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Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law

By Jacco Bomhoff

Continental legal theory is uncannily "other" for an American, perhaps because just about everything in our legal culture is present in theirs, often translated word for word, but nothing seems to have the same meaning.¹

— Duncan Kennedy
A Critique of Adjudication (fin de siècle), 1997

I. Introduction

Courts in much of the Western world often use very similar-sounding, 'balancing' language when adjudicating constitutional or fundamental rights claims. In freedom of expression cases, for example, the U.S. Supreme Court has used a variety of balancing tests;² the German Constitutional Court insists courts "must weigh the

¹ Duncan Kennedy, A Critique of Adjudication (fin de siècle), 1997.
values to be protected against each other;" the European Court of Human Rights makes standard references to the need to ‘balance’ individual rights and public interests; and the Supreme Court of Canada has held that in each case, “courts will be required to balance the interests of society with those of individuals and groups.”

It has become increasingly common for commentators to identify these individual, or systematic, references to balancing with a transition from ‘balancing’ as a feature within fundamental rights adjudication to ‘balancing’ as an emblematic characteristic of entire legal systems and cultures. The German Professor Walter Leisner, for example, has written about the German legal system: “It is clear that more has to be seen in ... balancing than mere isolated searches for justice in individual cases: Behind these notions stands a foundational conception of the State (Staatsgrundkonzeption).” For the political scientist Alec Stone Sweet, ‘proportionality balancing’ has emerged as a “master technique of judicial governance in the EU.” And in the United States, the constitutional scholar Alexander Aleinikoff famously identified an “age of balancing” for American constitutional law in the late 1980s.

Aggregates of balancing references are, finally, also given meanings across jurisdictions. In Duncan Kennedy’s view, for example, the idea of “balancing of conflicting considerations” is a defining characteristic of a “globalization of law and legal thought” that has taken place since World War II. For the Canadian


5. R. v. Oakes, [1986] S.C.R. 103 (Can.), para. 70 (emphasis added). The Oakes-test is applicable to all areas of rights adjudication under the Canadian Charter. For more references, see, e.g., AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006); Paul W. Kahn, Comparative Constitutionalism in a New Key, 101 Mich. L. Rev. 2677, 2698 (2003) (“Judicial review in the Israeli Supreme Court is an endless deployment of proportionality review”); more sources are cited in David S. Law, Generic Constitutional Law, 89 Minn. L. Rev. 652 (2005). Discussion in this article will be limited to examples taken from North America and Europe.


9. Duncan Kennedy, Two Globalizations of Law & Legal Thought, 36
constitutional law scholar Lorraine Weinrib, judicial balancing is an element of what she calls "the Postwar Paradigm" of constitutional rights adjudication; a model for constitutional review that has had "extensive reach and deep transformative power." Another Canadian scholar, finally, has recently argued that judicial balancing is an integral element of a principle of proportionality as a universal "ultimate rule of law."

On the basis of this torrent of similar-sounding language from such a wide variety of jurisdictions and sources, it might be thought that judges and constitutional lawyers have hit upon a highly coveted prize of comparative law scholarship: a community of discourse. Comparative lawyers have long had the ambition "to develop some neutral framework, some common language with which several legal systems could be described in a way accessible to... lawyers belonging to any one of those legal systems." The "language of judicial balancing," it seems, is taken by many to form at least a building block of such a common discourse.

Coveted goals, however, are often elusive. And the danger that faces any semblance of a "community of discourse," is that such a community, as Mirjan Damaška has put it, might be "mainly a rhetorical achievement," people using similar expressions without actually meaning similar things. Suspicion that something like this could be the case for "balancing" is raised when we take a more detailed look at balancing references in the judicial opinions and legal literature of different legal systems and cultures, as, upon closer inspection, these references do in fact show marked differences. In Europe and Canada, for example, balancing is hardly ever mentioned...


14. DAMAŠKA, supra note 12, at 67-68.
without simultaneous reference to a "principle of proportionality," a term rarely used in U.S. legal discourse. Conversely, American judges and authors often refer to balancing ‘tests’ while such designations are unfamiliar in Europe. There are also clear differences in the kinds of parameters courts in different systems say they are weighing, with German courts much more prone to engage in a weighing of “values” than U.S. courts. Broader discussions, too, show differences. European debates on balancing, for example, often omit extended treatment of institutional considerations or of a relationship between the use of balancing and particular substantive outcomes; both elements are central to discussions in the United States. In contrast, one of the most important debates on balancing in Europe turns, to a large extent, on the “formal rationality” – in the Weberian sense – of balancing as legal argument. Discussions of this dimension, in turn, seem to be lacking from the voluminous American literature on balancing.

The object of this article is to provide a framework for understanding relevant similarities and differences in this broad range of references to ‘balancing’ in contemporary constitutional legal discourse. The article argues that understanding and evaluating “balancing”-related language in judicial opinions and literature, as


17. Frequently used parameters are “interests,” “principles,” “rights,” “circumstances” and “considerations.”

18. Fear of “balancing away” rights protection is a pervasive theme in American literature on constitutional judicial review. See Kathleen M. Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. COLO. L. REV. 293 (1992). For more on this aspect of European/US difference, see Duncan Kennedy & Marie-Claire Belleau, La place de René Demogue dans la généalogie de la pensée juridique contemporaine, 56 REVUE INTERDISCIPLINAIRE D’ÉTUDES JURIDIQUE 163, 180 (2006) (noting the absence of “arguments de compétences institutionelles” in French thinking on balancing and pointing to their centrality in American legal thought).


20. See discussion infra Section III.3.
well as appraising broader qualifications of legal systems, cultures and trends in terms of “balancing,” present a number of especially difficult challenges for comparative law methodology. Two kinds of such challenges will be distinguished.

First, in terms of traditional divisions in comparative law methodology, “balancing” straddles the divide between the two dominant sets of approaches in a uniquely complicated way, exhibiting intimate connections to the premises and methods of both functionalism and of functionalism’s critiques. On the one hand, judicial references to balancing are at heart arguments, offered to legitimize the exercise of political authority in particular settings. As with any other type of reasoning, the legitimizing force of these arguments is inherently dependent on local meanings and understandings. At the same time however, balancing references are special forms of argument in the sense that they exhibit a number of unique ties to ideas and understandings that transcend the local, legal landscape. In many of its manifestations, balancing, as argument, draws continuous explicit and implicit connections to notions of fairness and rationality that are presented as having a strong universal dimension. Complicating matters still further is the fact that the precise nature of these relationships to this dimension of universality can be shown, again, to differ among legal systems and cultures. The article argues that because of this local/universal duality, and perhaps more than any other element in contemporary legal culture, balancing is intimately attached to the foundational concerns and premises of the two competing basic models for comparative analysis: functionalist approaches and their criticisms.

