

Proportionality Analysis and Models of Judicial Review

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

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A Theoretical and Comparative Study

Benedikt Pirker

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CHAPTER I

Introduction

Proportionality analysis is a much discussed topic today. Adjudicators in the most diverse contexts face it. But how should they deal with it, how should they use it, how can they compare their situation with that of other adjudicators and draw useful lessons from such a comparison?² To put it succinctly, if the German Federal Constitutional Court feels entitled to use proportionality analysis in adjudicating fundamental rights cases, does this mean that arbitrators on the bench of an investment tribunal should do the same – and do it in the same manner – when dealing with an expropriation claim?

The interpretation of vague norms makes it theoretically possible for adjudicators to balance competing interests more broadly while applying such a norm. But at the same time, adjudicators face the problem of the legitimacy of such virtually law-making action.

Recent scholarship has used a broad-brush approach in promoting proportionality analysis as the best answer to the problem: Where norms seem to permit proportionality analysis, its use is recommended.¹ We introduce a more nuanced answer in the present study. In our view, judicial review and its institutional features influence to what extent adjudicators should use proportionality analysis. There has been a lack of studies engaging in detail with the link between judicial review and proportionality analysis. We aim to close this lacuna with the present systematic comparative study. The aim is to provide a more thorough reflection, both for adjudicators and practitioners facing this question in actual cases and for observers and commentators whose debate on the answer given by adjudicators may matter in the future. The legitimacy of value choices is central to such an inquiry. Judicial review is partly a question of technical competence – can complicated questions be better resolved by judges or legislators? Finding no clear-cut answer to this question, the present study focuses more on the legitimacy of reconciling competing values and the delegation of this task to one particular institution. Judicial review combined with the use of proportionality analysis means that judges are given this power. The central reflection of this study is how such a delegation of authority can be justified. If the use of proportionality analysis by courts and tribunals has to be justified, the elements of this justification must be found in the context in which they exercise this authority – the context of judicial review.

The present study thus develops the idea of pre-balancing. Substantially, it is an exercise by a tribunal or court which consists in weighing the arguments taken from the context of judicial review to ascertain how proportionality analysis ought to be used; i.e. to what extent its use is justified.

To conceptualize pre-balancing, we need to take a closer look at balancing – proportionality analysis. Proportionality analysis itself is a procedure central to protecting and adjudicating rights claims. It is, however, not undisputed in legal theory, as opposing views would perceive rights in a more deontological perspective which excludes ‘balancing’ as suggested by proportionality analy-

¹ See in particular the various writings of Professor Stone Sweet cited and discussed throughout this study.

sis.² Robert Alexy has contributed to a vivid debate on proportionality analysis with his *Habilitation*, suggesting the existence of a category of norms which is necessarily applied by means of proportionality analysis.³ Alexy has based this Principles Theory of his on the basic assumption that fundamental rights are norms applied by proportionality analysis; he refers to such norms as principles, as opposed to rules which are applied by subsumption. Subsequently, it is shown that the norm-theoretic claim of the Principles Theory does not help us progress much in linking proportionality analysis and judicial review. However, if we understand proportionality analysis as mirroring the process of the balancing of reasons at the level of practical reasoning and of moral argumentation, we grasp the actual way in which the very existence of the rules of positive law and of authorities – such as courts – is justified. With this understanding, it becomes clear that individuals always balance reasons to accept authorities, so that – in our suggestion – authorities cannot themselves be excluded from balancing reasons. If balancing – proportionality analysis – is omnipresent, authorities must also ‘balance balancing’, i.e. decide based on a weighing of reasons whether, in a particular situation, they should engage in proportionality analysis or not. This is pre-balancing.

Of course, the introduction of a new concept complicates the picture of proportionality analysis. Ockham famously suggested:

*[F]rustra fit per plura quod potest fieri per pauciora[.]*⁴

It is futile to do with more things that which can be done with fewer.

Following this principle of parsimony, we should only introduce new elements such as pre-balancing for a clear purpose. Even though it seems that we are adding more factors to the analysis than have been used to date, our hope is that the balance found provides a better basis for our theoretical account and the subsequent comparative studies, as well as for future discussion on the topic. In this way, we would not have violated Ockham’s principle of parsimony.

As to pre-balancing, the reasons weighed by adjudicators are, in our view, presented by the particular setting of judicial review. There is a wide range of factors, but a division into two is suggested. First, there is a broader context of judicial review which is marked by history, the set-up of constitutional adjudication, institutional features and the political economy of dispute settlement. These features play out differently in each regime, as the subsequent compara-

² G. Pavlakos, ‘Constitutional Rights, Balancing and the Structure of Autonomy’ (2011) 24 Canadian Journal of Law and Jurisprudence 129, 129, succinctly speaks of a ‘family dispute’ between liberal constitutional lawyers.

³ R. Alexy, *Theorie der Grundrechte* (Suhrkamp-Taschenbuch Wissenschaft, Suhrkamp, Frankfurt am Main 1986).

⁴ W. Ockham, *Summa Logicae* (edited by Philotheus Boehner) (Franciscan Institute Publications, St. Bonaventure 1951), Book I Chapter 12.

tive studies show. They are, however, of a non-normative nature and can thus explain, but not justify a particular use of proportionality analysis. Still, they can usefully inform an assessment of the truly normative arguments to be used in pre-balancing. The second set of features consists of arguments relating to the justification of judicial review itself. These arguments can in our view most usefully be deduced from the procedural democracy doctrine, a theory developed in United States constitutional legal doctrine. Put succinctly, the authority gained by an adjudicator in a situation of judicial review must be justified based on the value at issue that is underrepresented for some reason in the political democratic process and thus requires protection by means of judicial review. Typically, in United States constitutional law, the closer the value to be protected is to the functioning of the democratic process, the stronger the justification of judicial review is perceived to be. As becomes visible over the course of our study, broader concepts of democratic process and thus of the importance of values are also possible. We must therefore first assess the descriptive elements surrounding judicial review before we turn to pre-balancing the normative arguments on the justification of judicial review.

The introduction of two models then sets out two possible directions in which this decision of pre-balancing can go. In a model of equal representation review, the reasons for proportionality analysis prevail, while under a model of special interest review, an adjudicator operates in a more constrained setting focused on representation of one particular value. Proportionality analysis is the exception rather than the rule in the latter case, and other tests – often effectively sub-tests of proportionality analysis without the final step of proportionality *stricto sensu* – are the more appropriate choice in many but not in all cases. It should be noted here that despite the introduction of one model where full-scale proportionality analysis should only play a marginal role, the present study in no way aims to reject proportionality analysis *per se*. Rather, it argues that claims that proportionality analysis constitutes a kind of panacea must be refined and adapted to the institutional context. Using pre-balancing and the two-models structure, it thus becomes possible both to actually assess what courts and tribunals are doing and to judge whether their reasoning on the use of proportionality analysis appears convincing and complete.

Based on these theoretical grounds, pre-balancing and the two models are then applied to a variety of legal regimes with the aim of appropriately evaluating and criticizing the use of proportionality analysis in a context-sensitive manner. As a first advantage over earlier studies, in the framework of the present comparative studies, a broader set of factors is taken into account than in previous comparative contributions. There may thus be legitimate differences between what the German Federal Constitutional Court has to consider when engaging in proportionality analysis as compared to an arbitral tribunal in international investment law. As a second advantage, with pre-balancing and the two models in mind a very diverse set of legal regimes can be examined following a unitary structure of discussion, which renders comparisons and comparing criticism easier. The present study thus chooses diverse normative backgrounds

– fundamental rights in domestic constitutions, human rights in international treaties, economic competence norms in supranational and domestic constitutional law, broad standards of international economic law – to assess situations of value conflict and their resolution by means of proportionality analysis. The variety of norms is combined with a variety of situations of judicial review – specialized constitutional and international courts and tribunals, general domestic and supranational courts, arbitral tribunals. However, despite this diversity, the focus on our concept of pre-balancing permits us both to provide an answer to the central question of the inquiry: How ought proportionality analysis to be used in different contexts of judicial review?

Having sketched the approach of this study, we should link it back to what has already been done. A contemporary study dealing with proportionality analysis does not start out from a blank slate. Quite the contrary, a vibrant community of researchers has already worked intensely on the topic; but they have, in our view, so far left many stones unturned. We will provide a brief overview of the research done in legal theory and in various legal regimes; in the latter case of course focusing on those regimes that also feature in the case studies chosen as comparative studies.

In legal theory, we have already mentioned Alexy's groundbreaking work on proportionality analysis. The subsequent translation of his work and thus the Principles Theory into English has carried the debate to the international level.⁵ Scholars both in domestic constitutional law and international human rights law have reacted to Alexy's work both with praise and criticism.⁶ After the translation of a substantial amount of scholarship into English⁷ and other languages,⁸ the discussion has broadened even further. As our subsequent theoretical part shows, however, the Principles Theory – with the exception of a few recent contributions – has neglected the link between the institutional question of judicial review and the power shift towards judiciaries that the use of proportionality analysis entails.⁹

⁵ R. Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers) (Oxford University Press, New York 2002).

⁶ See e.g. D. Beatty, *The Ultimate Rule of Law* (Oxford University Press, Oxford 2004); M. Borowski, *Grundrechte als Prinzipien* (2 edn Nomos, Baden-Baden 2007); M. Kumm, 'Democracy is not enough: Rights, proportionality and the point of judicial review' in M. Klatt (ed) *Institutional Reason The Jurisprudence of Robert Alexy* (Oxford University Press, New York 2011); on a more critical note K. Möller, 'Balancing and the structure of constitutional rights' (2007) 5 *International Journal of Constitutional Law* 453; G. Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, Cambridge 2009); S. Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7 *International Journal of Constitutional Law* 468; M. Khosla, 'Proportionality: An assault on human rights?: A reply' (2010) 8 *International Journal of Constitutional Law* 298.

⁷ See Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers).

⁸ See for example the translation into Spanish by Ernesto Garzón Valdés, *Teoría de los derechos fundamentales*, (Centro de Estudios Constitucionales, Madrid 1993).

⁹ M. Klatt and J. Schmidt, *Spielräume im Öffentlichen Recht – Zur Abwägungslehre der Prinzipientheorie* (Mohr Siebeck, Tübingen 2010).

Apart from theoretical work, much work has also been done in various legal regimes. Intense discussion on proportionality as a legal concept has sprung up in Germany as a reaction to the German Federal Constitutional Court's early use of the legal concept. As a consequence, there is abundant discussion in the field on the way in which proportionality analysis (referred to as *Übermassverbot* or *Verhältnismäßigkeitsgrundsatz* in German) is and should be applied by the German Federal Constitutional Court.¹⁰

Under a different label (*balancing*), proportionality analysis has also started to play a role in United States constitutional law and has provoked vivid reactions among the academic community. In comparison to the German discussion, more attention has here been paid to the institutional dimension of proportionality analysis – the question of whether a court should be called to review legislative acts by means of proportionality analysis or whether instead deference should be paid to decisions taken by parliaments.¹¹ It is thus from this debate that some further inspiration can be taken for the pertinent theoretical part of our inquiry.

The European Court of Justice has also interpreted the law of the European Union using proportionality analysis. This approach has proven particularly useful in delineating which measures, from among the sphere of prohibited measures which potentially endanger the single market project, Member States were still permitted to take to regulate for public purposes. At the same time, the influence of fundamental rights in EU law has sparked interest in the use of proportionality analysis to delineate legitimate interference with such rights both by Member States in implementing EU law and by EU institutions when interfering with individuals' fundamental rights.¹² At the level of international law, the constant use of proportionality by the European Court of Human Rights under the European Convention on Human Rights and Fundamental Freedoms has prompted comprehensive research efforts.¹³ Much debate has also emerged on the case law in international trade law, regarding the interpretation of the General Agreement on Trade and Tariffs from 1947 and the law of the later World Trade Organisation.¹⁴ As an additional and rather new field, international investment law has come of age. In the case law issued by arbitral tribunals interpreting both bilateral investment treaties and broader regional investment agreements, first efforts akin to proportionality analysis have emerged. Scholars have observed this and started the debate on the usefulness of proportionality analysis in this field.¹⁵

¹⁰ See chapter 3.

¹¹ See chapter 4.

¹² See chapter 6.

¹³ See chapter 5.

¹⁴ See chapter 7.

¹⁵ See chapter 8.

As soon as scholars discovered the parallel use of proportionality analysis in various legal regimes, they also turned towards comparative studies.¹⁶ Some have opted to compare various national legal orders.¹⁷ Others have chosen a comparison between treaty regimes in international law.¹⁸ Perhaps the broadest account in recent scholarship has been offered by Stone Sweet and Matthews, who have traced the spread of proportionality analysis through various domestic and international legal regimes.¹⁹

Arguably, however, room remains for more pervasive research. As a starting point, many comparative studies remain rather descriptive and merely put the legal tests used by courts or tribunals in different regimes next to each other without engaging in a detailed examination of what contextual differences lead to divergent legal tests.²⁰ Furthermore, the theoretical debate on the principles theory and proportionality analysis has neglected the relationship between judicial review and proportionality analysis with the only exception of some very recent efforts.²¹

¹⁶ For an early account of parallels between GATT 1947 case law and jurisprudence of the United States' Supreme Court see D.A. Farber and R.E. Hudec, 'Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause' (1994) 47 *Vanderbilt Law Review* 1401.

¹⁷ See e.g. N. Emiliou, *The Principle of Proportionality in European Law: a Comparative Study* (Kluwer Law International, London/The Hague 1996); E. Ellis (ed), *The principle of proportionality in the laws of Europe* (Hart Publishing, Oxford 1999); D. Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383; M. Cohen-Eliya and I. Porat, 'American balancing and German proportionality: The historical origins' (2010) 8 *International Journal of Constitutional Law* 263.

¹⁸ F. Ortino, 'From 'Non-Discrimination' to 'Reasonableness': A Paradigm Shift in International Economic Law?' (2005) Jean Monnet Working Paper 1; E Reid, 'Regulatory Autonomy in the EU and WTO: Defining and Defending Its Limits' (2010) 44 *Journal of World Trade* 877. See also the discussion on analogies to the European Court of Human Rights' use of proportionality analysis in J.E. Alvarez and K. Khamsi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' in K.P. Sauvant (ed) *Yearbook on International Investment Law & Policy* (Oxford University Press, Oxford 2008-2009), 440 ff.

¹⁹ A. Stone Sweet and J. Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73.

²⁰ See e.g. M. Andenas and S. Zleptnig, 'Proportionality: WTO Law in a Comparative Perspective' (2007) 42 *Texas International Law Journal* 371.

