

## Is Proportionality Analysis Consistent with Originalism?

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**Abstract:** *L'analisi di proporzionalità è coerente con l'originalismo?* – While it is often thought that proportionality analysis (PA) and originalism are inconsistent with one another, this essay argues that the two approaches do not necessarily conflict. The reason is that originalism and PA are focused on different things. Originalism is an interpretive method that attempts to determine and apply the original meaning of a constitution. PA, by contrast, is a method mainly for analyzing rights under the fundamental law. If the original meaning of the constitution requires PA, then the two approaches will coincide. If the original meaning requires something other than PA, then the two will conflict. The real question, then, is not whether the two approaches conflict or coincide in general, but whether the original meaning of a particular constitution requires or permits PA. This essay develops these points. It starts by showing that originalism is not necessarily inconsistent with PA. It then explores the changes in originalism in recent years and some of the different types of originalism. It then explains how several constitutions throughout the world, which do not explicitly allow PA, might or might not, depending upon the details, be understood to require or permit PA.

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### 1. Introduction

It is often thought that proportionality analysis (PA) and originalism are inconsistent with one another – and perhaps are even opposites. According to this view, originalism embraces a limited role for judges – one that restricts judges to following an original meaning that significantly constrains them. By contrast, PA is often thought to embrace an expansive role for judges, who will be operating more as partners, rather than agents, of the lawgiver in implementing the values of the polity. These apparent differences are reinforced by the different places these approaches apply: originalism is very influential in the United States and sometimes said not to exist in the rest of the world, whereas PA is probably the dominant approach in Europe and is followed in many other countries.

But this view of the relationship between originalism and PA is mistaken. PA and originalism do not necessarily conflict – sometimes they do conflict but sometimes they coincide. The reason is that originalism and PA are focused on different things. Originalism is an interpretive method that attempts to determine and apply the original meaning of a constitution. PA, by contrast, is a method mainly for analyzing rights under the fundamental law. If the original meaning of the constitution requires PA, then the two approaches will coincide. If the original meaning requires something other than PA, then the two will conflict.

The real question, then, is not whether the two approaches conflict or coincide in general, but whether the original meaning of a particular constitution requires or permits PA. We can distinguish several cases. In some cases, the original meaning of the constitution will clearly require PA, as when it explicitly provides for PA. Far from conflicting, in these cases originalism will mandate PA. In other situations, it will not be clear on the face of the law whether originalism requires or allows PA. Determining whether originalism requires or allows PA will necessitate a closer investigation into the constitution. Under some constitutions, originalism may require PA; under others, originalism may allow but not require PA; and under yet other others, originalism may forbid PA. The answer will also depend on the type of originalism that is being applied.

This essay develops these points. It begins with a discussion of originalism and PA, showing that originalism is not necessarily inconsistent with PA. It then explores the changes in originalism in recent years and some of the different types of originalism. It then explains how constitutional provisions that do not explicitly allow PA might or might not, depending upon the details, be understood to require or permit PA.

## 2. Originalism and Proportionality Analysis

Let us begin with originalism, which is the view that a constitution should be interpreted in accord with its original meaning. It is now generally recognized that originalism as an approach to constitutional interpretation has changed over the last several decades. During this period, originalism has remained consistently interested in finding and applying a constitution's original meaning. But it has changed in other ways. While the "old originalism" focused on the original intent of the lawgivers as the method for determining the original meaning, the newer versions have focused on other indicia, such as original public meaning and original methods. I will discuss these different approaches below.

Another important change involves the question of judicial constraint. The old originalism, through a variety of techniques, sought to ensure that judges were significantly constrained by a constitution's original meaning – that judges did not have discretion to inject their own policy views into constitutional decisions.

Newer versions of originalism, however, have abandoned this focus on judicial constraint. Under the newer versions, it is recognized that the key question is what the original meaning of a constitutional provision is. If the provision has a determinate meaning, then it will significantly constrain judges who adhere to originalism. If the meaning is more permissive – if it is less clear or confers more discretion – then it will impose less constraint on judges. But even if the original meaning is permissive, originalists recognize that this is the constitution's original meaning and that it should be enforced.