There is a second dimension to the complexity of balancing as a topic in comparative law. This lies in the fact that the ideas and practices that underlie and shape judicial balancing habitually transcend many of the basic conceptual oppositions that are


22. One way to illustrate this is by reference to John Rawls' influential understanding of legitimacy, which draws specifically upon “reasonableness” and “rationality.” See John Rawls, Political Liberalism 217 (1996) (“[O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational”).
characteristic for legal thought generally. Familiar distinctions between, for example, "form and substance," "process and outcome," or "law and politics" collapse when faced with the task of classifying balancing, as references may fit both, or any one, of these categories. Since these conceptual categories are generally the same ones that comparative analysis employs as common terms of reference, the dualities exhibited by many balancing references cause particular problems for comparative study.

These two sets of difficulties in situating balancing in terms of traditional comparative law approaches – complex ambivalence between the universal and the particular, and ambiguity in terms of legal categories – are intimately related to the very foundations of the ideas and practices that make up judicial balancing in contemporary constitutional adjudication. Analyzing the relationship between balancing and comparative law methodology in detail, therefore, may ultimately contribute to our understanding of balancing itself.

The article is structured as follows. Part II discusses the ways in which comparative law's dominant methodologies take position with regard to the topic of judicial balancing. Parts III and IV then take up the two sets of problems identified above and discusses how each of these themes impacts the relationship between balancing and comparative legal studies. Part V concludes and sets out guidelines for future research.

II. Similarities and Differences: Balancing, Functionalism, and Expressivism

A. Introduction

Understanding references to "balancing" by courts and commentators in different legal systems means confronting one of comparative law's most vigorously contested dilemmas: the question of similarities and differences among legal cultures. Successive waves of comparative law scholarship have debated this question to
such an extent that for some modern authors, "the division between
the proponents of similarity-oriented and those of difference-oriented
comparison" constitutes "the most visible methodological cleavage in
contemporary comparative law."24 The similarities/differences debate
can, in turn, be seen as a reflection of two fundamental issues at stake
in comparative research: (a) the question of what to compare (objects
of comparison), and (b) the question of "of what and how much
context to include" (scope of comparison).25 The relationship
between the dilemma and these two underlying, fundamental
questions becomes evident from looking at the key tenets of two
opposing camps in comparative methodology: that "incomparables
cannot usefully be compared"26 and, that findings of sameness are
"necessarily based on a repression of pertinent differences."27

This Part first illustrates the relevance of the question of
similarities and differences for the topic of balancing by listing a
number of basic ambiguities that references to balancing in legal
discourse may present. This section then gives a brief overview of the
main approaches to comparative law, structured along the dividing
line between functionalist approaches and a number of methods
united primarily in their rejection of functionalism. These
alternatives will be grouped together here under the label of expressivist
approaches.28 For each set of approaches, the description
focuses on the most distinctive assumptions and interests, in full
recognition of the fact that very few actual comparative studies will
rigorously follow all of any one approach. For each of the two basic
perspectives, special attention will be paid to how they would

24. LASSER, supra note 23, at 146 (emphases added).
25. Annelise Riles, Wigmore's Treasure Box: Comparative Law in the Era of
Information, 40 HARV. INT'L L.J. 221, 228, 240 (1999) ("Any amount of contextual
detail that the comparativist might provide seems insufficient, and yet every amount
of detail threatens the possibility of comparing across different systems"). See also
Danneman, supra note 23, at 394 ("It appears on closer inspection that much of the
opposition between a presumption of similarity and a presumption of difference does
not relate to whether laws are generally similar or different. What is more
controversial is which aspects of law and its context are most relevant for
comparative research . . .").
26. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE
27. Pierre Legrand, The Same and the Different, in COMPARATIVE LEGAL
STUDIES: TRADITIONS AND TRANSITIONS 261 (Pierre Legrand & Roderick Munday
eds., 2003), cited in LASSER, supra note 23, at 145.
28. Following Mark V. Tushnet, The Possibilities of Comparative Constitutional
approach the study of balancing in constitutional rights adjudication.

**B. Balancing References and the Object and Scope of Comparison**

As applied to the basic observation that judges in many jurisdictions often use very similar balancing language when adjudicating upon fundamental rights claims, the questions of similarities and differences and of object and scope of comparison play out in many different ways. To illustrate the relevant issues, here are two quotations, taken from the U.S. Supreme Court and the European Court of Human Rights (“ECHR”), both on appropriate limitations to freedom of expression:

> Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved.\(^2\)

> A balance must be sought between the exercise by the press of the right guaranteed to it... and the necessity to impose a restriction on the exercise of this right.\(^3\)

Taken by themselves, all that these short quotations establish is that both the ECHR and the U.S. Supreme Court do, at least on some occasions, refer to “balancing” or “weighing” when dealing with freedom of expression claims. But beyond that, little is clear, as each reference may code for a number of very different underlying ideas. We cannot tell, for example, whether the references to weighing are statements of doctrine that courts intend to apply, and have applied, or more general, informal descriptions of issues they see before them. We cannot tell why these courts see the need to balance: whether it is because they feel that this is what the protection of freedom of expression – or perhaps their task as judges in a democracy – is fundamentally about, or whether it is because the judges cannot agree on anything more than that some sort of accommodation between individual and societal interests is important.\(^3\) We do not know

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31. Think of the difference between “grand” theory and “little” theory as described by, for example, Mark V. Tushnet, **Red, White and Blue: A Critical Analysis of Constitutional Law** (1988). Balancing could figure in – or be – either. Balancing may also be part of pragmatism or of minimalism as approaches to
whether, in presenting their reasoning in terms of balancing, judges understand their activity as being a specific form of interpretation or application of law in any traditional sense, or whether these references are intended precisely to signal an acknowledgement of the limits to traditional understandings of adjudication, and an admission of the political quality of judging. Neither can we say whether the relevant courts are taking a bold, controversial position in a debate or merely stating what they and their audience believe to be obvious.32

Questions such as these, primarily, raise the issue of the scope of comparison; given the basic linguistic similarity between the two courts' statements, how deep should we prod and how much context should we include in assessing their meaning. When this linguistic similarity – obvious in the two statements cited – becomes more tenuous, deciding on the object of comparison becomes more complicated as well. Here one relevant question would be whether to include for comparison statements of the U.S. Supreme Court on the need to "weigh the circumstances,"33 on the ground that the basic similarity in the use of the balancing metaphor warrants comparison, or whether we should take the difference between "circumstances," "rights" and "interests" to be a crucial difference that should not be repressed. Also, when the U.S. Supreme Court finds that it should assess whether a certain governmental regulation of speech "is not more extensive than is necessary,"34 it is not clear what should be more important: the fact that the court, here too, requires some sort of explicit, case-by-case valuation and comparison of different parameters, or the fact that words like "balancing" or "weighing" are not used directly, even when these same courts often do actually couple such statements with a reference to balancing?

