Probability Thresholds as Deontological Constraints in Global Constitutionalism

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This Article calls for the re-introduction of probability tests—such as the abandoned American "clear and present danger" or the Israeli "near certainty" test—and for their integration into contemporary models of rights adjudication in global constitutionalism. This stance is supported, inter alia, by psychological research on the cognitive bias of "probability neglect." Both the American strict scrutiny test, which focuses on a rigorous means-ends analysis, and the highly influential German proportionality test, which centers on the balancing of rights and interests, fail to properly ensure the priority of rights. The Article contends that it is important to integrate a probability requirement into what is commonly termed "generic constitutional law." Thus, after engaging in means-ends analysis and prior to conducting balancing, courts should require that the government meet a certain pre-defined probability threshold.

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INTRODUCTION

At the heart of the War on Terror lies Democracy's struggle to reduce the risk of future catastrophes while, at the same time, protecting human rights. Proper risk management must account for the *probability* that catastrophe will strike again. In times of emergency, governments and policy makers tend to ignore issues of probability and instead resort to taking drastic measures that often adversely affect human rights. Cognitive psychologists term this behavior "probability neglect."[1] Probability neglect is the tendency to disregard probability when making decisions under indeterminate conditions. This tendency is especially powerful regarding the probability of events in the future that trigger strong emotional reactions, such as terrorism.

Surprisingly, despite its critical importance, probability has not been an explicit component of contemporary models of

1. Cass R. Sunstein, *Probability Neglect: Emotions, Worst Cases, and Law*, 112 YALE L.J. 61, 62–70, 87–100 (2002).

constitutional rights adjudication. The two principal legal methods for judicial evaluation of limitations on constitutional rights—both perceived as methods that protect rights—lack an explicit doctrinal component incorporating probability assessment. The first, which is found in American constitutional law, protects against infringements of fundamental rights by applying the strict scrutiny test, which is essentially a rigorous means-ends test. The second, exemplified by German constitutional law, applies the proportionality test, which centers on balancing conflicting rights and interests in an effort to advance humanistic values.

A look at American constitutional history reveals that probability assessment can have a pivotal doctrinal role in the protection of constitutional rights. The clear and present danger test that reigned in first amendment jurisprudence during the first half of the twentieth century set a very high probability standard,[2] which in turn guaranteed strong protection of first amendment rights.[3] In a similar vein, the Israeli Supreme Court has devised a set of categorical probability tests based on the importance of fundamental rights and the nature of their conflict with state interests.[4] Nevertheless, in both the United States and Israel, the use of strict scrutiny and proportionality tests has marginalized the use of probability tests.

At the heart of this Article lies the insight that a judicial inquiry into the probability of harm to state interests should be a prime determinant in constitutional rights adjudication.[5] Prevailing doctrines in global constitutional law center on means-ends analysis and balancing. It is therefore our aim to argue that probability thresholds should be reintroduced into contemporary doctrines of global constitutionalism and to point to ways in which such thresholds can be integrated into existing patterns of constitutional adjudication. We believe that each of the three above-mentioned

2. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 51–52 (1919).

3. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969).

4. *See, e.g.*, HCJ 73/53 Kol Ha'am Co. Ltd. v. Minister of Interior 7 PD 871, 892 [1953]; Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309, 311, 328–31 (1995); Amos Shapira, *Judicial Review without a Constitution: The Israeli Paradox*, 56 TEMP. L.Q. 405, 414, 423–24 (1983).

5. A similar argument was recently made by Jonathan Masur. *See* Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293, 1305–14 (2007) (pointing to the significance of the judicial use of the clear and present danger test and arguing that it functions as a "probability threshold" which must be met prior to any judicial engagement in cost-benefit analysis).

models—means-ends analysis, probability thresholds and balancing—provides a necessary yet individually insufficient component in the protection of constitutional rights. It is our contention that the integration of all three models into a unified analytical framework will provide better protection for constitutional rights. In what follows we outline what we believe to be the appropriate analytical framework for the protection of constitutional rights by courts across the globe.

There are certain commonalities in constitutional law that appear across jurisdictions and that have been termed "generic constitutional law."[6] The first step in any constitutional rights adjudication is for the court to inquire whether the state interest is pertinent enough to override fundamental rights.[7] Once this has been determined, the court moves on to a means-ends analysis.[8] Here it is worth noting the requirements that the means further the ends and that these means be as un-restrictive as possible in order to achieve Pareto optimality.[9] The means-ends analysis, however, is not sufficient in and of itself to ensure the proper protection of fundamental rights, because it assumes that state interest always takes precedence over rights and must always be realized in full. A society that prioritizes fundamental rights must recognize that even vital state interests cannot be fully realized at the price of excessive harm to these fundamental rights.[10] American courts appear to recognize this point despite their rejection of an explicit balancing test. By way of not insisting that the least restrictive means be *as effective* as the means employed by the government, American courts apply the strict

6. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 659 (2005) ("Commonalities emerge across jurisdictions because constitutional law develops within a web of reciprocal influences, in response to shared theoretical and practical challenges. These commonalities are at points so thick and prominent that the result may fairly be described as *generic constitutional law*—a skeletal body of constitutional theory, practice, and doctrine that belongs uniquely to no particular jurisdiction.").

7. Moshe Cohen-Eliya, *The Formal and Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence*, 38 ISR. L. REV. 262, 264 (2005) (stating that "the proportionality requirement is the central standard today for judicial decisions dealing with competing values and interests in the public law of many democratic states.").

8. DAVID M. BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 15–16 (1995).

9. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 95 (2008); ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 399 (Julian Rivers trans., Oxford Univ. Press 2002) (1986).

10. *See generally* Cohen-Eliya, *supra* note 7, at 271.

scrutiny test while implicitly engaging in the act of balancing.[11] Meanwhile, in Germany and in many other Western democracies, the proportionality test explicitly requires that judges balance between the restrictive measure's benefit to state interest and the harm to fundamental rights (proportionality in the strict sense).[12]

The American aversion to extensive balancing in constitutional rights adjudication is, however, not without its merits. Judicial ad hoc balancing is susceptible to arbitrariness[13] and might tip the scales against constitutional rights, especially in times of emergency when the neglect of probability bias is most powerful. Even if we assume that it is possible to conduct non-arbitrary and efficient balancing, as law and economics scholars believe,[14] such a form of balancing would water down the idea of the priority of constitutional rights.[15] The concept of the priority of rights is a deontological concept and not a utilitarian one.[16] One of the

11. Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 468 n.23 (1969) ("By definition, the less drastic alternative will inhibit expression less than the policy embodied by the statute before the Court."); Guy Davidov, *Separating Minimal Impairment from Balancing: A Comment on* R. v. Sharpe *(B.C.C.A.)*, 5 REV. CONST. STUD. 195, 198–99 (2000); *see also* Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 384 (2007) (claiming that the U.S. Supreme Court often resorts to balancing).

12. Stone Sweet & Mathews, *supra* note 9, at 99; Grimm, *supra* note 11, at 393–95; Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369, 372 (2007).

13. *See, e.g.*, Burt Neuborne, *Notes for a Theory of Constrained Balancing in First Amendment Cases: An Essay in Honor of Tom Emerson*, 38 CASE W. RES. L. REV. 576, 578 (1988); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 259 (William Rehg trans., MIT Press 1996) (1992) ("Because there are no rational standards for [balancing], weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies.") (citation omitted).

14. *See, e.g.*, RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 360 (2003); Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 37 (1986); Richard A. Posner, *The Speech Market and the Legacy of* Schenck, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 120, 124–25 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002).

15. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198 (1977) ("The metaphor of balancing the public interest against personal claims is established in our political and judicial rhetoric, and this metaphor gives the model both familiarity and appeal. Nevertheless, the first model is a false one . . . .").

16. The conviction that utilitarianism is morally flawed stands at the heart of JOHN RAWLS, A THEORY OF JUSTICE (1971). For the most distilled deontological conception of rights, see ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). For the application of deontological moral theories to balancing and proportionality, see Mattias Kumm, *Political*

cornerstones of Modern Liberalism is the idea that rights function as deontological constraints on governmental utilitarian calculus. Thus, liberal thinkers conceive of rights as either having a lexical priority[17] over the public good[18]—a sort of trump card that overrides utility-based government policies[19]—or as shields that can be penetrated only by particularly compelling reasons.[20] Even if we adopt the more minimalist notion of the priority of constitutional rights, that of rights as shields, it is evident that balancing cannot, in and of itself, guarantee their protection.

The way, then, to guarantee the priority of these rights over state interests is by setting deontological thresholds.[21] In the present article we focus on the "probability threshold" which, we will claim, is a deontological threshold that is essential within the framework of

Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement, in LAW, RIGHTS, AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 131 (George Pavlakos ed., 2007).

17. *See* RAWLS, *supra* note 16, at 246 ("The lexical ranking of the principles specifies which elements of the ideal are relatively more urgent, and the priority rules this ordering suggests are to be applied to nonideal cases as well.").

18. John Rawls, the most prominent liberal scholar of the second half of the twentieth century, has based his entire theory of justice on the rejection of utilitarianism. RAWLS, *supra* note 16, at viii. According to Rawls' theory, basic liberties have priority over other interests. *See generally* JOHN RAWLS, POLITICAL LIBERALISM 294–98 (1993). The first principle of justice assigns the basic liberties specified in the list a special status, which means that they "have an absolute weight with respect to reasons of public good and of perfectionist values." *Id.* at 294. Thus, for example, a group cannot be denied equal political liberties in order to prevent it from blocking policies needed for economic efficiency and growth. Basic liberties may conflict and must be restricted for the sake of one or more other basic liberties so that they fit into a coherent scheme of liberties, but they can never be limited or denied solely for reasons of public good. *Id.* at 294–95.

19. *See* DWORKIN, *supra* note 15, at 277.

20. *See* Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 429 (1993).