²¹ See e.g. W.W. Burke-White and A. Von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations' in S.W. Schill (ed) *International Investment Law and Comparative Public Law* (Oxford University Press, Oxford 2010), who argue against proportionality analysis in investor-state arbitration because arbitrators are not sufficiently familiar with the domestic context to successfully apply this type of review; or Cohen-Eliya and Porat, 263, who suggest that the historical background of constitutional rights review played a major part in the shaping of proportionality analysis in different constitutional legal regimes. See also A. Brady, *Proportionality and Deference under the UK Human Rights Act – An Institutionally Sensitive Approach* (Cambridge: Cambridge University Press, 2012).

In light of these shortcomings, the present study arguably closes a lacuna in two respects: First, it aims to contribute to the theoretical discussion through the development of pre-balancing and the idea of models of judicial review as typical outcomes of pre-balancing. Each of the two models presents a different set of arguments on the appropriate use of proportionality analysis. Second, this theoretical contribution is then applied in practice to a variety of legal regimes. The study shows that pre-balancing applies just as usefully to regimes of domestic constitutional law as to international legal regimes. The dividing line between the two models is thus not the domestic or international nature of the regime in which judicial review is embedded. On the contrary, in our view it is the particular features of judicial review that determine how the arguments are to be weighed and thus how proportionality analysis is to be used.

**Proportionality Analysis, Pre-balancing
and Models of Judicial Review**

I Introduction

The link between proportionality analysis and judicial review has to date not been examined in sufficient detail. In order to tackle this topic, we must depart from a definition of what proportionality analysis is and what its costs and benefits are. We will therefore assess how the use of this legal technique can be justified. While proportionality analysis' critics point out various difficulties in its practical application in adjudication, we find no existential challenge to proportionality analysis.

To justify its use, the Principles Theory would suggest a norm-theoretic approach, distinguishing between some norms that must be applied by means of proportionality analysis and others that do not. A more thorough understanding emerges, however, if we consider proportionality analysis as an interface between positive law and moral values which are part of legal argumentation. Proportionality analysis mirrors the weighing of moral reasons in practical argumentation, thereby weakening the exclusionary force of the law. The postulate of such an open position of positive law certainly requires justification. Such justification comes from an exercise of weighing the force of rules of positive law and authorities – another use of a weighing technique like proportionality analysis prior to the use of substantive proportionality analysis. With this conceptualization judicial review can be brought into the picture.

Having developed this relative understanding of the force of rules of positive law and authorities, the present chapter then has to reassess the way in which we perceive proportionality analysis and judicial review. It is suggested that both are linked, in the sense that judicial review can be understood as a specific exercise of authority which is based on a weighing of underlying reasons for the strength and shape of judicial review. We conceptualize this weighing as an exercise of proportionality analysis on a separate level, which we label a 'pre-balancing' exercise. The separate level of pre-balancing is to some extent linked to recent scholarly findings under the Principles Theory, findings which separate the question of discretion as a balancing exercise of its own from the exercise of proportionality analysis between substantive values.

During the pre-balancing exercise, adjudicators weigh for themselves the various reasons to decide which will help them to determine to what extent and with what intrusiveness they should use proportionality analysis. To simplify the presentation of the result of this pre-balancing, we develop two models. Under each one of these models the reasons underlying judicial review warrant a different use of proportionality analysis. On the one hand, under a model of equal representation review the use of full-scale proportionality analysis seems justified, while under the model of special interest representation adjudicators would only rely on full-scale weighing under proportionality analysis in rather exceptional cases.

The reasons weighed in the pre-balancing exercise – just like the pre-balancing exercise itself – are of a normative nature, which makes it possible to assess

the pre-balancing as it appears to have been done by concrete adjudicators, and to judge whether the weighing of reasons seems to have led to a plausible result. At the same time, empirical factors cannot wholly be taken out of the equation. To understand what reasons underlie a particular setting of judicial review, it remains indispensable to discuss the background of each particular setting of judicial review with regard to aspects such as history, political economy and institutional characteristics.

Having established the pre-balancing exercise and the two models in theory, we can outline the considerations underlying the planned comparative assessment of the subsequent chapters. To show the relevance of the suggested two models, a broad range of legal regimes should ideally be used as a sample. Furthermore, to demonstrate that the dividing line between the two models does not run along lines of domestic constitutional and international law, case studies from both sides were carefully selected. The structure of the comparative studies mirrors the division between the empirical and normative elements we pointed out above. While for each legal regime first the background of judicial review is set out in a descriptive assessment, a second section weighs the normative considerations of judicial review, before the actual use of proportionality is more closely examined and criticized using case law and doctrinal discussion.

II Proportionality Analysis – Its Promises and Pitfalls

Discussing proportionality analysis is the logical starting point for a study on proportionality analysis and judicial review. If we suggest that some settings of judicial review may be more appropriate for the use of proportionality analysis than others, we must necessarily point out the advantages and disadvantages of proportionality analysis.

Consequently, the present section aims to both introduce proportionality analysis in detail and to present sceptical views of its use by adjudicators. Proportionality analysis presents the advantages of opposing values on an equal footing by examining all arguments equally. But simultaneously, there is a danger of subjective evaluations by adjudicators and of technical difficulties in applying the test successfully.

Simultaneously, the chapter serves to establish a uniform terminology for the subsequent comparative studies. Proportionality analysis has been discussed under various labels and on various stages: Various stages, because it appeared in different legal orders at different points in time, as the comparative case studies will show; various labels, because there is some terminological rank growth on the same topic. Terms such as proportionality, balancing or reasonableness are sometimes used to mean the same thing, sometimes different things.¹

¹ See on the common law pedigree of the notion of reasonableness A. Barak, *Proportionality – Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012), 371 ff.

Warnings have been issued against equating different forms of proportionality analysis as it is used in different legal regimes: for instance, an analysis could risk remaining at the ‘rhetorical’ level and underscoring actual differences in order to achieve some hidden goal of the comparison.² In the present section, we thus also clarify the terminology used for the study at the outset to avoid this problem. While we have used the term proportionality analysis up to this point to simply denote a specific legal technique of interpreting norms, we now discuss the various legal tests proportionality analysis encompasses as well as some additional terms.

We thus begin with a discussion of the classic, four-pronged understanding of proportionality analysis. At the same time, some other terms and various readings of proportionality analysis must be assessed. As a consequence, we adopt a broad reading of the phenomenon of proportionality analysis, which also implies looking at adjudicative tools such as the burden of proof and the standard of review.

A Proportionality Analysis: The Classic, Four-Pronged Structure

Today, the four-pronged structure of proportionality analysis is widely known among lawyers. The present overview aims to point out in particular the conceptual debate on the individual prongs, which on several occasions foreshadows the subsequent discussion of Alexy’s Principles Theory.

The main proponents of proportionality analysis are those supporting the Principles Theory. Consequently, the overview presented here engages both with their views and critical voices to conceptualize the various stages of proportionality analysis, before we turn our attention to a more formal discussion of the Principles Theory and its holdings.³ The four prongs of proportionality analysis in the classic understanding are the recognition of the pursuit of a legitimate objective of a measure, the test of suitability, the test of necessity and the test of proportionality *stricto sensu*. When discussing proportionality analysis, a somewhat mixed picture emerges. There are advantages to proportionality analysis as a tool used to represent arguments on an equal footing. Critics underline the difficulties in its application, but ultimately no attack on its conceptual grounds is successful. As the perhaps most central feature for the subsequent inquiry, proportionality analysis amounts to a self-empowerment of the adjudicator that is not in itself unjustified, but requires justification.

² J. Bomhoff, ‘Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law’ (2008) 31 *Hastings International and Comparative Law Review* 555, 557.

³ See section III.

i. The pursuit of a legitimate objective

Proportionality analysis is a tool used to examine whether a certain measure is destined to achieve some sort of value in a proportionate manner. The term value which we have used so far appears most suitable to convey a neutral image: it can encompass individual interests like human rights just as much as the panoply of collective interests often assembled under the notion of public interests. It also encompasses a vertical perspective, such as when the State interferes with a value, as well as a horizontal dimension, e.g. in cases where individuals cause a disturbance in the free enjoyment of a value by other individuals and the question arises whether the State must react in some way. As a starting point, the values that are affected – be it in a positive or negative way – by the measure at issue must be ascertained. Various problems ensue – most centrally, the question of whether some values should be excluded as illegitimate or whether initially more values should be admitted in a rather liberal fashion and then be rejected at a later stage of the subsequent balancing process of proportionality analysis. One could e.g. exclude some values on the grounds that they are moralistic or paternalistic.⁴

The Principles Theory suggests a rather open position which coincides with the vision of connectedness between law and morals that Alexy suggests.⁵ Values which are principles in Alexy's account appear to be a rather open notion, and their link with proportionality analysis is automatic.⁶ This openness is, however, limited to some extent in each legal regime. In constitutional law, only constitutional values set out in written or unwritten limitation clauses can overrule other constitutional values.⁷ While in international legal regimes, issues of constitutional rank are not the pertinent question, interpretation of the pertinent provisions and limitation clauses operates as a similar constraint on the values to be admitted.⁸ To fully understand what is done at this first stage of proportionality analysis, we will take a closer look first at the notion of a value conflict and the debate on human rights as values in proportionality analysis, before turning to the notion of public interests as values. We will then also assess the 'horizontal' dimension of values.

⁴ M. Kumm, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement' in G. Pavlakos (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007), 142.

⁵ See section IV for more detail on this point.

⁶ See R. Alexy, *Theorie der Grundrechte* (Frankfurt am Main: Suhrkamp, 1986), 98 and 100.

⁷ See on this 'weak trump model' M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford: Oxford University Press, 2012), 23.

⁸ See for example the discussion on the interpretation of the sub-headings of Article XX GATT in WTO law chapter 7 section IV.A.

a. The notion of a conflict of values

In the Principles Theory's account, proportionality analysis is simply the mode of operation of certain norms – principles. We will assess this norm-theoretic claim later.⁹ For the moment, the notion of a conflict of values merits closer discussion as to what sorts of conflicts are at stake. This also entails the assessment of what conflicts are *not* the focus of the present study.

The present study does not focus in particular on a situation of conflict of norms. It should, however, be noted that a value conflict *can* entail a norm conflict. Examples of a rule for a conflict of norms are the maxims of *lex specialis* or *lex posterior*. A strict separation between proportionality analysis and other conflict rules is unconvincing. Closer examination of *lex specialis* in international law has shown that it implies the weighing of facts to establish which are relevant, which in turn determine what rule is to be considered special in comparison to the more general one.¹⁰ At least implicitly, norm conflicts thus contain conflicts of values, but the codification of conflict of norms rules typically reduces the use of full-scale proportionality analysis.

Second, the present study also does not focus specifically on conflicts between particular legal regimes, sometimes referred to as a conflict of laws.¹¹ In the case of conflict of laws, the central question is which law should apply to a specific case in the sense of a legal order, a domestic substantive law (for example patent law or competition law) or a treaty regime in international law. However, effectively a weighing process has to take place between the values of the relevant laws. This process can again take the shape of proportionality analysis.

The typical cases examined in this study refer to values enshrined within a norm of one particular legal regime. However, there are also conflicts between values in different regimes. This problem arises in particular in international law. As the present study examines both domestic constitutional and international legal regimes, the subsequent discussion of values thus also addresses the problem of such values that are external or foreign to a particular legal regime.¹² As a final note, our focus on value conflicts leads to less attention being paid to the issue of technical competence in judicial review. While certainly relevant e.g. in administrative review of highly technical decisions, our main concern remains the question of judicial review of the weighing of values in proportionality analysis, as it is predominantly done by legislators.

⁹ See section III.

¹⁰ M. Koskeniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Report of the Study Group of the International Law Commission' (2006) ILC, 58th Session, UNDoc A/CN.4/L682, 1-256 ILC Fragmentation Report, 58 paras 106-107.

¹¹ See insightful on the distinction J. Pauwelyn and R. Michaels, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law' in T. Broude and Y. Shany (eds.), *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2011), *passim*.

¹² See section II.A.i.c.

b. Human rights as legitimate objectives

In the area of human rights, there are some views that challenge the acceptance of human rights as values prone to be applied in proportionality analysis. The general starting point for the latter position is often to derive proportionality analysis from the very structure of a typical democratic constitution based on the principles of democracy, the rule of law and protection of fundamental rights.¹³ As our study does not exclusively focus on constitutional law and human or fundamental rights, we subsequently move, however, beyond this basis for proportionality analysis.¹⁴

Some codified concepts in human rights law seem to exclude a consideration of competing values and thereby challenge the use of proportionality analysis. These concepts are the inviolable core of human rights and so-called absolute human rights. Human rights are typically thought to possess an ‘inviolable core’. Conceptually, such a core is expressly not put in relationship with competing public interests.¹⁵ There should thus be no proportionality analysis at all, which is inconceivable for proponents of the Principles Theory.

Absolute human rights pose a similar challenge. Again, such rights should in theory not be balanced against any other right or public interest. If absolute rights are merely posited as the result of a proportionality exercise, implicitly the special rank of absolute rights loses its meaning. The precedence enshrined in theory in the law itself no longer answers any legal question; everything will be balanced.¹⁶

Recent writing, however, has managed to integrate these concepts convincingly into the Principles Theory. Even absolute rights cannot be applied in a perfectly abstract manner, without taking any concrete cases or other principles into consideration. Even the idea of establishing precedence for them already requires a dimension of weight and thus balancing.¹⁷ It thus appears more convincing to give preference to absolute rights by assigning to them a predominant abstract weight, which in practice leads to their precedence.¹⁸ For the case of the inviolable core, such a core also emerges from the proportionality analysis model. The more serious the interference with a right, the heavier the weight of justifying reasons must become. This automatically leads to the emergence of a core where virtually no countervailing principle will be able to take priority.¹⁹

¹³ See e.g. Barak, 226 and 234.

¹⁴ See section II.B. for a broader understanding of proportionality analysis.

¹⁵ This is even admitted by some proponents of the Principles Theory, see J. Rivers, ‘Proportionality and Variable Intensity of Review’ (2006) 65 *Cambridge Law Journal* 174, 180.

¹⁶ M. Jestaedt, ‘Die Abwägungslehre – ihre Stärken und ihre Schwächen’ in O. Depenheuer and others (eds.), *Staat im Wort: Festschrift für Josef Isensee* (Heidelberg: C.F. Müller, 2007), 271, colourfully evokes the image of the trap of constitutionalisation (*Konstitutionalisierungsfalle*) snapping shut. See also M. Jestaedt, ‘The Doctrine of Balancing – its Strengths and Weaknesses’ in M. Klatt (ed.), *Institutionalized Reason – The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2012), 169.