C. Functionalist Approaches

In methodological terms, the opposition between similarities and differences, and the questions of object and context referred to

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32. The Majority in Konigsberg was arguably doing the former, the Strasbourg Court in Sunday Times the latter.


34. See, e.g., Central Hudson Gas & Electric v. Public Service Commission, 447 U.S. 557, 566 (1980) (establishing a specific test for "commercial speech").
before, find their expression in debates over the virtues and flaws of the *functional method*.

Functionalist approaches take as their basic premise the idea that “the problems of justice are basically the same in time and space throughout the world.” In Zweigert and Kötz’s canonical formulation, from a functionalist perspective “the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results.”

Functionalist approaches take a clear position with regard to the questions of the object of comparison and the similarities/differences controversy. The objects of comparison are the “solutions” different legal orders and cultures have found to the uniform problems that face them. In this sense, functionalist studies are interested in outcomes rather than in the processes that lead to these outcomes; what counts for the purpose of comparison in functionalist approaches “is the fact of a solution and not the ideas, concepts, or legal arguments that support the solution.” With regard to the differences/similarities controversy, functionalists come down strongly on the side of similarities. For Vivian Grosswald Curran, the dominant functionalist perspective has reflected a “conscious, articulated intent to identify unifying elements and to discount differentiating ones.”

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37. ZWEIGERT & KÖTZ, *supra* note 26, at 34.


40. Curran, *supra* note 35, at 66 n.76 (“functionalism is suited to yielding results of similarity because it does not stray from the surface level of functional results to
The question of context, by contrast, has not received such an unequivocal answer, for here functionalists face a basic dilemma. Functionalist approaches cannot specify their all-important functions at too high a level of abstraction, or in terms that rely to heavily on "mere rationality." Doing so would carry the twin dangers of ethnocentric bias in approach and of irrelevance and inapplicability of conclusions. At the same time, functionalists cannot specify functions "so precisely that every institution performs a complex set of functions unique to it," as incorporating too much context in this way would make all comparison impossible.

D. Functionalism and Balancing

For functionalists, references to balancing in judicial opinions would be the manifestation of a shared underlying function that judges in different legal orders need to confront. Balancing references, in this view, are (part of) a solution to a common legal problem, or set of problems. This perspective immediately provokes the obvious question: what function, or what problem?

Given that judicial balancing in fundamental rights cases occurs within the context of constitutional law, it is important to call attention to the argument that functionalism might be especially well-suited to constitutional law because it revolves around a smaller and more homogeneous set of functions than private law. Former legal problems to societal, historical and cultural underpinnings). See also Tushnet, supra note 28, at 1239.

41. Cf. Zweigert & Kötz, supra note 26, at 43-44 ("the solutions we find in the different jurisdictions must be cut loose from their conceptual context and stripped of their national doctrinal overtones so that they may be seen purely in the light of their function"), with Riles, supra note 25, at 228 ("With functionalism came a new attention to 'context,' for if what mattered were the functions of legal rules, it would be important to understand the meaning of statutes or cases in the context of the institutional, economic and cultural pillars of each society.'), and John Bell, Comparing Public Law, in COMPARATIVE LAW IN THE 21ST CENTURY 235, 236 (Andrew Harding & Esin Örücü eds., 2002) ("Generic statements of the functions of law are of limited value. A comparatist has to examine not only rules and functions, but also the context in which they operate and in which legal problems arise").

42. Cf. Frankenberg, supra note 35, at 415 ("The rigorous rationalist who relies on conceptual or evolutionary functional universals is prone to give her world-view and norms, her language and biases only a different label.").

43. Cf. Tushnet, supra note 28, at 1238 ("[functionalism] must avoid specifying functions so generally that its purported insights become banal").

44. Id.

45. Functionalist approaches have tended to focus mostly on private law. Cf.
Dutch, European Court of Justice ("ECJ") Judge, Professor Koopmans, propagates this view in his recent book *Courts and Political Institutions* and in his earlier writing on comparative legal methodology. In his view, the comparative study of public law has a bright side in that "the number of fundamental problems is smaller than in private law." Detailed analysis of public law in liberal democracies will, in his view, "unearth a certain number of questions which are 'fundamental' in the true sense of the word: an answer to such questions must have been given before the system of public law could begin to operate."

One important representative example of such a basic function would be that of the "countermajoritarian dilemma." In discussions on this dilemma, notions of "balance" – between branches of government and between individuals and majorities – are in fact often used. Taking the dilemma to be both a shared, universal problem and also a sufficient explanation for balancing in individual judicial opinions, however, is deeply problematic for a number of reasons.

The U.S. constitutional scholar, John Hart Ely has famously claimed that the countermajoritarian dilemma is both the "central function" and the "central problem" of judicial review. Others have echoed this point, arguing for example that the countermajoritarian problem has "generic flavor," in that when constitutional systems move toward a model of "checks and balances" a "growth of judicial power is necessary to provide a balance." However tempting it may be to frame a strong link between observations such as these and the spread of judicial balancing, such connections are fraught with

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47. KOOPMANS, *supra* note 46, at 7.

48. Id. at 8.

49. See Law, *supra* note 5, at 662-87 *passim*; KOOPMANS, *supra* note 46, para. 5.2 ("The counter-majoritarian difficulty"), ch. 8 ("Courts and individual rights").


difficulty. For one thing, as Mark Tushnet has argued, the claim that the maintenance of “balance” or “equilibrium” is a fundamental, shared function has little meaning in the absence of “well-specified concept of disequilibrium.” Secondly, recent studies have in fact emphasized the contingency of understandings of judicial review and have convincingly argued that “the countermajoritarian dilemma that obsesses the legal academy is not some timeless problem grounded in immutable truths.” Thirdly, and most importantly for this article, a theory of balancing based too heavily on the “countermajoritarian dilemma” runs into descriptive problems when applied outside the United States, where summary study shows that “obsession” with this problem is very much a specifically American phenomenon. And finally, even if it is granted that courts in many jurisdictions do face a broadly similar problem of having to simultaneously legitimate and limit their exercise of power, this observation in no way shows the necessity of adopting balancing specifically as discourse or as method, let alone as “overarching principle” or “master technique,” of constitutional judicial review.