21. By "deontological thresholds" we mean thresholds that must be preserved irrespective of their consequences. For a law and economics approach suggesting the setting of deontological thresholds prior to cost benefit analysis, see Eyal Zamir & Barak Medina, *Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law*, 96 CALIF. L. REV. 323 (2008). Some deontological thresholds are grounded in Kantian moral philosophy, such as the prohibition of treating persons as mere means and not as ends in themselves. IMMANUEL KANT, THE MORAL LAW: GROUNDWORK OF THE METAPHYSICS OF MORALS 91 (H.J. Paton trans., Routledge 1991) (1785) ("Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.").

constitutional adjudication of non-absolute rights.[22] Indeed, probability thresholds would require governments to show that the risk to state interests in the absence of the restriction of rights meets a certain predefined standard of probability. Only if the risk meets the predefined probability threshold can the court move on to ad hoc balancing. We believe that not only would the integration of probability thresholds into existing doctrines of constitutional rights adjudication serve the purpose of ensuring the priority of constitutional rights, it could also open the door to further consideration of the most effective way to integrate earlier doctrines of constitutional rights adjudication, such as the clear and present danger test, into more contemporary ones, and thus to achieve coherency in the law.

In Part I of this article, we present two dominant contemporary models of constitutional rights adjudication, the American model and the German one, and evaluate their success in prioritizing rights. In Part II, we argue for the need to integrate probability thresholds into constitutional rights adjudication. In Part II.A, we focus on the research offered by cognitive psychology illustrating people's tendency to overestimate the potential risks linked to catastrophic events, which triggers strong emotional reactions like the fear of terrorism, while underestimating more mundane risks. We move on in Part II.B to discuss several court cases from different jurisdictions (particularly the United States and Israel, where probability tests were the reigning doctrines at least in the past), showing how the absence of probability thresholds in constitutional analysis can adversely affect human rights. In Part II.C, we show that probability tests such as the clear and present danger test have been used in both American and Israeli constitutional law and have served to enhance the protection of fundamental rights. In Part III of this article, we present our proposed accumulative model for constitutional rights adjudication, integrating all three aforementioned models—means-ends, probability thresholds and balancing—into an analytical framework that, in our view, can best prioritize constitutional rights. Finally, in Part IV we present and then reject several institutional objections to the courts' use of probability tests.

22. For a recent defense of the use of probability thresholds in first amendment constitutional analysis, see Masur, *supra* note 5, at 1305–22.

I. THE CONSTITUTIONAL PROTECTIONS OF RIGHTS: TWO CONTEMPORARY MODELS

There are two principal legal methods for protecting constitutional rights.[23] The first, found in American constitutional law, is to protect rights by applying a rigorous means-ends test. The second, exemplified by German constitutional law, is to guide judges to balance conflicting constitutional rights and state interests with a view to promoting humanistic values. Both the American and the German methods are presented here as a means of contrasting two ideal type models. Hence, we do not wish to argue that there is no balancing in American constitutional law, or that there is no means-ends analysis in German constitutional law. Our aim is to evaluate the success of these two different methods of constitutional analysis in protecting fundamental rights.

A. Strict Means-Ends Analysis: The American Model

In the United States, the most fundamental rights are rigorously protected through the so-called "preferred rights doctrine."[24] The origins of this doctrine can be traced back to the famous footnote four of the *Carolene Products* case, in which the U.S. Supreme Court concluded that a more exacting judicial scrutiny must be applied when enumerated constitutional rights are in question (as, for example, in the case of restrictions on free speech) and when there is reason to suspect that the political processes have failed (as in the case of suspect classifications).[25] The strict scrutiny

23. The American model of constitutionalism is often contrasted with the Canadian or European one. *See generally* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005); EUROPEAN AND U.S. CONSTITUTIONALISM (Georg Nolte ed., 2005). Lorraine Weinrib terms the Canadian or European model—"the postwar paradigm." *See* Lorraine Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 98 (Sujit Choudhry ed., 2006). The American model is based on suspicion towards the government, while the European, mostly German, model is built on greater trust of the government. For such a contrast with regard to free speech, see Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND U.S. CONSTITUTIONALISM 49, 59 (Georg Nolte ed., 2005).

24. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 769–84 (2d ed. 1988).

25. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

test has evolved, especially in the 1960s,[26] and was also applied to fundamental rights that were not directly linked to the political process.[27]

American constitutional law protects fundamental rights in two ways: first, by narrowly construing them and second, by applying a rigorous means-ends analysis to them.[28] As far as the first course of action is concerned, American constitutional law tends to delimit the scope of constitutional rights by excluding certain activities from that scope; for example, certain forms of speech have been excluded from the constitutional right to free speech.[29] Furthermore, American constitutional rights are "negative" rather than "positive," meaning they do not require that the government *act* in order to realize them.[30] In addition, constitutional rights bind only the government and not individuals.[31] This narrow construction of rights avoids the problem of their dilution.[32]

As for the second course of action, that of applying a rigorous means-ends analysis once an infringement of fundamental rights has been identified, the court typically applies a strict scrutiny test.

26. *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270 (2007).

27. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 162–64 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965) (concurring opinion applying strict scrutiny to the right to privacy).

28. Note, however, that when non-suspect classifications and non-fundamental rights are infringed, the Court typically applies the rational basis test. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487–88 (1955). In classifications based on sex, the court applies the heightened scrutiny test. United States v. Virginia, 518 U.S. 515 (1996). *See generally* TRIBE, *supra* note 24, at 770 (discussing the criteria for identifying "fundamental" or "preferred rights").

29. *See generally* Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265 (1981) (discussing how the term "speech" as used in the First Amendment may be read to exclude forms of speech such as obscenity and libel).

30. *See* Harris v. McRae, 448 U.S. 297, 316 (1980) ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice [to terminate her pregnancy], it need not remove those *not of its own creation*." (emphasis added)).

31. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982) (noting that the conduct allegedly causing the deprivation of a federal right must be attributable to the State). An exception to this rule can be found in *Shelley v. Kraemer*, 334 U.S. 1, 18–23 (1948) (noting that the Court will not enforce a racist restrictive covenant, as courts' decisions constitute state actions).

32. *See* Sandra Fredman, *Transformation or Dilution: Fundamental Rights in the EU Social Space*, 12 EUR. L.J. 41, 41–42 (2006).

Despite the fact that the strict scrutiny test has several versions,[33] this test essentially requires the government to prove, first, that it has pursued a compelling state interest and, second, that the means employed to do so are narrowly tailored to achieve that goal. The requirement that the means be "narrowly tailored" obliges U.S. courts to engage in processes similar to those which some courts outside the United States engage in when executing the first two steps of proportionality analysis: the means must be rationally related to the ends, and the least restrictive means must be employed.[34] In the United States, these means-ends requirements are rigorously applied within the strict scrutiny test, requiring an almost perfect fit between the means and the ends.[35] In a sense, the strict scrutiny test serves the purpose of smoking out illicit motives, because the lack of a perfect fit between means and ends serves as evidence for the existence of unlawful motives.[36]

In its strongest version, the strict scrutiny test would almost completely prevent government actions from infringing upon constitutional rights. As Professor Gerald Gunther famously put it, the strict scrutiny test is often "'strict' in theory and fatal in fact."[37]

The protection given to constitutional rights under the strict scrutiny test does not involve balancing, at least not explicitly. In the United States, balancing, as it pertains to constitutional law, often carries with it an anti-rights connotation and is associated with ways to weaken the absolute protection of fundamental rights provided by

33. Professor Fallon, *supra* note 26, at 1302–11, distinguishes between three versions of the strict scrutiny test: (1) strict scrutiny as a nearly categorical prohibition; (2) strict scrutiny as a weighted balancing test; (3) and strict scrutiny as an illicit motive test.

34. *See infra* Section I.B. (*Balancing: The German Model*).

35. JOHN H. ELY, DEMOCRACY AND DISTRUST 146 (1980) (noting that the strict scrutiny test requires an "essentially perfect fit").

36. *See* CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 30 (1993) ("Heightened scrutiny involves two principal elements. The first is a requirement that the government show a close connection between the asserted justification and the means that the legislature has chosen to promote it. If a sufficiently close connection cannot be shown, there is reason for skepticism that the asserted value in fact account[s] for the legislation. The second element is a search for less restrictive alternatives—ways in which the government could have promoted the public value without harming the group or interest in question. The availability of such alternatives also suggests that the public value justification is a facade.").

37. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

the American constitution.[38] Frederick Schauer touches on this point when discussing the protection of free speech: "For the absolutists in this debate, what was wrong about balancing was not anything structurally problematic about the idea of balancing, but rather the worry that in the actual balance, free speech interests would be balanced too lightly and countervailing interests would be balanced too heavily."[39] Consequently, balancing in American constitutional law is often perceived as suspect rather than as the appropriate mechanism to protect constitutional rights.

Nevertheless, it is questionable whether a means-ends analysis, even when rigorously applied, is sufficient to properly protect constitutional rights. Taking rights seriously means that, even where there is a perfect fit between the means and the compelling state interest, we will still want to override the state interest when the harm to our constitutional rights would exceed the benefit to the state interest.[40] Indeed, a closer reading of American strict scrutiny case law reveals that in many instances judges are implicitly engaged in a sort of cost-benefit analysis when considering whether less restrictive means are available.[41] Richard Fallon, for example, argues that one

38. *See* Moshe Cohen-Eliya and Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8(2) I.CON: INT'L J. CONST. L. 263, 276, 280–83 (2010) (providing a historical account of the anti-rights attitudes towards balancing in the United States. Balancing was developed in the U.S. in the early twentieth century to limit rights accorded absolute protection by the *Lochner* Court).

39. Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND U.S. CONSTITUTIONALISM 49, 64 (Georg Nolte ed., 2005).

40. This is often true in national security cases, for example, in the Israeli *Beit Sourik* case regarding the legality of the security barrier in the Palestinian occupied territories. HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr., 58(5) PD 807 [2004]. In this case the petitioners argued that the route chosen by the Israeli defense forces for the barrier violated the property rights and the freedom of movement of the Palestinian residents. *Id.* at 820. The Israeli Supreme Court concluded that although there was a perfect fit between the means chosen and the legitimate national security aim, the specific route chosen caused excessive harm to the rights of the Palestinians in comparison to its marginal benefits. *Id.* at 850–52. Were the court to rely only on a means-ends analysis, the results would have been different.

41. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (applying a balancing test within the strict scrutiny test in an affirmative action case); Emp't Div. of Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 883 (1990) (Scalia, J.) (arguing that balancing test used in a previous free exercise of religion case has not been applied in recent cases), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Richardson v. Ramirez, 418 U.S. 24, 78 (1974) (Marshall, J., dissenting) (arguing that the strict scrutiny test should be understood as a balancing test taking into account the importance of the interest and of the right).

of the contemporary versions of the strict scrutiny test, used in cases of free exercise, freedom of association and affirmative action, is "strict scrutiny as a weighted balancing test."[42] What distinguishes this test from other balancing tests, according to Fallon, is the unusually high weight attributed to constitutional rights.[43]

This sort of balancing, however, is undisciplined and lacks transparency, since no explicit doctrines exist within the scope of the strict scrutiny test that can guide judges in properly engaging in balancing.[44]

B. Balancing: The German Model

Hailed as the birthplace of the highly influential Doctrine of Proportionality (with its origins harking back to early nineteenth century Prussian administrative law),[45] German constitutional law has served in the last decades as a tremendous influence on many constitutional democracies around the globe.[46] The proportionality test,[47] as conceived by German constitutional law, is divided into three distinct stages of constitutional analysis.[48] First, there must be a rational relationship between the restrictive means and the pursued ends (suitability).[49] Second, the means must be the least restrictive to achieve the pursued end (necessity).[50] Third, the potential harm to constitutional rights must not exceed the expected benefit to state interest (proportionality in the strict sense, or PSS).[51] As Donald

42. Fallon, *supra* note 26, at 1306–08.

43. *Id.* at 1306.

44. For a similar critique of Canadian constitutional case law for incorporating balancing into the means-end test, see Davidov, *supra* note 11; Grimm, *supra* note 11.

45. Cohen-Eliya & Porat, *supra* note 38, at 271.

46. Jeffrey B. Hall, *Taking "Rechts" Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany*, 9 GERMAN L.J. 771, 771 (2008) ("Over the past 60 years the German Basic Law has become one of the most influential constitutional systems in the world.") (citation omitted).

47. The literature on the doctrine of proportionality is immense. *See generally* Stone Sweet & Mathews, *supra* note 9; DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 163 (2004); Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803 (2004) (reviewing DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004)).

48. Stone Sweet & Mathews, *supra* note 9, at 75 n.8; *see also* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 163 (2004).

49. Stone Sweet & Mathews, *supra* note 9, at 75 n.8.

50. *Id.*

51. *Id.*

Kommers states, the proportionality test is perceived by German law as the central feature of a judicial system devoted to upholding humanistic values (*Wertrangordnung*).[52]

Although human dignity is considered to be the supreme value of the German Basic Law,[53] all other constitutional rights are believed to have the same legal status. Unlike the American Preferred Rights Doctrine, the German conception of constitutional rights is not hierarchical.[54] For example, in the *Lebach* decision, the Federal Constitutional Court (FCC) addressed the question of whether a television station should be allowed to broadcast a documentary which would reveal details, including allegations of homosexual relationships, of a crime committed by a prisoner about to be released.[55] The court emphasized that it would not use an abstract ranking of the competing rights to reach its verdict. Instead, it balanced ad hoc the extent to which the broadcast would harm the prisoner's right to privacy against the extent of harm to free speech as a result of the prohibition.[56] The court found in favor of the petitioner, stating that a prohibition on disclosing the prisoner's sexuality better adhered to the supreme value of human dignity and was therefore justified.[57]

52. *See generally* DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 46–48 (2d ed. 1997); HAURST DREIER, DIMENSIONEN DER GRUNDRECHT – VON DER WERTORDNUNGSJUDICATURE ZU DEN OBJECTIVE RECHTLICHEN GRUNDRECHTSGEHALTEN (1993).

53. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 1(1), May 23, 1949, BGBl. I: ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."); *see also* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 24, 1971, (*The Mephisto Case*) 30 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 173 (1971); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 16, 1969, (*The Microcensus Case*) 27 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (1970).

54. Grimm, *supra* note 11, at 394 ("The Constitutional Court does not recognize a hierarchy among the various fundamental rights."). *See also* Eckart Klein, *Preferred Freedoms—Doktrin und Deutsches Verfassungsrecht*, *in* GRUNDRECHTE, SOZIALE ORDNUNG UND VERFASSUNGSGERICHTSBARKEIT: FESTSCHRIFT FÜR ERNST BENDA ZUM 70. GEBURTSTAG 130–139 (1995) (rejecting the suggestion to apply the same doctrinal mechanism as the American Preferred Rights doctrine in German constitutional law).

55. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 5, 1973, (*The Lebach Case*) 35 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 202 (1974) (Ger.).

56. *Id.* at 218.

57. *Id.* at ¶ 53.

In German law, the primary focus of constitutional rights adjudication lies not in the means-ends components of proportionality analysis—a rational connection between means and ends and the use of the least restrictive means to reach the ends, but rather in the final component—PSS centered on ad hoc balancing.[58] In view of the empirical difficulties in assessing means-ends connections, the FCC tends to defer to the government at the first two steps of the proportionality analysis (rationality and necessity).[59] Consequently, constitutional analysis in Germany routinely reaches the last component of the proportionality test, PSS, at which point the court asks which of the competing rights and interests better advances the underlying values of the German constitution, most notably the supreme value of human dignity.[60]

This approach has two principal advantages compared to the American approach. First, from an analytical standpoint, it seems that in order to properly protect constitutional rights it is necessary to add a balancing test even after the restricting law has successfully passed the means-ends test. In other words, taking rights seriously requires that judges strike down laws which severely restrict constitutional rights even where a perfect fit exists between means and ends (provided of course that the harm to constitutional rights outweighs the benefit to state interests). Second, the German approach enjoys the benefit of transparency, as balancing is conducted explicitly in the PSS stage, rather than implicitly in the

58. Grimm, *supra* note 11, at 393 ("The most striking difference between [Canada and Germany] is the high relevance of the third step of the proportionality test in Germany and its more residual function in Canada.").

59. *Id.* at 390–91 (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Aug. 8, 1978, (*The Kalkar Case*) 49 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 89 (1979) (refusing to substitute judicial opinions for political ones in this case, which involved the risks of atomic energy plants).

60. Israeli constitutional jurisprudence also centers on proportionality in the strict sense. However, the balance between the competing interests and values is conducted according to the extent to which each of the competing interests fulfills the values of the state of Israel as a Jewish and democratic state. For two prominent examples of the centrality of proportionality in the strict sense in Israeli case law, see HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. 58(5) PD 807 [2004]; HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Interior [2006], http://elyon1.court.gov.il /files_eng/03/520/070/a47/03070520.a47.htm. The focus of the Israeli constitutional analysis on proportionality in the strict sense can be explained by the conception of judicial discretion of the former President of the Israeli Supreme Court (1995–2006), Aharon Barak, who is a strong supporter of judicial balancing. *See generally* AHARON BARAK, THE JUDGE IN A DEMOCRACY (2006).

means-ends stage,[61] making it more judicially sincere than the American approach.[62]

Despite these advantages, we find the German approach problematic in two main regards. First, from a democratic standpoint, it is more legitimate for judges to engage in fact-finding than to be involved in value judgments that are an indispensible part of the balancing process.[63] It seems that the German constitutional analysis shifts too quickly into the stage of balancing, overlooking the benefits of the earlier stages—the requirements that a rational connection exist between means and ends and that the least restrictive means be employed.[64] For example, means-ends tests are an important tool for exposing illicit motives. Secondly and more importantly, ad hoc balancing of the sort conducted by German courts in the PSS stage is undisciplined and thus may be used to water down the protection of constitutional rights. This problem is particularly acute in Germany, specifically because the FCC employs expansive notions of constitutional rights. Indeed, the German

61. *See* Grimm, *supra* note 11, at 388 ("The question of whether the objective chosen by the legislature is important enough to justify a certain infringement of a fundamental right . . . appears at a later stage of the test, namely in the third step, where the Court asks whether a fair balance between competing interests has been struck."); *id.* at 397 ("A confusion of the steps creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable.").

62. When judges are engaged explicitly in balancing, this allows them to be more precise and to develop more sophisticated legal reasoning. For example, see the ruling of the President of the Israeli Supreme Court, Aharon Barak, in HCJ 769/02 Public Comm. against Torture in Isr. v. Israel [2006] (unpublished), para. 41–46, http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf, in which the Court developed a complex and sophisticated version of proportionality. *See also* Georg Nolte, *Thin or Thick? The Principle of Proportionality and International Humanitarian Law*, 4(2) L. & ETHICS HUM. RTS. 244 (forthcoming 2010), *available at* http://www.bepress.com/cgi/viewcontent.cgi?article=1050&context=lehr (arguing that "[p]roportionality analysis became more sophisticated by including considerations of function (of the suspected terrorist who is considered to be targeted), of necessary procedure (to be followed before the order to kill could be issued), and of evidentiary standards (which must be met). It became thicker by the insistence by the Court on how hard military commanders must look at situations in which a targeted killing is being contemplated. The change from outward appearance to procedurally determinable function can also be conceived as a thickening of the proportionality analysis, even if—paradoxically—it resulted in a reduction of the size of the group of protected civilians.").

63. BEATTY, *supra* note 47, at 163; ELY, *supra* note 35, at 102–03 (arguing judges have institutional expertise in fact-finding).

64. Grimm, *supra* note 11, at 387–89. In Germany, the government has only to prove that the objective the restrictive law pursues is a legitimate one. *Id.* As noted above, the Court is also deferential toward the government in assessing the means-ends nexus.

judicial system has at times gone so far as to consider even trivial pursuits such as riding horses in public woods, feeding pigeons in public squares, smoking marijuana[65] or obtaining the permission to import certain breeds of dogs,[66] as interests that should be protected as constitutional rights.[67] Since German constitutional rights are so broadly defined, are viewed as "positive" rights, and may also be applied in private law, the German model of rights adjudication is a model in which "everything counts" and everything is balanced. Hence, undisciplined ad hoc balancing plays a much more central role in Germany than in the United States.