¹⁷ Klatt and Meister, 32.

¹⁸ *Ibid.* This point will become clearer in the discussion of Alexy’s weight formula in section II.A.iv.

¹⁹ Klatt and Meister, 68, demonstrate the point using Nash’s Social Choice Function.

The Principles Theory has also been criticized in general for its overall openness to balancing. Two main sceptical positions can be distinguished, one definitional, the other using the concept of ‘exclusionary’ reasons. Just like the general debate on proportionality analysis, these conceptual discussions have focused predominantly on human, fundamental and constitutional rights.

Several arguments were developed in support of the notion that human rights²⁰ have a special position. As a seminal starting point, Dworkin developed the model of rights as ‘trumps’ which triumph over other policy considerations and are to be realized to the greatest extent possible even before such other interests are taken into consideration.²¹ Often, such models of rights are referred to as ‘deontological’, while the balancing model conceptualizes rights in a rather ‘teleological’ fashion.²²

From a philosophical point of view, support for this position has been added by Habermas. He criticizes that the use of proportionality analysis as suggested by the Principles Theory unduly reduces the discussion of relationships between human rights and the pursuit of collective goals to mere policy arguments of the same ranking.²³ Habermas argues that human rights lose the priority they normally enjoy within a legal system over other considerations; the ‘firewall’ of their protection. This is aggravated by the lack of a rational standard of judicial balancing which leads important question to be decided under an overemphasized judicial discretion.²⁴

Alexy rejected this ‘firewall’ argument by pointing to his Law of Balancing.²⁵ Its application introduces a ranking of the importance of interference with rights. As a consequence justification by public policy is rarely available in cases of severe interference with a human right. In his view, the ‘firewall’ remains intact even if proportionality analysis is applied.²⁶ Others add that the advantage of proportionality analysis is precisely the fact that it is able to adequately

²⁰ For the sake of simplicity and convenience, the term of ‘human rights’ is used hereinafter. The discussion has, however, taken place with similar vigour and with the same arguments on fundamental rights granted at domestic constitutional level, as the pertinent comparative studies (chapters 3 and 4) show.

²¹ R. Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 266. The contrary position to give no special status to rights was advanced most elaborately by Raz, see J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 186 ff.

²² See on these notions G. Pavlakos, ‘Constitutional Rights, Balancing and the Structure of Autonomy’ (2011) 24 *Canadian Journal of Law and Jurisprudence* 129, 133 ff.

²³ J. Habermas, *Between Facts and Norms* 2 edn (Cambridge: Polity, 1996), 256ff.

²⁴ *Ibid.*, 261. Rivers also supports this position; he distinguishes between two culturally different conceptions of proportionality for this purpose. In Continental Europe, rights and public interests are opposed in a formally indistinguishable way, while in English common law public interests function rather as limitations on rights which the courts are required to police. The continental approach with its proportionality approach is thus preferable, see Rivers, 177 ff.

²⁵ See section II.A.iv.a for discussion in detail.

²⁶ R. Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 *Ratio Juris* 131, 140. See also Barak, 490.

quantify and put in relation competing values, and that it therefore constitutes a cornerstone of constitutional rights adjudication.²⁷ A more formalistic perspective suggests that proportionality analysis does not endanger the status of rights in constitutional law, if the limitation of rights is understood to occur at a sub-constitutional level. Rights remain definite at the constitutional level, and merely their limitation for other rights or public interests creates a new rule operating below the constitutional level.²⁸

However, it would be too much to suggest that only scholars in favour of a particular protection of human rights oppose proportionality analysis. Webber's concept of a negotiable constitution offers a quite particular vision of constitutional rights which attempts to avoid the use of proportionality analysis.²⁹ Limitation of a right is expressed in legislation as the expression of the people's will at a given moment and simultaneously part of the right. The legislator thus determines the boundaries of a right and justifies its decisions in the framework of a given limitations clause. It remains, however, highly questionable why Webber's model opposes judicial protection of individuals' rights against the potential dangers of democratic majority-rule, while entrusting the majority-based legislator with determining a right's content and limitations.³⁰

Scholars who are sceptical of proportionality analysis and worried about the unique character of human rights are likely to opt for a definitional approach. For such individual values as those enshrined in human rights and those which are considered special, the decision on their primacy in case of conflict with collective interests was already taken in advance. The adjudicator's task is thus to define the scope of the right within which it will prevail, while at its margins other collective interests – public interests – may again 'win' in a conflict situation. The definition of the scope of the right therefore eliminates any conflict in the first place, rather than to delegate the conflict to resolution by proportionality analysis.³¹

There are certain shortcomings in the definitional approach. Adjudicators set the limits of their own rights jurisdiction by establishing the scope of a right, thereby excluding consideration of a conflict between the right and public interests beyond this horizon. Furthermore, the definitional approach purports that there may be a number of clear-cut situations where exceptions to a right are acceptable for public interest purposes. Reality may, however, be too complex and present adjudicators with additional considerations that would need to be

²⁷ D. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004), 186, explains this using the example of the well-known racial segregation case of *Brown v. Board of Education* 347 US 483 (1954).

²⁸ See Barak, 40-41.

²⁹ G. Webber, *The Negotiable Constitution – On the Limitation of Rights* (Cambridge: Cambridge University Press, 2009).

³⁰ See Barak, 495, who compares Webber's views with Waldron's general scepticism of judicial review.

³¹ See with further references A. McHarg, 'Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights' (1999) 62 *The Modern Law Review* 671, 681.

taken into account to decide upon a conflict of values. Consequently, critics suggest that only proportionality analysis can usefully account for all future cases.³² Effectively, definitional or categorical approaches to rights may end up simply using the balancing suggested by proportionality analysis to create the definitions and categories they subsequently rely on.³³

Some proponents of a more definitional approach denounce the use of proportionality analysis because of its inherent tendency to put all the weight on the later stages and to water down the important discussion of what the actual values that are to be put in relation are. A confused starting point is difficult to reconcile with a correct follow-up analysis. The inherent danger is the potential that moral reasoning required to identify and answer important questions about the scope of rights and their content could be hidden or neglected because in any case a decision can be reached at the later stages of proportionality analysis.³⁴

It should, however, be noted that the mere use of proportionality analysis does not exclude using moral reasoning to ‘exclude’ values that are perceived as illegitimate. Examples of erroneous adjudication that are typically brought forward by such critics of proportionality analysis cannot rebut proportionality analysis as a concept.³⁵

Related to the definitional approach, but somewhat different is the ‘excluded reasons’ conception of rights. Based on Raz’s account of ‘exclusionary’ and ‘excluded’ reasons,³⁶ its proponents suggest that in some contexts, human rights should be conceived not as a weight on a balance, but as a freedom to act combined with a prohibition for the opposing authority to interfere with the freedom based on certain prohibited reasons. Rather than balancing right and interference, an adjudicator would thus have to examine the reasons for the authority for acting in this ‘motivational’ perspective on rights.³⁷ In a non-motivational view of rights, any interference will be subject to proportionality analysis to see whether the right has been interfered with beyond proportion. Under a motivational view, proportionality analysis still remains a valid tool for

³² See *Ibid.*, 682-683.

³³ Barak, 521.

³⁴ See with the example of human rights adjudication in the context of the European Convention on Human Rights and Fundamental Freedoms S. Tsakyrakis, ‘Proportionality: An assault on human rights?’ (2009) 7 *International Journal of Constitutional Law* 468, 481. Tsakyrakis calls this approach of proponents of proportionality analysis the ‘principle of definitional generosity’.

³⁵ M. Khosla, ‘Proportionality: An assault on human rights?: A reply’ (2010) 8 *International Journal of Constitutional Law* 298, 306. See for a similar argument G. Webber, ‘Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship’ (2010) 23 *Canadian Journal of Law and Jurisprudence* 179.

³⁶ See section IV for a detailed account and discussion.

³⁷ D. Halberstam, ‘Desperately Seeking Europe: On Comparative Methodology and the Conception of Rights’ (2007) 5 *International Journal of Constitutional Law* 166, 178.

some situations,³⁸ but in others courts should only assess whether a measure was taken for a prohibited reason. In that case it is inadmissible without any proportionality analysis taking place.³⁹ Similar to the definitional approach, the main operation undertaken by the judiciary would thus be to examine whether the motives of the taker of a measure fall within a defined range of excluded reasons.

This latter approach suggests that rights should not simply be perceived as values that have to be applied by means of proportionality analysis in cases of conflict. Instead, they should be seen as structures, because they do not protect the autonomy of the individual in these situations but rather operate as means to define the permissible reasons for state action.⁴⁰

As a related criticism of proportionality analysis, some scholars deplore the oversimplification that might ensue.⁴¹ The structure of rights is not necessarily fully explained by admitting proportionality analysis.⁴² In this vein, Kumm argues that the link to proportionality analysis is only a part of the nature of rights. They do not act as ‘trumps’ prevailing automatically over policy considerations; such considerations may actually override rights. But in some contexts rights prevail, in particular when the policy considerations include the use of the rights-bearer as a means. This would be the example of sacrificing one life to save many.⁴³ In his account of proportionality analysis there is also room for the category of excluded reasons.⁴⁴ Consequently, proportionality analysis may in some situations be too simple as an explanation structure. Values that take the shape of human or constitutional rights require close examination and show their true strength only in presence of the specific structure of reasons present in a factual situation.⁴⁵ One could thus suggest a dual model of applying rights, partly by proportionality analysis and in other situations following an excluded reasons approach.⁴⁶ The problem is, however, whether excluded reasons truly amount to an exclusion of reasons on a qualitative basis or rather to their exclusion as values that merit only negligible weight in a balancing exercise – a rather

³⁸ R.H. Pildes, ‘Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law’ (1993-1994) 45 *Hastings Law Journal* 711, 714.

³⁹ *Ibid.*, 712.

⁴⁰ *Ibid.*, 724.

⁴¹ R. Poscher, ‘The Principles Theory – How Many Theories and What is their Merit?’ in M. Klatt (ed.), *Institutionalized Reason – The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2012), 241-242, denounces that such an account would fall behind a state of knowledge already attained.

⁴² K. Möller, ‘Balancing and the structure of constitutional rights’ (2007) 5 *International Journal of Constitutional Law* 453, 463-464.

⁴³ Kumm, 165.

⁴⁴ See also Barak, 470.

⁴⁵ *Ibid.*, 166.

⁴⁶ See for this suggestion I. Porat, ‘The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law’ (2006) 27 *Cardozo Law Review* 1393.

quantitative approach.⁴⁷ In line with the sceptical view of exclusionary reasons taken for the purpose of this study, the second position seems more adequate.⁴⁸

This conclusion is bolstered by a convincing solution for the problem of rights-bearers as means suggested by Pavlakos: If in such situations the position of the balancing agency is adopted, it is impermissible to balance certain reasons which undermine the character of persons as such, because the very ‘point’ of proportionality analysis – optimisation – is lost. The authorisation of the agency of balancing reasons by means of proportionality analysis is lost ‘when agency turns against itself’.⁴⁹ This is, however, not tantamount to the introduction of excluded reasons.

Summing up, there are competing positions as to whether human rights should be applied by means of proportionality analysis. A number of scholars would suggest that definitional or excluded reasons approaches are more apt to protect rights. Their criticism helpfully points out the difficulties in applying proportionality analysis, but arguably cannot refute it in a convincing manner.

c. Public interests as legitimate objectives

As another category of values so-called ‘public interests’ or ‘policy considerations’ typically enter into conflict with human rights or other values. The complexity of these notions stems from the difficulty of actually determining their content. Several theories may be used to assess what a ‘public interest’ is.⁵⁰ However, they all suffer from specific shortcomings.

According to preponderance theories, a public interest, simply put, is based on an aggregate of the preferences of a majority of individuals.⁵¹ There are, however, technical difficulties with this definition, as it is impossible to clearly establish preponderant views through voting if there are more than two alternatives available.⁵² There is also a strong moral criticism to such theories, as the interests of a minority are sacrificed for the benefit of the interests of a majority without examining the merit of each group’s claims.⁵³

Unitary interest theories aim to depart from objective interests derived from a theory of what is ideally good for people, i.e. what they should ideally want.⁵⁴ By necessity, a supreme moral scheme is needed for two purposes: first, to posit alternatives to individual interests which would make everyone better off; second, to remove some inappropriate values. The risks which emerge are paternalism and the need to develop a universal scheme of moral values.⁵⁵

⁴⁷ See for this suggestion Barak, 502.

⁴⁸ See section IV.C.

⁴⁹ Pavlakos, 146.

⁵⁰ See V. Held, *The Public Interest and Individual Interests* (New York: Basic Books, 1970).

⁵¹ F.J. Sorauf, ‘The Public Interest Reconsidered’ (1957) 19 *The Journal of Politics* 616, 619.

⁵² K.J. Arrow, *Social Choice and Individual Values* 2 edn (New Haven: Yale University Press, 1963).

⁵³ McHarg, 675.

⁵⁴ Sorauf, 622.

⁵⁵ McHarg, 675-676.

Common interest theories similarly aim to identify a category of interests distinct from the ones held by individuals. These interests are, however, not determined by reference to morals, but by the fact that they are held by the public as a whole as opposed to individuals or groups of individuals. These values can be identified by asking in what kind of society the public would like to live.⁵⁶ The pursuit of such an overall public interest is linked to benefits for the whole of society, although these benefits are not necessarily distributed in a uniform manner. As a problematic feature, common interest theories reduce the possible ground for a public interest to such an extent that it becomes effectively redundant.⁵⁷

Another concept appears related to common interest theories: a conceptualisation of the public interest as a balance of interests, in the sense that it is constituted by a compromise as the result of conflicting interests which provides individuals with durable confidence in the overall stability of a state or community.⁵⁸ It is not perfectly clear whether this compromise solution should be understood as compromise as procedure or as compromise as a result,⁵⁹ which prepares the ground for procedural views on judicial review and proportionality analysis.⁶⁰

Whatever approach adjudicators use to establish the existence and relevance of a public interest, arguably care must be taken in its definition before engaging in proportionality analysis. By all too easily admitting public interests as values, they may face the reproach of letting wrong candidates enter into the weighing process of proportionality analysis. One situation that frequently poses problems in this regard poses is the interest of protecting a person's or a group's feelings, e.g. typically in cases where the freedom of expression conflicts with the freedom of religion where religion is criticized. The question becomes to what extent tolerance as a value must also include intolerance.⁶¹

On the other hand, adjudicators could be criticized as illegitimate gatekeepers who unduly exclude arguments based on public interests from judicial consideration if they choose to adopt a more definitional or an 'excluded reasons' approach.

