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# The Rule of Law as a Law of Standards

JAMAL GREENE\*

Justice Antonin Scalia titled his 1989 Oliver Wendell Holmes Lecture at Harvard Law School *The Rule of Law as a Law of Rules*.<sup>1</sup> The lecture posed the sort of dichotomy that has become a familiar feature of Justice Scalia's jurisprudence and of his general approach to judging. On one hand are judges who recognize that the only legitimate means by which they may adjudicate cases in a democracy is to seek to do so through rules of general application.<sup>2</sup> On the other hand are those judges who generally prefer to adopt an all-things-considered balancing approach to adjudication.<sup>3</sup> This latter species of judge is akin, he says, to King Solomon, deciding difficult constitutional questions based on some judge-empowering intuition.<sup>4</sup>

This dichotomy is familiar in both the literature and the case law. In her 1991 *Harvard Law Review* foreword, Kathleen Sullivan memorably distinguished between a "[j]ustice of rules" and a "[j]ustice of standards."<sup>5</sup> A justice of rules prefers to issue legal directives that "bind[] a decisionmaker to respond in a determinate way to the presence of delimited triggering facts."<sup>6</sup> The key word in this formulation is "delimited"—as Sullivan writes, "the rule's force as a rule is that decisionmakers follow it, even when direct application of the background principle or policy [that the rule captures] to the facts would produce a different result."<sup>7</sup> A justice of standards prefers "to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation."<sup>8</sup> Sullivan notes that the distinction in constitutional law between categorical approaches and balancing approaches is "a version of the rules/standards distinction."<sup>9</sup>

It is clear to me, and has been clear to much of the U.S. legal community at least since *Craig v. Boren*,<sup>10</sup> that as a general matter, Justice Stevens is much

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\* Associate Professor of Law, Columbia Law School. © 2011, Jamal Greene. Rosalind Dixon, Jeffrey Fisher, David Fontana, and Elora Mukherjee provided valuable comments and suggestions. I would like to thank Justice John Paul Stevens, for whom I served as a law clerk during the 2006–07 Supreme Court Term. I trust I violate no privilege in remarking that if you don't like Justice Stevens, you just don't like people.

1. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989).

2. *See id.* at 1176–77.

3. *See id.*

4. *See id.* at 1176 ("King Solomon is also supposed to have done a pretty good job, without benefit of a law degree, dispensing justice case-by-case.").

5. Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 121 (1992).

6. *Id.* at 58.

7. *Id.*

8. *Id.*

9. *Id.* at 59.

10. 429 U.S. 190 (1976).

more a justice of standards than a justice of rules.<sup>11</sup> In his concurring opinion in *Craig*, which invalidated an Oklahoma law that distinguished between men and women in setting the drinking age for certain low-alcohol beverages,<sup>12</sup> Justice Stevens departed from the “tiers-of-scrutiny” doctrinal formulation that divided the majority from the dissenters.<sup>13</sup> He wrote:

There is only one Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases. . . .

I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.<sup>14</sup>

Several times after *Craig*, which was decided in his first full Term on the Court, Justice Stevens reiterated his view that the Equal Protection Clause is and should be applied contextually on a case-by-case basis.<sup>15</sup> That view is representative of a broader opposition to adjudication based on one-size-fits-all rules. In his valedictory opinion, dissenting in *McDonald v. City of Chicago*, Justice Stevens wrote that in adjudicating claims to substantive rights under the Due Process Clause, “we have eschewed attempts to provide any all-purpose, top-down, totalizing theory of ‘liberty.’ That project is bound to end in failure or worse.”<sup>16</sup> Ever the common law judge, facts matter to Justice Stevens; for him, a single standard might be applied differently in different factual contexts in order to further the underlying purposes of a given constitutional or statutory

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11. See, e.g., James E. Fleming, “*There Is Only One Equal Protection Clause*”: An Appreciation of Justice Stevens’s Equal Protection Jurisprudence, 74 *FORDHAM L. REV.* 2301, 2301 (“With [his] words [in *Craig*], he served notice that . . . he was to be . . . a ‘justice of standards’ as distinguished from a ‘justice of rules.’” (quoting Sullivan, *supra* note 5)). Sullivan refers to Justice Stevens as Justice Scalia’s “standard-bearing antagonist.” Sullivan, *supra* note 5, at 88.