The German judicial system seems to trust its judges to conduct balancing in a systematic, coherent and disciplined fashion,[68] so as to uphold the humanistic values of post World War II Germany (most notably that of human dignity). The extent to which these guidelines function on a doctrinal, operative level rather than on a mere rhetorical one, however, is questionable, given that the FCC has never defined the exact meaning of the rather vague value of "human dignity."[69]

65. BVerfGE 90, 145.

66. BVerfGE 110, 149.

67. Mattias Kumm, *Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341, 348 (2006).

68. In Germany it is rare to find an attack on the legitimacy of judicial review. In ALEC STONE SWEET, GOVERNING WITH JUDGES (2000), Alec Stone Sweet explains the lack of criticism by the fact that in Germany, as in Europe in general, the Constitutional Court is not perceived as conducting judicial review in the typical anti-majoritarian sense that many Europeans oppose. Instead, the Court is viewed as a political organ that constitutes an integral part of the state. *See also* Jed Rubenfeld, *Commentary, Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2000–03 (2004). For a rare attack on the legitimacy of the application of proportionality in the strict sense, see Bernhard Schlink, *Freiheit durch Eingriffsabwehr – Rekonstruktion der Klassischen Grundrechtsfunktion*, 11 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 457 (1984).

69. Human dignity is an abstract value that can accommodate both libertarian and communitarian understandings. Thus, for example, Nozick draws the atomized concept of the self from the Kantian concept of human dignity, while communitarians associate the notion of the "embeddedness" of the person with the value of human dignity. It seems that the FCC prefers the more communitarian understanding of human dignity. NOZICK, *supra* note 16, at 228. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 20, 1954, 4 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 7, 15–16 ("The Basic Law's idea of man is not the idea of an isolated sovereign individual; rather, the Basic Law has resolved the tension between the individual person and the community in terms of the person being community related and community bound *without infringing on their value*.").

II. PROBABILITY THRESHOLDS

Until now we have discussed the advantages and disadvantages of two existing models of constitutional adjudication: the American categorical model and the German proportionality model. We have argued that the current American model, with its emphasis on categorical tests, affords certain fundamental rights a categorical priority and restricts the individual discretion of judges, thereby ensuring that similar cases will be treated similarly. We have likewise noted the disadvantage of the American model in that it restricts itself, at least explicitly, to a means-ends analysis that allows the infringement of constitutional rights even in cases where the harm caused to rights exceeds the benefit to state interests.[70] We have contrasted the American model with the German one, claiming that the German proportionality model enjoys the advantage of allowing the court to strike down restrictive laws if the damage to constitutional rights exceeds the benefit to state interests, yet has the disadvantage of defining constitutional rights too broadly and allowing judges too much leverage in weighing constitutional rights against state interests, thereby putting at risk the supreme priority of constitutional rights. We have noted that this disadvantage is especially pertinent since many individual interests are perceived in Germany as constitutional rights and every individual judge is afforded the power to weigh differently the balance between rights and interests.

We wish to claim that each of the two models provides a necessary but, by itself, insufficient means in the process of rights adjudication in constitutional law. We believe that in order to guarantee the priority of constitutional rights, courts must add probability thresholds to their assessment of governmental policies that stand to infringe upon rights. Insisting that governmental measures meet predefined probability thresholds is especially vital in times of emergency, when governments tend to exaggerate threats,

70. A good example of this disadvantage is in *Korematsu v. United States*, 323 U.S. 214 (1944), which will be further discussed below. In this case, the Court applied the strict scrutiny test to the exclusion of all Americans of Japanese descent from prescribed areas during World War II. The Court affirmed the military order, finding that the means of exclusion justified the end of protecting national security. In its analysis the Court failed to ask whether the harm caused to Americans of Japanese descent—most of whom, like the petitioner, were not even formally suspected of disloyalty—exceeded the benefit to national security. *Id.* at 216, 223–24. Only Justice Murphy in his dissent referred to this question and concluded that it did. *Id.* at 235.

thereby advocating overly broad restrictions on human rights.[71] This ties into subsection II.A, wherein we discuss research conducted in cognitive psychology pointing to people's tendency to overestimate the risk of terrorism while underestimating other, far more mundane, risks. In subsection II.B, we will examine several court cases from different jurisdictions in order to show how the absence of probability thresholds in constitutional analysis adversely affects human rights. Finally, in subsection II.C, we will aim to show how probability thresholds, such as the clear and present danger test, have been used in both American and Israeli constitutional jurisprudence, most notably in the context of free speech. We will then demonstrate how the use of such thresholds can enhance the judicial protection of constitutional rights and discuss two institutional objections to the use of probability thresholds.

A. Cognitive Flaws in Risk Evaluation

It is well established by now that humans tend to make cognitive errors in risk assessment when under conditions of uncertainty.[72] Research in cognitive psychology suggests that the assessment of probability is especially askew in cases involving what Sunstein and Zeckhauser call "fearsome risks," such as fear of "economic meltdown, environmental catastrophe, terrorist attack, contracting cancer, or getting killed in a plane crash."[73] Fearsome risks trigger strong emotional reactions such as anxiety and anger, but more importantly may result in a cognitive failure known as "probability neglect," i.e., the tendency to completely disregard probability when making decisions under conditions of uncertainty.[74] This cognitive failure may then translate into an exaggerated reaction, affecting individuals and policy makers alike.

Probability neglect is most likely to occur when harm is portrayed in vivid, graphic terms, as suggested by the following psychological study.[75] In this study, four groups were asked how

71. CASS R. SUNSTEIN, LAW OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 206 (2005).

72. *See generally* Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979) (showing that people fail to give the proper weight to probable outcomes when evaluating risks).

73. Cass R. Sunstein & Richard Zeckhauser, *Overreaction to Fearsome Risks* 4 (Harvard Kennedy Sch., Faculty Research Working Papers Series, No. RWP08-079, 2008).

74. *Id.* at 1.

75. *Id.* at 4–5.

much money they were willing to invest in protecting themselves against cancer.[76] Two of the groups were not given any particular overview of the disease, while the disease was described to the other two groups as "very gruesome and intensely painful, as the cancer eats away at the internal organs of the body."[77] As expected, among individuals who were asked about their willingness to eliminate the same probability of cancer, the individuals who received a vivid description of the disease were willing to pay more to eliminate the risk than the individuals who did not.[78] Much as in the case of vivid imagery, probability neglect becomes more widespread when the dangerous event is deemed out of one's control.[79] The potential of probability neglect increases when one feels outrage towards a danger posed intentionally or as a result of gross negligence. This is best illustrated in the outrage people harbor towards the idea of exposure to nuclear waste, which, while no more dangerous than exposure to radon found in their basements, elicits far greater outrage.[80] In fact, research shows that people reacted similarly to the potential risk of exposure to nuclear waste whether the probability of harm was deemed 1 in 100,000 or 1 in 1,000,000.[81] The final risk factor for probability neglect is the cognitive availability of an example of such danger and the ease with which this example comes to mind, the "availability heuristic."[82]

It seems that the phenomenon of probability neglect is especially powerful in the context of terrorism, in which all of the aforementioned conditions occur simultaneously.[83] Indeed, acts of terrorism are most often portrayed by the media in highly graphic terms, causing panic and thereby leading to the first probability neglect risk factor. That they are beyond people's control pertains to the second risk factor for probability neglect. The intentionality and malice of terrorist activity generates a sense of outrage similar to that surrounding nuclear waste and thus corresponds to the third risk

76. *See id.*

77. *Id.* at 4.

78. *Id.* at 5.

79. Masur, *supra* note 5, at 1339.

80. *See* Sunstein & Zeckhauser, *supra* note 73, at 6.

81. *Id.* at 6, citing Peter M. Sandman, Neil D. Weinstein & William K. Hallman, *Communications to Reduce Risk Underestimation and Overestimation*, 3(2) RISK DECISION AND POLICY 93, 102–06 (1998).

82. Sunstein & Zeckhauser, *supra* note 73, at 1.

83. *See also* Jonathan Marks, *9/11 + 3/11 + 7/7 = ? What Counts in Counterterrorism*, 37 COLUM. HUM. RTS. L. REV. 559 (2006).

factor for probability neglect. Lastly, since terrorism is at the center of public debate, people tend to overestimate the probability of its occurrence. Research indicates that people are willing to pay more for flight insurance that covers losses caused by terrorism than for flight insurance that covers all risks.[84]

It is important to note that since the probability of being affected by terrorist activity is markedly low (at least in comparison to other risks), even the slightest deviation in the assessment of such probability may lead to significant statistical mistakes. As Masur notes in the context of free speech: "[I]f the government believes that an event will occur with a probability of 2 in 100,000 if certain speech is allowed to take place, but the actual probability is, in fact, 1 in 100,000, then the statistical estimate of harm is off by 50%."[85]

To sum up, when it comes to terrorism it seems people imagine the worst and assess risk accordingly, neglecting the question of probability even when empirically the risk appears to be low. Since governments respond to public opinion and try to ease the anxieties of their citizens, it is reasonable to assume that governmental decision making processes will suffer from the same cognitive flaw of probability neglect as individual citizens do. Moreover, oftentimes governments will have a vested interest in using worst-case scenarios to justify their use of restrictive measures. In these cases, probability neglect is a means to manipulate public opinion to support the use of harsh, restrictive measures supposedly for the purpose of reducing the risk of terror.

B. Judicial Failures in Risk Evaluation due to Probability Neglect

Judges are naturally as likely to suffer from at least some types of cognitive errors and biases as any other decision maker.[86] Cognitive errors such as probability neglect, when carried out by judges, stand to affect adversely the protection of human rights. This problem is particularly acute when judges engage in ad hoc balancing

84. Eric J. Johnson, John Hershey, Jacqueline Meszaros and Howard Kunreuther, *Framing, Probability Distortions, and Insurance Decisions*, 7 J. RISK & UNCERTAINTY 35, 39 (1993).

85. Masur, *supra* note 5, at 1337. *See generally* Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, 39 AM. PSYCHOLOGIST 341 (1984) (discussing the psychophysics of value in risky contexts).

86. *See* Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 816 (2001); *see also* Frederick Schauer, *On the Supposed Jury-Dependence of Evidence Law*, 155 U. PA. L. REV. 165, 187 (2006).

of fundamental rights and state interests, especially in times of emergency. In what follows we draw on anecdotal evidence from several different jurisdictions in order to show how, in the absence of judicial inquiry into the probability of harm to state interests, fundamental rights are unnecessarily restricted.

