Special Issue: Constitutional Reasoning

On Apples and Oranges. Comment on Niels Petersen

By Martin Borowski[*]

In the article "How to Compare the Length of Lines to the Weight of Stones" Niels Petersen presents a variety of considerations on the doctrine of proportionality and balancing. In the first section he offers a very brief introduction to proportionality analysis with the concept of balancing at its core, and goes on to sketch selected objections to this doctrine.[1] The second section is devoted to "reduced forms of proportionality," namely, proportionality analysis without balancing, and "Wednesbury Reasonableness."[2] Finally, the third section deals with "categorical forms of argumentation,"[3] where Petersen refers to methods that have been proposed as alternatives to proportionality analysis.

Petersen begins his exposition by explaining that constitutional lawyers all over the world have come to appreciate that the doctrine of proportionality[4] is key in assessing claims that stem from basic rights.[5] It cannot come as a surprise that this unprecedented proliferation of a doctrine across different constitutional cultures has met with considerable criticism. With an eye to criticism of the doctrine, Petersen does well to emphasize that "the critique of balancing [would have only had] practical bite" if there were convincing alternative methods.[6] One could not agree more. Some of the critics of the doctrine of proportionality go to great lengths in trying to explain why this method supposedly does not work and

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[1] Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones. Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 GERMAN L.J. 1387 (2013).

[2] Petersen, *supra* note 1, at 1394-1398.

[3] *Id.*, at 1398-1407.

[4] *See* Alec Stone Sweet & Jud Matthews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73, 98–112 (2008) (discussing the German origins of the doctrine of proportionality); Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT'L J. CONST. L. 263, 271–76 (2010). The German origins of proportionality analysis are often acknowledged in European circles, too. *See, e.g.*, PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES AND MATERIALS 526 (5th ed. 2011) ("The concept of proportionality is most fully developed within German law.").

[5] On the international proliferation of proportionality, see DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATION (2012).

[6] Petersen, *supra* note 1, at 1388.

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cannot work, without addressing the question of what could and what ought to take its place. When one considers that the doctrine of proportionality is well entrenched in a number of constitutional traditions, anyone who fundamentally criticizes the doctrine ought to be prepared to present a convincing alternative. To be sure, some of the critics of the doctrine of proportionality have offered alternatives. The suggested alternatives turn out, however, either to be less than convincing or to be disguised and conceptually retooled forms of proportionality analysis.

Petersen takes up a great many aspects in his article that are related to proportionality analysis and balancing, topics that have been subject to a complex and protracted debate. I shall confine myself to five points: (1) the distinction among radical balancing scepticism, radical balancing optimism, and the moderate thesis on the rationality of balancing, (2) the distinction between ordinal scales and cardinal scales, and whether Alexy's triadic classification comes closer to the former or to the latter, (3) Petersen's characterization of balancing as a "normative concept," (4) the idea of "definitional balancing," and, finally, (5) the issue of discretion in balancing.

A. Radical Balancing Scepticism, Radical Balancing Optimism, and the Moderate Thesis

The title of Petersen's article—"How to Compare the Length of Lines to the Weight of Stones"—suggests that the issue of *incommensurability* takes center stage. The title refers to a dictum by U.S. Supreme Court Justice Antonin Scalia in a concurring opinion. In *Bendix Autolite Corp.* v. *Midwestco Enterprises, Inc.*[7] the Court followed the balancing approach to the commerce clause. Scalia disagrees: "[T]he scale analogy is not really appropriate, since the interests on both sides are incommensurate."[8] A couple of pages earlier one reads: "It is more like judging whether a particular line is longer than [whether] a particular rock is heavy."[9] This is the incommensurability objection against balancing, which has been presented numerous times in more or less sophisticated forms, and Petersen lists a number of familiar and recent examples in a footnote. Scalia's metaphor strikes one as convincing, for it is indeed impossible to find some common denominator for the weight of a stone and the length of a line. There is no operation available to transform weight and length into something that can be reconstructed on an ordinal, not to mention a cardinal, scale. This is precisely, however, why Scalia's metaphor is misleading: Competing constitutional rights and constitutional goods resemble "apples and oranges" rather than "stones and lines." T. Alexander Aleinikoff employed the metaphor of apples and oranges in his seminal article on balancing in American constitutional law.[10] Petersen cites

[7] *Bendix Autolite Corp. v. Midwestco Enter., Inc.*, 486 U.S. 888 (1988).