12. 429 U.S. at 191–92.

13. Justice Brennan’s majority opinion employed what has become known as intermediate scrutiny, see *Craig*, 429 U.S. at 197 (requiring gender classifications to “serve important governmental objectives” and to be “substantially related to achievement of those objectives”), whereas Chief Justice Burger and Justice Rehnquist argued that rational basis review is appropriate, *id.* at 217 (Burger, C.J., dissenting) (“[S]ince eight Members of the Court think the means not irrational, I see no basis for striking down the statute as violative of the Constitution simply because we find it unwise, unneeded, or possibly even a bit foolish.”); *id.* at 217–18 (Rehnquist, J., dissenting) (“I think the Oklahoma statute challenged here need pass only the ‘rational basis’ equal protection analysis . . .”).

14. *Id.* at 211–12 (Stevens, J., concurring).

15. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 800 (2007) (Stevens, J., dissenting) (“The Court’s misuse of the three-tiered approach to Equal Protection analysis merely reconfirms my own view that there is only one such Clause in the Constitution.”); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) (“I have never been persuaded that these so-called [tiers-of-scrutiny] ‘standards’ adequately explain the decisional process.”).

16. 130 S. Ct. 3020, 3100 (2010) (Stevens, J., dissenting) (footnote omitted).

text.<sup>17</sup>

It is easy to caricature this approach as lawless. Indeed, Justice Scalia wrote in *McDonald* that when judges follow Justice Stevens's suggestion that their "own reasoned judgment" guide them in due process cases, it "basically means picking the rights we want to protect and discarding those we do not."<sup>18</sup> A glance outside our borders confirms, however, that many of the world's leading constitutional courts do not view standards-based adjudication, or the judicial balancing that often accompanies it, as inconsistent with the rule of law. To the contrary, many of the world's most respected constitutional courts, including the courts of Canada, Germany, Israel, India, and South Africa, in addition to the European Court of Human Rights and the European Court of Justice, incorporate balancing into forms of proportionality analysis.<sup>19</sup>

As practiced by most of the courts that employ it, proportionality analysis constitutes a formalized approach to balancing; it is not balancing simpliciter. Typically, it asks first whether the rights claimant has made out a *prima facie* case. This is usually quite easily satisfied.<sup>20</sup> The analysis then proceeds through a series of threshold stages that test the legality of government action. We can identify a substantive legality inquiry that addresses whether the government is

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17. See, e.g., *Illinois v. Wardlow*, 528 U.S. 119, 126–27 (2000) (Stevens, J., concurring in part and dissenting in part) (praising the Court for refusing to adopt a *per se* rule governing the permissibility of detaining someone who flees at the sight of a police car); *Karcher v. Daggett*, 462 U.S. 725, 751–61 (1983) (Stevens, J., concurring) (advocating a totality of the circumstances approach in political gerrymandering challenges). One evident exception to Justice Stevens's general preference for standards over rules is his Sixth Amendment jurisprudence. He joined Justice Scalia's majority opinion in *Crawford v. Washington*, which established a bright-line rule that a criminal defendant must be given the opportunity to test all testimonial statements used against him through confrontation. 541 U.S. 36, 68 (2004). More conspicuously, Justice Stevens has led the charge in favor of a bright-line rule requiring every fact that raises a criminal defendant's sentence beyond the statutory maximum for the offense to be found by a jury under a reasonable doubt standard. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); see also *United States v. Booker*, 543 U.S. 220, 243–44 (2005) (applying *Apprendi*'s rule to the federal sentencing guidelines); *Blakely v. Washington*, 542 U.S. 296, 299–301 (2004) (joining Justice Scalia's majority opinion, which applied *Apprendi*'s rule to a state sentencing guidelines scheme). The apparent inconsistency might be explained by arguing—as is fitting, contextually—that constitutional provisions whose structure is more rule-like call for more a rule-based doctrine. That explanation will in some cases be question-begging, but the distinction is most defensible in those cases—involving equal protection and substantive due process—in which Justice Stevens has been most consistently opposed to rules. If any constitutional provisions are meant for a standards-based jurisprudence, they are the exceptionally broad Due Process and Equal Protection Clauses. See *McDonald*, 130 S. Ct. at 3100 n.24 (Stevens, J., dissenting) (arguing that his approach to the Due Process Clause avoids "a rigid, context-independent definition of a constitutional guarantee that was deliberately framed in open-ended terms"); see also ROBERT ALEX, A THEORY OF CONSTITUTIONAL RIGHTS 57 (Julian Rivers trans., 2002) (distinguishing between rules, which "insist that one does exactly as required" unless impossible, and principles, which "require that something be realized to the greatest extent legally and factually possible" and which "lack the resources to determine their own extent in the light of competing principles and what is factually possible" (emphasis added)).