E. Functionalism’s Critics: Expressivism

Opposed to functionalism generally, and to its application in the field of constitutional law in particular, we find a number of different perspectives that, following Mark Tushnet’s classification, may be

53. Tushnet, supra note 28, at 1238 n.64 (emphasis added).
54. Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 YALE L.J. 153, 156 (2002). See also Michael Oakeshott, Morality and Politics in Modern Europe 6 (1993) (“[E]ven those writers who insist most strongly that they are concerned with the permanent and unchanging problems of government are in fact concerned with those problems as they appear in the circumstances of a particular time and place.”).
55. There is very little direct discussion, either in legal literature or judicial opinions, of the dilemma in Europe. In the U.S., on the other hand, the theme is dominant. See, e.g., Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Mark V. Tushnet, Taking the Constitution Away from the Courts (2000); Jeremy Waldron, Law and Disagreement (1999); Jeremy Waldron, The Core of the Case Against Judicial Review, 115 YALE L.J. 1346 (2006).
56. A wealth of alternative arguments exist, with different varieties being dominant in different systems. For two often used typologies in the U.S., see Philip C. Bobbitt, Constitutional Fate: Theory of the Constitution (1982); Richard H. Fallon Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 HARV. L. REV. 1189 (1987).
grouped together under the rubric of “expressivist approaches.” For expressivist scholars, functionalism “reduces the law to a formal technique of conflict resolution, stripping it of its political and moral underpinnings.” The opposing vision of law as historically, politically, economically, culturally and in short: societally contingent, leads to very different choices with regard to the objects of comparison, the attention given to context and the emphasis that may be placed on similarities or differences. The comparative scholar’s task is no longer that of identifying and matching problems and solutions, but rather of trying to grasp “the local meaning of legal institutions or practices” through a process of “cultural immersion.”

In terms of the objects of comparison, the focus shifts decidedly away from the ‘solutions’ cherished by functionalists. As Günter Frankenberg has put it: “[b]y stressing the production of ‘solutions’ through legal regulations the functionalist dismisses as irrelevant or does not even recognize that law also produces and stocks interpretive patterns and visions of life.” Outcomes and solutions are far less important in these approaches than that what leads up to these outcomes, the factors conditioning practices, rules and institutions, and the specific shapes these are given in different jurisdictions. “Interpretive patterns,” “mentalités,” “styles of thought” and “characteristic patterns of reasoning,” are what matters in comparative law studies in this mode. This shift in perspective puts legal discourse – language used by judges and other actors in both the own and the foreign legal order – front and center as object of comparison, as reflective of an underlying “jurisprudence,” of “visions of law,” and of broader understandings.

57. Tushnet, supra note 28.
58. Frankenberg, supra note 35, at 437.
59. Riles, supra note 25, at 241 (emphasis added).
60. Curran, supra note 35, at 51.
62. Id.
63. Curran, supra note 35, at 51.
64. Ewald, supra note 45, at 1948. See also Valcke, supra note 23, at 717.
65. Cf. Patrick S. Atiyah & Robert S. Summers, Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions 4 (1987) (“By a ‘vision’ we mean, roughly, the inarticulate and perhaps unconscious belief held to some degree by the public at large, and more especially by judges and lawyers, as to the nature and functions of law, and as to how and by whom it should be made, interpreted, applied and
and perspectives.

While functionalist comparative scholars have limited the application of their method primarily to private law, their critics have developed their attacks and alternatives in particular with regard to public law, and especially, constitutional law. There may be no "nation-specific forms of civil liability insurance," but Constitutions – in the expressivists’ view – undeniably help constitute national identities and as such are bound to differ from country to country. Public and constitutional law is thought to be especially contingent on historical, political, and cultural factors.70 Countering, the functionalists’ stress on similarities of functions; these scholars emphasize that surely there must be “more than one way to design a democracy." Others are willing to admit that there may be “broadly generic” functions performed by law in different systems,71 or that countries are grappling with a set of problems that are “in a general way similar,”72 but insist that looking for these functions is unlikely to yield any thorough understanding and carries a serious risk of misconception.

**F. Expressivism and Balancing**

Expressivist accounts of balancing are likely to focus on references to balancing as legal arguments, used to achieve a particular effect with a particular audience, in a particular setting. The language of balancing will be seen as expressive of underlying mentalités and patterns of thought that are closely intertwined with the foundations of the specific legal culture in which they occur. The goal of expressivist studies of balancing would be to try to understand, as closely as possible, what balancing references mean to

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66. Bell, supra note 41, at 247.
67. Cf. Tushnet, supra note 28, at 1228 (“Constitutions help constitute the nation, to varying degrees in different nations, offering to each nation’s people a way of understanding themselves as political beings”).
68. Ewald, supra note 45, at 1988 (“I take it to be obvious that the principles of constitutional law cannot be adequately explained if we limit our attention, as does the traditional approach, to the study of present-day legal rules. The issues involved are too closely bound up . . . with national history”).
70. Cf. Bell, supra note 41, at 236.
a particular legal community at a given time.

This emphasis on the local, and the important critique that expressivist understandings have brought to bear on functionalist approaches, does, however, face a basic problem when it comes to balancing: how to account for the astounding spread of very similar looking language, involving references to balancing and proportionality, in so many legal systems around the world? The language of balancing — and proportionality — has become a new lingua franca of courts and constitutional scholars around the world. Expressivist methodology must be able to account for, or at least accommodate, this widespread similarity.

Expressivism’s difficulty does not end with the increased commonalities in judicial discourse and the cross-jurisdictional appeal of balancing-based arguments. As Part III will show, balancing, as argument, has a number of special qualities that align it particularly closely with ideas that are presented as having a high degree of universality, straining to an even greater degree the focus on local ideas and practices that is so important to expressivist approaches.

III. Transcending the Local

A. Introduction

Quite obviously, careful attention to methodology is important in all areas of comparative legal studies. The fundamental differences in outlook between functionalist and other — here: expressivist — approaches assume a particular significance when it comes to the study of judicial balancing. More than any other feature of contemporary legal cultures, judicial balancing fits uneasily in either dominant outlook. This, it is submitted, is primarily due to two sets of factors.

First, in terms of comparative law methodology, balancing is

72. See, e.g., Jörg Polakiewicz & Valérie Jacob-Foltzer, The European Human Rights Convention in Domestic Law: The Impact of the Strasbourg Case-Law in States Where Direct Effect is Given to the Convention (Parts I, II and III), 12 HUMAN RIGHTS L.J. 65, 66 (1991) (“We are witnessing the beginning of a true dialogue between the European Human Rights Court and national jurisdictions whereby principles like the proportionality test that have been developed in certain national legal orders are taken up by the European Court of Human Rights and later accepted in other countries as part of a common European standard”); Jackson, supra note 15, at 803 (“Proportionality analysis is becoming a term of art in constitutional law”).
uniquely attached to foundational premises and concerns of functionalist approaches, making the topic especially resistant to critical insights from opposing perspectives. This attachment comes in the form of (1) shared historical and conceptual foundations, and (2) the ways in which balancing practices make continuous explicit and implicit references to ideas of universality. At the same time, as (legal) arguments, judicial references to balancing are inherently dependent on local meanings and understandings for their legitimizing force. This means that the same balancing language may signify different mixes of references to the universal and the particular across cultural settings. In addition, the precise nature of the links between a court’s balancing language and universality differs as between systems, complicating the picture even further. The following sections address these various connections in turn.