[8] *Id.* at 897.

[9] *Id*. at 893. To be sure, Scalia's quotation is taken from the context of the commerce clause.

[10] T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 973–74 (1987).

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Aleinikoff for the claim that balancing is irrational "because it requires placing incommensurable values on the same scale."[11] This is not, however, Aleinikoff's view, as demonstrated in the following quotation: "Some critics of balancing surely overstate their case by claiming that balancing, because it demands the comparison of 'apples and oranges,' is impossible."[12] He continues half a page later: "Competing interests are not, by definition, incomparable. Apples and oranges can be placed on a fruit scale or assigned a price in dollars per pound."[13] The problem, Aleinikoff continues, is "the derivation of the scale needed to translate the value into a common currency for comparison."[14] He is correct in requiring "a scale external to the Justices' personal preferences."[15] Robert Alexy, one of the most prominent proponents of the doctrine of proportionality, has claimed convincingly that different constitutional values can be rendered indirectly comparable "from the point of view of the constitution."[16] The archimedian point for the comparison is the point of view of the constitution, and the values that compete under the circumstances of the case at hand that can then be compared with an eye to their "importance for the constitution."[17] But how does one determine this "importance for the constitution" and distinguish it from "personal preferences"? Alexy's plausible answer is a reference to the rational discourse.[18]

The question arises as to why most critics of balancing claim that balancing could be a rational and workable method only if there were a fully determinate objective yardstick for the weight of competing constitutional values. Just making this claim explicit sheds light on how naïve it is. As if there were such certainty in the interpretation of constitutional or statutory provisions beyond the issue of balancing. Alexy emphasizes that his theory "has never maintained" the "thesis that balancing leads in a rational way to one outcome in every case."[19] According to him, taking Habermas's thesis that balancing lacks "rational standards"[20] leads straightaway to the thesis that "there is no case in which a result to a

[11] Petersen, *supra* note 1.

[12] Aleinikoff, *supra* note 10, at 972.

[13] *Id.* at 973.

[14] *Id.*

[15] *Id.*

[16] Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, 16 RATIO JURIS 433, 442 (2003).

[17] *Id.*

[18] *Id.*

[19] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 402 (Julian Rivers trans., 2002).

[20] JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 259 (William Rehg trans., 1996).

balancing exercise can be reached on a rational basis."[21] This thesis shall be termed "radical balancing scepticism."[22] The radical antithesis, according to which "balancing leads in a rational way to one outcome in every case,"[23] can be termed "radical balancing optimism." This radical antithesis, which sceptics on balancing often seek to ascribe to the supporters of the doctrine of proportionality, is not, however, the only antithesis. Alexy points out that there is also a moderate antithesis, according to which "one outcome can be rationally established through the use of balancing, not in every case, but in at least some cases."[24] He continues, asking whether balancing as a method in constitutional law can be justified turns on whether "the class of such cases is interesting enough."[25] This is to say that there are surely hard cases in balancing, but there are also plain cases, something which may well be overlooked if one confines oneself to hard cases. Depending on how difficult it is to justify the outcome of balancing in a rational fashion, a broad spectrum of cases between a paradigmatically plain case and a paradigmatically hard case emerges. This moderate thesis is an antithesis to both "radical balancing scepticism" and "radical balancing optimism."[26] Depending on how sceptical or optimistic one is with an eye to the number of cases in which a single outcome can be rationally established by means of balancing, one might be tempted to refer to this moderate thesis as either "moderate scepticism toward balancing" or as "moderate optimism toward balancing."[27]

Interestingly, even Aleinikoff, who is frequently cited as sceptic on balancing—not least of all by Petersen—grants expressly that there are plain cases in balancing: "Even in constitutional law, we can occasionally say that one particular interest outweighs another."[28] This is to say that Aleinikoff rejects radical balancing scepticism.[29]

On one hand, "radical balancing optimism" is no more than an artificial position often mistakenly ascribed to the supporters of the doctrine of proportionality by sceptics on balancing. On the other hand, on a closer reading not every sceptic on balancing supports

[21] ALEXY, *supra* note 19, at 401.