It is true that some originalists may not believe that permissive provisions are normatively desirable. But originalists hold that there is a key distinction between the constitution's original meaning and what is normatively desirable. Originalists generally believe that the original meaning of a constitution should be enforced, even if a judge believes it is undesirable, except under extraordinary

circumstances (such as that the constitution is so bad that it cannot command allegiance).

Now consider PA. PA involves a common analytic framework that is used to give content to human rights. While this framework may differ a little in different countries, one useful formulation taken from a recent book is the following:

1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right?
2. Are the means in service of the objective rationally connected (suitable) to the objective?
3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective?
4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?<sup>1</sup>

As applied by different courts, PA appears to confer significant discretion on judges. The discretion can exist at each of the different stages of the analysis.

While PA might be criticized by some as conferring excessive discretion on judges, that is not the key issue in determining whether it is consistent with originalism. Under the newer versions of originalism, the question is whether PA is either required or allowed under the original meaning of the constitution.

And the answer to this question is sometimes a clear yes. Consider the limitation clause of the South African Constitution, which, both its text and history suggest, adopts a version of proportionality analysis.<sup>2</sup> The text of 36(1) provides:

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -
  1. the nature of the right;
  2. the importance of the purpose of the limitation;
  3. the nature and extent of the limitation;
  4. the relation between the limitation and its purpose; and
  5. less restrictive means to achieve the purpose.

Another example of an explicit adoption of PA, based on both text and history, is the Charter of Fundamental Rights of the European Union, which was adopted by the Treaty of Lisbon. The Charter included a limitation clause that specifically noted that limitations were governed by “the principle of proportionality.”<sup>3</sup>

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<sup>1</sup> Proportionality and the Rule of Law 2 (Eds. Grant Huscroft, Bradley W. Miller & Gregoire Webber 2014).

<sup>2</sup> Constitution of the Republic of South Africa Ch. 2, §36 (1996).

<sup>3</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, ¶ 8, Dec. 13, 2007, 2007 O.J. (C 306) 1, 13. See also A. Stone Sweet, J.

While examples like these, in which originalism requires PA, are often overlooked, they clearly show that originalism and PA are not always incompatible. Still, once they are reflected upon, their result might seem obvious and trivial.

But the consistency of originalism and PA extends beyond explicit provisions. The most interesting cases involve constitutions that do not explicitly address the question of whether to apply PA or some other type of analysis. In these cases, could PA still be legitimate under originalism?

### 3. Types of Originalism

To address this question, it is necessary to discuss some of the different originalist approaches that have been developed in recent years. The discussion can be limited to three approaches: original intent, original public meaning, and original methods.<sup>4</sup>

The earliest of these approaches is original intent, which argues that the meaning of a constitutional provision is the one the lawgivers intend. While this was the dominant approach in the early years of the originalist revival in the United States in the 1960s and 1970s, it was soon supplanted by the original public meaning approach. Under this latter approach, the original meaning turns on how a reasonable and knowledgeable person at the time would have interpreted the language of a provision in context. This approach requires one to look to the language rules at the time, since a reasonable and knowledgeable person would follow those rules.

A third approach is that of original methods originalism. Under this view, the interpreter follows the interpretive rules that would have been deemed applicable to the constitution at the time of its enactment. For example, if the dominant way of interpreting a constitution at the time would have looked to the original intent, then original methods would require an original intent approach. Similarly, if the dominant way of interpreting a constitution would have looked to the contemporary meaning rather than the original meaning of the terms, then original methods would require that. Thus, original methods might require that a nonoriginalist interpretive method be followed depending on the interpretive rules at the time of the constitution's enactment.<sup>5</sup>

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Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *Columbia Journal of Transnational Law*, 2008, 73, 141.

<sup>4</sup> For a discussion of the three approaches, see J.O. McGinnis, M.B. Rappaport, *Originalism and the Good Constitution*, 2013.