There is thus also a danger of insufficient attention being paid to the ascertainment of the public interest. Values that are external to a legal regime and therefore appear problematic for the adjudicator are merely one example of such an insufficient or erroneous examination of values.

Typically, this problem is connected to the limited jurisdiction of adjudicators, as is the case in international law. The tendency in international law has been the development of increasing specialisation. Legal regimes based on

⁵⁶ See e.g. B. Barry, *Political Argument* (New York: Harvester Wheatsheaf, 1990), 173 ff.

⁵⁷ Held, 156.

⁵⁸ Sorauf, 623.

⁵⁹ *Ibid.*, 623.

⁶⁰ See on this latter point in more detail section V.B.iv.c.

⁶¹ Barak, 274-275, suggests that an offense to a person's or group's feelings must be severe beyond a certain level of tolerance to be counted.

treaties deal with ever more specific topics.⁶² The danger concerning values ‘foreign’ to an adjudicator’s regime is that they may be misrepresented or ignored altogether, which may influence proportionality analysis. Adjudicators can thus represent as external some values which in most cases will lead to intra-systemic values prevailing.⁶³ It is difficult to conceive of any adjudicator as neutral in this regard: A trade court is likely to evaluate the same conflict between trade and other values in a different manner than for example a human rights court.⁶⁴ This can come to bear upon the interpretation used by an adjudicator, but also upon other available features of the process of adjudication such as jurisdiction. The result is potentially the exclusion or hierarchically lower representation of extra-systemic values.

Another problem could potentially stem from too high a threshold for the admission of legitimate objectives; effectively, such a threshold could come down to already balancing the social importance of a value as in the final stage of proportionality *stricto sensu*, which overthrows the sequence of the sub-tests.⁶⁵

The above mentioned factors render proportionality analysis difficult to apply. Again, however, the difficulty of establishing a public interest does not provide a substantive argument in favour of discarding the use of proportionality analysis as such.

d. The horizontal dimension of human rights and public interests

As a final indispensable consideration, the horizontal dimension of the problem of values receives increasing attention in constitutional law and should thus not be neglected when discussing the values acting in proportionality analysis. Initially, most conceptualized conflicts between values such as human rights and public interests as vertical conflicts on the protection of rights of the individual against the State intervening on behalf of the public interest. There is an increasing tendency to discuss infringements of rights and public interests caused by private parties’ actions.⁶⁶ To no small extent this is due to the ever-decreasing stability of strict forms of the public-private distinction in many

⁶² Koskenniemi, p. 10 paras 5 ff.

⁶³ See e.g. C. Joerges and F. Rödl, ‘Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval’ (2009) 15 *European Law Journal* 1, with the example of a conflict between national labour law as a value opposed to the economic freedom of establishment enshrined in EU law.

⁶⁴ Pauwelyn and Michaels, 36-37.

⁶⁵ See e.g. P.W. Hogg, *Canadian Constitutional Law* (Toronto: Thomson Carswell, 2007), 153, who suggests that in answering the first step of a pursuit of a legitimate objective, one simultaneously already answers the question of a proportionate effect asked at the last step of proportionality analysis.

⁶⁶ See e.g. J.G. Ruggie, ‘Business and Human Rights: The Evolving International Agenda’ (2007) 101 *American Journal of International Law* 819 in international human rights law on the increasing awareness of the potential of violations of human rights norms by multinational corporations.

constitutional legal regimes.⁶⁷ Public interests are no less subject to this development. As an example, in labour law the employee as one party to a private contract is protected because of his or her typical weakness, despite the arising conflict with the principle of equality. The latter principle should normally prevail in private law relations, but the public interest of workers' protection intervenes here between private parties as a constraint on private autonomy.⁶⁸

e. Conclusion

To conclude, discussing, defining and accepting values as legitimate objectives for the purpose of proportionality analysis constitutes a step of high importance. At this first stage, the conception of rights of the adjudicator already plays a crucial role. Definitional and excluded reasons approaches would exclude proportionality analysis at least partly based on the nature of some values. If the Principles Theory is favoured, there is a danger of all too easily admitting values that might have deserved a closer look and perhaps should have been excluded outright. Yet, this is only a potential mistake, not an inevitable one. The underlying reasons for the different approaches become clearer as soon as the Principles Theory is discussed at the level of argumentation.⁶⁹ For the moment, suffice it to state that diligent proponents of proportionality analysis have shown that the exclusion of values is also possible in such an account. Opponents of proportionality analysis tend to point to difficulties in the adjudicative process, but have to date not provided convincing conceptual flaws to bolster their claim of overthrowing proportionality analysis as a legal technique as such.

ii. Suitability

Suitability as the second prong of proportionality analysis denotes conceptually a test which examines whether by taking one measure, at least one value is furthered. It is not always put explicitly in all descriptions, but a second value must necessarily be negatively impacted, as otherwise no conflict of value arises in the first place. The test 'excludes the adoption of means obstructing the realisation of at least one principle without promoting any principle or goal for which they are adopted'.⁷⁰ However, the focus of the test itself is only on the positive effect on the first value.⁷¹

⁶⁷ See M. Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341.

⁶⁸ P. Mates and M. Bartoň, 'Public versus Private Interest – Can the Boundaries Be Legally Defined?' in A.J. Bělohávek and N. Rozehnalová (eds.), *Czech Yearbook of International Law – Rights of the Host States within the System of International Investment Protection* (2011), 183.

⁶⁹ See section IV.

⁷⁰ Alexy, 'Constitutional Rights, Balancing, and Rationality', 135. See also Alexy, *Theorie der Grundrechte*, 103.

⁷¹ It appears thus slightly misleading that Alexy evokes the image of Pareto-optimality in his Principles Theory when describing suitability, see Alexy, 'Constitutional Rights, Balancing, and Rationality', 135.

The test of suitability requires an assessment of the degree of satisfaction of a value, but also of predictions of future facts, which involves in particular the possible uncertainty and the probability of reaching a result.⁷² The assessment is thus fundamentally influenced by the distribution of the burden of proof among parties; a similarly vital role is played by the standard of review adopted by an adjudicator towards the assessments undertaken in the decision under scrutiny. In adjudicating suitability-based tests, adjudicators may act with deference, accepting a rather theoretical reason advanced for a measure. They can, on the other hand, engage in intense scrutiny of the likelihood of concrete factual effects of a measure. The main factual problem encountered at this level is caused by epistemic limitations: to what extent is it possible to know whether a measure has or will have certain effects? Such factual uncertainty should, however, not be the basis for extreme approaches. Neither can an adjudicator require extreme certainty of a result to be proven nor should a mere statement that a result ought to be achieved by a measure be found to be sufficient.⁷³

At the same time, there is also a potential problem of moral argumentation for identifying a threshold. What sort of contribution is to be classified as a contribution towards a value? This could become problematic in cases of a very small effect on a value, as it remains unclear whether any effect – including nearly or completely unintended effects – will suffice or whether a targeted contribution is required.

The central legal problem caused by the use of suitability is an implicit ranking of the values at issue. A mere suitability test neglects the negative impact on the second value and is satisfied as soon as a positive effect on the first value can be shown – subject to the qualifications outlined above. It is a hierarchical solution, which is at the same time easy to administer in comparison to the later stages of full proportionality analysis, as the degree of moral argumentation is lower.

As an additional factor, inequalities between parties as to the access to elements of evidence may increase hierarchy.⁷⁴ Adjudicators may use their discretion in distributing the burden of proof to strengthen or weaken the hierarchical element of the legal test applied.

For proportionality analysis as a whole as well as for its individual sub-tests such as suitability, it matters crucially who is required to prove what allegation and to what extent. The burden and standard of proof matter because they

Suitability does indeed verify that at least one position is better off after taking a measure. Contrary to what Pareto-optimality would prescribe, however, it does not take into account whether a second position is worse off if the first position's benefit is given.

⁷² J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden: Martinus Nijhoff Publishers, 2009), 167.

⁷³ Barak, 308.

⁷⁴ For a detailed examination of the 'evidential discretion' of courts see J. Rivers, 'Proportionality, Discretion and the Second Law of Balancing' in G. Pavlakos (ed.) *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Oxford: Hart Publishing, 2007), 182.

implicitly establish a hierarchy between values. If, for example, a claim in favour of one value is perceived as the exception to the rule, often the claimant of that exception will carry the burden of proof and find it difficult to achieve a high standard of proof, which would then allow the ‘rule’ – the opposite value – to prevail.⁷⁵

In domestic law, burden of proof issues are often partly settled by the law. The more proceedings involve only the review of legal issues, the less relevant fact-bound elements such as the burden of proof become. For instance, constitutional review is often a field where legal questions are preponderant. Before international tribunals and courts, on the other hand, matters are often less well-defined. At the very least, a general principle has been identified in international jurisprudence according to which the party who alleges something has to prove its claim: *actori incumbit probatio*.⁷⁶ Often, review in international adjudication includes factual issues and the burden of proof and its sub-concepts thus play a vital role in proceedings.

From a law and economics perspective, the distribution of the burden of proof by adjudicators can be guided by various considerations. The costs of obtaining evidence are a first important factor. An initial burden on one party, i.e. the complainant, should ensure that the adjudicator’s time and resources are only used for claims that can be substantiated to a minimal degree by evidence. With similar arguments, the burden of proof is imposed on a defendant for provisions identified as defences, because a complainant would otherwise be required to produce costly evidence for a multitude of alternative pleas which a defendant could effectively make.⁷⁷

As to the standard of proof, its varying degrees are based on the concern over two different types of errors in adjudication. Type 1 errors are false positives, i.e. applications of the norm to the ‘wrong’ situations. To avoid such over-inclusiveness, a high burden of persuasion can be imposed.⁷⁸ Type 2 errors, i.e. false negatives, relate to non-applications of a norm to situations to which it should have applied. To avoid under-inclusiveness in such cases, a lower burden of persuasion is applied.⁷⁹

For proportionality analysis and the typical situation of judicial review, one could thus impose the burden of persuasion predominantly on the state trying to justify its measure, because it is likely to have the resources to bring forward

⁷⁵ See also the relevance of proof issues under the sub-tests of suitability and necessity as described in sections II.A.ii. and II.A.iii.

⁷⁶ G. Niyungeko, *La preuve devant les juridictions internationales* (Brussels: Bruylant, 2005), 68. Contrary to strict conceptions of this maxim, however, there is no rule that states that it must be the party who instituted the proceedings upon whom the burden falls, M. Kazazi, *Burden of Proof and Related Issues – A Study on Evidence before International Tribunals* (The Hague: Kluwer Law International, 1996), 221.

⁷⁷ R.A. Posner, ‘An Economic Approach to the Law of Evidence’ (1998-99) 51 *Stanford Law Review* 1477, 1502-1503.

⁷⁸ The classic example would be the avoidance of erroneous convictions in criminal law.

⁷⁹ See Posner, 1504.

evidence. At the same time, an excessive burden of proof would somewhat run counter to the fact that a legislator's action should at least be presumed to be constitutional.⁸⁰ In practice, some more equilibrated solutions have been suggested, as will be explored in the subsequent section on necessity.

Summing up, suitability is a rather weak threshold, but can be adapted by adjudicators in its strictness. Generally, it implies rather practical problems such as the appropriate attribution of the burden of proof, while there is less need for moral argumentation than in the later stages of proportionality analysis.

iii. Necessity

Necessity requires a closer nexus between the two values at issue than suitability. The simplified example is a measure which achieves a certain degree of satisfaction of the first value and simultaneously causes a certain degree of non-satisfaction of the second value. Under a necessity test, the adjudicator examines whether there exists an alternative measure which achieves the same degree of satisfaction for the first value while entailing a lower degree of non-satisfaction of the second value. The test is certainly closer to Pareto-optimality than suitability: The second position which is made worse is the baseline, based on which a maximum of optimisation for the first position is sought.⁸¹ This also implies that any measure that goes beyond the defined objective also fails to pass the test of necessity.

The simplification of the model is essential to engage in a necessity test: If for example a third value is at issue, a necessity test cannot be applied.⁸² This means, e.g., that the technical and administrative costs to take an alternative measure in comparison with the original measure could come into play and require the last prong of proportionality analysis and its weighing exercise.

Similar problems as those under a suitability test arise. However, they weigh in heavier as the test itself is stricter: Again, adjudicators have to assess facts, including future facts. The test thus entails uncertainty as to whether promised results can actually be achieved. Therefore, the burden of proof and the standard of review act as features to adjust the strictness of the test. As one rather equilibrated solution for the burden of proof, the burden of persuasion can be distributed between parties: the party claiming a violation of rights would have to identify possible alternatives less restrictive of their rights, while the burden of showing the exact details of the chosen measure and the alternatives – their restrictive effects and their contribution towards the chosen objective – would remain with the party justifying a measure.⁸³

⁸⁰ Barak, 443-444.

⁸¹ For a detailed account see Rivers, 'The Second Law of Balancing', 172.

⁸² Alexy, *Theorie der Grundrechte*, 102.

⁸³ See for such an attribution the solution found in WTO law, chapter 7 section IV.A.iii.c. See also Barak, 449.

Moral argumentation is needed to a higher degree in the case of necessity than for suitability. The identification of alternative measures leaves some leeway to the adjudicator: In order to qualify as an alternative, a measure must achieve the same degree of satisfaction. Conceptually, one may contend that it is impossible for two measures to achieve the exact same positive result for a certain value. In practice, moral argumentation must ensure that a justified decision is taken on whether the *same* degree of satisfaction is achieved. Similarly, moral argumentation is inevitable in assessing how the negative effect on e.g. a constitutional right is weighed.

Measures achieve a variety of effects, positive and negative, intended and non-intended.⁸⁴ Adjudicators thus enjoy leeway as to how narrow or broad they draw the circle of potential alternatives. This may not only manifest in interpretative leeway, i.e. the breadth of the concept of an alternative. Adjudicators may also loosen the standard of review for this purpose and accept with less intense scrutiny the arguments of a party.