B. Balancing and the Foundations of the Functional Method

Balancing in judicial reasoning is closely related to the historical and theoretical foundations of the functional method, the classic, though criticized, approach to comparative law, as discussed above. In terms of intellectual history, functionalism as an approach to comparative law on the one hand, and the very ideas behind judicial balancing on the other, share the same origins: the German school of Interessenjurisprudenz and America’s proto-realist sociological jurisprudence in the early decades of the twentieth century. It was these scholars’ understanding of law as dealing with a number of conflicting private and social interests that forcefully suggested a depiction of the judge’s (and the legislator’s) task as involving a balancing of these interests. That same insight—law as a mechanism for dealing with conflicting interests—however, also provided the theoretical underpinnings for functionalism as an approach to comparative law. By insisting on law as an abstract, “empty” mechanism of conflict resolution, functionalist comparative scholars could relegate all contingent elements of context to the realm of “interests to be regulated.”

73. See, e.g., Otto Kahn-Freund, Comparative Law as an Academic Subject, 82 L. Q. R. 40, 51 (1966) (“the satisfaction of felt needs of society through the law is, in my submission, the cardinal subject of all academic legal studies”). Cf. Frankenberg, supra note 35, at 434 n.78 (“only with the rise of Interessenjurisprudenz and sociological jurisprudence has functionalism become the dominant paradigm of comparative legal research”). It is difficult to causally attribute the dominance of functionalism to Interessenjurisprudenz and Sociological Jurisprudence; very little
Contemporary scholars were quick to realize both the potential and the limitations of this new understanding of law for comparative legal scholarship. Phillip Heck, the leading German representative of the *Interessenjurisprudenz*, noted how his conception of interests reduced differences between legal systems and allowed for easier comparison.74 Pierre Lepaulle, a French lawyer, in a 1922 article on *The Function of Comparative Law*, however, was decidedly less enthusiastic about this ‘breakthrough.’

To say that law is a mere balancing of interests involves the postulate that the legal system is an impartial, impasive receptacle in which more or less automatic reactions take place. But, as a matter of fact, we know that the legal machinery of a given society is very much like a living body with its reactions, its currents, its temperaments, its prejudices; that it is extra-sensitive to certain things, blind to others. When reality is presented to the legal eye, it is as much distorted as it is to the human eye.75

Lepaulle was, of course, not the first to argue that it was important to see the laws of different societies as reflective of these same societies.76 But his argument shows the impetus the new interest-based conception of law could give to functionalism’s, similarity-oriented approaches to comparative analysis.

It is important to note that the basic connection between the premise of functionalism in relation to conceptions of balancing itself is likely to differ between legal systems and cultures. For the German *Interessenjurisprudenz* scholars, for example, balancing of interests was completely neutral and “entirely independent of any ideology.”77

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74. PHILIP HECK, BEGRIFFSBILDUNG UND INTERESSENJURISPRUDENZ 133 (1932). Michaels, supra note 35, at 349, n.36 quotes Max Rheinstein who described comparative law as nothing more than a “necessary supplement and continuation of the jurisprudence of interests.”


76. Montesquieu famously argued that the laws of each nation should fit the people for which they were made. See Curran, supra note 35, at 43. See also ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH (1997).

77. HECK, supra note 74, at 120, 123 (referring to his method’s “juridical autonomy”).
It is against this background idea of neutrality that claims such as, that the jurisprudence of interests, “being independent of any particular Weltanschauung, [could] provide a working basis for the lawyer under any legal system,” must be understood.8 Balancing, in this view, is intimately related to functionalism because both look at legal and judicial method as a neutral device that relegates context – and therefore, difference – to its parameters. For Roscoe Pound and the Sociological Jurisprudes, on the other hand, balancing of interests accorded with a vision of law as a form of “social engineering.”79 Legal method, under this view, was a purpose-oriented instrument. At the time Pound expounded this ideology, the effectuation of a new, “social” conception of justice was, in many Western societies, the most pressing of these ends.80 Once again, under this perspective, balancing and functionalism come to be intimately related. This time, however, the relationship is based on the understanding that law’s instrumentality will everywhere be put to the same use, albeit in different systems.81 While the precise nature of the relationship between the underlying ideas of balancing and functionalism differs between Europe and the United States, both the neutral and the instrumental perspectives on balancing share important affinities with the functionalist approach to comparative law.

C. Balancing and Claims to the Universal (1): Rationality

Unlike alternative legal arguments, such as those drawn from textualism or interpretations of legislative intent, balancing, in many of its manifestations, often makes a specific and explicit, dual appeal to values that are thought to transcend the local and the contingent. These values are those of (1) rationality and rational decision making,82 and (2) fairness, as a dominant conception of justice. These

81. Lepaulle’s critique therefore actually shows a better fit with continental ideas on balancing than with American ones.
82. Cf. Adam Seligman and Suzanne Last Stone’s observation that “Reason, of course, as method, is formal and universal in a way that traditions – and texts – are not, which is the source of its seductive appeal.” Adam Seligman & Suzanne Last Stone, Text, Tradition and Reason in Comparative Perspective: An Introduction, 28
two elements are discussed in this and in the following section. Here too, it will be seen that although the broad contours of these appeals are similar, their precise content may differ significantly between legal systems.

Balancing references are often used as shorthand for neutral, *rational decision-making*, a conception of adjudicating that fits particularly well with liberal rule of law ideals. A judge who balances, it is often thought, takes all relevant aspects of a case into consideration without any predetermined preferences or biases. David Beatty's strong defense of the proportionality principle and of the practice of judicial balancing, for example, is built to a large extent upon his conception of proportionality and balancing as rational in this sense. He writes: “[P]roportionality permits disputes about the limits of legitimate lawmaking to be settled on the basis of reason and rational argument. It makes it possible to compare and evaluate interests and ideas, values and facts that are radically different in a way that is both rational and fair.” The rationality of balancing has also been emphasized and defended by others, such as Frank Easterbrook in the United States (balancing in the cost-benefit variety) and Robert Alexy in Europe (balancing of fundamental rights principles). It is telling also that one common manifestation of balancing in the US occurs precisely in the context of what is called ‘rational basis’ review.