<sup>5</sup> By listing original methods originalism as a third form of originalism, I do not mean to suggest it is necessarily distinct from original public meaning. In my view, starting with an original public meaning approach leads to original methods, because a knowledgeable and reasonable reader would employ the applicable interpretive rules to the document. A similar point applies concerning original intent leading to original methods. But to keep the exposition simple in this short essay, I list original methods as a separate approach.

#### **4. Situations in which a Constitution Does Not Explicitly Require Proportionality Analysis**

With this understanding of the different types of originalism, we are now in a position to discuss whether and, if so, when originalism requires or allows PA for constitutional provisions that do not explicitly adopt it. There are several situations worth exploring.

##### *A. Original Public Meaning*

First, one can imagine a constitutional provision that does not explicitly adopt PA, but that includes PA as part of its meaning. One way that this could occur is if a provision is adopted that was previously understood in a law or a different legal system as requiring PA. One possible example involves the limitation provision of the New Zealand Bill of Rights Act (NZBORA). While this is a statute, rather than a constitutional provision, it is quasi-constitutional in that it purports to limit all branches of government, including the legislature.<sup>6</sup> The statute states that it does not render ordinary legislation invalid, but it does require that such legislation be interpreted, if possible, in accord with the Act.<sup>7</sup>

The limitation clause in the Act is taken from the limitation clause of the Canadian Charter of Rights and Freedoms.<sup>8</sup> While it is not clear that an originalist would have interpreted the Canadian limitation clause to incorporate PA,<sup>9</sup> by the time that the NZBORA was adopted, that language had been read to require PA. Thus, there is a strong case to be made that the NZBORA adopted the same PA that the Canadian courts had found under the Canadian limitation clause. After all, the NZBOA had used the same exact language that Canada had famously interpreted to require PA.

As with other interpretive claims in this essay, I am not making a definitive claim about the original meaning of the NZBORA. That would require a great deal of research and much longer discussion. My main point is that, based on some obvious features of the Act, it appears that the original public meaning of the NZBORA might adopt PA, even though it is not the explicit meaning of the law.

##### *B. Original Methods*

A second way that the meaning of a provision that does not explicitly adopt PA might still require such analysis involves the original methods approach. Under original methods, an interpreter follows the interpretive rules that were deemed applicable to the constitution at the time of its enactment. One can imagine a legal system in which rights provisions were traditionally protected by PA, even though those provisions did not textually suggest that PA should be applied. In that legal system, it would be assumed that rights provisions would be given content using

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<sup>6</sup> New Zealand Bill of Rights Act §3 (1990), available at [www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html](http://www.legislation.govt.nz/act/public/1990/0109/latest/DLM224792.html).

<sup>7</sup> *Id.* §§ 4, 6.

<sup>8</sup> Compare *id.* §5. with Canadian Charter of Rights and Freedoms §1 (1982) (both measures state that the rights are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”).

<sup>9</sup> See *infra*.

PA. Interpreting rights provision using PA would then be an “original interpretive rule” that should be followed when giving meaning to a provision. The persons writing the provisions in such a legal system would presumably both intend and expect that it would be applied using PA.

One possible example of an original interpretive rule that could give content to rights using PA involves the German Basic Law. While the German Basic Law did not explicitly provide for PA, a type of PA had existed under German administrative law.<sup>10</sup> If this earlier proportionality type analysis was sufficiently influential, it might have been thought to apply to the rights written in the German Basic Law. The strength of this inference would depend on a variety of factors, including whether there was an alternative approach available in the legal system for interpreting rights provisions.

Once again, I do not want to suggest that this argument shows that the original meaning of the German Basic Law requires PA. My point is that, if there was an original interpretive rule applying PA to human rights provisions in the German legal system, it might have justified PA under the Basic Law.<sup>11</sup>

### *C. Delegation to the Judges*

A third possible way that PA might be justified under originalism is if the applicable interpretive rules allow judges to select the doctrinal tests that will determine the content of provisions. Imagine that under a legal system, no particular interpretive method is applied to provisions to decide on the doctrinal test for giving content to a provision. Instead, the legal system, at the time of the constitution’s enactment, understands a provision that does not have a doctrinal test explicitly or implicitly attached to it as involving a delegation to the court to decide the best doctrine for implementing the provision.