Such deference is required in particular if there is a leeway of epistemic discretion for legislators in their choice of measure. Adjudicators may find it appropriate to respect this discretion in their scrutiny.⁸⁵

A last crucial feature of a necessity test is – as in the case of suitability – the hierarchical representation of values that such a test entails. Conceptually, a certain degree of satisfaction of the first value can be ‘bought’ for the price of dissatisfying the second value to the lowest extent possible. If a very high level of satisfaction of the first value is sought, inevitably there are fewer and fewer alternatives with a lower impact on the second value. If the highest possible level of satisfaction of the first level is the aim, there will be virtually no alternative, and the negative impact on the second value is effectively accepted.⁸⁶ Consequently, necessity conceptually introduces a hierarchy in favour of the first value. The potential leeway of the standard of review and the distribution of the burden of proof influence the degree of this hierarchy.

Eventually, necessity is thus also a hierarchical test. In its application, however, adjudicators face practical problems of attributing the burden of proof. There is also a substantial need for moral argumentation to assign a weight to the contribution of a measure and to its restrictive effect for the purpose of comparison with alternative measures. The need for moral argumentation is, however, still lower than in the case of proportionality *stricto sensu*. The latter asks for a comparison between the contribution of a measure and its restrictive effect, giving rise to the problem of commensurability and comparability of these two elements, which can only be overcome by intense moral argumentation.

⁸⁴ See also Rivers, ‘The Second Law of Balancing’, 180.

⁸⁵ *Ibid.*, 169.

⁸⁶ See also *Ibid.*, 171-172.

iv. Proportionality *stricto sensu*

In its simple form, one could state that proportionality *stricto sensu* leads to a weighing between competing values to assess which value should prevail. At this step more extensive moral argumentation than in the cases of suitability and necessity is inevitable. While the Principles Theory, with its use of formulas, suggests that the weighing is a procedure of quasi-mathematical precision and rationality, in practice adjudicators may find it difficult to assign weight to values and compare them, as required by proportionality *stricto sensu*. The accusation of subjectiveness is thus levelled with particular vigour against the use of proportionality *stricto sensu*.

According to the Principles Theory, proportionality *stricto sensu* suggests a rational decision-making process comparing the abstract and concrete weight of values in a factual situation. Alexy developed a virtually mathematical formula which serves as a structural explanation of constitutional argumentation, the so-called ‘Weight Formula’. Arguments are channelled into various factors: the abstract weight of principles, the concrete weight of principles and – as a proxy – the epistemic quality of the findings. As a result, a quasi-mathematical process yields a result according to which one value – in Alexy’s account, a principle – prevails. Alexy has termed this process the ‘Law of Balancing’.

The use of this model and the utility of proportionality *stricto sensu* are justified by Alexy as a consequence of the claim to correctness implicit in constitutional review.⁸⁷ Such review thus requires a rational procedure, and the reproach of irrationality is taken very seriously by proponents of the Principles Theory. Time and again the value of the Weight Formula has been defended as an ‘argument form of rational legal discourse’.⁸⁸

In a similar vein, scholars have supported proportionality analysis as a potentially more ‘honest’ and transparent argumentation procedure than other legal tests to arrive at an informed decision.⁸⁹ Barak perceives it not as the only option, but as the ‘best available option’ for the adjudication of constitutional rights claims.⁹⁰ Even Kennedy, though depicting it sceptically as a ‘counsel of despair’, gives proportionality analysis the merit of constituting a progress from excessive faith in exegesis or ungrounded faith in the coherence of a legal system.⁹¹

⁸⁷ R. Alexy, ‘The Dual Nature of Law’ (2010) 23 *Ratio Juris* 167, 168.

⁸⁸ R. Alexy, ‘The Construction of Constitutional Rights’ (2010) 4 *Law & Ethics of Human Rights* 19, 26 ff. See also A. Stone Sweet and J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 73, 89, who develop the justification of proportionality analysis as an ‘argumentation framework’.

⁸⁹ Stone Sweet and Mathews, 89. See also A. Barak, ‘Proportionality and Principled Balancing’ (2010) 4 *Law & Ethics of Human Rights* 3, 14–15.

⁹⁰ Barak, 458.

⁹¹ D. Kennedy, ‘Thoughts on Coherence, Social Values and National Tradition in Private Law’ in D. Kennedy (ed.), *Legal Reasoning – Collected Essays* (Aurora: Davies Group, 2008), 188.

These justifications possess merit. Proportionality *stricto sensu* as set out by Principles Theory does indeed suggest an ordering of legal arguments. The remaining inherent danger of every order is oversimplification. Alexy suggests the ‘Weight Formula’ to formalize the judgments on interference and the importance of satisfaction. The elements of the Weight Formula and the Law of Balancing are discussed below and then examined as to potential difficulties in the adjudicative process.

a. The Weight Formula

For the purpose of explaining the Weight Formula as set out by Alexy, we must introduce various variables. Values as principles are referred to as P, while the concrete importance is designated by the variable I. The abstract weight is labelled W.

The adjudicator accordingly uses values on a triadic scale (light, moderate, serious) which are ascribed to the various components of an equation.⁹² The importance of values as principles possesses an abstract and a concrete dimension, the latter being determined by the facts of the case. The concrete importance can be derived from a counterfactual scenario: The concrete importance of P₁ (I₁) is identical to the importance achieved by omitting the interference with P₂.⁹³

In the framework of the Weight Formula, these elements are brought together in an equation. The concrete weight of the realisation of P₁ against P₂ (W_{1,2}) can be established by dividing the concrete importance of P₁ (I₁) by the concrete importance of P₂ (I₂).⁹⁴

$$W_{(1,2)} = I_1 / I_2$$

These values can then be assigned numbers, preferably based on a geometric rather than an arithmetic sequence.⁹⁵ As an example, a value of 20 would be ascribed to ‘light’, 21 to ‘moderate’ and 22 to ‘serious’.

To refine the Weight Formula, the abstract weight of principles (W) is also brought into the equation. These abstract weights can change the outcome of the equation in the following manner:

$$W_{(1,2)} = (I_1 \times W_1) / (I_2 \times W_2)$$

⁹² R. Alexy, ‘On Balancing and Subsumption. A Structural Comparison’ (2003) 16 *Ratio Juris* 433, 440. The three levels can also be referred to as ‘minor’/‘weak’, ‘moderate’ and ‘high’/‘strong’ according to Alexy. A triadic scale is, of course, not the only possible option. As Rivers, ‘The Second Law of Balancing’, 184, explains, the more points there are on the scale, the more an adjudicator engages in fine-tuning the balancing process and the less discretion of a policy choice is left to the legislator or administrative decision-maker.

⁹³ Alexy, ‘Balancing and Subsumption’, 441.

⁹⁴ Modeled after Alexy, ‘Balancing and Subsumption’, 444.

⁹⁵ Alexy, ‘Balancing and Subsumption’, 445-446.

Ultimately, Alexy adds as a sort of proxy the reliability of empirical assumptions (R). This criterion relates to the ‘epistemic quality’ of the assessment of interference and of the importance of principles. The epistemic side of Alexy’s theory has been called the ‘Epistemic Law of Balancing’ or ‘Second Law of Balancing’, which in essence prescribes that the certainty of the underlying empirical premises for the interference with a principle must increase proportionally to the intensity of the interference.⁹⁶

$$W(1,2) = (I1 \times W1 \times R1) / (I2 \times W2 \times R2)$$

For the moment this may suffice, although this last Epistemic Law of Balancing requires some further discussion and critique at the level of judicial review.⁹⁷ Putting all this together, the quotient of this mathematical operation provides a quotient representing the Law of Balancing in action.⁹⁸ The quotient becomes clearer if, as suggested by Alexy, a geometric rather than arithmetic sequence is used for the attribution of numerical values.

As a consequence, proportionality analysis in Alexy’s view constitutes a rational decision-making process and has to take place as soon as principles are at stake. All the three of the above-mentioned steps of the proportionality analysis can be derived directly from the nature of principles and their collision.⁹⁹

b. The representation of values under proportionality stricto sensu

There exist, however, conceptual difficulties in implementing proportionality *stricto sensu* as is shown subsequently. First, proportionality *stricto sensu* rests on the premise that two clear values can be identified and put in relation to each other. We have already discussed that the identification of a value may prove problematic in itself.¹⁰⁰

However, one may also doubt the completeness of the representation of arguments that a full-scale proportionality test suggests. Alexy already indicates that there may be situations where more than two values are at stake, and that a more complex ‘balancing’ exercise must take place in such situations, the concrete procedure of which still requires elaboration.¹⁰¹

Proportionality *stricto sensu* necessarily always remains a short-cut procedure, a heuristic for decision-making. Otherwise an unlimited number of values could theoretically be at stake in any given situation. Whatever measure is taken by a state or other entity, its effects necessarily have an impact on a variety

⁹⁶ Ibid., 446. See also generally Rivers, ‘The Second Law of Balancing’.

⁹⁷ See section V.B.i.

⁹⁸ Alexy, ‘Balancing and Subsumption’, 446-447.

⁹⁹ Alexy, *Theorie der Grundrechte*, 102. See also M. Borowski, ‘Abwehrrechte als grundrechtliche Prinzipien’ in J.-R. Sieckmann (ed.) *Die Prinzipientheorie der Grundrechte – Studien zur Grundrechtstheorie Robert Alexys* (Baden-Baden: Nomos, 2007), 92. See in more detail on this norm-theoretic claim subsequently section III.

¹⁰⁰ See section II.A.i.

¹⁰¹ Alexy, ‘Constitutional Rights, Balancing, and Rationality’, 136.

of values, be it intentional or not. To engage in proportionality *stricto sensu*, however, means to reduce complexity by suggesting a limited number of values that are put in the balance. As an example, in virtually every situation where a measure strikes a balance between two values, one could reasonably ask whether the costs of the measure, its technical and administrative difficulties, should not weigh in as a third value. It could plausibly be argued that a state's finances must be treated carefully in order not to overburden its actual capacities.¹⁰²

This is not to suggest that there is no merit in reducing complexity in a legal analysis for the sake of feasibility. The use of a heuristic is virtually indispensable.¹⁰³ However, although proportionality *stricto sensu* is justified as a structure for argumentative representation of the relevant concerns, it is so only subject to this limiting reduction of complexity.¹⁰⁴

First, its structure as a heuristic gives power to judges to delineate the relevant values for the inquiry without necessarily providing clear criteria on how these judges should proceed in doing so.¹⁰⁵

Second, the claim that the factual elements of cases themselves raise the required issues so that an appropriate representation of values will be achieved is also doubtful.¹⁰⁶ Proportionality *stricto sensu* leaves it fully to the discretion of judges to decide which of the practically unlimited factual elements of a case should be considered relevant and what the criteria for this decision are.¹⁰⁷ Proportionality *stricto sensu* thus encompasses a comprehensive shift of power towards the adjudicative instance applying it.

c. *Attributing weight to values*

The second crucial stage of proportionality *stricto sensu* requires that weights be attributed to the values that have been identified as relevant. The moral argumentation needed in such an exercise is not at all denied by scholars supporting the use of proportionality *stricto sensu*.¹⁰⁸ Alexy's view is fundamentally based on discourse theory: the attribution of weight for the purpose of proportionality

¹⁰² The author is grateful to Professor Alexy for clarifying this point at the conference on 'Proportionality and Post-National Constitutionalism' at Antwerp University, 17-18 February 2011.

¹⁰³ J.P. Trachtman, 'Trade and... Problems, Cost-Benefit Analysis and Subsidiarity' (1998) 9 *European Journal of International Law* 32, 39, notes that if resources and bounded rationality would allow it, courts would probably proceed to a full-scale comparative cost-benefit analysis, but that the constraints of adjudication force them to use 'rules of thumb', i.e. heuristics, for their decision-making.

¹⁰⁴ See more detailed discussion on argumentative representation in R. Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *International Journal of Constitutional Law* 572, 579.

¹⁰⁵ Jestaedt, 266. See also T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943, 977.

¹⁰⁶ Alexy, 'Balancing, Constitutional Review, and Representation', 580, claims that all that is required is a 'sufficiently broad' class of cases.

¹⁰⁷ Jestaedt, 266. Similarly, Aleinikoff claims that the setting of a case can easily lead to misrepresentation, Aleinikoff, 978.

¹⁰⁸ See more on this point under section IV.

stricto sensu is part of the rational structure of discourse to establish a correct legal judgment, labelled summarily as ‘propositionality’.¹⁰⁹ At the same time, however, Alexy does not suggest that there is simply one right answer for every exercise of proportionality analysis.¹¹⁰

For the abstract weight of a principle, Alexy suggests that in many cases there will be equality between values. In some cases, there may be differences. These seem to be based on the legal enshrinement of the value, in his example the German constitution.¹¹¹ It remains yet to be set out in more detail on what criteria the determination of a differing abstract weight for certain values ought to be based.

As to the concrete weight of a value, Alexy suggests that the strength of an interference with a value can be identified by using a comparison: To establish how strong the interference with one value is, it must be asked what the omission of the concrete interference would mean for the value.¹¹² This does not tell us, however, who is asked to identify the strength of interference. The problem of interpersonal comparisons of utility is not adequately addressed in this account. Interference with a certain value may be evaluated in a highly different way by various individuals.¹¹³ The concrete value may differ fundamentally based on whether one individual is asked to ‘sell’ their right to non-interference or whether another individual is asked to ‘buy’ an entitlement to interfere.¹¹⁴ One may assume a community which gives the same weight to values across its individual views, but this can only be a reduction of complexity, in which the risk of erroneous appreciation increases the more heterogeneous the assumed ‘community’ is in reality.

Still, these difficulties of ascribing weights to values cannot overthrow proportionality analysis conceptually. Some would argue that the necessary quantification of values can only be done irrationally and therefore correctly point out the difficulty of establishing the weights of values in concrete situations through rational argumentation. To reject balancing based on the assumption of the impossibility of any such rational argumentation, however, is to risk totally ‘giving up the idea of constitutional law as a rational enterprise’.¹¹⁵

¹⁰⁹ Alexy, ‘Balancing, Constitutional Review, and Representation’, 577.

¹¹⁰ See closer on this point section V.A.

¹¹¹ This at least appears to be what Alexy is doing, see his example for the operation of the Weight Formula in Alexy, ‘Balancing and Subsumption’, 447.

¹¹² *Ibid.*, 441.

¹¹³ For an economist’s perspective see N. Kaldor, ‘Welfare Propositions of Economics and Interpersonal Comparisons of Utility’ (1939) 49 *The Economic Journal* 549.

¹¹⁴ For the argument in more detail in the context of cost-benefit analysis see D. Kennedy, ‘Cost-Benefit Analysis of Entitlement Problems: A Critique’ (1981) 33 *Stanford Law Review* 387, 401.