18. *McDonald*, 130 S. Ct. at 3052 (Scalia, J., concurring).

19. VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 60 (2010).

20. See Alec Stone Sweet & Jud Mathews, *All Things in Proportion?: American Rights Doctrine and the Problem of Balancing*, 60 EMORY L.J. (forthcoming 2011) (manuscript at 7), available at <http://ssrn.com/abstract=1569351> ("No important claim will ever be rejected at this stage.").

pursuing a legitimate objective to which its acts are rationally related, and a procedural legality stage that addresses whether it is pursuing that objective through the least rights-infringing among reasonably available means.<sup>21</sup> A final step is often called “balancing in the strict sense,” which entails weighing the legitimate government objective against the burdening of the right, in order to complete the analysis.<sup>22</sup> There is considerable diversity in the extent to which jurisdictions focus on the legality stages of the analysis as compared to the balancing stage.<sup>23</sup>

Proportionality analysis is also commonly described as trans-substantive, meaning it applies across rights adjudication, not just, for example, in equality cases.<sup>24</sup> Even as various jurisdictions necessarily tailor the analysis to different sorts of government acts and different kinds of rights,<sup>25</sup> proportionality analysis remains notionally trans-substantive—there is only one Constitution, it seems to say. That distinguishes proportionality analysis from the tiers-of-scrutiny review that is a familiar feature of American case law. Under standard proportionality formulations, a similar analysis applies across a range of rights, whereas the American approach typically tailors the doctrinal test to the right that has been identified.<sup>26</sup> As a rough cut, we can describe proportionality as an across-the-board form of intermediate scrutiny.<sup>27</sup>

Here is neither the place to defend proportionality analysis as a general

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21. *See id.*

22. *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 75 (2008).

23. *See, e.g.*, Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 384 (2007) (“[I]n Canada, most laws that fail to meet the [proportionality] test do so in the second step, . . . whereas in Germany, the third step has become the most decisive part of the proportionality test.”).

24. *See* DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 160 (2004) (“In all areas of government regulation, no matter the nature of the right or freedom that is alleged to have been violated, and regardless of the personal characteristics of those bringing the case, . . . the test is always the same.”); Sweet & Mathews, *supra* note 20 (manuscript at 12) (“[Proportionality analysis] offers judges the possibility of building trans-substantive coherence, since it can be applied across the board, to virtually all disputes involving rights.”).

25. *See, e.g.*, *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 994, 999–1000 (Can.) (deferring to the government’s conclusion that it had a “reasonable basis” for concluding that its chosen means minimally impaired the claimed right at issue, where the Court considered infringement of the right to be insubstantial); Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 418 (2008) (noting that the German and South African constitutional courts, as well as the European Court of Human Rights, vary the stringency of their proportionality tests with the significance of the right).

26. *See* Sweet & Mathews, *supra* note 20 (manuscript at 9) (“In the United States . . . strict scrutiny is only applied to a small number of rights . . .”); *cf. id.* (manuscript at 45) (arguing that the Court’s tiers-of-scrutiny approach “treat[s] a rights provision as either *de facto* absolute or *de facto* without force”).