This third approach differs from the previous two in a significant way. Under the previous two approaches, the original meaning requires PA. By contrast, under this approach, the judges get to choose what doctrine to follow and they choose PA. Thus, under the former approaches, the originalist would argue that the constitution requires PA. But under the third approach, the originalist would argue that the constitution does not require PA. The constitution authorizes the judges to make the decision and, if the judges choose PA, then the constitution requires that choice to be followed. But the constitution does not require PA and originalists (as well as others) might criticize the judge on normative grounds for choosing PA.

<sup>10</sup> Sweet, Maxwell, *supra*, at 98-104.

<sup>11</sup> It might be argued that the approach to originalism in this article is problematic, because it permits a kind of originalism in which judges might end up following nonoriginalism. If the interpretive rules allowed judges discretion on how to interpret provisions, then that would be nonoriginalism, not originalism. But this objection is mistaken. Originalism is about following the original meaning. If the original meaning allows judicial discretion, that is what originalism requires. Certainly, if the constitution explicitly conferred judicial discretion, it would be clear that originalism required it. Similarly, if the original public meaning or the original methods implicitly require such discretion, the same result obtains – judges should have discretion.

Once again, it is not clear there is a real world example of this approach. But one possibility involves the living tree doctrine under Canadian Constitutional Law, which was first announced under the Constitution Act, 1867 and then applied to the Canadian Charter of Rights and Freedoms.<sup>12</sup> The living tree doctrine allows for progressive interpretation of constitutional provisions to take into account changes in modern life. Since the doctrine existed prior to the Charter of Rights and Freedoms, it might have been assumed to apply to the Charter. While the doctrine normally applies to constitutional interpretation of substantive matters, such as the meaning of “person,” one could imagine it being applied to doctrinal tests. Under this view, the living tree would allow judges to select a doctrinal test, such as PA, that made sense for human rights under the Canadian Charter. And if that were the case, then the Canadian Supreme Court was allowed to develop PA, even though they were not required to do so.

### **5. Situations in Which the Original Meaning Prohibits PA**

While I have discussed several possible ways that originalism might require or permit PA, there are many situations in which it may not. If the fairly specific conditions I have identified for inferring PA under originalism do not hold, there is a very good chance that PA is prohibited. In fact, many of the situations I have used as examples where PA might be inferred, such as Germany and Canada, may turn out, upon closer examination, to be examples where originalism did not require or permit PA. Ultimately, to determine whether the original meaning implicitly proscribes PA, one would need to carefully study the original public meaning of a constitution and the interpretive rules that existed in a regime. The likely result of these studies would indicate that some of these regimes adopted PA in accord with originalism, while others adopted it in violation of originalism.

### **6. Conclusion**

Ultimately, then, originalism and PA are not necessarily inconsistent. Originalism not only requires PA in cases in which the constitution explicitly adopts such analysis, but may also implicitly require or permit PA in a variety of cases. Without exploring the constitutional provisions and the legal system in detail, it is hard to know how many places where PA is employed are doing so consistently with originalism. But simply because a legal system employs PA does not necessarily mean it is not originalist.

Of course, it is also true that, just because a legal system employs PA consistently with originalism, does not mean that the legal system overall is originalist. For example, a textually explicit requirement to use PA might be perfectly consistent with originalism, but the judges that apply that provision might still not be originalists if in other cases they do not follow the original meaning or they would employ PA even if it were not the original meaning. Thus, one might still conclude that the European Court of Justice is not originalist, even

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<sup>12</sup> B.W. Miller, *Beguiled by Metaphors: The “Living Tree” and Originalist Constitutional Interpretation in Canada*, 22 *Canadian Journal of Law and Jurisprudence*, 2009, 331.

though application of PA to the Charter of Human Rights is consistent with originalism. But the fact that the court employs PA, and such PA appears to give judges significant discretion, is not necessarily evidence that the court is nonoriginalist.