The first example we discuss is the American *Korematsu* case.[87] During World War II, all American citizens of Japanese descent were excluded from coastal areas and forced to move into relocation camps by executive orders of the U.S. government and military commander. Although the Court ruled, for the first time, that any restriction based on race or national origin is suspect and therefore subject to judicial strict scrutiny, it denied the petition and exhibited extreme deference in the matter of the exclusion order towards the military commander in assessing the constitutionality of the restriction.[88] Justice Black, speaking for the Court, explained that:

> [The] exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group.[89]

Indeed, the Court failed to require that the government assess the probability that national security would be harmed absent such a restriction.[90]

Another example from the United States, this time from the Cold War era, is the *Dennis* decision in which the Supreme Court affirmed the convictions of leaders of the American Communist Party for conspiring to advocate the destruction and overthrow of the U.S. government using tactics of force and violence.[91] The Court explicitly rejected the use of probability tests holding that:

87. Korematsu v. United States, 323 U.S. 214 (1944).

88. *Id.* at 221–24.

89. *Id*. at 218–19.

90. *Id*. at 219.

91. Dennis v. United States, 341 U.S. 494, 516–17 (1951).

> Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of the revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt.[92]

In a more recent court ruling on the other side of the ocean, the European Court of Human Rights applied the proportionality test in affirming the Turkish ban on the wearing of headscarves in public universities.[93] The *Sahin v. Turkey* case examined the propriety of the ban in light of the existence of "extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts."[94] The ban on wearing veils was seen as serving "to protect the individual [. . .] from external pressure from extremist movements"[95] and ensuring the continued respect for the principle of secularism in Turkey.[96] The court accepted the assumption that permitting veils to be worn in public universities will make it possible for extremist movements to threaten the principle of secularism *without* inquiring into the probability that such a threat will materialize and without requiring any concrete evidence to that effect.[97]

A final example comes from the Israeli Supreme Court and takes the form of a family reunification case.[98] The *Adalah v. Minister of Interior* case involved a challenge to the constitutionality of an amendment to the Israeli Citizenship Law, which prohibited family reunification of Israeli citizens with Palestinian residents of the Occupied Territories for security reasons.[99] Since the vast

92. *Id.* at 509.

93. Sahin v. Turkey, 11 Eur. Ct. H.R. 173, 204–07 (2005).

94. *Id.* at 206.

95. *Id.* at 205.

96. *Id.* at 206–07.

97. *Id.* at 206.

98. HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Interior [2006], http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.htm.

99. *Id.* The amendment was implemented following a series of deadly terrorist attacks in Israel carried out by terrorists residing in the Occupied Territories and its stated purpose was to protect the security of the state of Israel.

majority of Israeli citizens seeking family reunification with Palestinian residents of the Occupied Territories are Israeli citizens of Palestinian descent, the petitioners claimed that the amendment violated the constitutional rights of Israeli citizens of Palestinian descent to family life and equality under the law.[100] Rejecting the petition, the plurality of the court held that national security interests outweighed the violation of these individual rights.[101] These security interests were tantamount to upholding Israeli citizens' right to life and therefore superseded the Arab minority's rights to equality and family life.[102] The plurality of the court, however, failed to take into account that, when examined at the level of each individual applicant, the probability that each individual applicant for family unification would harm national security was miniscule.

C. Legal Doctrines of Probability Tests

In the previous section, we showed how probability neglect affects courts. We illustrated how such neglect results in unjustified restrictions on human rights, especially in times of emergency. The problem is particularly acute if we remember that judges routinely engage in ad hoc balancing between human rights and state interests. In the following section we wish to argue that in order to reduce unjustified harm to human rights, probability thresholds must be incorporated into assessments of human rights infringement. We believe that before engaging in ad hoc balancing, judges should examine whether the risk to state interests meets a certain predefined probability threshold, so that if the risk is below the predefined probability threshold, courts can reject the proposed restrictive measure.

Legal doctrines that use probability tests to assess the justifiability of harm to human rights have been used in the past both in American and Israeli constitutional law. In the following sections we shall demonstrate the use of such tests by American and Israeli courts.[103] We will then return to the examples provided in the

100. *Id.* at para. 9–11 (Barak, C.J., dissenting).

101. *Id*. at para. 122 (Cheshin, J.).

102. *Id*. at para. 120 (Cheshin, J.).

103. While Israeli constitutional law has in recent years adopted the German model of proportionality tests, in the past Israeli constitutional law has centered on probability tests. *See infra* notes 110–118 and accompanying text. Since adopting the balancing model, Israeli law has struggled to combine the probability tests with the proportionality tests. *See infra* note 119 and accompanying text. We therefore use Israeli law in this article both to

previous section to show how the use of probability tests could have resulted in a better outcome for human rights protection. Finally, we shall discuss two institutional objections to the use of probability thresholds by the courts.

1. Probability Tests in American and Israeli Constitutional Law

Perhaps the most prominent example of the judicial system's use of probability thresholds to assess infringements on human rights is the American clear and present danger test, announced in the early years of the twentieth century.[104] *Schenck v. United States* serves as a case in point. In this instance, the defendants were convicted for violating the Espionage Act of 1917 on the grounds of distributing leaflets urging all men of draft age to resist the draft. Justice Holmes upheld the indictments, holding that "the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[105]

A reformulation of the clear and present danger test can be found in *Brandenburg v. Ohio* where, in finding the Ohio Criminal Syndicalism Act unconstitutional, the Court overturned the conviction of a Ku Klux Klan leader charged with making a racist speech against Jews and African Americans at a KKK rally.[106] The Court reversed Brandenburg's conviction, articulating a different version of the clear and present danger test.[107] According to this version, the government must prove, first, that the speech "is directed

demonstrate the use of probability tests and to suggest ways to integrate them within the framework of proportionality tests.

104. Interestingly, probability tests were used even earlier than this in the jurisprudence of the Prussian Supreme Administrative Law Court. In the *Weavers Case*, the Prussian court ruled that in order to justify the censoring of a play the police must show "an actual, near, impending danger" to public order absent such a restriction. *See* MARTIN PAGENKOPF, DAS PREUSSISCHE OVG UND HAUPTMANNS "WEBER": EIN NACHTRAG ZUM 125. GEBURTSTAG VON GERHART HAUPTMANN 56–70 (1988) (reproducing the seminal judgments of the Supreme Administrative Law Court). For more, see Kenneth F. Ledford, *Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court (1876–1914)*, 37 CENT. EUR. HIST. 203, 220 (2004).

105. Schenck v. United States, 249 U.S. 47, 52 (1919).

106. Brandenburg v. Ohio, 395 U.S. 444 (1969).

107. *Id.* at 447.

to inciting or producing imminent lawless action" and second, that it "is likely to incite or produce such action."[108]

It is important to mention in this context that the use of probability tests in American constitutional law is for the purpose of determining *probability thresholds* to be met prior to engaging in cost-benefit analysis. Probability tests that function as mere thresholds *do not* measure or take into account the magnitude of the harm in question. A different way of using probability tests in legal doctrines is to incorporate them into the process of balancing. A legal doctrine reflecting such incorporation can be found in the jurisprudence of the Israeli Supreme Court. While in American jurisprudence probability thresholds express the priority of human rights inherent in the constitution, in Israeli law, because of the absence of a constitution to protect human rights, probability tests are used as a means to prioritize fundamental rights.[109]

In what follows we shall focus on the two fundamental differences between the Israeli Probability Doctrine and the American one. Primarily, the Israeli probability threshold is a relative one in the sense that decisions made regarding the infringement of rights depend both on the nature of the right and the nature of the conflicting state interests. Secondarily, while Israeli probability tests indeed began as threshold tests, in time they have transformed into balancing tests.

The *Kol Ha'am* decision is illustrative. It was in this milestone case that the Israeli Supreme Court set the doctrinal basis for the prioritization of fundamental rights by using probability tests.[110] The Minister of Interior had used the power invested in him to suspend the publication of a newspaper on the grounds of it publishing an op-ed against the Israeli government.[111] The main question before the court was how to deal with the Minister's line of argumentation that cited his right to restrict publication if it seemed "*likely* to endanger the public peace."[112] In other words, the question before the court was how to interpret the word "*likely*." The court

108. *Id.*

109. Absent an entrenched constitutional bill of rights, from its inception the Israeli Supreme Court has devised a set of probability tests as a means of inserting rights protection into Israeli constitutional law. *See generally* Segal, Zeev, *Constitution without a Constitution: The Israeli Experience and the American Impact*, 21 CAP. U. L. REV. 1, 23 (1992).

110. HCJ 73/53 Kol Ha'am Co. Ltd. v. Minister of Interior 7 PD 871 [1953].

111. *Id.* at 874.

112. *Id.* at 882 (emphasis added).

rejected the Minister's contention that even a small likelihood would suffice.[113] It held that in a democracy the government can only restrict freedom of speech if it can show that there is a *near certain* probability that the continued publication of the newspaper will harm the public peace.[114] Following this case, the *near certainty* test has become the mandatory test for adjudicating conflicts between the freedom of political speech and the state interest in public peace and national security.[115]

The *near certainty test*, however, has been deemed by the Israeli Supreme Court insufficient for the entire range of cases brought before it, and the court has claimed that other kinds of probability tests were more suitable for adjudicating certain other types of conflicts. For example, the court ruled that in the event of conflict between freedom of speech on the one hand and state interest in maintaining impartial legal proceedings (*sub judice*) on the other, a *reasonable likelihood*—as opposed to *near certainty*—that the impartiality of the legal proceeding may be damaged will justify imposing limitations on free speech.[116] Again, *reasonable likelihood* has become the standard rule for this type of conflict.

While in the case of the *Kol Ha'am* decision the probability test served merely as a *probability threshold test*, examining only the *probability of harm*, in subsequent cases the Israeli Supreme Court added to the probability threshold test an examination of the *magnitude of harm* in question. Thus, for example, in cases of conflict between freedom of speech and national security or public order the court requires nothing less than *near certainty* that absent the restriction on human rights *severe harm* will befall state interest.[117] In cases of conflict between human rights and religious feelings, the court applies an even stricter test, requiring a *near*

113. *Id.* at 887.

