

# Symmetrical Proportionality Test

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# Claims

A. There are at least two conceptions of rights (as principles).

B. The proportionality test can effectuate the conception which respects deontological limits of rights.  
(the Third Way Thesis)

# The Structural Theory

1. Rights are principles.
2. Principles are norms that require that something be realized to the greatest extent possible given the legal and factual possibilities.  
(„the optimisation requirement”)
3. The nature of principles implies the principle of proportionality.

R. Alexy, A Theory of Constitutional Rights (1985/2002)

Alexy's followers:

There is only one structure of constitutional rights clauses worldwide  
(„the Single Conception Thesis”)

# Optimisation requirement

„On any sensible interpretation, the greatest possible extent can only mean the correct extent. If data protection and security come into conflict, and we know how to resolve the conflict correctly, then this resolution will realize both principles to the greatest possible extent. This becomes clear in the negative hypothesis. When we resolve the conflict between data protection and security in any morally or legally *wrong* way, either or both will be realized to an extent less than what is possible.”

„Alexy’s theory would hold true only if making the moral argument always implied balancing the two competing principles.“ (See Dworkin, Nozick, ...)

# The Global Model

- dominant narrative vs. global model
- moral reconstruction of the practice
- foundation of rights = right to personal autonomy
- against a 'morality filter' for evil activities

A. There are at least two conceptions of rights as principles (rather than one).  
The Single Conception Thesis

# The French Declaration of the Rights of Man and Citizen (1789)

## Article 4

„Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. *These bounds may be determined only by Law.*”

Individual will vs. General will

=> Rousseau's footprint

# ECHR (the same structure)

## Article 8

„1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right *except such as is in accordance with the law* and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”



