

Proportionality and the Rule of Law

**Rights, Justification,
Reasoning**



**Edited by Grant Huscroft, Bradley W. Miller,
and Grégoire Webber**

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Proportionality And The Rule Of Law Rights Justification Reasoning

Thomas Poole



Proportionality And The Rule Of Law Rights Justification Reasoning:

Proportionality and the Rule of Law Grant Huscroft, Bradley Wayne Miller, Grégoire Charles N. Webber, 2014 To speak of human rights in the twenty first century is to speak of proportionality Proportionality has been received into the constitutional doctrine of courts in continental Europe the United Kingdom Canada New Zealand Israel South Africa and the United States as well as the jurisprudence of treaty based legal systems such as the European Convention on Human Rights Proportionality provides a common analytical framework for resolving the great moral and political questions confronting political communities But behind the singular appeal to proportionality lurks a range of different understandings This volume brings together many of the world s leading constitutional theorists proponents and critics of proportionality to debate the merits of proportionality the nature of rights the practice of judicial review and moral and legal reasoning Their essays provide important new perspectives on this leading doctrine in human rights law

Handbook of Legal Reasoning and Argumentation Giorgio Bongiovanni, Gerald Postema, Antonino Rotolo, Giovanni Sartor, Chiara Valentini, Douglas Walton, 2018-07-02 This handbook addresses legal reasoning and argumentation from a logical philosophical and legal perspective The main forms of legal reasoning and argumentation are covered in an exhaustive and critical fashion and are analysed in connection with more general types and problems of reasoning Accordingly the subject matter of the handbook divides in three parts The first one introduces and discusses the basic concepts of practical reasoning The second one discusses the general structures and procedures of reasoning and argumentation that are relevant to legal discourse The third one looks at their instantiations and developments of these aspects of argumentation as they are put to work in the law in different areas and applications of legal reasoning

The Rule of Law and Automated Decision-Making Markku Suksi, 2023-07-24 The book presents observations concerning automated decision making from a general point of view at the same time as it analyses the manner in which praxis in some jurisdictions has evolved as concerns automated decision making and how the requirements that are placed by the legal orders on it are formulated The principle of the rule of law should apply in the context of automated decision making of public authorities just as much as when the decision makers are physical persons In sync with increasing automatization of decision making in public authorities problematizing questions about the appropriate legal basis for algorithmic decision making have started emerge How should the principle of the rule of law apply within the area of automated decision making how should automated decision making be regulated so that it satisfies the requirements created by the principle of the rule of law and how should the principle of the rule of law be made concrete in decision making that is based on algorithms The proposal for an AI Act launched by the European Commission in April 2021 including an identification of high risk uses of algorithmic techniques raises further questions concerning practices and interpretations related to automated decision making The state based on the rule of law proceeds from the maxim that public powers are exercised within a legal frame that makes the exercise of public powers foreseeable in light of

legal norms Also a state based on the rule of law requires that the contents of the exercise of public powers is regulated by legal norms which means that the citizens must be able to know everything that is relevant about how the powers will be exercised not only who it is that will exercise the powers Because of rules and principles of this kind including non discrimination and proportionality the exercise of powers will not become arbitrary

The Judge and the Proportionate Use of Discretion Sofia Ranchordás, Boudewijn de Waard, 2015-06-12 This book examines different legal systems and analyses how the judge in each of them performs a meaningful review of the proportional use of discretionary powers by public bodies Although the proportionality test is not equally deep rooted in the literature and case law of France Germany the Netherlands and the United Kingdom this principle has assumed an increasing importance partly due to the influence of the European Court of Justice and European Court of Human Rights In the United States different standards of judicial review are applied to review arbitrary and capricious agency discretion However do US judges achieve a similar result to the proportionality or reasonableness test Drawing together a selection of key experts in the field this book analyses the principle of proportionality in the judicial review of administrative decisions from different perspectives The principle is first examined in the context of recent developments in the literature and case law including the inevitable EU influence then light shall be shed on the meaning of this principle in the specific case law of the European Court of Justice and European Court of Human Rights Finally the authors go on to explore the ways in which US judges consciously sanction the disproportionate and or unreasonable use of agency discretion In the legal systems where the proportionality test plays a very limited role Ranchordás and de Waard also try to clarify why this is the case and look at what alternative solutions have been found This book will be of great interest to scholars of public and administrative law and EU law

Interconnected Intellectual Property Graeme W. Austin, Andrew F. Christie, Andrew T. Kenyon, Megan Richardson, 2020-03-12 A timely examination of fundamental issues in intellectual property IP law with international perspectives looking across regimes jurisdictions disciplines and professions