¹¹⁵ Klatt and Meister, 60.

d. Refinements of the Weight Formula in the light of uncertainty

More recent research by proponents of the Principles Theory also admitted that uncertainty may be attached to the graduation of interference with a value. The Epistemic Law of Balancing had already introduced a variable for the reliability of its empirical assumptions. Klatt, Schmidt and Meister concede that the problem may not simply be reliability, but true uncertainty. This uncertainty concerns both the empirical and normative side.

Empirical certainty describes to what extent it can be determined whether a certain interference with a value will occur.¹¹⁶ Klatt, Schmidt and Meister suggest a formula of their own, the law of graduation (*Einstufungsgesetz*), according to which, the higher the certainty of finding a strong level of interference with a value is, the higher the certainty of finding a weak level of interference with the same value must be. Put differently, a pessimistic point of view must be taken in cases of doubt. The law of graduation has a 'heuristic' relationship to the Law of Balancing, as it suggests which value of empirical certainty and concrete interference should be used for the subsequent application of the Law of Balancing.¹¹⁷

Normative certainty relates to the exactitude with which a value can be attributed to the level of interference, which decreases with the fineness of the scale used.¹¹⁸ The difficulty with ever smaller scales relates to the human mind's limited powers of discrimination. It appears hardly feasible to distinguish between two similar forms of interference if a very fine scale is used.¹¹⁹ Normative certainty also concerns the abstract weight given to a value in the Weight Formula.¹²⁰

Klatt, Schmidt and Meister argue that instead of the relatively vague 'reliability' of empirical assumptions used by Alexy, the Weight Formula should be construed in a more complex manner, taking into account these findings. The initial formula held:

$$W(1,2) = (I_1 \times W_1 \times R_1) / (I_2 \times W_2 \times R_2)$$

Using the variables of Re for the degree of certainty of empirical premises and Rn for the degree of certainty of normative premises, the formula would then read:¹²¹

¹¹⁶ M. Klatt and J. Schmidt, *Spielräume im Öffentlichen Recht – Zur Abwägungslehre der Prinzipientheorie* (Tübingen: Mohr Siebeck, 2010), 24. For an English version of their arguments, see M. Klatt and J. Schmidt, 'Epistemic Discretion in Constitutional Law' (2012) 10 *International Journal of Constitutional Law* 69, or Klatt and Meister, 109 ff.

¹¹⁷ Klatt and Schmidt, 24, Klatt and Meister, 118.

¹¹⁸ Klatt and Schmidt, 42, Klatt and Meister, 124.

¹¹⁹ See T. Williamson, *Vagueness* (London/New York: Routledge, 1994), 237 ff., discussing the problem of limited powers of discrimination from an epistemic point of view.

¹²⁰ Klatt and Schmidt, 46, Klatt and Meister, 135.

¹²¹ In the German original, Klatt and Schmidt use the letter S (*Sicherheit*) instead of R (*Reliability*).

$$W(1,2) = (I_1 \times W_1 \times Re_1 \times Rn_1) / (I_2 \times W_2 \times Re_2 \times Rn_2)$$

As an even more important result, the acknowledgement of uncertainty in the empirical and normative classification of interferences with values leads Klatt, Schmidt and Meister to concede the existence of margins of discretion (*Spielräume*). At the empirical level, a margin of discretion emerges if the empirical certainty of finding two different degrees of interference is the same, which leads to a freedom to choose for the decision-maker.¹²² At the normative level, a margin of discretion emerges in the presence of a scale into which classification of the abstract weight of a value or the degree of interference is not feasible without uncertainty. Again, the first-level decision maker may choose in such situations without the adjudicator's intervention.¹²³

These refinements of the Law of Balancing render it closer to adjudicative reality. The introduction of new variables of uncertainty acknowledges the problem of valuation identified previously. However, the price to pay is the lower administrability of the formula. Again numbers must be attributed to the new variables, which again may give rise to difficult exercises of valuation. While Klatt, Schmidt and Meister's account provides more realistic insights into the possible reasoning of adjudicators, at the end of the day the seemingly advantageous simplicity of the Weight Formula is reduced in order to reproduce more and more the actual complexity of situations of value conflict.

The actual process of assigning weight to values thus necessarily suffers from the vagueness inherent in both the required moral argumentation and in normative and empiric uncertainty, providing yet another open flank for criticism.

e. Putting the weighed values in comparison

As the third and final step of the weighing exercise of proportionality *stricto sensu*, values must be put in comparison, so that the prevailing value can be identified. The central difficulty consists in finding a scale 'external' to the adjudicators subjective convictions for this purpose.¹²⁴

The recognition of commensurability between values is central to the acceptance of comparing them. Some have objected that there exist incommensurable values, between which no reconciliation by means of a unit of scale can be found for the purpose of comparison.¹²⁵ However, despite imprecision in many cases it

¹²² Klatt and Schmidt, 25, thereby also reject Alexy's view that the interference asserted by the legislator should also be adopted by the adjudicator. See also Klatt and Meister, 123.

¹²³ Klatt and Schmidt, 48-49, Klatt and Meister, 130.

¹²⁴ Aleinikoff, 972.

¹²⁵ C.R. Sunstein, 'Incommensurability and Valuation in Law' (1993-94) 92 *Michigan Law Review* 779, 803. For an overview of the debate and further references see F. Schauer, 'Commensurability and Its Constitutional Consequences' (1994) 45 *Hastings Law Journal* 785, 787 and footnote 9. Similarly sceptical of a possibility to monetize and compare values Aleinikoff, 972. K.-H. Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik: Plädoyer für eine Erneuerung der liberalen Grundrechtstheorie* (Tübingen: Mohr

appears that a very rough comparison remains possible. This could, for example, take the form of a statement that a particularly large amount of x may be worth more than a particularly small amount of y .¹²⁶ Waldron coined the terms of ‘strong’ and ‘weak’ incommensurability for this purpose.¹²⁷ Strong incommensurability suggests that in an individual’s knowledge there is no basis for knowing which decision between incommensurable values is the correct one. No relation can be established. In cases of weak incommensurability, a relation can be established, although there is no unit of scale for comparison. There is simply an ‘order of priority’.¹²⁸ Da Silva distinguishes even more clearly between the types of scale needed for proportionality analysis. While opponents of proportionality analysis seem to attack that no cardinal ranking can be established between competing values, da Silva suggests that only an ordinal ranking is needed. Comparability, not commensurability, is thus the issue.¹²⁹

To defend the idea that values are comparable and not ‘social facts which have less in common than apples and oranges’, Alexy introduces the importance of values for the constitution – in his case the German one – as the relevant benchmark.¹³⁰ Comparability comes into being based on the constitution as the relevant common point of view. The existence of such a benchmark also serves to refute the claim that proportionality analysis could privilege quantifiable over non-quantifiable considerations. The assignment of weights to values is based on such a benchmark and thus requires an external justification for the weight given to a value in a concrete case. The quantification of a particular value ceases to be the problem as soon as comparability has been established.¹³¹ Beyond the setting of domestic law, where a common legislator exists, the lack of a common point of reference may, however, render it more difficult to identify such a benchmark for commensurability.¹³² One may be left with the rather general benchmark of marginal societal importance of the benefits achieved or harm prevented to values.¹³³

In addition, Alexy suggests the introduction of a model of scales.¹³⁴ The Principles Theory thus seems to be fundamentally based on the idea of the commen-

Siebeck, 2004), 13, emphasizes in particular the impossibility of commensurability between collective or public interests on the one hand and private interests on the other.

¹²⁶ Sunstein, 803.

¹²⁷ J. Waldron, ‘Fake Incommensurability: A Response to Professor Schauer’ (1994) 45 *Hastings Law Journal* 813, 815-816.

¹²⁸ *Ibid.*, 817.

¹²⁹ V. Afonso da Silva, ‘Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision’ (2011) 31(2) *Oxford J Legal Studies* 273, 282 f.

¹³⁰ Alexy, ‘Balancing and Subsumption’, 442.

¹³¹ Klatt and Meister, 61, answering here to a claim brought forward by Tsakyrakis.

¹³² Pauwelyn and Michaels, 26, suggest that as an example, such a benchmark may also be replaced by a uniform standard of welfare maximisation.

¹³³ Barak, 484.

¹³⁴ Alexy, ‘Balancing and Subsumption’, 442.

surability of values, which includes the possibility of their quantification. This is certainly based, to no small extent, on the acceptance this theory holds for moral argumentation,¹³⁵ but again has led to criticism of the idealist vision of proportionality analysis it entails.¹³⁶

Still, the conceptual claim for proportionality analysis holds, as criticism to date has only shown practical difficulties in applying proportionality analysis without pointing out any fatal flaw. We conclude the present insight into proportionality *stricto sensu* with similar thoughts as the first one on the pursuit of legitimate objectives. At this stage, proportionality analysis again shows itself as a potentially useful and rational decision-making technique, but invests adjudicators with considerable power combined with difficulties, as it requires comprehensive moral argumentation. Adjudicators may thus have conceptual problems in adopting proportionality *stricto sensu*, and a powerful justification will be required.

v. Conclusion

The present section has discussed in detail the phenomenon of proportionality analysis in its classic, four-pronged structure. The analysis shows that there is an idealized account given by the Principles Theory: Proportionality analysis can thus ensure, through its various stages, that all arguments are heard, weighed and considered in a case so that ideally a result which optimises the realisation of the competing values in a concrete case can be reached. A rational construction of proportionality analysis is suggested in the form of the Law of Balancing and the Weight Formula as mathematical equations. Apart from these beneficial features, however, there are a number of thorny questions that an adjudicator must tackle for the purpose of proportionality analysis. As a starting point, the values at issue must be defined and admitted in the first place. Under suitability and necessity, values are put in hierarchies, but there is a lower need for extensive moral argumentation. Under the last stage of proportionality *stricto sensu*, the most difficult exercise of moral argumentation has to be undertaken. Adjudicators must weigh values, attribute abstract and concrete weight to them and compare the results in order to reach a decision. Every stage of this process poses particular problems and opens up the adjudicative function to potential criticism, as reliance on moral argumentation may also be denounced as unduly subjectivist decision-making.

Adjudicators who are reluctant to undertake such an exercise, which they perhaps perceive as extra-legal, will understandably have their difficulties in

¹³⁵ See section IV.

¹³⁶ Still, it should be noted that there are even economic solutions for balancing exercises of incommensurable goods, so that incommensurability arguably is no absolute obstacle for proportionality analysis. See in this regard on the Nash bargaining solution P.-E. Veel, 'Incommensurability, Proportionality, and Rational Legal Decision-Making' (2010) 4 *Law & Ethics of Human Rights* 178, 195 ff.

particular with proportionality *stricto sensu* and must be given appropriate justification for why they should overcome their hesitance.

Our discussion of suitability and necessity has also pointed out the relevance of the burden of proof and the standard of review for ensuring the equal representation of arguments proportionality analysis promises. The burden of proof is thus an intrinsic part of how proportionality analysis operates in context. An unbalanced distribution of the burden or an inappropriate standard of proof may undermine this claim of equal representation. In the following section, we briefly elaborate this broader perspective on proportionality analysis which will also guide the subsequent comparative studies. Having clarified this point, we can then turn to the issue of justification for adjudicators to engage in proportionality analysis, which will also bring us closer to the link with judicial review.

B A Broader Understanding of Proportionality Analysis

Up to this point, we have presented proportionality analysis as a four-pronged legal test. However, the four-pronged sequence is not the only way in which proportionality analysis can be applied. At the same time, however, it has already become obvious that the claim of equal representation of proportionality depends to no small extent on the accompanying features of a legal test, i.e. the burden of proof and the standard of review. The terminology and our conceptualization of proportionality analysis should be clarified before we engage in a comparative inquiry which juxtaposes different ways of applying proportionality analysis and its sub-tests. Therefore, the present section briefly assesses different understandings of proportionality analysis and positions our approach against their background before we return to our initial question of justifying the use of proportionality analysis by adjudicators.

i. Understanding proportionality analysis beyond the classic conceptualisation

We suggested earlier that a mere understanding of proportionality as one particular interpretation or legal test is unsatisfactorily narrow. There are, in the literature, signs of different readings of what proportionality analysis actually is.¹³⁷ A discussion of possible alternative readings of proportionality analysis allows us to situate our approach in relation to such other readings.

Bomhoff suggests that balancing as a topic should be understood as a discourse bound to correspond to a specific historical legal background.¹³⁸ An understanding of proportionality analysis as a specific method or legal test would lead to a functionalist approach for comparative studies. This again would assume all too easily that balancing is the same everywhere could end up simply

¹³⁷ E.g. Barak, 131, describes proportionality analysis as a 'legal construction' as well as a 'methodological tool'.

¹³⁸ J. Bomhoff, 'Genealogies of Balancing as Discourse' (2010) 4 *Law & Ethics of Human Rights* 109, 112-113.

projecting experiences from one legal system onto another.¹³⁹ Bomhoff's warning is indeed appropriate. As a consequence, proportionality analysis is treated as a culturally embedded phenomenon in the present study. However, a mere suggestion to read balancing as a discourse that cannot be compared seems to overlook the fact that there are indeed substantially similar situations which are tackled in the situations of judicial review examined in the present study. Arguably, the departure from legal theory can thus provide a working vocabulary and theoretical underpinnings for a comparative study without unduly excluding the historical background of proportionality analysis. Balancing as a discourse is thus a useful reminder of potential difficulties for a comparative inquiry, but arguably does not render such an exercise futile.

As another possible reading, Röhl suggests that proportionality analysis should be understood as part of the structure of teleological interpretation. The 'logic of ends and means' of teleological interpretation encompasses the different steps of the proportionality test. A measure has to further its objective. This would already fulfil the test of suitability. At the same time, the costs caused have to be kept to the minimum, which implies that the least restrictive means is chosen, as under a test of necessity. Lastly, the relationship between the effect on the aim pursued and the impact on other interests has to be evaluated. A means could thus be disproportionate if its negative impact is excessive.¹⁴⁰ Since all the requirements are included within the maxim of teleological interpretation and not bound to some legal basis in a norm or general principle of law, they are applicable in all fields of law.

Conceptually, proportionality analysis can thus be understood along the lines of teleological interpretation. Yet, interpretative rules would come in to determine in what circumstances teleological interpretation – and with it proportionality analysis – should apply, and what its relationship with other methods of interpretation should be. As an example, in international law the general rules laid down in the Vienna Convention on the Law of Treaties create no hierarchical relationship between different methods, e.g. between teleological interpretation and contextual interpretation of a treaty text.¹⁴¹ In applying proportionality analysis, are international courts and tribunals thus superimposing teleological interpretation at the expense of other methods of interpretation? Or do they choose it as the most appropriate tool, i.e. as the result of a process of weighing various possible interpretative methods? Röhl's account loosens the link between the text to be interpreted and the use of proportionality analysis, yet would require a more detailed explanation of the impact on and relationship with other methods of interpretation.

