The second edition of Comparative Constitutional Law updates the first edition by including material on important recent developments. The second edition expands the treatment “dialogic” forms of judicial review, presenting material on the British Human Rights Act, and recent scholarly analyses of these forms of review. It incorporates a substantial discussion of the treatment of emergencies in the world’s constitutional systems, focusing on the extent to which constitutions regulate government operations in emergencies by requiring executives to obtain authorization from legislatures or, in contrast, do so through direct judicial supervision of executive action. The old chapter on courts and constitutionalism has been reorganized and expanded, with new material on the political roles of constitutional courts and on proportionality analysis in constitutional law. The first edition’s discussion of social and economic rights is expanded to include the decisions of the South African C...
Proportionality in Action

Having identified proportionality as the main tool for limiting constitutional rights, Aharon Barak explores its four components (proper purpose, rational connection, necessity and proportionality stricto sensu) and discusses the relationships between proportionality and reasonableness and between courts and legislation. He goes on to analyse the concept of deference and to consider the main arguments against the use of proportionality (incommensurability and irrationality). Alternatives to proportionality are compared and future developments of proportionality are suggested.

Proportionality in Asia

This comparative study of the constitutional jurisprudence of three East Asian jurisdictions investigates how the rulings of the Constitutional Court of Taiwan, the Constitutional Court of Korea and the Hong Kong Court of Final Appeal have converged. The unique political contexts of all three jurisdictions have led to strong courts using the structured proportionality doctrine and innovative constitutional remedies to address human rights issues. Hong Kong, Taiwan, and South Korea have the only courts in Asia that regularly use a structured four-stage Proportionality Analysis to invalidate laws, and routinely apply innovative constitutional remedies such as Suspension Orders and Remedial Interpretation to rectify constitutionally flawed legislation. This volume explores how judges in these areas are affected by politics within their different constitutional systems. The latest developments in Asian constitutional law are covered, with detailed analysis of key cases.

Proportionality Balancing and Constitutional Governance

Constitutional law has been and remains an area of intense philosophical interest, and yet the debate has taken place in a variety of different fields with very little to connect them. In a collection of essays bringing together scholars from several constitutional systems and disciplines, Philosophical Foundations of Constitutional Law unites the debate in a study of the philosophical issues at the very foundations of the idea of a constitution: why one might be necessary; what problems it must address; what problems constitutions usually address; and some of the issues raised by the administration of a constitutional regime. Although these issues of institutional design are of abiding importance, many of them have taken on new significance in the last few years as law-makers have been forced to return to first principles in order to justify novel practices and arrangements in their constitutional orders. Thus, questions of constitutional 'revolutions,' challenges to the demands of the rule of law, and the separation of powers have taken on new and pressing importance. The essays in this volume address these questions, filling the gap in the philosophical analysis of constitutional law. The volume will provoke specialists in philosophy, politics, and law to develop new philosophically grounded analyses of constitutional law, and will be a valuable resource for graduate students in law, politics and philosophy.

The Judge and the Proportionate Use of Discretion

Constitutional Law of the European Union

This thesis presents a phenomenology of deference in proportionality. There is a relatively broad consensus that proportionality balancing as a method for resolving conflicts of fundamental rights in cases of judicial review needs to be coupled with some kind of doctrine of deference. Although there is a significant literature on many aspects of this question, thus far one of the more basic ones, namely what deference looks like in cases of proportionality, has received less attention. In order to analyze this question, this thesis analyses the case law of four courts – the German Federal Constitutional Court, the Supreme Court of Canada, the Constitutional Court of South Africa and the European Court of Human Rights – with regard to three sets of rights – freedom of expression, the right to privacy and freedom of religion. From this analysis a number of points emerge: In the first place it shows that deference in balancing takes place through adapting the normative and empirical arguments required by that exercise to the institutional limitations attendant to courts. Further, we find a variety of similarities and differences in how deference operates between different rights and different courts. Here we can observe that proportionality is often constructed in a similar fashion among the same right between the different courts. This means that, the way in which courts balance is, often, very similar in Canada, South Africa, Germany and the ECtHR. We can further observe, that there are differences in the practice of balancing between the different rights. The normative and empirical questions that occupy
A Critique of Proportionality and Balancing

Proportionality and Deference

This book of essays examines the meaning of proportionality in a number of different contexts. Proportionality typically, when applying PA, the judiciary would ensure that (i) the State is pursuing a legitimate objective; (ii) the governmental measure undertaken is rationally connected to the stipulated policy objective; and (iii) the right-derogation is no more than necessary to achieve those stated goals—