27. In referring to intermediate scrutiny, I refer to the vast salmagundi of doctrinal tests that fall between the rational basis standard of *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487–88 (1955), and the strict scrutiny test specified in cases involving governmental racial discrimination, *e.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). I do not mean the specific intermediate scrutiny formulation used in sex discrimination cases since *Craig*.

approach to judging, nor to litigate whatever challenges may inhere in applying that analysis as it has been conducted around the world to the American context.<sup>28</sup> What I do wish to highlight, however, are the ways in which the distinctive features of proportionality analysis, and indeed the features that make proportionality analysis consistent with the rule of law, dovetail with much of the rights jurisprudence of Justice Stevens.<sup>29</sup> Proportionality analysis is interesting not because it contemplates balancing in the strict sense, which I presume to be a feature of all of the world's constitutional courts, but because it does so only after requiring the government to justify its actions by reference to a limited set of objectives and procedural options.<sup>30</sup> These distinctive features aim for rule of law in the strictest sense—that is, the sense in which we mean to reduce the discretion of the entire government, and not just of judges.<sup>31</sup>

First, consider what I have called substantive legality. In many proportionality jurisdictions the significance of the governmental objective is not simply pro forma or hypothetical, as in the rational basis test of *Williamson v. Lee Optical*.<sup>32</sup> Rather, that objective must sound in a constitutional register. Thus, in Canada, whose *Oakes* test<sup>33</sup> is much imitated internationally,<sup>34</sup> the reason for the government's rights violation must "relate to concerns which are pressing and substantial in a free and democratic society."<sup>35</sup> The particular language of the Canadian formulation derives from the language of section 1 of the Charter

28. Compare Sweet & Mathews, *supra* note 20 (manuscript at 74–82) (urging the Supreme Court to develop an American version of proportionality analysis), with Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367, 399 (2009) (arguing that proportionality analysis is incompatible with American skepticism of judges).

29. Justice Stevens has not to my knowledge offered any explicit endorsement of proportionality analysis. Justice Breyer has referred approvingly to "proportionality" in ways that make clear his familiarity with the transnational discourse on the subject. See *District of Columbia v. Heller*, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting); STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW* 163–64 (2010).

30. See *supra* notes 21–23 and accompanying text.

31. David Beatty has called proportionality "the ultimate rule of law" because he believes it "is an integral, indispensable part of every constitution that subordinates the system of government it creates to the rule of law." BEATTY, *supra* note 24, at 163. But see Richard A. Posner, *Constitutional Law from a Pragmatic Perspective*, 55 U. TORONTO L.J. 299, 301 (2005) (contesting Beatty's claim of the universality of proportionality).

32. See *Williamson*, 348 U.S. at 487–89.

33. *R. v. Oakes*, [1986] 1 S.C.R. 103, 135–40 (Can.).

34. See Sujit Choudhry, *So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1*, 34 SUP. CT. L. REV. (2d) 501, 502 (2006) ("The citation of *Oakes* by courts in Antigua and Barbuda, Australia, Fiji, Hong Kong, Ireland, Israel, Jamaica, Namibia, South Africa, the United Kingdom, Vanuatu and Zimbabwe has made *Oakes* one of the central models for rights-based constitutional adjudication . . ." (footnotes omitted)).

35. *Oakes*, 1 S.C.R. at 138. The German Constitutional Court does not require more than a "legitimate purpose" at what I have referred to as the legality stage of the analysis, but the importance of the governmental purpose is assessed at the balancing stage. See Grimm, *supra* note 23, at 388. Still, as Donald Kommers writes, in contrast to the United States, "[b]ecause rights in the Basic Law are circumscribed by duties and are often limited by objectives and values specified in the constitutional text, the Constitutional Court receives considerable guidance in determining the legitimacy of a state

of Rights and Freedoms, which subjects rights guaranteed therein to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>36</sup> Among the values the Supreme Court of Canada has said are sufficiently "pressing and substantial" are "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society."<sup>37</sup>

Justice Stevens's view of which governmental objectives count as legitimate has long been both demanding and unorthodox from the perspective of American jurisprudence. In his dissenting opinion in *Bowers v. Hardwick*, which upheld Georgia's anti-sodomy law,<sup>38</sup> he argued that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice."<sup>39</sup> Justice White's majority opinion countered that assertion with the memorable line, "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."<sup>40</sup> Justice White might be correct, but he misses the point, and in so doing he helps to make Justice Stevens's argument. It is precisely because so many laws have (or could be said to have) substantially moral elements that some justification beyond morality is necessary to confer legality upon governmental action. That additional justification must be grounded in governmental objectives that do not simply assume away the problem of rights infringement—in a constitutional democracy that protects all of its constituent subjects, the government's aim cannot be to discriminate.<sup>41</sup>

Consider also Justice Stevens's views on religious establishment, which are more skeptical of the government than those of perhaps any other Justice in the Court's history.<sup>42</sup> In *Webster v. Reproductive Health Services*, for example, the Court considered, among other things, whether a Missouri statute could permis-

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purpose." DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 46 (2d ed. 1997).

36. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, § 1 (U.K.).

37. *Oakes*, 1 S.C.R. at 136.

38. 478 U.S. 186, 189 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

39. *Id.* at 216 (Stevens, J., dissenting).

40. *Id.* at 196 (majority opinion).

41. See *Romer v. Evans*, 517 U.S. 620, 634 (1996) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." (alteration in original) (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973))); *Mathews v. Lucas*, 427 U.S. 495, 520 n.3 (1976) (Stevens, J., dissenting) ("[P]ure discrimination is most certainly not a 'legitimate purpose' for our Federal Government . . .").

42. Cf. Michael Stokes Paulsen, *Counting Heads on RFRA*, 14 CONST. COMMENT. 7, 17 (1997) ("Stevens . . . is implacably hostile to religion, in a way that seems to go beyond jurisprudence.").

sibly state in its preamble that human life begins at conception.<sup>43</sup> Dissenting from a holding allowing the preamble to stand,<sup>44</sup> Justice Stevens wrote for himself alone that the language violated the First Amendment's Establishment Clause because it "serves no identifiable secular purpose."<sup>45</sup> Justice Stevens was also the sole Justice who believed that the Religious Freedom Restoration Act, which sought to require courts to apply a strict scrutiny standard to claims of infringement on religious liberty,<sup>46</sup> violated the Establishment Clause because it constituted a "governmental preference for religion, as opposed to irreligion."<sup>47</sup>

Finally, take Justice Stevens's distinction between forward-looking affirmative action plans that ostensibly benefit society as a whole, the constitutionality of which he generally supports, and backward-looking plans designed to compensate for past harm, which he has generally found wanting.<sup>48</sup> That view, like his view on religious establishment and his disapproval of public morality as a legitimate governmental interest, is nontraditional, and has contributed to the erstwhile perception of Justice Stevens as a judicial maverick. But Justice Stevens's articulation of the values that pass muster as governmental objectives in rights-infringing cases overlap substantially with the values the Supreme Court of Canada has concluded are "pressing and substantial."<sup>49</sup> In each of the aforementioned cases, we can reframe Justice Stevens's concern as a demand that the government justify its coercive activities in a way that presumptively treats each member of society—gay or straight, religious or atheist, black or white—with equal concern.<sup>50</sup> As he wrote in *McDonald*, the "conceptual core" of the Due Process Clause "safeguards, most basically, 'the ability independently to define one's identity,' 'the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny,' and the right to be respected as a human being."<sup>51</sup> Significantly, that core not only

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43. 492 U.S. 490, 504–07 (1989).

44. *Id.* at 507.

45. *Id.* at 566–67 (Stevens, J., concurring in part and dissenting in part).

46. See *City of Boerne v. Flores*, 521 U.S. 507, 515–16 (1997).

47. *Id.* at 537 (Stevens, J., concurring).

48. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 601–02 (1990) (Stevens, J., concurring) (endorsing the Court's "focus on the future benefit, rather than the remedial justification" of government decisions involving racial classifications), *overruled by* *Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989) (Stevens, J., concurring in part and concurring in the judgment) ("I believe the Constitution requires us to evaluate our policy decisions—including those that govern the relationships among different racial and ethnic groups—primarily by studying their probable impact on the future."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 313 (1986) (Stevens, J., dissenting) ("Rather than analyzing a case of this kind by asking whether minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board's action advances the public interest in educating children for the future.").