Constitutionalism and the Paradox of Principles and Rules Marcelo Neves, 2021-04-29 This title offers a unique approach to constitutionalism focusing on the paradoxical relationship between principles and rules from the perspective of systems theory It presents a critical counterpoint to Ronald Dworkin's principle based theory and in particular to Robert Alexy's idea of optimizing balancing Instead of ceding to the compulsion of an optimizing balancing it suggests the possibility of a comparative or at least satisficing balancing considering the precariousness of legal rationality The book also reverses Dworkin's metaphor associating rules with Hercules and principles with the Hydra It takes constitutional principles seriously criticizing the abuse of principles by the legal and constitutional doctrine and practice and pointing out their relationship of complementarity and tension with rules Finally it offers an alternative model to the recent legal and constitutional theory on the basis of certain assumptions of the systems theory It deals especially with the paradox of the circular and reflexive relationship between constitutional principles and rules the former refers primarily to the openness and adequacy of legal

system to society and thus to substantive argumentation the second refers primarily to the closure and consistency of legal system and thus to formal argumentation

Reason of State Thomas Poole, 2015-07-20 This historically embedded treatment of theoretical debates about prerogative and reason of state spans over four centuries of constitutional development Commencing with the English Civil War and the constitutional theories of Hobbes and the Republicans it moves through eighteenth century arguments over jealousy of trade and commercial reason of state to early imperial concerns and the nineteenth century debate on the legislative empire to martial law and twentieth century articulations of the state at the end of empire It concludes with reflections on the contemporary post imperial security state The book synthesises a wealth of theoretical and empirical literature that allows a link to be made between the development of constitutional ideas and global realpolitik It exposes the relationship between internal and external pressures and designs in the making of the modern constitutional polity and explores the relationship between law politics and economics in a way that remains rare in constitutional scholarship

Constitutionalism Under Extreme Conditions Richard Albert, Yaniv Roznai, 2020-09-24 This book examines the problem of constitutional change in times of crisis Divided into five main parts it both explores and interrogates how public law manages change in periods of extraordinary pressure on the constitution In Part I Emergency Exception and Normalcy the contributors discuss the practices and methods that could be used to help legitimize the use of emergency powers without compromising the constitutional principles that were created during a period of normalcy In Part II Terrorism and Warfare the contributors assess how constitutions are interpreted during times of war focusing on the tension between individual rights and safety Part III Public Health Financial and Economic Crises considers how constitutions change in response to crises that are neither political in the conventional sense nor violent which also complicates how we evaluate constitutional resilience in times of stress Part IV Constitutionalism for Divided Societies then investigates the pressure on constitutions designed to govern diverse multi national populations and how constitutional structures can facilitate stability and balance in these states Part V titled Constitution Making and Constitutional Change highlights how constitutions are transformed or created anew during periods of tension The book concludes with a rich contextual discussion of the pressing challenges facing constitutions in moments of extreme pressure Chapter Public Health Emergencies and Constitutionalism Before COVID 19 Between the National and the International is available open access under a Creative Commons Attribution 4.0 International License via link [springer.com](https://www.springer.com)

Resolving Conflicts between Human Rights Stijn Smet, 2016-11-10 Under the influence of the global spread of human rights legal disputes are increasingly framed in human rights terms Parties to a legal dispute can often invoke human rights norms in support of their competing claims Yet when confronted with cases in which human rights conflict judges face a dilemma They have to make difficult choices between superior norms that deserve equal respect In this high level book the author sets out how judges the world over could resolve conflicts between human rights He presents an innovative legal theoretical account of such

conflicts questioning the relevance of the influential proportionality test to their resolution. Instead, the author develops a novel resolution framework specifically designed to tackle human rights conflicts. The book combines concerted normative theory with profound practical analysis, firmly rooting its theoretical arguments in human rights practice. Although the analysis draws primarily on the case law of the European Court of Human Rights, the book's core arguments are applicable to judicial practice in general. As such, the book should be of great interest to academics, postgraduate students, and legal practitioners in Europe and beyond. The book is particularly suited for use in advanced courses on legal theory, human rights law, and jurisprudence.

Privacy Revisited Ronald J. Krotoszynski Jr., 2016-04-18

Rapid technological change, the advent of Big Data, and the creation of society-wide government surveillance programs have transformed the accessibility of highly personal information. These developments have highlighted the ambiguous treatment of privacy and personal intimacy. National legal systems vouchsafe and define privacy and its first cousin, dignity, in different ways that reflect local legal and cultural values. Yet in an increasingly globalized world, purely local protection of privacy interests may prove insufficient to safeguard effectively fundamental autonomy interests—interests that lie at the core of self-definition, personal autonomy, and freedom. *Privacy Revisited* articulates the legal meanings of privacy and dignity through the lens of comparative law and argues that the concept of privacy requires a more systematic approach if it is to be useful in framing and protecting certain fundamental autonomy interests. The book begins by providing relevant and reasonably detailed information about both the substantive and procedural protections of privacy and dignity in the U.S., Canada, South Africa, the United Kingdom, and among Council of Europe member states. Second, the book explores the inherent tension between affording significant legal protection to the right of privacy or human dignity and securing expressive freedoms, notably including the freedom of speech and of the press. The author then posits that the protection of privacy helps to illuminate some of the underlying social and political values that lead the U.S. to fail to protect privacy as reliably or as comprehensively as other liberal democracies. Finally, the book establishes that although privacy and speech come into conflict with some regularity, it is both useful and necessary to start thinking about the important ways in which both rights are integral to the maintenance of democratic self-government.

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