Philosophical Foundations of Constitutional Law

The principle of proportionality in the case law of the Constitutional Court of the Republic of Slovenia nudges with paternalistic aims pose special legal problems in liberal States. Surprisingly, the discussion on regulation-by-nudging has not focused on the constitutional limits to nudging. Although the property rights of firms potentially infringed by nudging measures are dealt with in the literature and by (international) courts (eg the tobacco cases), the potential infringement of the rights of those being nudged is neglected. But judges may at one point be confronted with a nudge regulation challenged by the individuals being nudged; and even before reaching a court, the legality of nudging should be scrutinised by legislators. I explore the legal limits of paternalistic nudging under the German Constitution, especially the right to freedom of action and self-determination under Art. 2 (1) German Basic Law, judging different types of nudges by the proportionality principle. The analysis can be extended to other constitutions as well. At issue is the question of how much paternalistic nudging and what types of paternalistic nudges the fundamental rights protection in Germany permits. The proportionality analysis can be applied, mutatis mutandis, to non-paternalistic nudges (targeting externalities and public goods/bads).

Legitimate Expectations and Proportionality in Administrative Law

Proportionality as a Remedial Principle

This book offers a comprehensive critique of the principle of proportionality and balancing as applied to human and constitutional rights.

Proportionality and Fair Taxation

A comparative and empirical analysis of proportionality in the case law of six constitutional and supreme courts.

Proportionality and Facts in Constitutional Adjudication

This book offers one of the rare empirical studies on the different meanings of proportionality as part of a global constitutional discourse. It develops and applies a theoretically informed comparative methodology for the study of differences in the use of legal transfers. Beyond the transplant versus culture controversy, it enriches our understanding of the relationship between law and its social context. Beyond the common law and civil law cleavage, it provides an in-depth comparison of French, English and Greek judicial review, rendering some core features of these systems accessible to non-initiated readers. The last part of the book provides insights as to the different visions of Europe underlying different phases of European integration and thus enriches our understanding of the process of integration through law.
Proportionality, Balancing, and Rights

For a judiciary in a democracy, dispensing justice is not only about doing justice, but also about showing that justice is being done; it is about giving reasons and creating a “culture of justification”. The question becomes how to nurture such a culture. A number of liberal democratic jurisdictions have answered this question in part with the adoption of the multi-step method of evaluating the constitutionality of legislative infringements on fundamental rights widely known as Proportionality Analysis. Under Proportionality Analysis courts must engage in a structured process of reasoning. This book deals with Gender Justice and Proportionality Analysis in India. The author argues that the Supreme Court of India should consider adopting Proportionality Analysis for the adjudication of the fundamental right to sex equality in Indian courts. The book includes an analysis of Canadian and South African Proportionality Analysis and makes some suggestions on how an Indian Proportionality Analysis could be generated using this comparative investigation. Additionally, the book proposes ways of applying the effects of socio-political context on doctrine, as well as doctrine’s interpretive impact on adjudicated outcomes for gender, thus making a contribution to feminist jurisprudence. Finally, the author analyses Indian gender equality jurisprudence, demonstrating the inadequacies of the current doctrinal framework for achieving the goal of substantive gender equality and suggesting ways in which an Indian Proportionality Analysis might be fashioned to address these inadequacies.

A novel examination of the gender situation in India in comparative perspective, this book will be of interest to academics in the field of Gender Studies, Asian and Comparative Law and South Asian studies.

Gender Justice and Proportionality in India

This first-of-its-kind volume surveys twenty constitutional judges who ‘towered’ over their peers, exploring their complexities and flaws.

Proportionality in Australian Constitutional Law

One of the hallmarks of the present era is the discourse surrounding Human Rights and the need for the law to recognise them. Various national and supranational human rights instruments have been developed and implemented in order to transition society away from atrocity and callousness toward a more just and inclusive future. In some countries this is done by means of an overarching constitution, while in others international conventions or ordinary legislation hold sway. Contract law plays a pivotal role in this context. According to many, this is done through the much-debated ‘civilising mission’ of the contract, a notion which itself constitutes the canon of the Western liberal principle of ‘civilised economy’. The movement away from the belief in the absolute freedom of contract, which reached its zenith in the nineteenth century, to the principles of fairness and justice that underpin contract law today, is often deemed to be a testament to this civilising influence. Delving into the interplay between human rights policies, constitutional law, and contract law from both theoretical and practical perspectives, this first volume of a two-book collection offers a totally new reappraisal of the subject by gathering a collection of essays written by contract law scholars from Europe, South Africa, Canada, and Australia. Instead of providing the reader with a sterile compilation of positivistic norms and policies on the impact of fundamental rights and constitutional law issues on contract law’s development, the authors build on their personal experience to analyse specific topics related to contracting that include a constitutional dimension. The book fills an important void in comparative law scholarship and in so doing represents the starting point for further debate on the subject.

Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration

This book presents a comparison of the development of legitimate expectations and proportionality in European and English law against the different traditions of administrative law. While these two principles are well established in European law, only in recent years have the English courts sought to integrate them into the common law and have experienced various difficulties in doing so. This book seeks to understand the motivation behind this development, explain why the English courts have been troubled by the principles and suggest how such difficulties can be resolved. It will be of interest to all administrative lawyers, both in practice and in academe. It will also be of interest to EU lawyers, particularly those interested in EU public law.
The need for innovative thinking about alternative constitutional experiences is evident, and readers of Comparative Constitutional Theory will find in its pages a compendium of original, theory-driven essays. The authors use a variety of theoretical perspectives to explore the diversity of global constitutional experience in a post-1989 world prominently marked by momentous transitions from authoritarianism to democracy, by multiple constitutional revolutions and devolutions, by the increased penetration of international law into national jurisdictions, and by the enhancement of supra-national institutions of governance.

Proportionality and Constitutional Culture

The book applies the principle of proportionality to a number of conventional wisdoms in the social sciences, such as in dubio pro reo and the assumption that a crime is always a crime; that you must go to war if instructed to do so. Individuals and states are not obliged to come to the aid of stricken individuals and states. The book is organised in seven chapters, each dealing with a self-standing theme related to proportionality.

The Principle of Proportionality in the Laws of Europe

The principle of proportionality is currently one of the most discussed topics in the field of comparative constitutional law. Many critics claim that courts use the proportionality test as an instrument of judicial self-empowerment. Proportionality and Judicial Activism tests this hypothesis empirically; it systematically and comparatively analyses the fundamental rights jurisprudence of the Canadian Supreme Court, the German Federal Constitutional Court and the South African Constitutional Court. The book shows that the proportionality test does give judges a considerable amount of discretion. However, this analytical openness does not necessarily lead to judicial activism. Instead, judges are faced with significant institutional constraints, as a result of which all three examined courts refrain from using proportionality for purposes of judicial activism.

Proportionality in Law

The book focuses on Robert Alexy's theory of constitutional rights. Alexy systematically presented the theory in his seminal book Theorie der Grundrechte (1985; Engl. translation Theory of Constitutional Rights, 2002) and continued to develop it in numerous subsequent articles. Arguably still the most influential theory of constitutional rights, it has found widespread academic support, as well as recognition in several constitutional jurisdictions. On the other hand, it has also been the object of considerable criticism. The aim of this book is to outline the central aspects of Alexy's theory as he sees them, and to further develop the principles of constitutional, fundamental, and human rights by applying a constructive criticism of his theory.

Constitutional Convergence in East Asia

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.

The Implementation of the Principle of Proportionality in the Slovenian Constitutional Case-Law

This book considers the relationship between proportionality and facts in constitutional adjudication. Analysing where facts arise within each of the three stages of the structured proportionality test – suitability, necessity, and balancing – it considers the nature of these 'facts' vis-à-vis the facts that arise in the course of ordinary litigation. The book's central focus is on how proportionality has been applied by courts in practice, and it draws on the comparative experience of four jurisdictions across a range of legal systems. The central case study of the book is Australia, where

Borrowing Justification for Proportionality

Advanced Introduction to Comparative Constitutional Law

Proportionality is one of the most important principles in constitutional law, relevant throughout the law and in jurisdictions worldwide. Setting out the 'state of the art' in proportionality doctrine, this book combines theoretical reconstruction with case-law examples, defending and developing the dominant model of proportionality.

The Constitutional Structure of Proportionality

Proportionality analysis describes a particular legal technique of resolving conflicts between human rights or constitutional rights and public interests through a process of balancing. However, as a general tendency, the current vivid academic debate on proportionality pays insufficient attention to the institutional context - the question of judicial review. Based on the premise that proportionality analysis is a permissible approach to resolve conflicts between rights and other interests, this book lays out a strategy for courts and tribunals to deal with the challenge of using proportionality analysis in an adequate manner, taking into account their situation and context of judicial review. For this purpose, the book develops the concept of models of judicial review in a first theoretical chapter. These models are then applied to six comparative case studies in German and US constitutional law, the law of the European Convention on Human Rights, European Union law, World Trade Organization law, and international investment law.

Proportionality Principles in American Law

Mark Tushnet excels in updating the Advanced Introduction to Comparative Constitutional Law. In this second edition Tushnet includes new material based on developments in practice and scholarship since the original edition's publication back in 2014. Topics which are given substantial additional attention include abusive constitutionalism, the idea of the constituent power, eternity clauses and unconstitutional amendments, recent developments in weak- and strong-form constitutional review, and expanded consideration of third generation rights. This title will appeal to those who fell in love with the first edition and those who are interested in learning more about Comparative Constitutional Law.