[22] *See* MARTIN BOROWSKI, GRUNDRECHTE ALS PRINZIPIEN 122 (2d ed. 2007).

[23] ALEXY, *supra* note 19, at 401.

[24] *Id.* at 402.

[25] *Id.*

[26] BOROWSKI, *supra* note 22, at 123.

[27] *Id.*

[28] Aleinikoff, *supra* note 10, at 972.

[29] Aleinikoff's skepticism towards balancing is based on the use of this method by the U.S. Supreme Court rather than by problems of the method itself. *See* Aleinikoff, *supra* note 10, at 982 ("The problems that plague most balancing opinions, I believe, have severely damaged the credibility of the methodology.").

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"radical balancing scepticism." This is to say that there is little point in discussing the "rationality" of balancing in a framework that comprises only an opposition of the two radical theses. The moderate thesis on the rationality of balancing—call it "moderate optimism toward balancing" or "moderate scepticism toward balancing"—is the thesis that most people in the field support, and it is by far the most plausible.

B. Ordinal Scales, Cardinal Scales, and the Triadic Classification

Because the justification of normative premises—such as the relative weight of competing constitutional rights and goods—is a difficult task, it is crucial to determine what precisely needs to be justified. To determine the outcome of a case of balancing an ordinal scale is sufficient.[30] With an eye to weight "from the point of view of the constitution," it must be possible to distinguish three relations: *Greater than*, *smaller than*, and *equal to*. If *A* is greater than *B*, *A* outweighs *B*. If *A* is smaller than *B*, or *A* is equal to *B*, *A* does not outweigh *B*. In particular, if *A* is greater than *B*, it plays no role in determining just how far *A* outweighs *B*—all one needs to decide the case of balancing is the fact that *A* outweighs *B*.[31] Such an ordinal scale is "less demanding,"[32] for it is far easier to justify than a cardinal scale or ratio scale, which presupposes that the weight be expressed in numbers.[33] If the supporters of the doctrine of proportionality and balancing had to subscribe to the claim that rational balancing judgments required information at the level of a cardinal scale—as many critics of balancing would have us believe—it would then be next to impossible to provide a rational justification for even a single balancing judgment. Already in the German edition of *A Theory of Constitutional Rights*, Alexy granted, in 1985, that "the idea of a ranked order of values on a cardinal scale collapses at the problems of—metrication of the weights and intensity of realization of values or principles."[34] One simply had to grant that radical balancing scepticism held true. The insight that an ordinal scale is sufficient, however, to carry out a case of balancing lends a great deal of support to the thesis that there may very well be a highly significant class of cases in which an outcome can be rationally justified through balancing. In other words, this insight lends a great deal of support to the moderate thesis on the rationality of balancing.

Petersen invites attention, however, to a problem. This problem is that Alexy's weight formula—which he developed for a more sophisticated reconstruction of balancing in a

[30] On ordinal scales, see WOLFGANG STEGMÜLLER, 2 PROBLEME UND RESULTATE DER WISSENSCHAFTSTHEORIE UND ANALYTISCHEN PHILOSOPHIE 22–38 (1970).

[31] *See* BOROWSKI, *supra* note 22, at 83.

[32] ALEXY, *supra* note 19, at 97.

[33] For a discussion on cardinal scales or ratio scales, see STEGMÜLLER, *supra* note 30, at 44.

[34] ALEXY, *supra* note 19, at 99.

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number of publications in 2002 and 2003[35] —requires, at least on first glance, information about the weight from the point of view of the constitution on a cardinal scale. The weight formula contains mathematical operations such as division and multiplication, and these operations cannot be carried out on the basis of a mere ordinal ranking. Petersen regards this objection as convincing: "[I]f one performs arithmetic operations that are exclusively reserved for ratio scales with ordinal values, the (arbitrary) choice of the scale can already determine the result of the balancing exercise."[36] It is understood that dependence on an arbitrary choice rules out the possibility of speaking of a rational procedure for deciding a competition of rights and goods.