Proposing an interpretative reading in addition to Röhl's account, Vranes looks for an explanation for proportionality analysis in the 'logic of rule and

¹³⁹ *Ibid.*, 117.

¹⁴⁰ K.F. Röhl, *Allgemeine Rechtslehre: ein Lehrbuch* (Köln: C. Heymann, 1994), 636-638.

¹⁴¹ M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden/Boston: Martinus Nijhoff, 2009), 424 and 438.

exception'.¹⁴² Whenever, in a given context, one norm constitutes a fundamental rule while another one constitutes a limited exception,¹⁴³ means that do not support the aim of the exception cannot be accepted in light of the rule. In addition, means are only acceptable under the rule if they cause the least grave violation of said rule and still pursue the aim of the exception. Lastly, disproportionate means will not, according to this view, find cover under the exception.

The rule-exception construction could potentially suffer from a hierarchical view of the values involved. An exception in itself is subject to a rule and often narrowly interpreted. A value conflict in itself does not tell us, however, which interest is the rule and which the exception. Proportionality analysis in its truest sense, however, claims equal representation of arguments and may thus often not find adequate expression through the rule-exception model.

Barak suggests a distinction between 'interpretive' and 'constitutional' balancing. 'Interpretive' balancing is used to determine the interpretation of a text – statute or constitution – whose purpose is to reconcile conflicting principles. It is distinct from 'constitutional' balancing as it does not serve the purpose of determining the constitutionality of such a norm. In practice, both kinds of balancing are, however, based on the structure of proportionality analysis and its sub-tests.¹⁴⁴ For our study, this distinction is only of lesser relevance, as the focus is predominantly on judicial review – i.e. on 'constitutional' balancing in Barak's terms.

Readings of proportionality analysis through the lens of interpretative theory thus possess the merit of loosening the link between the text and proportionality analysis.¹⁴⁵ They help us to understand proportionality analysis as a method of reading norms¹⁴⁶ rather than as a legal test derived from some words of a norm. However, such readings face their own challenges as has been shown.

A different approach has been taken in more recent scholarship: In their comparative study in international investment law, Von Staden and Burke-White seem to suggest that proportionality analysis cannot be understood indepen-

¹⁴² E. Vranes, *Trade and the Environment – Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford: Oxford University Press, 2009), 142-143.

¹⁴³ The expression 'limited exception' is used by Vranes as by many others. In general, one might wonder whether unlimited exceptions can exist, as exceptions always limit the scope of application of the related rule. An unlimited exception in its truest sense would therefore leave a rule without scope of application.

¹⁴⁴ See Barak, 75 and 93 for a more concrete description.

¹⁴⁵ See also on indeterminacy of the law, balancing and interpretation C. Gerstetter, 'The Appellate Body's 'Response' to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation' in C. Joerges and E.-U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Oxford: Hart Publishing, 2011), 115-116.

¹⁴⁶ See also J. Christoffersen, 'Straight Human Rights Talk – Why Proportionality does (not) Matter' (2010) 55 *Scandinavian Studies in Law* 11, 17.

dently of the standard of review.¹⁴⁷ This coincides with the present study's suggested broader understanding of proportionality analysis as an adjudicative operation including procedural and methodological considerations as discussed in the subsequent section: An understanding of proportionality analysis that does not incorporate features like the flexibility of adjudication, the standard of review and the burden of proof is simply incomplete. With this also comes the realisation that there are other versions of the basic test which take inspiration in the classic scheme, but apply it differently.

ii. Balancing and other, less formalized versions of proportionality analysis

Our account has so far focused on proportionality analysis and its conceptual difficulties based on the fairly traditional four-pronged model as it has most fundamentally been developed in German constitutional law.¹⁴⁸ However, this 'pure' form of proportionality analysis translates into a variety of different tests in the practice of different legal regimes. One notion that should still be introduced and will be of use in the subsequent comparative studies is that of balancing. It has been extensively used by Alexy as a description of the overall process of proportionality analysis and more specifically to denote proportionality *stricto sensu*. For our purposes, however, we adopt a slightly different, more specific meaning: In particular in United States constitutional law,¹⁴⁹ 'balancing' is used to define a test that does not focus strongly on textual elements of the norms to be interpreted. Rather, the adjudicator assembles all the potential arguments, weighs them informally for the two main values at stake and takes a final decision, often without necessarily clearly stating what weight he or she assigns to what side. This open-ended version, which resembles proportionality *stricto sensu*, but in our view adopts a less formalized approach, deserves a designation of its own.

In practice, there exist different ways in which proportionality analysis is applied. In the Principles Theory's account, proportionality analysis, including its ultimate stage of proportionality *stricto sensu*, is the only stage on which full representation of all arguments and a rational discourse can take place. Other legal tests, in particular the first two steps of suitability and necessity, can be derived from the process of optimisation, which principles require.¹⁵⁰ In other words, if complete proportionality analysis is perceived as the ideal decision-

¹⁴⁷ See both W.W. Burke-White and A. von Staden, 'Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 *Yale Journal of International Law* 283 and W.W. Burke-White and A. Von Staden, 'The Need for Public Law Standards of Review in Investor-State Arbitrations' in S.W. Schill (ed.) *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010).

¹⁴⁸ See chapter 3.

¹⁴⁹ See chapter 4.

¹⁵⁰ Alexy, *Theorie der Grundrechte*, 101-103.

making procedure, all other tests necessarily represent nothing but precursors to that test and will – as it appears – collapse into it in extreme cases which bring suitability and necessity to their limits.

Other alternatives to proportionality analysis could for example be the use of truncated tests, i.e. reliance on only suitability or on suitability and necessity without the final stage of proportionality *stricto sensu*. Apart from these truncated tests, it has been suggested that proportionality *stricto sensu* is nothing but a heuristic form of cost-benefit analysis that courts would apply if they had the resources to do so.¹⁵¹ The classic four-pronged, ‘vertical’ structure of proportionality analysis can also be applied in a more ‘flexible-horizontal’ manner.¹⁵² Furthermore, some scholars suggest that next to full four-pronged proportionality analysis, there also exist versions with a greater margin of deference, such as a mere control of plausibility, a prohibition of gross disproportionality¹⁵³ or a guarantee of a minimal position.¹⁵⁴

Alexy claims that such other legal tests are merely a version of proportionality analysis combined with a further, formal principle which calls for deference in the case at issue.¹⁵⁵ It appears, however, somewhat unsatisfying to simply explain alternative approaches by introducing a new principle into the balancing formula suggested for proportionality analysis whenever needed. At the end of the day, there may be a risk of representing nothing other than the complexity of adjudicative reality with a virtually unlimited number of interacting principles. Their relevance and impact remains to be determined in a convincing manner. One may wonder whether such a representation of reality by means of seemingly objective mathematical formulae adds much to the understanding of what an adjudicator actually has to do in order to reach a satisfactory resolution to a value conflict.

In light of the incompleteness identified for proportionality *stricto sensu* as a legal test, we should thus be cautious about speaking all too dismissively of adjudicators using other tests as simply concealing that they are actually engaging in proportionality *stricto sensu*. There may often be good reasons for their approach which merit closer attention. The present study thus aims to examine the influence the characteristics of judicial review on the chosen test beyond the notion of a formal principles. This should not be understood as a rejection of the concept of formal principles, but rather as an attempt to flesh out the way in which adjudicators weigh reasons as to how to apply the individual segments of proportionality analysis.

¹⁵¹ Trachtman, 39.

¹⁵² Christoffersen, *Fair Balance*, 71.

¹⁵³ See e.g. B. Pieroth and B. Schlink, *Grundrechte* 21 edn (Heidelberg: C.F.Müller, 2005), 69.

¹⁵⁴ See e.g. R. Poscher, ‘Einsichten, Irrtümer und Selbstmissverständnis der Prinzipientheorie’ in J.-R. Sieckmann (ed.) *Die Prinzipientheorie der Grundrechte – Studien zur Grundrechtstheorie Robert Alexys* (Baden-Baden: Nomos, 2007), 74.

¹⁵⁵ R. Alexy, ‘Constitutional Rights and Proportionality’ in C. Joerges and A. Herwig (eds.), *Proportionality and Post-National Constitutionalism* (forthcoming 2013), 11-12.

C Conclusion

Summing up briefly, the present section has undertaken two major steps. In a first discussion, it has been established what proportionality analysis is and why it is contested at all. In discussing its individual elements, it becomes clear that proportionality analysis entails answering difficult questions through moral argumentation. First, adjudicators must decide which values are actually in conflict and are subject to proportionality analysis. Second, similarly contentious findings must be taken by adjudicators when ascribing weight to values, assessing contributions and negative effects on values and comparing values during the different stages of proportionality *stricto sensu*. The substantive transfer of power towards judiciaries established by the use of proportionality analysis thus requires justification.

Suitability and necessity as sub-tests of proportionality analysis also make us aware of the need to consider other elements besides the pure interpretation of norms that play a role in proportionality analysis. Consequently, the standard of review and the burden of proof are relevant as well, in particular for a comparative study that purports to examine to what extent different use has been made of proportionality analysis by different adjudicators and what consequences these distinctions have for the equal representation of arguments. As a second step, we have examined how our approach to proportionality analysis can be contrasted in particular with those approaches taken in recent literature by other scholars. In the light of its potential complexity and diversity of application, the present study aims not to suggest one single ideal version of proportionality analysis, but rather to examine and explain the different forms of application of proportionality analysis by focusing on the reasons for adjudicators to adopt one particular reading.¹⁵⁶

With these clarifications, it is now time to turn to the justification of adjudicators for using proportionality analysis. In establishing such a justification, the reasons for adjudicators to adopt different versions of proportionality analysis should also become clearer. For this purpose, we return to legal theory, and the Principles Theory in particular. As a starting point, we will examine the norm-theoretic justification given by the Principles Theory for the use of proportionality analysis. The structure of certain norms – principles – ought to provide such a justification.

III Balancing vs. Subsumption: The Norm-Theoretic Justification for Proportionality Analysis under the Principles Theory

Proportionality analysis has been shown to carry with it a power shift towards judiciaries. As a justification for this shift, the Principles

¹⁵⁶ See subsequent section V.B.

Theory centrally erects a norm-theoretic claim: Some norms require proportionality analysis for their application because of their structure.

In the following sections, we first set out the norm-theoretic distinction between rules and principles of the Principles Theory. While the theory has been refined after first criticism, there remains doubt as to the actual possibility of distinguishing rules and principles in a clear-cut fashion. Adjudicative practice also does not add strong foundations to the claim of a clear-cut distinction. As a consequence, the justification of proportionality analysis must arguably be found at a different level than that of the structure of the norms, and we move on to discuss proportionality analysis as mirroring practical argumentation.

A The Origin and Central Tenets of the Principles Theory: The Rules and Principles Distinction

Alexy's central work on the Principles Theory was initially drafted in the 1980s.¹⁵⁷ Even before this, thinkers had begun to delineate certain norms in terms of their structure. Esser suggested that in adjudication norms other than rules applied by classic subsumption play a role. Positivist accounts of adjudication such as those by Kelsen¹⁵⁸ or by Hart¹⁵⁹ would only see an exceptional role for extra-legal considerations beyond legal norms in the strict sense. Esser, however, argued that principles are omnipresent in adjudication and an important factor in the development of the law.¹⁶⁰ In a similar vein, but without previous knowledge of Esser's work,¹⁶¹ Dworkin mounted an attack on the positivist viewpoint. He suggested a distinction along structural lines: The idea of distinguishing rules and principles was born. Rules are norms which apply in an 'all or nothing' fashion. Principles, on the other hand, possess a 'dimension of weight'.¹⁶² They also encompass such principles that have no solid basis in codification or doctrine, but are part of political or social moral and therefore apply due to their content.¹⁶³ A link between morals and law is established. Rules apply in specific circumstances or they do not; in the latter case they have no influence on the decision taken. They have a highly condensed legal content

¹⁵⁷ See Alexy's *Habilitation Alexy, Theorie der Grundrechte*.

¹⁵⁸ H. Kelsen, 'Juristischer Formalismus und Reine Rechtslehre' (1929) *Juristische Wochenschrift* 1723, 1726; H. Kelsen, *Reine Rechtslehre* 2 edn (Wien: Verlag Österreich, 1960), 242ff.

¹⁵⁹ H.L.A. Hart, *The Concept of Law* 2 edn (Oxford: Clarendon Press, 1994), 173ff.

¹⁶⁰ J. Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts* (Tübingen: Mohr, 1956), *passim*. It should be noted that Esser was partially reacting to the existing work of W Wilburg, *Entwicklung eines beweglichen Systems im bürgerlichen Recht* (Graz: Kienreich, 1951).

¹⁶¹ Poscher, 'The Principles Theory', 221.

¹⁶² Dworkin, 24-26.

¹⁶³ P. Holländer, 'Der Verhältnismäßigkeitsgrundsatz: Variabilität seiner Struktur?' in J.-R. Sieckmann (ed.) *Die Prinzipientheorie der Grundrechte – Studien zur Grundrechtstheorie Robert Alexys* (Baden-Baden: Nomos, 2007), 185.

which allows an unambiguous application of the rule if its conditions are fulfilled. In cases of conflict, a rule can only apply or be invalid.

Principles are not as clear-cut in their applicability. As indicated by the concept of a 'dimension of weight', they have to be realized to the highest possible degree, both in the actual and legal dimension, and do not apply in the yes-or-no fashion which is applicable to rules.¹⁶⁴ In case of overlap, they must be weighed and balanced against each other with the result of one principle prevailing, but only limited to the circumstances of the case. The second principle does not thereby become invalid, and no general conclusion can be drawn for future conflict situations.¹⁶⁵ The resolution of conflict reached by balancing constitutes the creation of a rule that only applies for the case at issue.

Alexy further developed these fundamental ideas. While in essence accepting Dworkin's account, he aimed to reassemble the suggestions made by Dworkin on fundamental rights and to establish an overall theory on fundamental rights based on the idea of the rules-principles dichotomy.¹⁶⁶ His object of study is the German constitution and the German Constitutional Court's jurisprudence on constitutional rights and their conflicts. Not convinced that the distinction between rules and principles can be based merely on a process of subsumption, Alexy underlines that principles are obligations to optimise, or more generally speaking they incorporate the idea that a certain value should be reached to the highest extent possible.¹⁶⁷ They are consequently obligations of a *prima facie* character.¹⁶⁸ This is their dimension of weight which defines principles in situations of norm conflict. Like Dworkin, Alexy suggests that principles collide without one or the other necessarily becoming invalidated; both are realized to the highest possible degree in order to give each of them appropriate weight. As a consequence, a rule is created, but only for the situation at hand.