114. *Id*. at 892 (emphasis added).

115. Another type of conflict in which the court ruled that the proper test is the "*near certainty*" test is that between the free exercise of religion on the one hand, and the state interest in national security and the public peace, on the other. *See* HCJ 292/83 Ne'emnei Har HaBait v. Chief of Jerusalem Police 38(2) PD 449, 456 [1984].

116. HCJ 696/81 Azulai v. State of Isr. 37(2) PD 565 [1983]. A similar test of *"reasonable likelihood"* is applicable in cases of a conflict between the right to run for public office and the state's interest in its continued existence as a Jewish and democratic state. *See* EA 2/84 Neiman v. Chairman of the Cent. Elections Comm. for the Eleventh Knesset 39(2) PD 225 [1985].

117. HCJ 680/88 Schnitzer v. Chief Military Censor 42(4) PD 617, 636 [1988].

certainty that absent the restriction on human rights the harm to religious feelings will be "severe, grave and serious."[118]

To conclude, the Israeli probability test requires both a probability threshold test and a magnitude of harm assessment, both of which are determined relative to the importance of the human right and the seriousness of the state interest in question.

Unfortunately, the rise of the strict scrutiny and proportionality tests in the United States and Israel, respectively, has marginalized the use of probability tests because both of these models do not explicitly instruct the court to assess the probability of harm to state interests prior to allowing the infringement on fundamental rights. Since Israel's adoption of the Basic Laws on Human Rights in 1992—laws instructing the court to carefully examine the proportionality of restrictions on human rights as compared with the harm to state interest—there have been numerous cases exhibiting the court's confusion with regard to the proper relationship between the new proportionality test and the old probability test. The confusion seems to be twofold. Primarily, it centers on the question of whether or not there is still room for probability tests in Israeli constitutional law. Secondly, if such room still exists, it asks how probability tests should be incorporated into the dominant proportionality testing method.[119]

Similarly, in the United States, the rise of the strict scrutiny test in the 1960s led to its replacement of the clear and present danger test (which was, from its very inception, intended to serve only in first amendment cases). This replacement was not without its analytical difficulties. Indeed, it remains unclear if and how questions of probability should be incorporated into the strict scrutiny test. One possibility, hinted at by Richard Fallon, is to examine probabilities when asking whether the restriction is narrowly tailored, especially if asking whether it is over inclusive.[120] A second

118. HCJ 5016/96 Horev v. Minister of Transp. 51(4) PD 1, 55 [1997].

119. In Israeli constitutional case-law there are four approaches to the probability test within the framework of proportionality analysis. *See* HCJ 951/06 Stein v. Karadi (Apr. 30, 2006), Nevo Legal Database (by subscription) (probability should be examined when assessing the importance of the state interest). *See also* HCJ 6698/95 Ka'adan v. Isr. Land Admin. 54(1) PD 258 [2000]; HCJ 1715/97 Isr. Inv. Dir. Office v. Minister of Fin. 51(4) PD 367 [1997] (probability should be examined when assessing whether there is a rational connection between means and ends); HCJ 2665/98 Nachum v. Israel Police 52(3) PD 454 [1998] (probability should be examined when assessing whether the means used are the least restrictive possible); HCJ 4541/94 Miller v. Minister of Def. 49(4) PD 94 [1995] (probability should be examined when assessing whether the means are proportional in the strict sense).

120. Fallon, *supra* note 26, at 1330.

possibility, suggested by Stephen Siegel, is to assess probability by determining how compelling the state interest is.[121] Neither of these possibilities, however, has been methodologically developed nor explicitly addressed by the courts.

2. Probability Tests as a Mechanism for Reinforcing Protection of Human Rights

Basing our insights on the cases discussed in Part II.B, we will dedicate the following subsection to a discussion of probability tests as a means of reinforcing the protection of human rights in constitutional law adjudication. We shall highlight the ways in which the dissents in the cases previously discussed used probability tests to oppose the application of restrictive measures to fundamental rights.

Let us start with the *Korematsu* case affirming the exclusion of Americans of Japanese descent from coastal areas during WWII.[122] In his dissenting opinion, Justice Murphy rejected the Court's conclusion that the confinement was justified. Applying a probability threshold, he concluded that "no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law."[123] It is likely that had the Court required the government to pass a high probability threshold in order to justify the confinement order, it would have reached a conclusion similar to that of Justice Murphy and would have likewise rejected the racial confinement order. Similarly, according to Justice Douglas' dissent in the *Dennis* case, the application of the clear and present danger test would have led to the acquittal of the Communist Party leaders.[124] As Justice Douglas noted, the record "contains no evidence whatsoever showing that the acts charged, *viz.*, the teaching of the Soviet theory of revolution with the hope that it will be realized, have created any clear and present danger to the Nation."[125]

121. Stephen A. Siegel, *The Death and Rebirth of the Clear and Present Danger Test*, *in* AMERICAN LEGAL HISTORY: ESSAYS IN HONOR OF PROFESSOR MORTON J. HORWITZ 211, 220–23 (Harvard Law School, 2009).

122. Korematsu v. United States, 323 U.S. 214, 233 (1944).

123. *Id.* at 235.

124. Dennis v. United States, 341 U.S. 494, 587 (1951).

125. *Id.*

Dissenting from the court's decision to allow the ban on head veiling in Turkey, Justice Tulkens of the European Court of Human Rights argued that in order to prove the ban on veiling is necessary to ensure the principle of secularism, Turkey must supply the court with "indisputable facts and reasons whose legitimacy is beyond doubt—not mere worries or fears."[126] Justice Tulkens' reasoning calls for careful judicial assessment of the likelihood that any harm to secularism would occur absent the ban. The lack of an explicit mention of probability in the Justice's reasoning may have to do with the fact that, contrary to American and Israeli law, the probability test in European human rights law has never been explicitly employed as a doctrine.

Finally, let us not forget that the court's mere contention that it is utilizing probability tests, even if strict ones, does not in itself guarantee the protection of human rights. The proper use of probability tests requires that the court engage in two types of inquiry: (1) an insistence that the government produce sufficient evidence to establish that the probability of harm is above the required probability threshold; and (2) an assessment of the probability of harm on an individual basis. The family reunification case brought before the Israeli Supreme Court serves as a case in point.[127]

As mentioned earlier, this case dealt with the right of Israeli citizens (most notably Israeli citizens of Palestinian descent) to reunite with their families residing in the Occupied Territories.[128] Although the amendment was enacted due to a series of deadly terrorist attacks carried out by terrorists originating from the Occupied Territories after the start of the Second Intifada, the involvement of Palestinians who arrived in Israel through family reunification in these attacks was miniscule. According to the evidence presented by the government, out of 130,000 Palestinians who entered Israel via family reunification, only twenty-six were suspected of being involved in terrorist activity.[129] Nevertheless, Justice Grunis, joining the plurality upholding the amendment,

126. Sahin v. Turkey, 11 Eur. Ct. H.R. 222 (2005).

127. HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Interior, http://elyon1.court.gov.il/files_eng/03/520/070/a47/03070520.a47.htm.

128. Because the vast majority of Israeli citizens seeking family reunification with Palestinian residents of the Occupied Territories are Israeli citizens of Palestinian descent, the petitioners claimed the amendment violated the constitutional rights of the Israeli citizens of Palestinian descent to family life and to equality. *Id.* at para. 9 (Barak, C.J., dissenting).

129. *Id.* at para. 16 (Procaccia, J., dissenting).

concluded that "on the basis of these figures, I believe that it can be said that there is a certainty that the entry of thousands of additional spouses will lead to harm to human life."[130]

Justice Grunis' line of reasoning was criticized by dissenting justices, who argued in favor of individual assessment of petitioners despite the increased risk to national security entailed in this process. They claimed that the sweeping rejection of family reunification was unjust. Likewise dissenting from the decision, former President of the Supreme Court Justice Barak pointed to the fact that modern society cannot function without taking risks, the likes of which he compared to the risks emanating from driving cars, and should therefore be willing to take certain risks in the context of family reunification.[131] Calling into question Justice Barak's comparison between the risks involved in driving cars and the risk to national security brought about by the family reunification law, Justice Grunis claimed that:

> [A] blanket prohibition against traveling by motorized vehicles on the roads and a return to the days of carriages will significantly reduce the number of persons killed and injured in road accidents. Nonetheless, it can be assumed that a proposal to this effect will not be adopted in a modern society.[132]

Reading Justice Grunis' response, one cannot but wonder why a blanket restriction on traveling in cars would not be accepted in a modern society while a blanket restriction on family reunification of Palestinians would be accepted. It is clear, of course, that both sweeping restrictions are by far the most efficient means of reducing risk to human life. There are two interrelated answers to this question. Primarily, as noted in Part II.A, terrorism invokes high levels of anxiety, stirs outrage and therefore provokes drastic measures. Secondly, contrary to a blanket ban on driving cars which restricts the rights of all members of Israeli society, it is mostly Israeli citizens of Palestinian descent (rather than Israel's Jewish majority) that bear the weight of the blanket ban on family reunification. The fact that the affected members are of a minority group makes both decision makers and public opinion all the more

130. *Id.* at para. 5 (Grunis, J.).

131. *Id.* at para. 110 (Barak, C.J., dissenting).

132. *Id.* at para. 5 (Grunis, J.).

prone to probability neglect. Both these points are reflected in Justice Hayut's dissent, quoting Sunstein:

> If the restrictions are selective, most of the public will not face them, and hence the ordinary political checks on unjustified restrictions are not activated. In these circumstances, public fear of national security risks might well lead to precautions that amount to excessive restrictions on civil liberties. The implication for freedom should be clear. If an external threat registers as such, it is possible that people will focus on the worst-case scenario, without considering its (low) probability. The risk is all the greater when an identifiable subgroup faces the burden of the relevant restrictions. [I]f indulging fear is costless, because other people face the relevant burdens, then the mere fact of 'risk,' and the mere presence of fear, will seem to provide a justification.[133]

III. THE PROPOSED ACCUMULATIVE MODEL

Thus far we have discussed three models of rights adjudication and evaluated the extent to which they prioritize and protect constitutional rights. The first model we presented was the American strict scrutiny model, which prioritizes constitutional rights by strictly scrutinizing the fit between means and ends. The second model we looked at was the German one, which applies proportionality analysis focused on ad hoc balancing and is aimed at promoting humanistic values. The third model, dominant in American and Israeli constitutional law prior to their adoption of the strict scrutiny and proportionality tests, examines the probability of harm to state interests absent the restriction of human rights.