Petersen misses, however, a crucial element of Alexy's new reconstruction of balancing on the basis of the weight formula. Already in Alexy's *A Theory of Constitutional Rights* one finds the remark that numbers can only be used as a means of illustration:

> [A]t any rate an intersubjectively persuasive allocation of figures to intensity of realization is impossible. One cannot produce a firm answer on the basis of reliable quantification; rather the outcome—however it is determined—can only be *illustrated* numerically.[37]

In the context of his weight formula Alexy then developed the idea of a "three-grade or triadic model," which distinguishes between three classifications, namely, *light*, *moderate*, and *serious*.[38] This is an instance of limited scaling, as opposed to infinitesimal scaling. Infinitesimal scaling assumes that a quantity, such as the weight from the point of view of the constitution, is infinitely variable.[39] By contrast, limited scaling works on the basis of discrete numbers.[40] Alexy emphasizes that such a triadic model is perfectly suited to a reconstruction of classifications traditionally used in legal argument. With an eye to Petersen's claim that Alexy's weight formula requires information at the level of a cardinal

[35] *See* ALEXY, *supra* note 19, at 405–25; Alexy, *supra* note 16, at 443–49; Robert Alexy, *The Weight Formula*, *in* [3 STUDIES IN THE PHILOSOPHY OF LAW] FRONTIERS OF ECONOMIC ANALYSIS OF LAW 9 (Jerzy Stelmach, Bartosz Brozek, & Wojciech Zaluski eds., 2007) [hereinafter *The Weight Formula*].

[36] Petersen, *supra* note 1, at 1390.

[37] ALEXY, *supra* note 19, at 99 (emphasis in the original).

[38] *See* ALEXY, *supra* note 19, at 405; Alexy, *supra* note 16, at 440; Alexy, *The Weight Formula*, *supra* note 35, at 15.

[39] *See* BOROWSKI, *supra* note 22, at 84.

[40] This is to say that the substance of constitutional law rules out, by its nature, infinitesimal scaling. It is not, then, the case that infinitesimal scaling would be generally possible and that we have difficulty only in establishing more than rough distinctions. *See* Robert Alexy, *Verfassungsrecht und einfaches Recht: Verfassungsgerichts-barkeit und Fachgerichtsbarkeit*, 61 VVDSTRL 7, 26 (2002).

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scale, it is worth quoting Alexy's key statement. After having explained the idea of a triadic scale, Alexy writes:

> Such a three-class system is far removed from a metrification of intensities of interference and degrees of importance on a cardinal scale running over a continuum from 0 to 1, and it has to be far removed, for intensities of interference and degrees of importance are not capable of metrification on such a scale.[41]

One can argue whether a triadic scale—and this would apply the more to a double-triadic scale[42]—is, however, in essence a form of a cardinal scale, for it goes beyond an ordinal scale. If a triadic scale indeed counts as a cardinal scale, it is, however, a form of cardinal scale that is nearly as easy to justify as an ordinal scale, and it is—to quote Alexy's phrase—"far removed from a metrification of intensities of interference and degrees of importance on a cardinal scale running over a continuum from 0 to 1."[43] With respect to the difficulty of justifying a certain classification of the weight, a triadic scale resembles far more closely an ordinal scale than a cardinal scale. And a triadic scale permits the mathematical operations of the weight formula.

C. Balancing as a "Normative Concept"

Petersen characterizes balancing as a "normative concept." By this he means that a balancing judgment requires that normative premises be justified.[44] There can be little doubt that this is true. A comprehensive characterization of balancing must, however, take account of law's three dimensions: The analytical, the empirical, and the normative dimensions. To begin with, balancing refers to a procedure or method rather than to a "concept." Balancing is a method for the justification of normative propositions. This requires an analytical structure that shows which empirical and normative premises need to be justified. Earlier in his article Petersen had pointed out that Alexy distinguishes between internal and external justification of balancing judgments.[45] Internal justification concerns the deduction of the legal consequence from the relevant premises, namely,

[41] Alexy, *The Weight Formula*, *supra* note 35, at 19.

