Part Ic
Reasonableness in Constitutional Adjudication
Proportionality, Judicial Review, and Global Constitutionalism

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1 Introduction

Over the past fifty years, proportionality analysis (PA) has widely diffused. It is today an overarching principle of constitutional adjudication, the preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest. With the consolidation of the “new constitutionalism,” this type of dispute has come to dominate the dockets of constitutional and supreme courts around the world. Although other modes of rights adjudication were available and could have been chosen and developed, PA emerged as a multi-purpose, best-practice, standard.

From German origins, PA has spread across Europe, including to the post-Communist states in Central and Eastern Europe, and into Israel. It has been absorbed into Commonwealth systems—Canada, South Africa, New Zealand, and, via European law, the UK—and it is presently making inroads into Central and South America. By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of PA. Strikingly, proportionality has also migrated to the three treaty-based regimes that have serious claims to be considered “constitutional” in some meaningful sense: the European Union (Stein 1981; Stone Sweet 2004; Weiler 1999), the European Convention on Human Rights (Alkema 2000; Flauss 1999), and the World Trade Organization (Cass 2005; Petersmann 2000; Trachtman 2006). In our view, proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism, if global constitutionalism can be said to exist at all.

In this paper, we seek to explain why this has happened, through what processes, and with what consequences for judicial authority. Because some readers might not be familiar with PA, it might be useful to summarize the basics.

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1 See below note 9. The basic elements of the “new constitutionalism” are discussed in Section 2.3. See also Stone Sweet 2000.