We believe that each of the three above-mentioned models provides a necessary yet individually insufficient element in the protection of constitutional rights. It is our belief that only the integration of all these elements—means-ends analysis, probability thresholds and balancing—into a unified analytical framework can provide proper protection of constitutional rights. We thus propose to add to the German model of proportionality analysis, which already includes a means-ends analysis and balancing, an additional

133. *Id.* at para. 3 (Hayut, J., dissenting) (alteration in original) (quoting CASS R. SUNSTEIN, LAW OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 204–05, 208 (2005)).

element—probability thresholds—to be met prior to engaging in balancing.

We have previously argued that the American model, by way of restricting itself (at least explicitly) to a means-ends analysis, maintains the disadvantage of not taking rights seriously enough. Taken literally, this limitation requires that the court allow the infringement of constitutional rights even if the harm to rights exceeds the advantage to state interests. As pointed out by scholars such as Alexander Aleinikoff, in an effort to overcome this limitation, American judges at times implicitly engage in the act of balancing.[134] Consequently, Justice Breyer has suggested on numerous occasions, most recently in *District of Columbia v. Heller* (pertaining to gun control), that American constitutional law should abandon the strict scrutiny test and adopt an approach he termed "the proportionality approach," which is quite similar to the German proportionality model.[135]

Rejecting Justice Breyer's suggestion in the *Heller* case, Justice Scalia has argued that adopting the proportionality approach would water down the rights enumerated in the constitution. Such an approach, Justice Scalia concluded, will strip fundamental rights from their inherent priority in the very concept of constitutional rights. Justice Breyer's approach, Scalia explains, is no more than "a judge-empowering 'interest-balancing inquiry.'"[136]

We believe that incorporating the balancing element into rights adjudication will add a much needed extra layer of protection to constitutional rights. We share Justice Scalia's concern, however, that if the balancing is done in an undisciplined ad hoc way, it stands to dilute the protection of rights instead of strengthening them. It seems Justice Scalia's concern is based on the assumption that adopting Justice Breyer's approach will lead to a relaxation of the

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

135. District of Columbia v. Heller, 128 S. Ct. 2783, 2852 (2008) (Breyer, J., dissenting). Justice Breyer makes a reference to the following case law to show that the principle of proportionality is embedded in American constitutional law. *See* Thompson v. W. States Med. Ctr., 535 U.S. 357, 388 (2002) (Breyer, J., dissenting); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000) (Breyer, J., concurring).

136. *Heller*, 128 S. Ct. at 2821. *See generally* 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 (2009).

strict means-ends test and shift the weight to the balancing component in a way that much resembles the German approach.[137]

We therefore think that reintroducing a probability threshold of the sort that once existed in American constitutional law as an additional element in constitutional rights adjudication can resolve some of the difficulties to which Justice Scalia points. By introducing a probability threshold, the court will only resort to balancing in cases where a certain threshold of probability that state interests will be harmed is met. In all other cases, when the probability threshold has not been met, the government's restrictive policies will be rejected even if they pass the means-ends test. According to our suggestion, the balancing stage will only be reached after the government's restrictive measures have passed both the means-ends test and the probability threshold, and will allow the court to strike down the restriction if the harm to constitutional rights supersedes the harm to state interest.

One last analytical question that must be addressed before we move on to outline our suggested use of the probability threshold is at what point in the judicial process it should be applied. The two possibilities are either placing the probability threshold within the framework of assessing the legitimacy of state interests, or placing it after the means-ends analysis and before engaging in balancing. Those who support the first possibility will rely on the landmark Canadian *Oakes* decision, in which the court ruled that the objective must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom."[138] This is to say that the importance of the rights restricting objective is to be measured against the importance of the constitutional right.[139] They will further claim that there are analytical similarities between the probability threshold and the *sufficiently important objective* test and that, therefore, the former should be integrated into the latter.[140] Only if the government can prove that there is a certain probability of harm absent the restriction can its objective be considered of sufficient importance; but if the government's objective is to avoid any risk to national security, however remote the risk and whatever

137. In *Heller*, for example, Justice Breyer seems to apply the *"least restrictive means"* test in a manner that requires the petitioners to show that their suggested less restrictive means are *as effective* as the means suggested by the government. *Heller*, 128 S. Ct. at 2864. This is similar to the German approach. *See* Grimm, *supra* note 11.

138. R. v. Oakes, [1986] 1 S.C.R. 103, 141 (Can.).

139. *See* DAVID BEATTY, CONSTITUTIONAL LAW IN THEORY AND PRACTICE 149 (1995).

140. *See* PETER HOGG, CONSTITUTIONAL LAW OF CANADA 33 (3d ed. Supp. 1996).

the consequence to human rights, then this cannot be considered a legitimate objective in a democratic society.

It is our belief that inserting the probability test into the *sufficiently important objective* test is methodologically flawed since the criteria used to determine the *sufficient importance* of the objective is too abstract. It is debatable at what level of abstraction judges should determine the importance of the objective.[141] Clearly, too high a level of abstraction makes it easier for the government to veil illicit motives. Conversely, too low a level of abstraction creates a methodological problem as the two distinct stages of analysis—assessing the importance of the objective (which should be done at a higher level of abstraction) and analyzing the proportionality of the means (which should be done more concretely)—collapse into one another and obscure the logic behind each of the separate stages.[142] It is therefore our belief that the low level of abstraction that the probability threshold represents is unsuitable for the assessment of the importance of the objective stage of the constitutional analysis.[143] We agree rather with the second of the two options, that of placing the probability threshold after the means-ends analysis and before engaging in balancing.

To conclude, the proper way to go about the protection of human rights, as we see it, is to ask the following set of questions once the court has determined that a fundamental right has been infringed for a legitimate reason. First, is there a proper relationship between the restrictive measure and the state interest the government wishes to protect? Second, can less restrictive means be used while still obtaining the state interest in full? These first two questions serve to filter out unnecessarily harsh government restrictions, unveil illicit motives, as well as enhance Pareto optimality. Third, prior to asking whether the restriction is proportional in the strict sense, the

141. In Canadian constitutional law there has been a debate regarding the legitimacy of defining the purpose in too high a level of abstraction. For more, see *id.* at 18–19; RJR-MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199, 335–36 (Justice McLachlin warning against defining the governmental objective in too high a level of abstraction); Norman Siebrasse, *The* Oakes *Test: An Old Ghost Impeding Bold New Initiatives*, 23 OTTAWA L. REV. 99, 103 (1991).

142. Aharon Barak, *Proportionality and Principled Balancing*, 4 LAW & ETHICS HUM. RTS. 1 (2010), http://www.bepress.com/cgi/viewcontent.cgi?article=1041&context=lehr. *See also* Fallon, *supra* note 26, at 1271.

143. *See* Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835, 877–882 (Can.) (noting that the difference between the objective stage and the PSS is that while in the former the government interest is evaluated in the abstract, in the latter the actual salutary effects of the restriction are examined).

next question should be whether the probability of the harm to state interests absent the restriction has met a predefined probability threshold. Here the court should set a series of categorical probability thresholds, balancing the importance of the infringed right against the importance of the state interest at stake. We find the Israeli model of categorical probability testing, applying the "high likelihood" test where free speech conflicts with national security and the "reasonable likelihood" test where free speech conflicts with the very existence of the state, to be most illuminating.[144] Only in the event that the first three questions are answered positively, should the court ask whether the law is proportional in the strict sense, making sure the harm to human rights does not exceed the benefit to state interest.

We recognize that our suggestion does not neatly fit into the current American constitutional framework that centers on the strict scrutiny test. The strict scrutiny test, as it stands today, does not include our proposed last step: that of proportionality in the strict sense. As we have shown, American judges do engage, if implicitly, in ad hoc balancing at different stages of constitutional analysis. That they already engage in balancing leaves only the question of timing: at what stage should the court apply the probability threshold? Earlier we mentioned two possibilities—one is to integrate the probability threshold into the compelling state interest stage and the second is to integrate it into the means-ends test. Let us reiterate then that the most analytically appropriate order of constitutional analysis, as we see it, is to apply the probability threshold after the means-ends tests and prior to the proportionality in the strict sense test.[145] In view of the current American framework of rights adjudication, however, we introduce here an alternate timeline too. As a second possibility, we suggest the incorporation of the probability threshold into any of the stages so long as this comes *prior* to balancing.

We think our proposal superior to the current American and German models of constitutional law for two reasons. First, it provides a more accurate analytical framework for the evaluation of restrictions on constitutional rights. Second, it provides better

144. As noted earlier, the Israeli probability tests have evolved to require the court to examine the magnitude of harm in addition to the probability of its occurrence. We believe that the examination of the magnitude of harm should be reserved for the balancing stage and should not be confused with the examination of whether the probability threshold is met.