A closer look at these defenses of balancing as rational, however, shows that ‘rationality’ is invoked to reflect disparate meanings. In Europe, one of the most important debates on the rationality of balancing has taken place between Jürgen Habermas and Robert Alexy. Robert Alexy, one of the main theorists of balancing on the Continent, has insisted that “for a showing that balancing is

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rational... it is necessary that an inferential system is implicit in balancing.\textsuperscript{87} The establishment of such an "inferential system," in turn, "is intrinsically connected with the concept of correctness."\textsuperscript{88} Although Alexy does not label his argument as such, it is clear that his defense proceeds on the basis of a "formal" conception of rationality, in accordance with Max Weber's famous typology.\textsuperscript{89} Both the elements of an "inferential system" and of "correctness," or "validity," fit neatly with Weber's formal rationality, which may be defined as "the degree to which the form of the argument yields a reliable judgment about the truth of its conclusion."\textsuperscript{90}

In the United States, in contrast, the formal rationality of balancing as argument does not seem to be an important topic. When American authors refer to balancing as rational, what they seem to have in mind is some form of rational decision-making geared towards achieving results based on "ethical imperatives" and "utilitarian and other expediential rules."\textsuperscript{91} Often, these defenses of balancing talk explicitly of "instrumental rationality," using the law-and-economics language of cost-benefit analysis.\textsuperscript{92} Balancing, under this view, becomes an instrument of (utilitarian) judicial policy-


\textsuperscript{88} \textit{Id.}

\textsuperscript{89} \textit{MAX WEBER, MAX WEBER ON LAW IN ECONOMY AND SOCIETY I} (Max Rheinstein ed., Max Rheinstein & Edward Shils trans., 1954) (1925). For an extended discussion, see Duncan Kennedy, \textit{The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought}, 55 HASTINGS L.J. 1031 (2003).


\textsuperscript{91} Both elements of Weber's definition of "substantive" rationality. \textit{See WEBER, supra note 89, at 63.}

\textsuperscript{92} The debate between Tribe and Easterbrook is conducted in these terms. \textit{See} Laurence H. Tribe, \textit{Constitutional Calculus: Equal Justice or Economic Efficiency}, 94 HARV. L. REV. 592 (1985); Easterbrook, \textit{supra} note 85. For a sample of discussions on rationality in American legal literature, see, e.g., Laurence H. Tribe, \textit{The Limits of Instrumental Rationality: Technology Assessment and the Fourth Discontinuity}, 46 S. CAL. L. REV. 617, 618 (1973) (adopting as his definition "that form of rationality which seeks to discriminate among alternative actions by assessing their comparative tendency to advance or to retard the achievement of the actor's goals or values" and referring to Weber's 'purpose rationality'); Anthony V. Alfieri, \textit{Impoverished Practices}, 81 GEO. L. J. 2567, 2624 (1993) (referring to balancing's "instrumental rationality"). On the relationship between substantive rationality and formal rationality in Weber's typology, see Kennedy, \textit{supra} note 88.
making that is rational in the way that it legitimizes decisions which promote the achievement of certain overarching objectives or purposes.\textsuperscript{93}

\textbf{D. Balancing and Claims to the Universal (2): Fairness}

Balancing's second claim to universality lies in its close connections to two dominant, contemporary understandings of justice: (a) \textit{proceduralism}, and (b) justice as \textit{(substantive) fairness}. These two concepts are, again, thought to at least partly transcend local values and conceptions of justice.

Balancing, firstly, makes direct appeals to the notion of procedural justice. Its affinity to the ideal of neutrality in decision making has already been mentioned, but its appeals to proceduralist conceptions of justice go beyond mere neutrality. Frank Coffin, an American judge, has described balancing as,

\[\text{[A] process with demanding standards of specificity, sensitivity and candor. Open balancing restrains the judge and minimizes hidden or improper personal preference by revealing every step in the thought process; it maximizes the possibility of attaining collegial consensus... and it offers a full account of the decision-making process for subsequent professional assessment and public appraisal.}\textsuperscript{94}

Other commentators as well, Frank Michelman in the United States and Robert Alexy in Europe, for example, have called attention to the close links between balancing as method and basic tenets of procedural justice.\textsuperscript{95}

The appeal of balancing to ideals of justice is not limited to aspects of procedure – neutrality, taking all relevant factors into consideration, reason-giving, etc. – but are also visible with regard to

\textsuperscript{93} It is important to note that the \textit{formal} rationality of legal argument is by no means an excluded topic in American legal literature. This definition has often been used with regard to \textit{other} types of legal argument, in particular reasoning by analogy (for a prominent example see Brewer, \textit{supra} note 90, who evaluates analogy's "internal inferential structure" in very similar terms as does Robert Alexy for balancing in German constitutional law).

\textsuperscript{94} Coffin, \textit{supra} note 83, at 25.

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its purported outcome: a ‘fair balance’ between opposing rights, values and interests. Courts in many different jurisdictions have elaborated upon what they see as the intimate relationship between balancing and a conception of justice as fairness. The ECHR, which rarely refers to balancing without the added qualification “fair,” has held that the search for a *fair balance*, “to be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights” is “inherent in the whole of the Convention” and the U.S. Supreme Court, for its part, has said that the idea of proportionality is “essential to the concept of justice.” The Supreme Court of Canada, finally, has made the connections it sees between balancing, proportionality, rationality, and fairness explicit in its foundational decision in the case of *R. v. Oakes* of 1986.

As with the appeal to rationality, it is important here as well, to be precise on the nature of the invoked links to fairness. One significant difference between U.S. and European practices seems to hinge on the source and the scope of application of ‘fairness’ in constitutional adjudication. In U.S. constitutional law terms such as “fairness” and “proportionality” surface primarily in three, specific areas of constitutional law: (1) adjudication under the Due Process Clause; (2) the Equal Protection Clause; and (3) the prohibition on cruel and unusual punishment under the Eighth Amendment. Proportionality, in the sense of a *fair*, or reasonable, relationship between two parameters, is often referred to specifically as “*Eighth Amendment proportionality*,” while the phrase “fundamental fairness” is used virtually exclusively with regard to the Due Process

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98. R. v. Oakes, *supra* note 5, at para. 70 (“Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. *They must not be arbitrary, unfair or based on irrational considerations*”)(emphasis added).
In both instances, the relevant notions of fairness are derived from specific constitutional guarantees that are applicable only to a relatively narrow range of cases. Fairness, as a general principle of constitutional law is an idea that is largely alien to U.S. constitutional theory and practice.

