and sufficient conditions under which a right takes precedence over competing considerations as a matter of first-order political morality' (ibid 8).

[57] Alexy (n 3) 413. On the epistemic difficulties attending the application of the triadic model see also da Silva (n 6) 295–96.

[58] Tsakyrakis (n 4) 480–81.

definitional generosity or an incentive to counter-balance it by calibrating one of the other moving parts of proportionality.[59]

Definitional generosity need not be justified solely on such purely institutional grounds. Insofar as life in a political society imposes restrictions on our ability to further our self-conception, it is liable to cause frustration and resentment to those who are thus restrained.[60] Such feelings, if widespread, can affect the stability of a regime, to some degree independently of the justice of its laws. This is no small matter. Clearly, a regime will collapse unless it enjoys the broad support of its citizenry, and the resentful are likely to give, at best, a tepid and reluctant support. A mechanism which gives citizens a procedural right to demand an explanation, when their freedom is restricted, may play a valuable role in easing the strains of their commitment to political society. But that does not suffice to turn such a procedural right into a moral right. First, although resentment is sometimes triggered by injustice, this is not necessarily so. When I lose out in a fair competition, I may feel resentful, but I have not been wronged. Second, even if by and large effective, granting an individual right to judicial review is not the only means to address the problem of stability.[61] Third, stability does not require that everyone supports the regime, only that enough do. Hence, stability is a long way from the idea of a right to autonomy enjoyed by every person capable of autonomous action.

We had better view the balancing stage in the same light if we want to save it from irrelevance or vacuity. The more we allow moral theory into human rights adjudication, the more the notion of balancing appears as a misnomer. What good does it do to say that judges have to balance all considerations against each other, once we grant that political morality will assign some of them no weight at all? By embracing the notion of proportionality as a constitutional doctrine we can find a role, albeit peripheral, for the idea of balancing. We can say, for instance, that it serves an epistemic purpose, operating as a checklist of sorts. As Matthias Klatt and Moritz Meister have put it, it may '[identify] the elements of the judicial reasoning which follow formally from given premises, and those elements which have to be externally justified'.[62] Furthermore, a court that adopts the balancing method can arguably allay the legitimacy concerns raised by constitutional rights adjudication and at the same time give

[59] Or indeed one of the other doctrines governing constitutional review. Proportionality does not operate in isolation. It hangs together with other constitutional doctrines regarding admissibility, evidence, and remedies, among other things.

[60] It is one of Bernard Williams' distinctive insights that we must take seriously this form of resentment caused by 'the restriction of our activities by the intentional activities of others'. See his *In the Beginning was the Deed* (Princeton University Press 2005) 82. I suspect that it is the resentment at the loss of freedom that gives definitional generosity whatever traction it has in the theory of rights. But as Williams correctly points out, '[n]o one can intelligibly make a claim against others simply on the ground that the activities of those others restrict his primitive freedom, or that the extension of his primitive freedom requires action by them', (ibid 83).

[61] Sometimes political participation is enough. For the connection between participation and stability see Dimitrios Kyritsis, 'Constitutional Review in Representative Democracy' (2012) 32 OJLS 297.

[62] See Klatt and Meister (n 6) 694.

itself much-needed flexibility. In the words of Alec Stone-Sweet and Jud Mathews, such a court

> makes itself better off strategically relative to alternatives. The move to balancing makes it clear: (a) that each party is pleading a constitutionally legitimate norm or value; (b) that, *a priori*, the court holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts.[63]

By framing constitutional review in this way, balancing is, on this view, making judicial intervention more palatable to the losing side. Thus, like definitional generosity, it may be said to perform a valuable legitimating function.

In the preceding paragraphs, I gave some examples of how proportionality could be justified in a shallow fashion.[64] Nevertheless, it was not part of my claim that there will always be some shallow justification for the practice of proportionality or that, even if one exists, it will override other competing considerations. Neither are all shallow justifications good ones. Some of the arguments for the use of the proportionality test as a constitutional doctrine are misguided, and the critics have done well to call their bluff.[65] But other arguments are fruitful and largely correct, and once the switch of focus from abstract moral theory to institutional design is allowed, they should appeal to the critics as well. So theorists like Alexy are right not to give up on proportionality. More specifically, they are right to examine it independently of substantive theories of rights. If proportionality is a constitutional doctrine in the sense defined above, then its content does not fully map on such theories. But they are wrong to focus on the formal virtues of proportionality. Formal rationality will not do. For proportionality to be justified, it must track the right outcome, if not on a case-by-case basis then at least over a range of cases. We cannot know that until we have a better understanding of how the formal part interacts with the substantive ideas that are fed into it. By this I do not mean only that the formal structure of proportionality must be compatible with the more demanding theories of rights advocated by the critics. Compatibility is one thing. Effective combination is another. Proponents of proportionality must begin to wonder whether, once we invite judges to tackle human rights disputes by reference to first-order political morality as Möller's nuanced model of balancing does, the perceived advantages of doing so within the

[63] Stone-Sweet and Mathews (n 3) 88.

[64] Möller is well aware of such justifications. The chapter where he reconciles his theory of rights with a model of division of labour between courts and the political branches contains valuable insights into the doctrinal advantages of using the proportionality test. Nevertheless, he dismisses the idea that institutional considerations might be the ones actually driving the cart (*Global Model* 120).

[65] A good example is the now largely discredited idea that constitutional rights adjudication employing the proportionality test is value neutral. This idea has been defended by theorists such as Beatty (n 3). For criticism see Webber (n 4).

framework of the proportionality test are lost. In that case it may well be that, since political morality cannot be tweaked to our convenience, proportionality has to give way. Mind you, it is unlikely that we will then find ourselves in a doctrine-free space. The concerns that make constitutional doctrine necessary or useful will not go away along with proportionality. Important among those concerns is whether judges can, want to and should be philosophers. If we are sceptical about this, we will be inclined to devise constitutional doctrines that relieve them of some of the philosophical weight-lifting. But even if, like Möller, we think that judges can cope with difficult questions of political morality, we still have reason to develop appropriate constitutional doctrines that streamline judicial deliberation, improve co-ordination among courts and allocate responsibilities between them and the political branches.

5. *Conclusion*

Möller's book comes at a crucial juncture in the global debate on constitutionalism and makes a distinguished contribution to it. In particular, it must be commended for leading the way in an effort to assess the pros and cons of proportionality—and of the global model that has it as its hallmark—on a wider philosophical terrain. The practice of constitutional rights adjudication is about protecting rights, so we cannot evaluate it unless we know what rights we have; and to do that we need to engage in political philosophy. Still, constitutional practice need not aim at human rights directly and may well be counter-productive if it does so. Here, I have outlined an alternative hypothesis for understanding and evaluating proportionality. I have suggested that philosophers need not boggle their minds trying to find a deep basis for this doctrine in the morality of human rights or squeeze their theories of human rights into the proportionality straitjacket. Proportionality has all the justification it needs, if it is geared towards maximizing rights compliance. An advantage of this suggestion is that it opens a route for reconciling the practice with the theories of rights championed by the critics of proportionality. Of course, it remains to be seen whether, as a matter of political reality, proportionality helps improve the intensity of judicial supervision, the quality of legislative decision-making or—more generally—the constitutional rights record of the jurisdictions that practise it. It may turn out that it does not or that it no longer does. If so, we should not hesitate to jettison it. We are, after all, practical people.