145. This is so because probability thresholds require by their very nature the assessment of concrete facts. While the examination of the government objective is done on a more abstract level, the means-ends test tends to be more concrete.

protection of constitutional rights. This proposal is especially pertinent today, when the War on Terror causes governments to take extreme preventive measures that often come at the expense of protecting fundamental human rights. In the following segment we wish to demonstrate the advantages of our proposal by applying it to cases of preventive detention and of free speech. Recently, the U.S. Supreme Court ruled that the constitutional privilege of habeas corpus applies to enemy combatants detained at Guantanamo Bay.[146] This allowed the courts to examine the constitutionality of preventive detention for each case individually. While applying habeas corpus to enemy combatants certainly improves the protection of their rights, we nevertheless believe that under the current American model of rights adjudication this may not be enough, and that our suggested framework may enhance this protection even more. In most instances the government will have no difficulty satisfying the means-ends test reflected in the first and second steps of the aforementioned framework. This is because there do not seem to be less restrictive means than preventive detention that are as effective in protecting national security. The third step of the framework requires that even if the conditions of the means-ends test are satisfied, the government must show that the probability of harm to national security absent preventive detention of each individual detainee meets a certain predefined threshold. It seems to us that analyzing the constitutionality of preventive detention should not stop here. Indeed, if the means-ends test and the probability threshold are both met, the court should go on to the fourth stage of the analysis—the balancing stage. This form of extra precaution is necessary in a liberal democracy that values human rights, since it needs to be made certain that the harm caused to the rights of detainees does not exceed the benefit to state interests. Of course, the longer the detention, the higher the likelihood that harm to detainees' rights will exceed the benefit to national security. It is important to note, therefore, that contrary to Justice Scalia's concern that balancing will only water down constitutional rights, the present example reveals that, if used after all other tests have been properly applied, balancing could be the only safeguard against excessive and unwarranted restrictions on fundamental human rights such as unlimited detention.

Nevertheless, as the following Israeli case that uses the German proportionality model shows, when used on its own without a prior probability threshold, balancing fails to properly protect

146. *See generally* Boumediene v. Bush, 128 S. Ct. 2229 (2008).

human rights. In this case, an organization of victims of terrorist attacks wanted to place fifty-one protesters in front of a hotel in Jerusalem where U.S. President George W. Bush was staying during his visit to Israel, and in front of the residence of the Israeli Prime Minister.[147] The organization petitioned the Israeli Supreme Court after the police refused to permit the protest in the requested locations, only allowing a protest to take place in remote locations. Moving directly to examine the balancing prong of the proportionality model (proportionality in the strict sense), the Supreme Court rejected the petition, holding that the police had struck the proper balance between the fundamental freedoms of speech and demonstration on the one hand and the paramount state interest in national security on the other.[148] The court did not require the police to show any degree of probability that allowing the protest to be held in the requested locations might endanger national security, and the police did not offer any evidence to that effect.[149] Had the court required the police to meet the probability threshold that the Israeli court has customarily used in the past for conflicts between free speech and national security—near certainty that allowing the protest will endanger the national security—it is doubtful that the police could have passed this threshold.

IV. INSTITUTIONAL OBJECTIONS TO THE USE OF PROBABILITY TESTS IN COURT

The court's use of probability tests for the protection of human rights may raise two institutional concerns. The first of these has to do with the hardships encountered by judges when engaging in risk management that is part and parcel of probability testing. There is a legitimate reason for concern that judges are ill equipped to assess the risks to state interests involved in probability tests and will therefore opt to defer to the government.

In response to the first institutional concern, the argument fails on two levels. First, judges have developed institutionalized skills in fact-finding and causation analysis.[150] As Justice Rehnquist

147. HCJ 281/08 Almagor Organization of Terror Victims v. Police Comm'r Franco (Jan. 9, 2008), Nevo Legal Database (by subscription).

148. *Id.* § 7.

149. *Id.*

150. *See* ELY, *supra* note 35, at 102–03; BEATTY, *supra* note 47, at 169–72.

observed in the context of judges' ability to evaluate the probability of future criminal conduct when determining pretrial detention:

> [F]rom a legal point of view there is nothing inherently unattainable about a prediction of future criminal conduct. Such a judgment forms an important element in many decisions, and we have specifically rejected the contention, based on the same sort of sociological data relied upon by appellees and the District Court, "that it is impossible to predict future behavior and that the question is so vague as to be meaningless."
>
> We have also recognized that a prediction of future criminal conduct is "an experienced prediction based on a host of variables" which cannot be readily codified.[151]

Second, while we agree that courts are not immune to the cognitive failures of probability neglect, they are likely to be more objective than the government in assessing facts. As Dieter Grimm recently noted: "Governments tend to invoke the grand values when it comes to fighting terrorism, and they paint gloomy pictures in order to justify extraordinary means. Courts operate from a certain distance, do not have to look to the next election, and can employ a more sober view."[152] Moreover, we believe that the existence of an explicit doctrinal requirement that judges assess the probability of harm to state interests will further reduce the risk of failing to properly take probability into account.

The second of the two concerns has to do with the principle of Separation of Powers and concerns the implications of setting high probability standards on the effective functioning of the government. As Canadian Supreme Court Justice La Forest argues, setting high evidentiary standards for the government "could have the effect of virtually paralyzing the operation of government . . . ."[153] While it goes without saying that setting high evidentiary standards, such as

151. Schall v. Martin, 467 U.S. 253, 278 (1984) (footnote and citation omitted).

152. Dieter Grimm, *Civil Liberties in an Age of Terror: How to Balance Freedom and Security*, SPIEGEL ONLINE (Apr. 26, 2007), at 3, http://www.spiegel.de/international/world/0,1518,479668,00.html.

153. 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. 501, 525 (2006) (quoting RJR-MacDonald Inc. v. Canada, [1995] 3 S.C.R. 199 (La Forest, J., dissenting)).

the *near certainty* test or the *clear and present danger* test, will naturally restrict government actions, we believe that when applying probability thresholds to government measures involving harm to human rights the thresholds should be set according to the importance of the right and the nature of the state interest at stake. This means that the highest probability standards should be applied only where the most fundamental rights are concerned. In this way, the government's range of movement is not terribly impacted. Furthermore, in cases where the government wishes to implement policies that do not adversely affect constitutional rights, it is entitled to act in such a way that will reduce even low probability risks.[154] To conclude, quite simply, the taxing restrictions placed on government activity for the purpose of protecting constitutional rights are a price that liberal democracies that take human rights seriously must bear.[155]

CONCLUSION

While most constitutional democracies around the world conform to similar patterns of constitutional rights adjudication, the United States stands out in its insistence on constitutional exceptionalism.[156] The most vocal proponent of this exceptionalism within the U.S. Supreme Court is Justice Scalia, who objects to any borrowing from foreign constitutional law.[157] According to Scalia and his supporters, the use of foreign law hinders the autonomous

154. *See* Les v. Reilly, 968 F.2d 985, 990 (9th Cir. 1992); Pub. Citizen v. Young, 831 F.2d 1108, 1122 (D.C. Cir. 1987).

155. Ronald Dworkin, *It Is Absurd to Calculate Human Rights According to a Cost-Benefit Analysis***,** THE GUARDIAN (May 24, 2006), http://www.guardian.co.uk/commentisfree /2006/may/24/comment.politics ("The 20th-century tyrannies have taught us that protecting the dignity of human beings, one by one, is worth the increased discomfort and risk that respecting human rights may cost the public at large.").

156. Michael Ignatieff, *Introduction* to AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1, 1 (Michael Ignatieff ed., 2005). *See also* Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND U.S. CONSTITUTIONALISM 49, 57 (Georg Nolte ed., 2005); Lorraine Weinrib, Comment, EUROPEAN AND U.S. CONSTITUTIONALISM 70, 70–71 (Georg Nolte ed., 2005).

157. See Printz v. United States, 521 U.S. 898, 921 n.11 (1997), in which Justice Scalia stated that "[c]omparative analysis [is] inappropriate to the task of interpreting a constitution." *See also* Symposium, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519 (2005).

development of American constitutional law, thereby undermining its democratic legitimacy.[158] Those contesting Scalia's exceptionalist approach point to the fact that, as Anne-Marie Slaughter put it: "[L]ooking abroad simply helps [Supreme Court Justices] do a better job at home."[159] Our analysis of balancing in this article has aimed to do just that. By looking to different models of constitutional adjudication, by comparing the American model with the German one, we have been able to highlight the fact that balancing, properly applied, can add much needed protection to constitutional rights. The fact that American judges implicitly engage in the act of balancing when applying the means-ends analysis is evidence of the virtues of balancing. Nevertheless, this implicit use of balancing does not make full use of its virtues. As it stands today, American balancing is non-transparent, undisciplined and often believed to lack judicial sincerity.[160]

The beauty of borrowing, it seems to us, is that it works both ways. Indeed, the concept of the Priority of Rights originated in the United States, along with many other pertinent constitutional doctrines aimed at realizing this idea. One of these doctrines is the clear and present danger test that evolved in the early twentieth century, forcing the government to meet severe probability thresholds in order to justify any restriction on first amendment rights. A more contemporary addition to the pool of doctrines aimed at realizing the

158. *See* Roper v. Simmons, 543 U.S. 551, 628 (2005) (Scalia, J., dissenting) ("I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment . . . . [Foreign sources] are cited *to set aside* the centuries-old American practice—a practice still engaged in by a large majority of the relevant States—of letting a jury of 12 citizens decide whether, in the particular case, youth should be the basis for withholding the death penalty. What these foreign sources 'affirm,' rather than repudiate, is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.").

159. Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 201 (2003) ("[L]ooking abroad simply helps [Supreme Court Justices] do a better job at home, in the sense that they can approach a particular problem more creatively or with greater insight. Foreign authority is persuasive because it teaches them something they did not know or helps them see an issue in a different and more tractable light.") (citation omitted).

160. *See generally* Grimm, *supra* note 11; David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Martin Shapiro, *Judges as Liars*, 17 HARV. J.L. & PUB. POL'Y 155 (1994); Alan Hirsch, *Candor and Prudence in Constitutional Adjudication*, 61 GEO. WASH. L. REV. 858, 863–66 (1993) (reviewing JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION: THE SUPREME COURT'S OBLIGATION TO MAINTAIN THE CONSTITUTION AS SOMETHING WE THE PEOPLE CAN UNDERSTAND (1992)).

protection of constitutional rights is the strict scrutiny test, instructing judges to employ a rigorous means-ends analysis.

This article aims to contribute to the global constitutional dialogue by arguing that each of the above mentioned models of constitutional rights adjudication—probability thresholds, means-ends analysis and balancing—is a necessary but in itself insufficient element in the ongoing effort to prioritize constitutional rights. We therefore believe that combining all three doctrines into a unified analytical framework is the best way to advance the protection of constitutional rights. That said, it must be left up to each individual state to fill the framework with substance by taking into account the nature of the rights and the importance of the interests, within its own unique sociopolitical circumstances.