[42] On the idea of a "double-triadic scale," see ALEXY, *supra* note 19, at 412–13; Alexy, *The Weight Formula*, *supra* note 35, at 22–23.

[43] Alexy, *The Weight Formula*, *supra* note 35, at 19.

[44] Petersen, *supra* note 1, at 1392.

[45] *Id.*, at 1389.

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empirical and normative premises, whereas external justification concerns the justification of the empirical and normative premises themselves.[46] Alexy has aptly characterized the weight formula as the internal justification of a balancing judgment.[47] One must not underestimate the merit of the analytical dimension of balancing, its internal justification. Because the justification of the relevant normative premises proves to be so difficult, it is imperative that the normative premises requiring justification in the circumstances of the case at hand be carved out with utmost clarity.[48] Referring to balancing as a "normative concept" conceals rather than emphasizing this important merit of balancing.

D. Definitional Balancing

Petersen has an altogether positive view on *definitional balancing*, for, he believes, it provides greater predictability.[49] Characteristic of definitional balancing is that typical limiting reasons are balanced at an abstract level against the right in question, and the result is a concretization of both the right and the limiting reasons. This concretization is then taken to be an authoritative definition of the scope of the right in question, which may be applied to the case at hand without any further balancing. Definitional balancing is usually contrasted with "ad hoc" balancing, which is a pejorative expression. Characteristic of "ad hoc" balancing is that the balancing is performed by taking the circumstances of a concrete case into consideration.[50] In other words, "ad hoc" balancing is the form of balancing well known from the doctrine of proportionality.

The problem of definitional balancing is that in hard cases it may well lead to the "wrong result." A result is "wrong" if and when definitional balancing suggests a certain result, but balancing that takes the circumstances of the case at hand into consideration comes to the opposite result. On the basis of taking definitional balancing seriously, it is impossible to correct the "wrong" result, for the result of definitional balancing is supposed to be applied without further balancing.

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[46] On the distinction between internal and external justification, *see* Jerzy Wróblewski, *Legal Decision and Its Justification*, *in* LE RAISONNEMENT JURIDIQUE: ACTES DU CONGRÈS MONDIAL DE PHILOSOPHIE DU DROIT ET DE PHILOSOPHIE SOCIALE 409, 411–12 (Hubert Hubien ed., 1971); Jerzy Wróblewski, *Legal Syllogism and Rationality of Judicial Decision*, 5 RECHTSTHEORIE 33, 39–46 (1974); ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION 221–352 (Ruth Adler & Neil D. MacCormick trans., 1989); AULIS AARNIO, THE RATIONAL AS THE REASONABLE: A TREATISE ON LEGAL JUSTIFICATION 119–20 (1987).

[47] *See* Alexy, *supra* note 16, at 438–49.

[48] BOROWSKI, *supra* note 22, at 121–22.

[49] Petersen, *supra* note 1, at 1403.

[50] *See* Aleinikoff, *supra* note 10, at 948.

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If definitional balancing comes at this high price, the question arises as to what its supposed merit is. Petersen argues that it gives rise to greater "predictability" and "legitimate expectations" than does "ad hoc" balancing.[51] "Ad hoc" balancing gives rise, however, to predictability to nearly the same extent—provided that the balancing judgment in the circumstances of the case at hand is an expression of a coherent system of preference relations between and among competing rights and goods at different levels of abstraction.[52] The label "ad hoc" is pejorative because it has the distinct complexion of not being an expression of a coherent system and in being neither well considered nor well thought through. One can, however, combine balancing at an abstract level with balancing under the circumstances of the case at hand. Balancing at an abstract level creates a *prima facie* preference relation under the circumstances that characterize an abstract situation. Contrary to definitional balancing, such a prima facie preference relation does not preclude the possibility that balancing is continued under the circumstances of the concrete case. If the case is atypical, the presumption to which the prima facie preference relation gives rise may well prove to be rebutted, while in typical cases the presumption will prove to be identical with the final result. Such an understanding of balancing gives rise to both great predictability and justice even in atypical cases. Against this backdrop, to support the idea of definitional balancing is hardly convincing.