# US Bill of Rights (1791)

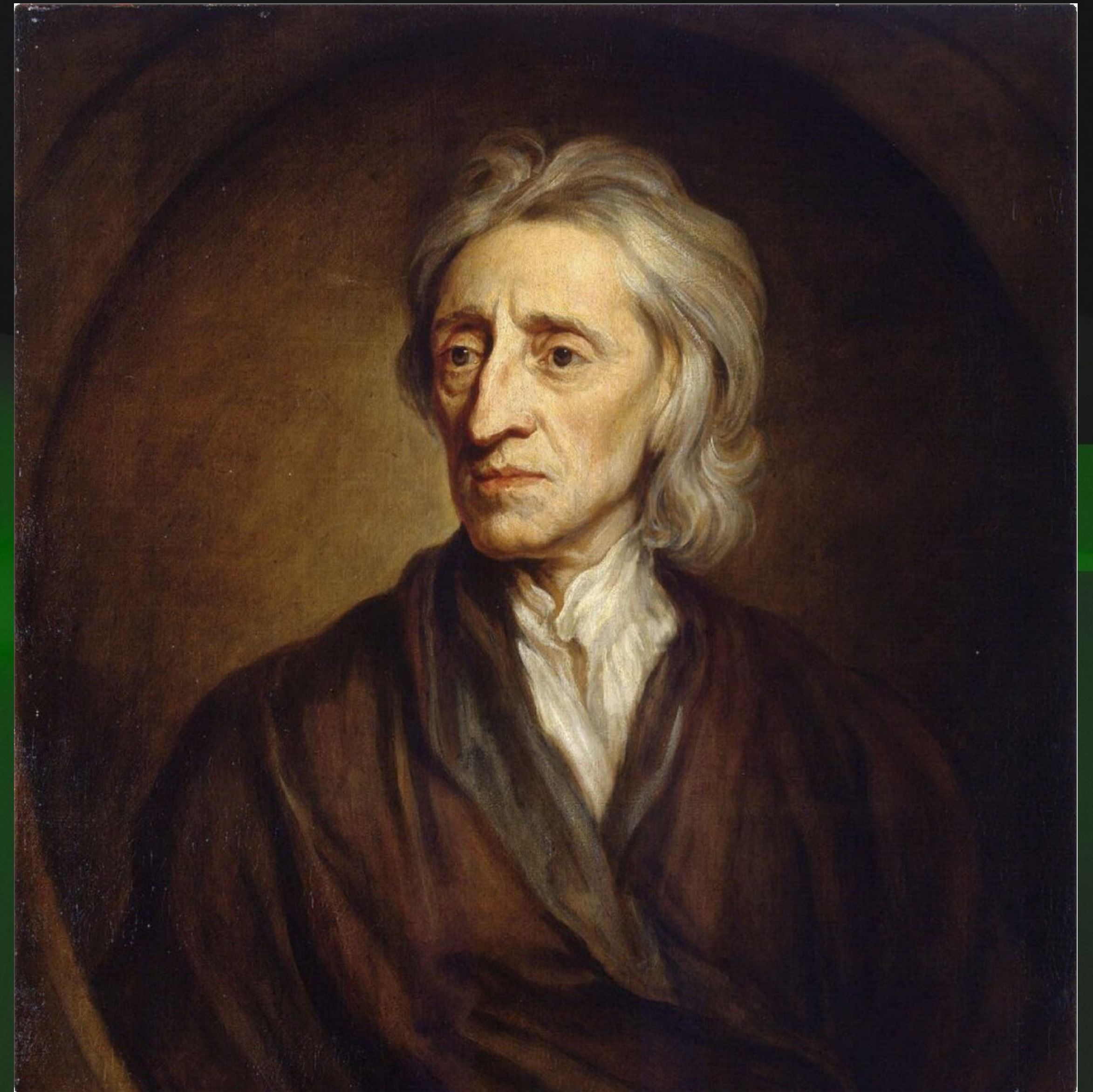
... the philosophical origins

- 1950s: the liberal consensus
- 1960s: rediscovery of classical republican politics (Bailyn, Wood, Pocock)
- 1980s onward: Locke's comeback: the republican synthesis brought to light important features, but Locke was the most frequently cited author in the American political writings from 1760 to 1775.

# John Locke

„The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.” (sec. 6)

J. Locke, *Second Treatise on Government* (1691)



# Limitations on rights in the law of nature

Men naturally owe each other not only reciprocal obligations, but also obligations that constitute rights:

*„As justice gives every man a title to the product of his honest industry, and the fair acquisitions of his ancestors descended to him; so charity gives every man a title to so much out of another’s plenty as will keep him from extreme want, where he has no means to subsist otherwise.” (I:42)*

Likewise, the right to unlimited acquisition is ultimately directed toward maximalisation of „the public good”, not individual preference.

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„If the owner of a large manor bequests in his last will the whole estate to his first-born, leaving only a tiny annual rent to his wife and daughters, the bequest is void by natural law.” (Kendrick 2011)

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# US Bill of Rights: a different conception

- For the founding generation, rights were anchored in the moral order and limited by their communal purpose.
- This is consistent with the communitarian ethic typical for the colonies and based on shared religious beliefs.
- The conception survived the 19th century.

# US Bill of Rights: a different conception

- 1900s: US courts balanced rights against public policy objectives.
- But the deontological limits remained
  - First Amendment (free speech clause): unprotected speech
  - Fifth Amendment (due process clause): limited by the police power (*West Coast Hotel*)
- Rights need not be realized to the greatest possible extent, but to the extent that is just.

# Two conceptions of rights

- In continental Europe, the I-conception unleashed the individual from moral bonds in the law of nature (teleological limits), except for those recognised by law as the expression of general will.
- In USA, the We-conception did not release the right-holder from moral bonds in the law of nature and the government serves both to protect and police the boundaries of natural rights.
- Both can be worked out as rules and/or principles.

# Compatibility of Alexy's and Moller's theories with the two conceptions



# Conceptions of rights in Alexy and Möller

- Möller's compatible only with the I-conception
  - the first-person perspective
  - admits that his model does not fit the US constitutionalism
- Alexy - neutral perspective?

# Conceptions of rights in Alexy and Möller

- The I-conception conceives of rights as resources of abstracted right-holders that ought to be maximised.
- This is exactly what the structural theory's optimisation is about. It means to make the best or most effective use of resources.
- *Optimisation vs. moral requirement: morally right solution must be found*
- „[J]ustice is not about aggregating or maximizing preferences or interests effectively or efficiently, but about distribution, i.e., about who is entitled to what.” (Urbina 2012, see also Tsakyrakis 2009, Webber 2013, Kyritsis 2014, Letsas 2018, Zanghellini 2019)

# Optimisation ~ I-conception

- For Locke, it makes no sense to think of two abstracted individuals as right-holders whose interests the law serves to protect, *no matter the moral obligations they have toward each other.*
- The objections against the optimisation requirement are an attack on the I-conception, because the proportionality test serves first and foremost for evaluating the constitutionality of legal restrictions of **preference satisfaction**, rather than for finding what justice demands.

B. The proportionality test can be construed  
Proportionality – conception? from the conception which respects  
deontological limits of rights.

## **Asymmetrical Proportionality Test:**

**Stage I (Interference): Does the policy infringe upon one of the rights?  
Was the right exercised for a legitimate reason?**

**Stage II (Justification): Was the interference in accordance with law?  
Did it pursue a legitimate aim? Was it proportionate?**

# Conclusion

1. The Single Conception Thesis is wrong. There are at least two conceptions of rights. Neither conception necessarily follows from the nature of principles. One could be morally superior.
2. Abandoning the I-conception does not mean abandoning the model of principles and proportionality. The symmetrical proportionality test gives effect to the We-conception of rights.
3. Question remains what the illegitimate/excluded reasons should be?

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# Objections



Who  
cares?

Thank you for your attention.

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