Comparative Constitutional Theory

This book addresses the principle of proportionality, which is currently one of the most important instruments of judicial review, from both analytical and theory of law perspectives. As such, the analysis provided is far more comprehensive and can be applied to all areas of law, not just constitutional law. On the one hand, the volume offers a broad perspective on several aspects related to proportionality, such as its structure, the balancing methodology and the distinction between rules and principles. On the other, it provides an innovative, normativist and analytical approach to proportionality, helping readers understand its structure and behaviour.

Proportionality "To speak of human rights is to speak of proportionality. It is no exaggeration to claim that proportionality has overtaken rights as the orienting idea in contemporary human rights law and scholarship. Proportionality has been received into the constitutional doctrine of courts in continental Europe, the United Kingdom, Canada, New Zealand, Israel, and South Africa, as well as the jurisprudence of treaty-based legal systems like the European Court of Human Rights, giving rise to claims..."
Why Proportionality in Constitutional Law Everywhere But

Even in the United States, which is widely understood to have formally rejected proportionality, some argue that the various levels of scrutiny adopted by the US Supreme Court are analogous to the standard questions posed by proportionality. As proportionality scholars are well aware, some of the early literature on balancing and rights is American, with special reference to the First Amendment. Notwithstanding proportionality's popularity, there is no consensus on its methodology. Much less does the use of a proportionality doctrine guarantee consensus on substantive rights questions. What the principle of proportionality promises is a common analytical framework, a framework the significance of which is not in its ubiquity (a mere fact), but because its structure influences (some would say controls) how courts reason to conclusions in many of the great moral and political questions confronting political communities. As a framework, proportionality analysis is superficially straightforward, setting out four questions in evaluating whether the limitation of a right is justifiable. A serviceable – but by no means canonical –

The Principle of Proportionality

This work provides an up-to-date picture of the constitutional law of the European Union and the law governing forms of co-operation among the Member States, such as common foreign and security policy, police and judicial co-operation in criminal matters, such as Schengen. The book begins by describing the pathways for integration in the EU, outlining the substantive, temporal and territorial jurisdiction of the EU. The authors provide an exposition of the objectives and tasks of the Community, together with an analysis of the principles of legal basis, subsidiarity, proportionality and equal treatment. This is followed by an analysis of substantive European law with particular attention given to the principles of the internal market and EMU.

Constitutional Dialogue

International investment law is one of the most dynamic fields of international law, and yet it has been criticised for failing to strike a fair balance between private and public interests. In this valuable contribution to the current debate, Valentina Vadi examines the merits and pitfalls of arbitral tribunals’ use of the concepts of proportionality and reasonableness to review the compatibility of a state’s regulatory actions with its obligations under international investment law.

The Constitutional Dimension of Contract Law

In the Function of the Proportionality Analysis in European Law the author offers a legal dogmatic, comparative and legal theoretical analysis of proportionality analysis applied by European courts.

Proportionality Analysis and Models of Judicial Review

In this book, Alec Stone Sweet and Jud Mathews focus on the law and politics of rights protection in democracies, and in human rights regimes in Europe, the Americas, and Africa. After introducing the basic features of modern constitutions, with their emphasis on rights and judicial review, the authors present a theory of proportionality that explains why constitutional judges embraced it. Proportionality analysis is a highly intrusive mode of judicial supervision: it permits state officials to limit rights, but only when necessary to achieve a sufficiently important public interest. Since the 1950s, virtually every powerful domestic and international court has adopted proportionality analysis as the central method for protecting rights. In doing so, judges positioned themselves to review all important legislative and administrative decisions, and to invalidate them as unconstitutional when such policies fail the proportionality test. The result has been a massive – and global – transformation of law and politics. The book explicates the concepts of ‘trusteeship’, the ‘system of constitutional justice’, the ‘effectiveness’ of rights adjudication, and the ‘zone of proportionality’. A wide range of case studies analyse: how proportionality has spread, and variation in how it is deployed; the extent to which the U.S. Supreme Court has evolved and resisted similar doctrines; the role of proportionality in building ongoing ‘constitutional dialogues’ with the other branches of government; and the importance of the principle to the courts of regional human rights regimes. While there is variance in the intensity of proportionality-based dialogues, such interactions are today at the very heart of governance in the modern constitutional state and beyond.

Towering Judges

Although the most important constitutional doctrine worldwide, a thorough cultural and historical examination of proportionality has not taken place until now. This comparison of proportionality with its counterpart in American constitutional law – balancing – shows how culture and history can create deep differences in seemingly similar doctrines. Owing to its historical origin in Germany, proportionality carries to this day a pro-rights association, while the opposite is the case for...
In addition, European legal and political culture has shaped proportionality as intrinsic to the state's role in realizing shared values, while in the United States a suspicion-based legal and political culture has shaped balancing in more pragmatic and instrumental terms. Although many argue that the USA should converge on proportionality, the book shows that a complex web of cultural associations make it an unlikely prospect.