E. Balancing and Discretion

At the very end of his article, Petersen mentions briefly the point which he regards as "probably the most important": The debate on the doctrine of proportionality "is essentially about different conceptions of what role courts should play in a democratic society and in the political system"; it is a debate, in other words, about constitutional review. As already mentioned, balancing is a method for the justification of normative propositions and can be used, as such, apart from the issue of constitutional review. For example, if the legislature is considering differing solutions in the course of enacting laws, the parliament may well want to balance competing rights and goods at an abstract level to arrive at the best compromise.

Still, it is true that the debate on proportionality analysis has particular relevance in the context of constitutional review. If a court is empowered to undertake constitutional review, the yardstick is the constitution; the court has to determine whether an act of legislation is constitutional. In some cases what the constitution requires will be clear,[53]

[51] Petersen, *supra* note 1, at 1403.

[52] BOROWSKI, *supra* note 22, at 121–22.

[53] In cases in which there is no epistemic uncertainty with respect to empirical or normative premises, it is clear what the constitution requires, and consequently there can be no epistemic discretion. *See* ALEXY, *supra* note 19, at 424; Robert Alexy, *Comments and Responses*, *in* INSTITUTIONALIZED REASON: THE JURISPRUDENCE OF ROBERT ALEXY 319,

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and in some cases it is not clear. It is not clear in cases in which empirical or normative premises are uncertain or unreliable. In such a situation, that of empirical or normative uncertainty, the question arises as to who is empowered, and to what extent, to have the final word: Is the court empowered to undertake constitutional review, or the democratically legitimated parliament? Against the backdrop of the principle of democracy a court empowered to undertake constitutional review is committed to considering a formal principle in the balancing of rights and goods, a formal principle that counts as a reconstruction of the relative authority of the decision of the democratically legitimated parliament.[54]

The weight of such a formal principle depends, first and foremost, on the abstract weight that is ascribed to this formal principle, the degree to which the decision of the legislator is not respected, and the degree of epistemic uncertainty.[55] The greater the weight of the formal principle, the greater the extent of epistemic discretion.[56] This is to say that the issue of epistemic discretion is an integral component of determining, in every case, the precise yardstick according to which an authoritative balancing decision by one institution is reviewed by another institution—and the paradigmatic example is the review of a parliamentary statute by a constitutional court. I doubt whether any comparison of the doctrine of proportionality with "Wednesbury reasonableness"[57] or the American standards for judicial review—the *rational basis test* and the *compelling state interest test*, along with *intermediate scrutiny* in some selected areas[58]—can come to any meaningful conclusion without systematically exploring the complex issue of discretion.

331 (Matthias Klatt ed., 2012); Martin Borowski, *Formelle Prinzipien und Gewichtsformel*, *in* PRINZIPIENTHEORIE UND THEORIE DER ABWÄGUNG 151, 197 (Matthias Klatt ed., 2013).

[54] *See* BOROWSKI, *supra* note 22, at 127–30; Martin Borowski, *Die Bindung an Festsetzungen des Gesetzgebers in der grundrechtlichen Abwägung*, *in* GRUNDRECHTE, PRINZIPIEN UND ARGUMENTATION 99, 111–21 (Laura Clérico & Jan-Reinard Sieckmann eds., 2009); Martin Borowski, *Discourse, Principles, and the Problem of Law and Morality: Robert Alexy's Three Main Works*, 2 JURISPRUDENCE 575, 583–86 (2011); Borowski, *supra* note 53, at 154–99.

[55] Borowski, *supra* note 53, at 195–99.

[56] Epistemic discretion is not to be confused with structural discretion; these species of discretion are different and both require, as a rule, consideration in the course of balancing. *See* ALEXY, *supra* note 19, at 393–425 (commenting on structural discretion); BOROWSKI, *supra* note 22, at 124–34.

[57] *See* Petersen, *supra* note 1, 1397-1398.

[58] *Id.*, at 1405-1407.

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