In much of European law, on the other hand, fairness and proportionality are accorded the status of "general principles," applicable to all cases involving fundamental rights, and with a radiating effect throughout the legal order. Appeals to fairness and proportionality, in the context of judicial balancing in Europe, must be read against this comprehensive background. This setting imbues such invocations with a very specific meaning, not found in the U.S. context.

E. Conclusion

Part III has argued two points. First, although balancing is, at its
most basic, a legal argument that is necessarily embedded in local understandings, it is special in the sense that, as an argument it makes a strong, dual appeal to values and ideas that transcend the local. Secondly, in each case, the nature of these links and of the ideas invoked differ significantly. The universality of balancing has been framed in terms of substantive neutrality (the German Interessenjurisprudenz scholars) and instrumentality towards universal goals (Sociological Jurisprudence in the United States). Defenses of balancing in terms of rationality turn out to rest on very different definitions - formal and substantive. And when it comes to fairness and reasonableness, there are important differences in the extent to which legal systems see these values as overarching principles, or as localized doctrinal categories. All these differences mean that the proportion between the global and the local - or the universal and the particular\(^\text{104}\) - in balancing discourse will, itself, be highly context-specific.

IV. Balancing and the Categories of Legal Thought

A. Introduction

Judicial balancing – in the many ways it figures explicitly in judicial reasoning – habitually transcends familiar categories of legal thought. The difficulty of locating balancing in conventional, analytical schemes becomes acute in comparative law because of the general need for abstractions applicable across different legal orders. Part IV discusses two of the most common and important boundary-crossing scenarios: the “technical” boundaries between legal doctrines and, what may be called, the boundary between the legal and the non-legal.

B. Categories and Qualifications

Judicial references to “balancing” and “weighing” will often be reflective of constructs operating within different technical categories of legal thought. As was discussed previously, balancing may locally be seen, for example, as (part of) an overarching principle, or as an element of a doctrinal “test” applicable only within the confines of a specific area of law, such as freedom of expression or the law of

\(^{104}\) Cf. Fletcher, supra note 39, at 335 (commenting on the “universal” and the “particular” in legal discourse).
procedural guarantees (due process).

The terms used for these classifications, such as "doctrine" and "principle," in addition, evidently do not carry precisely the same meaning everywhere.

The absence of uniformity in descriptions of what balancing is—already problematic with regard to traditional legal categories—becomes even more troublesome for comparative studies when commentators leave traditional definitions and begin to write about balancing in terms of "ages," "master techniques" and "foundational conceptions." By way of illustration, consider the descriptions of the role of balancing in the United States and Germany by Alexander Aleinikoff (1987) and Walter Leisner (1997), respectively.

Aleinikoff’s famous article on U.S. constitutional law in the Age of Balancing, contains very little discussion of what the qualification "age" is meant to signify. The author writes simply of the "hold that balancing has on our approach to constitutional cases." We know we have entered the "age of balancing" when "[b]efore we have time to wonder whether we ought to balance, we are already assessing the relative weights of the interests." Walter Leisner, in his evocatively entitled book The Balancing State (Der Abwägungsstaat), writes that judicial balancing has spread to such proportions in German constitutional law that "the Constitution, ultimately, could dissolve into [balancing based] proportionality" ("daB die Verfassung sich letztlich in Verhältnismäßigkeit auflösen könnte").

There are obvious broad similarities between these two powerful images of "age of" and "dissolution into . . . ." For one, it seems clear that each commentator is trying to assert a very specific point: that in the system under investigation balancing has developed into something more than the aggregate of a large number of individual references in judicial opinions. This suggests that the quality of

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105. See supra, Section III.4.
107. Aleinikoff, supra note 8, at 965; LEISNER, supra note 6.
108. Aleinikoff, supra note 8, at 971.
109. Id. at 971-72.
110. LEISNER, supra note 6, at 20.
111. See, e.g., STONE SWEET, supra note 7 (balancing as master technique of
“something more” is apparently, in very similar ways, an issue of interest in each system. Each of these descriptions, however, invokes a conceptual apparatus that is not commonly used in comparative study. Comparing the nature of this added dimension, therefore, is especially complicated because of the absence of shared terminology and understandings. Put briefly, if we want to know how “overarching principle of construction” relates to “foundational conception of the State,” we find very little guidance in standard constructs of comparative method, whether they focus on functions to be fulfilled or arguments used, on solutions produced or *mentalités* and styles of thought. In the absence of such a conceptual apparatus for comparison, and given the obvious and widespread similarity in balancing language, there is a real danger that those observing from the outside will tend to overemphasize evident similarities at the cost of neglecting subtle, but important, differences.

**C. Legal and Non-legal, Form, and Substance**

There is a second way in which balancing references transgress familiar legal categories in a way that is problematic for comparative law methodology. Balancing references are special in that, as arguments, they may have both predominantly “legal” and more “non-legal” meanings. As writers such as Duncan Kennedy and Mitchel Lasser have pointed out, judicial discourse, in the modern, post-realist mode of legal thought that is prevalent in the West, generally contains a mix of formal (in the sense of deductive) and substantive (policy-oriented) elements. Examples of the first category are appeals to precedent or deduction from textual sources; examples of the second type of argument are references to the purpose of constitutional provisions (teleological reasoning) or equity arguments. The way these elements are combined and the relative importance of each element in each legal system differ in ways that may, to a large extent, be seen as emblematic for each system.

Very often, however, balancing-based arguments occupy a

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112. See LASSER, supra note 23; Kennedy, supra note 89, at 1071 (“In the contemporary mode of legal thought, legal interpretation is based on a combination of deductive argument . . . and what is called ‘policy argument’”).

113. For this argument, see LASSER, supra note 23.
special place in this basic division. Balancing and proportionality tests can, in different contexts, be seen as either predominantly substantive, extra-legal arguments that have been formalized to an unusual extent, or as unusually substance-dependent forms of (formal) legal argument. Balancing arguments, in most settings, are relatively open forms of reasoning, incorporating such contextual elements as “interests,” “circumstances” or “factors” to be weighed. The significance of this “openness,” however, will vary among different legal systems and cultures. A judge using the language of balancing may be signaling that she is engaged in “extra”- “non-legal” practical reasoning, weighing costs and benefits the way an ordinary rational decision maker might. References to balancing, in this sense, can be seen as acknowledgments of the limitations of ‘law’ in dealing with difficult cases.

Alternatively, by actually saying that they are balancing – something that their audience may suspect judges will be doing anyway – courts may be signaling their desire to channel general practical reason through specifically legal or formal constraints. Many courts, for example, make elaborate attempts to show that their balancing in judicial opinions is different from ordinary, “all things considered” practical reasoning. The U.S. Supreme Court has formulated a wide variety of different ‘balancing tests’ that it presents as heavily structured forms of reasoning to be applied – as the “law” – in subsequent cases. And in Europe, the ECHR often structures its judgments under various headings that systematically address different parts of its balancing inquiry.