49. See *supra* notes 35, 37 and accompanying text.

50. See Christopher L. Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, 74 *FORDHAM L. REV.* 2177, 2184 (2006).

51. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3101 (2010) (Stevens, J., dissenting) (citations omitted).



defines substantive individual rights under the Fourteenth Amendment, but is a fundamental constraint on the government's objectives when it acts in a way that implicates those rights: the requirement of legality is what prevents substantive due process from being an oxymoron.<sup>52</sup>

The second element of legality I have referred to as procedural. In Canada this takes the form of the so-called minimal impairment test: a challenged law must impair a protected right "as little as is reasonably possible."<sup>53</sup> For the German Constitutional Court, the means chosen to achieve a law's purpose must be necessary, in the sense that it has the least restrictive effect on a constitutional value, as compared to other measures that may achieve the same objective.<sup>54</sup> Necessary does not mean necessary; the court gives some deference to the legislature in choosing appropriate means.<sup>55</sup> American jurists are familiar with this kind of means-ends testing, as it is a standard feature of heightened scrutiny analysis.<sup>56</sup>

Justice Stevens has shown a special interest in scrutinizing the basic rationality of the fit between the government's means and its legitimate purposes. The most conspicuous example is his death penalty jurisprudence. In arguing in *Baze v. Rees* that the death penalty is unconstitutional, he did not advance a moral or otherwise essentialist argument but rather argued that capital punishment as actually practiced in the United States—remember, facts matter—is neither necessary nor in some cases sufficient to serve the purposes for which the Court has permitted it (incapacitation, deterrence, and retribution).<sup>57</sup> For Justice Stevens, democratic deliberation must in fact be deliberative when significant rights are at stake. And in *Baze*, he was concerned that

current decisions by state legislatures, by the Congress of the United States, and by this Court to retain the death penalty as a part of our law are the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits.<sup>58</sup>

Likewise, Justice Stevens viewed the specific administration of a three-drug lethal injection protocol that uses a pain-masking paralytic agent as the disturb-

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52. See *id.* at 3090–91 (calling substantive due process "consonant with the venerable 'notion that governmental authority has implied limits which preserve private autonomy,' a notion which predates the founding and which finds reinforcement in the Constitution's Ninth Amendment" (footnote omitted)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring) ("[T]he word 'rational'—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.").

53. *R. v. Edwards Books*, [1986] 2 S.C.R. 713, 772 (Can.).

54. KOMMERS, *supra* note 35.

55. See Grimm, *supra* note 23, at 390.

56. See Sweet & Mathews, *supra* note 20 (manuscript at 41).

57. 553 U.S. 35, 78–81 (2008) (Stevens, J., concurring).

58. *Id.* at 78.

ing result of legislative inertia rather than reasoned argument:

Even in those States where the legislature specifically approved the use of a paralytic agent, review of the decisions that led to the adoption of the three-drug protocol has persuaded me that they are the product of “‘administrative convenience’” and a “stereotyped reaction” to an issue, rather than a careful analysis of relevant considerations favoring or disfavoring a conclusion.<sup>59</sup>

In another sign of Justice Stevens's startling methodological continuity, the language just quoted from *Baze*, which was decided near the end of his tenure on the Court, borrowed directly from the language of his vigorous dissenting opinion in *Mathews v. Lucas*,<sup>60</sup> which was argued twenty-five days after his investiture. The decision upheld a presumption of dependency under the Social Security Act that distinguished between “legitimate” and “illegitimate” children.<sup>61</sup> For Justice Stevens, this unfair classification could not be justified on the stated basis of “administrative convenience” because it was both overinclusive and underinclusive.<sup>62</sup> He wrote: “I believe an admittedly illogical and unjust result should not be accepted without both a better explanation and also something more than a ‘possibly rational’ basis.”<sup>63</sup> This was not a call for the application of strict scrutiny or some other categorical doctrinal device, but simply a demand for the government to offer something beyond conclusory bromides when important individual interests are at stake and have not had appropriate airing in the democratic process. We see those themes again in his *McDonald* opinion. Referring by way of example to the Court's refusal to establish a right to physician-assisted suicide, he wrote: “If a particular liberty interest is already being given careful consideration in, and subjected to ongoing calibration by, the States, judicial enforcement may not be appropriate.”<sup>64</sup> In contrast, however, Justice Stevens explained that “[the Court] ha[s] long appreciated that more ‘searching’ judicial review may be justified when the rights of ‘discrete and insular minorities’—groups that may face systematic barriers in the political system—are at stake.”<sup>65</sup>

Legality and proportionality in the strict sense (in other words, balancing) are natural, if not obvious, allies, and there is sense in their pairing within the jurisprudence of so many courts, and of Justice Stevens. According to Moshe Cohen-Eliya and Iddo Porat, in Germany—where proportionality is said to have

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59. *Id.* at 75.

60. 427 U.S. 495, 516, 520 (1976) (Steven, J., dissenting).

61. *Id.* at 497–99, 516 (majority opinion).

62. *See id.* at 517–18 (Stevens, J., dissenting).

63. *Id.* at 519–20.

64. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3101 (2010) (Stevens, J., dissenting).

65. *Id.* (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)).

originated<sup>66</sup>—balancing was, as it is in the United States,<sup>67</sup> associated with antiformalism, whereas the legalistic elements of proportionality analysis sat “within the framework of mainstream German formal thought.”<sup>68</sup> But justices of standards, who tend to support balancing, may well view a commitment to legality as their principal form of discipline. Proportionality emerges from a tradition in which, in contrast to the narrative Justice Scalia tends to push,<sup>69</sup> the concern is that judges will be tempted to support the sovereign, not individual rights claimants.<sup>70</sup> Proportionality, then, is a strategy for incorporating the rule of law into a system of workable government: it is, in a sense, a law of standards.

It is fitting that *McDonald* was the case in which Justice Stevens offered the most complete articulation of his judicial philosophy. *McDonald* extended *District of Columbia v. Heller*’s holding that the Second Amendment protects an individual right to keep and bear arms for self-defense to laws passed by state and local governments.<sup>71</sup> Justice Scalia’s majority opinion in *Heller* rejected an interest-balancing approach in the clearest terms,<sup>72</sup> and Justice Alito’s plurality opinion in *McDonald* reaffirmed that rejection.<sup>73</sup> But *Heller* and *McDonald* underscore the perils of rules-based jurisprudence. After two lengthy opinions, we still do not know the standard of review for laws that arguably infringe on Second Amendment rights. What we do know is that whatever rule the Court was announcing in *Heller* and reiterating in *McDonald* is one that invalidates a handgun ban in the District of Columbia, but is not bothered by laws regulating the carrying of guns in sensitive areas like schools and government buildings, the commercial sale of firearms, or the denial of guns to former convicts or the mentally ill.<sup>74</sup>

From a rules perspective, this regime is difficult to understand. The articulable rule that could produce this jurisprudence is elusive, unless it is a rule of (dare I say, Solomonic) common sense. As Justice Stevens wrote many years ago in an entirely different case, “[I]ike many bright-line rules, the categorical rule established in this case is only ‘categorical’ for a page or two in the U.S.

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66. Grimm, *supra* note 23 (“From Germany the principle of proportionality spread to most other European countries with a system of judicial review, and to a number of jurisdictions outside Europe.”); Sweet & Mathews, *supra* note 22, at 98–104 (describing the early development of proportionality analysis in Germany in the late eighteenth century).

67. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 949 (1987).

68. Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT’L J. CONST. L. 263, 275 (2010).

69. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in part and dissenting in part).

70. See Cohen-Eliya & Porat, *supra* note 68, at 273–74 (discussing the link between proportionality in the exercise of police power and natural rights).

71. *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3026 (2010) (plurality opinion).

72. See *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008).

73. *McDonald*, 130 S. Ct. at 3047.

74. See *id.*; *Heller*, 554 U.S. at 626–27.

Reports.”<sup>75</sup> It is not surprising that a jurisprudence of gun rights would produce a set of common-sense exceptions to full enforcement, given the sovereign’s existential interest in retaining its monopoly over the lawful use of violence. Balancing is inevitable in a well-functioning democracy, and in no other area of law is that more evident. Judges may conduct that balancing forthrightly, and with serious attention to substantive and procedural constraints on government action, as many forms of proportionality analysis require. Or they may do so through rules that (necessarily) either under-protect rights or find themselves bent into uncouth shapes. For Justice Stevens, the choice has long been pellucidly clear.<sup>76</sup>

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75. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1067 (1992) (Stevens, J., dissenting).

76. *Cf. McDonald*, 130 S. Ct. at 3118 (Stevens, J., dissenting) (arguing that “subjective judgments” may be “buried” in Justice Scalia’s approach, but that with his own approach, “the judge’s cards are laid on the table for all to see, and to critique”).