Debates on the faults and merits of balancing often follow the

114. See, e.g., Kennedy, supra note 89, at 1073 (on the “typification or ritualization” of legal policy argument). See also LASSER, supra note 23, at 64 passim (on the formal nature of American “multi-part” (balancing) tests).

115. Cf. LASSER, supra note 23, at 78 passim. One particularly prominent manifestation of the formalization of reasoning in the US is the scheme of “tiered scrutiny.” This specific form of classifying cases for the purposes of constitutional analysis has been argued to offer a “formal façade” and a “somewhat artificial air of precision” to value judgments. See Calvin R. Massey, The New Formalism: Requiem for Tiered Scrutiny, 6 U. PA. J. CONST. L. 945, 980-81 (2004).

form/substance division sketched out here. Thus, we see balancing practices being criticized both as overly rigid and formal, and as too heavily substantive and political. What is important for the purposes of this article, is not the substance of these defenses and critiques, but rather the point that a methodology for the comparative analysis of judicial balancing must be able to encompass both perspectives. A reference to balancing may, depending on the setting, be either an explicit abandonment of the ideals of legal formality, or an explicit effort to stretch legal formality as far as it can go. Furthermore, in both cases, what judges try to signal may be either very controversial or accepted practice; the distinction is another dimension that comparative research should be able to include.

These observations have two primary consequences for the comparative study of judicial balancing. First, it is important that analysis of balancing capture the two dimensions of form and substance, and bring into focus differences in the relative contributions from each element in different legal systems and cultures. Because of the unique way in which balancing arguments fuse formal and substantive elements, doing so in practice is likely to be more complicated than in the study of alternative legal arguments. Second, the greater the predominance of formal elements in balancing, the more bound up balancing references will be with posited law and doctrine, and vice-versa. This correlation has a direct

117. See, e.g., David L. Faigman, Madisonian Balancing: A Theory of Constitutional Adjudication, 88 NW. U. L. REV. 641, 651 (1994) ("The [Supreme] Court has employed balancing with a formalistic certainty that perverts the elegance of the method"); Coffin, supra note 83, at 39 (wondering whether modern tendencies in balancing do not represent "a return to the oracular or formal style" of judicial reasoning).


impact on the question of “scope” of comparison, or the relative importance of context, identified at the beginning of this article, because the more formalized balancing becomes, the more relevant context will be to its understanding.120

D. Conclusion

References to balancing will often have to be located within different categories of legal thought. Part IV has relied on the examples of doctrinal categories and labels and of the form/substance divide to show how these ambiguities, or dualities, complicate comparative analysis. Just as with the explicit appeals of balancing to universal values – discussed in Part III – the ambiguities analyzed here too exert an important push towards emphasizing similarity. Awareness of these complications should provide a welcome clarification to the understanding of claims for universal qualities in balancing practices.

V. Conclusion: Balancing the Global and the Local

Comparative law scholarship is continuously faced with the dilemmas involved in trying to identify the global and the local, the universal, and the particular, in law and legal culture. This article has argued, that the comparative study of judicial balancing is to an even greater extent subject to these dilemmas because of a series of basic ambiguities and dualities inherent in the language of balancing. When it comes to balancing, much would seem to favor the perspective of the universal. Factors such as closeness to the conceptual foundations of functionalist modes of comparative law; intuitive connections to ideals of rationality, reasonableness and of procedural and substantive fairness that are thought to transcend the local; and –most importantly – the sheer volume and scope of very similar-sounding references to balancing found all over the world, would seem to strongly push in this direction.

This article has tried to show, however, that each of these links to universality creates its own complexities, as the ties between balancing and “functionalism,” “rationality” or “fairness” are understood very differently in different legal systems and cultures.

120. Cf. Ugo Mattei, The Rise and Fall of Law and Economics, 64 MD. L. REV. 220, 235 (2005) (“the less a legal approach is positivistic and context-specific the more it circulates”).
The "push towards the universal" that these connections exert, must, therefore, be qualified to a significant extent.

This article has also highlighted a second dimension to the problematic quality of balancing as a topic in comparative law; the fact that balancing references frequently transcend familiar categories of legal thought. Intriguingly, it may well be that many of these basic ambiguities are the very foundation of the overwhelming contemporary appeal of balancing – an issue that lies beyond the scope of this article.121 What is clear, however, is that in terms of comparative law methodology, these ambiguities create significant problems for finding common terms of reference.

As balancing more and more often comes to be seen as emblematic for entire legal cultures, determining what Annelise Riles has called its "local meaning" will become ever more important.122 Of course, such a local meaning may be partially built around shared needs, understandings, histories and contexts, but it has, first and foremost, a specific local significance.123 Looking for the local meaning of the argument of balancing in constitutional legal discourse leaves open all the possibilities that this article identified as relevant; balancing references may code for both a mix of different ideas expressed in very similar ways and similar ideas expressed in slighty – but potentially significantly – different ways.

Perspectives on balancing that focus too heavily on the universal, such as David Beatty’s view of proportionality as a “universal rule of law,” have already come under fire for not telling “the whole story” about different systems. These critiques, however, have so far emphasized elements such as the fact that balancing and proportionality will often “co-exist with attention to historically specific aspects of national constitutions” or that “the way in which balancing is done will differ depending on a society’s history and

121. Two elements of circumstantial support for this claim may be adduced here – first, Thomas Grey’s description of “legal pragmatism,” a line of thought potentially very closely connected to balancing: “Pragmatists see law as both policy and principle, both wealth maximization and interpretation, both detached scientific tool sharpening and engaged cultural immersion.” Thomas C. Grey, Freestanding Legal Pragmatism, 18 CARDOZO L. REV. 21, 26 (1996). Second, Peter Westen’s argument that the enduring appeal of “equality” has to be found in this concept’s substantive “emptiness.” See Peter Westen, The Empty Idea of Equality, 95 HARV. L. REV. 537 (1982).
122. Riles, supra note 25, at 241.
123. This could be a local meaning against the background of a “globalization of legal thought.” Cf. Kennedy, supra note 9.
expectations concerning the relative importance not only of individual rights and social interests, but also of the role of courts and legislatures."\(^{124}\) By underscoring the suggestion that the very idea of balancing itself has different meanings in different legal systems and cultures, this preliminary study should contribute to the development of a richer, fuller perspective on the legitimizing force of a type of argument on which much of modern judicial practice in the field of fundamental rights has come to rest.