This specific requirement of optimisation (*Optimierungsgebot*) in situations of norm conflict helps to explain the difference between rules and principles. One central difference to Dworkin becomes visible with the problem of exceptions: In Alexy's view, contrary to Dworkin not all situations of conflict can be predicted and included in a rule. Sometimes, an exception will have to be introduced because of a principle.¹⁶⁹ The true structural distinction between rules and principles can therefore only emerge from an analysis of a given conflict. For the case of two principles, one will prevail due to its higher weight in a specific case without the other losing its validity. In case of a conflict between

¹⁶⁴ R. Alexy, 'On the Structure of Legal Principles' (2000) 13 *Ratio Juris* 294, 295.

¹⁶⁵ *Ibid.*, 296.

¹⁶⁶ There is a clear departure from Dworkin in Alexy's work. According to Alexy's view, Dworkin's account is non-positivistic, but still construes constitutional rights as rules. According to Dworkin, their application entails responding to moral questions, but does not include the need for balancing, i.e. full-scale proportionality analysis, see Alexy, 'The Construction of Constitutional Rights', 22-23.

¹⁶⁷ Alexy, *Theorie der Grundrechte*, 75.

¹⁶⁸ *Ibid.*, 88.

¹⁶⁹ *Ibid.*, 88.

a rule and a principle, the principle will not automatically prevail because of a higher weight than the value underlying the rule in question. Rather, the principle has to be accommodated within the rule by means of an exception.¹⁷⁰ The logical difference results only from the analysis of a situation of collision.

Proportionality analysis is thus the manner in which principles apply. In Alexy's view, it is opposed to subsumption, which is used to apply rules. Subsumption follows a deductive logic to reach a judgment, while proportionality analysis necessarily implies the use of arithmetic at the level of proportionality *stricto sensu*.¹⁷¹ Still, both methods have in common that they can be depicted as formulas, which Alexy calls the 'Subsumption Formula' and the 'Law of Balancing'.¹⁷² We have already set out the structure of proportionality and the 'Law of Balancing'.¹⁷³

B Norm-theoretic criticisms and the refinement of the principles theory

Some early work on *prima facie* obligations has been done in legal theory and has subsequently been taken up to mount an attack on the Principles Theory.

Searle developed a distinction between *prima facie* and definitive obligations.¹⁷⁴ He described three hypotheses for this distinction: In his first interpretation of *prima facie* norms, these do not really oblige in legal terms. There can thus be no real conflict between them and they cannot form the basis of or imply a legally binding norm. In the second interpretation, a *prima facie* norm contains a weak obligation. Only if it prevails over all other given norms in a specific situation does it become a definitive norm. The true character of any norm can therefore only be determined in view of the conditions of its application. The third interpretation sees both *prima facie* and definitive norms as sources of obligation, which differ, however, in their manner of naming reasons for action, i.e. the scope of given information.

Günther applies these findings to criticize the Principles Theory and to suggest a different rationale for the distinction between rules and principles.¹⁷⁵ While he accepts the premise of a distinction, he bases it on the distinct form of application of rules and principles in complex situations. For this purpose, he rejects Searle's first interpretation as a pure denial of conflict. He objects to the second on the grounds that it creates two spheres of validity for *prima facie* and definitive norms. For Günther, the validity of principles in the abstract only

¹⁷⁰ *Ibid.*, 89.

¹⁷¹ Alexy, 'Balancing and Subsumption', 448.

¹⁷² *Ibid.*, 434 and 436.

¹⁷³ See section II.A.iv.

¹⁷⁴ J. Searle, 'Prima Facie Obligations' in J. Raz (ed.) *Practical Reasoning* (Oxford: Oxford University Press, 1978), 89.

¹⁷⁵ K. Günther, *Der Sinn für Angemessenheit* (Frankfurt: Suhrkamp, 1988), 270.

encompasses and requires all actions contributing towards the optimisation object. Taking into account the specific conditions of the actual case through balancing makes it possible to determine which actions are actually required. The absolute validity of rules, which cannot be restricted, is no contradiction. All arguments that could bring about a restriction of validity have already been considered in advance in the case of a rule.¹⁷⁶ As for Searle's third interpretation, in Günther's view the distinction between the two categories is not of a structural nature, but determined by the use of a norm. Either a norm is used independently of the characteristics of the situation, or as a principle, in which case all factual and legal conditions are taken into account. Günther calls the latter the 'conditions of action' or 'conditions of conversation'.¹⁷⁷ Borowski criticizes this interpretation, arguing that it does not allow for a logical connection between and transition from *prima facie* norms to definitive norms.¹⁷⁸ In addition, the mere consideration of factors at the level of application is not identical to optimisation.¹⁷⁹ The character of principles would thus remain unexplained in Günther's model. However, by arguing in terms of validity, Günther usefully sheds light on the peculiarity of the Principles Theory: to construct a distinction between norms not based on their structure or validity, but referring to their application. Arguably, it also remains unclear why the consideration of all factors should not result in optimisation.

Another criticism is developed by Aarnio.¹⁸⁰ In his view, there is a transition from rules towards principles which can be depicted on a four-step ladder: There are 'rules', 'principle-like rules', 'rule-like principles' and 'principles'.¹⁸¹ While a norm sentence possesses a *prima facie* meaning according to our basic knowledge of the language, this meaning can change in the interpretation of a sentence when it is applied to a specific case. Aarnio calls this the 'all-things-considered-meaning'.¹⁸² Since the true meaning of a norm sentence is thus not known before its application, there can be no sharp distinction at the level of norm sentences. As a working hypothesis, Aarnio suggests a weaker distinction thesis similar to the concept of *family resemblance* in the sense of Wittgenstein. After the application of a norm, no structural distinction between rules or principles can be determined within this weaker distinction thesis.¹⁸³ Aarnio suggests that contrary to Alexy's concept, principles as optimisation requirements merely represent a rule according to which optimisation has to take place

¹⁷⁶ Ibid., 270-276.

¹⁷⁷ Ibid., 273.

¹⁷⁸ M. Borowski, *Grundrechte als Prinzipien* 2 edn (Baden-Baden: Nomos, 2007), III.

¹⁷⁹ Alexy, 'On the Structure of Legal Principles', 299.

¹⁸⁰ A. Aarnio, 'Taking Rules Seriously' in W. Maihofer and G. Sprenger (eds.), *Law and the States in Modern Times* (Stuttgart: Franz Steiner Verlag, 1990), 181.

¹⁸¹ Ibid., 184.

¹⁸² Ibid., 185.

¹⁸³ Ibid., 187.

or not.¹⁸⁴ Principles and rules therefore share the same deontic nature,¹⁸⁵ and as a consequence, even the weaker separation proposed in Aarnio's step-ladder model has to be rejected. The stronger separation suggested by Alexy is logically even less acceptable.

In reaction to such criticism, defenders of the Principles Theory have accepted that the optimisation requirement can be seen as a rule.¹⁸⁶ Borowski counters that the objective of the optimisation requirement (*Optimierungsziel*) can be achieved to varying degrees. The definition of a principle thus implies as its basis a rule requiring optimisation.¹⁸⁷ However, in his view this does not render obsolete the separation between rules and principles.¹⁸⁸ The use of the same deontic operator (a command) does not remove the difference in the structure of the normative content in Borowski's view.¹⁸⁹ Sieckmann supports this opinion and replies to Alexy with the creation of his own terminology:¹⁹⁰ There exist in his view principles in the restricted sense which are always commands in a deontic sense. Norms in the broader sense, i.e. norms whose applicability (*Geltung*) is required by the principle, can be either commands or permissions. There is therefore indeed a deontic parallel between rules and principles. Still, rules are normative statements, while principles are normative arguments requiring the realisation of an optimisation object (*Optimierungsgegenstand*).¹⁹¹ The difference between principles and rules can thus be refined by Aarnio's contribution, but the distinction in and of itself remains valid in Sieckmann's view. One can legitimately question whether the terminological switch to the creation of principles as 'normative arguments' pointing towards 'optimisation objects' satisfactorily explains the need for a distinction which seems virtually impossible to pinpoint in actual norm sentences.

In a different vein, Poscher questions the special position given to optimisation as a tool for the resolution of conflict situations. In his eyes, the process of optimisation of principles is only one among several potential provisions which would all create an exception for a colliding norm to remain in force.¹⁹² A distinction between the lines of rules and those of principles is thus not justified. There may be differences between the optimisation requirement and the types of provisions which create exceptions such as *lex posterior* or *lex specialis*. Still, these are differences in terms of content, as they also exist between other exceptions and do not promote the optimisation requirement to the prominent

¹⁸⁴ A similar view is presented by J.-R. Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems* (Baden-Baden: Nomos, 1990), 65.

¹⁸⁵ Aarnio, 188.

¹⁸⁶ Borowski, *Grundrechte als Prinzipien*, 108.

¹⁸⁷ Sieckmann, 66.

¹⁸⁸ Borowski, *Grundrechte als Prinzipien*, 108.

¹⁸⁹ *Ibid.*, 109.

¹⁹⁰ Sieckmann, 77.

¹⁹¹ *Ibid.*, 87.

¹⁹² Poscher, 'Einsichten, Irrtümer und Selbstmissverständnis der Prinzipientheorie', 65.

position given to it by Alexy. The possibility to lay down an optimisation requirement in positive legal terms in virtually any norm contradicts the thesis that some norms are different due to their structure.¹⁹³

As a reaction to such criticism, the Principles Theory has been refined by Alexy. He introduces a distinction between ‘commands to optimise’ and ‘commands to be optimised’.¹⁹⁴ Based on Sieckmann and accepting Aarnio’s views in part, Alexy suggests that principles are indeed commands to optimise which function in a rule-like fashion, i.e. optimisation is either required or not. However, there also exist ‘ideal oughts’, i.e. objects of optimisation.¹⁹⁵ These objects are on their own level, accompanied by a command that they must be achieved to the highest degree possible, the optimisation command. Alexy aims to preserve the structural distinction between rules and principles by accepting a certain rule-character of the optimisation command while simultaneously introducing the idea of optimisation objects, i.e. commands to be optimised. This is, in his perspective, linked to the dual nature of constitutional rights as part of their normativity, which necessarily includes a dimension of ‘ideal ought’.¹⁹⁶

Poscher, however, does not accept this claim. In his view, the above mentioned objects of optimisation are of a non-normative nature. Commands to optimise can here be simply understood as rules ‘in their own right’ which can apply to normative objects, but just as well to defective regulations which should be optimised.¹⁹⁷ There may well be general and more abstract legal norms within a system that can be singled out as principles, but they do not necessarily result in a command to optimise. Consequently, the very foundation of the Principles Theory as a theory of norms appears shaky. Alexy has recognized in recent writing that balancing cannot be seen as the universal formula, accepting subsumption and comparison of cases as valid other forms of application of norms.¹⁹⁸

In conclusion, the Principles Theory’s suggested strict distinction between rules and principles is difficult to sustain. In particular its operation at various levels, i.e. as a theory of norms which simultaneously bases itself on concepts of norm adjudication and legal argumentation, open the distinction up to criticism. It appears that without a clearly founded criterion for distinction, the legal order will present itself rather as a mixture of norms which feature rule-like and principle-like characteristics at the same time.¹⁹⁹ Consequently, courts and

¹⁹³ Ibid., 68.

¹⁹⁴ Alexy, ‘On the Structure of Legal Principles’, 300.

¹⁹⁵ Ibid., 300 (emphasis omitted).

¹⁹⁶ Alexy, ‘Comments and Responses’, 345.

¹⁹⁷ Poscher, ‘The Principles Theory’, 234.

¹⁹⁸ See R. Alexy, ‘Two or Three?’ in M. Borowski (ed.) *On the Nature of Legal Principles* (Stuttgart: Franz Steiner Verlag, 2010), 18, and Alexy, ‘Comments and Responses’, 345.

¹⁹⁹ Or as A. Aarnio, *Essays on the Doctrinal Study of Law* (Dordrecht: Springer, 2011), 124, suggests, some ‘flexible’ rules may have a *prima facie* role to play in legal discourse, while some principle-like rules may

tribunals as adjudicators find themselves facing the difficult task of identifying whether or perhaps to what extent they want to apply a certain norm as a rule or as a principle. If the norm-theoretic claim of the Principles Theory is, however, neither fully convincing in theory nor in practice, no justification for the use of proportionality analysis can be derived for adjudicators and our inquiry must examine a different level of the Principles Theory. This conclusion is bolstered by a look into adjudicative practice.

C Distinguishing Rules from Principles in Adjudicative Practice

According to the Principles Theory, rules are inextricably linked to subsumption, while principles apply by means of balancing. However, it is doubtful that this strict separation meets the test of practical reality. The rules cited in Alexy's examples are typically very simple commands: e.g. the command to leave a room once a fire alarm has been triggered or the prescription of opening hours for shops.²⁰⁰ Such rules do not require any discussion by a court, but can be applied without comprehensive legal reasoning. A different constellation is used to demonstrate a conflict of principles: In a case before the German Constitutional Court, the health of a defendant suffering from a cardiac condition was endangered by the prospect of having to appear before a court. This factor had to be weighed against the duty of the state to grant a functional administration of criminal law.²⁰¹ The application of such abstract norms requires a much more complex reasoning. This opposition of sample cases leads Alexy to the construction of the required differentiation between rules applied by simple subsumption and principles applied by complex balancing.

The choice of such examples for rules, however, reveals a highly formalistic conception of rules. The contrast with principles as regards their application by adjudication is overemphasized as a consequence.²⁰² Application of any norm can combine various methods including proportionality *stricto sensu* as well as other methods. Beyond simple application as in the case of prescribed opening hours, norms may require clarification because they are ambiguous, vague as regards a specific case or simply incomplete. There is a high variety of methods of application, and proportionality analysis is not even commonly required as regards important principles of civil law.²⁰³ There seems to be more of a difference of degree rather than a clear-cut dividing line between norms applied by subsumption and by balancing.

be 'definite' in providing a solution without the need for further arguments.

²⁰⁰ Alexy, *Theorie der Grundrechte*, 77-78.

²⁰¹ *Ibid.*, 79-80.

²⁰² Poscher, 'The Principles Theory', 236. Similarly, Hart, 263, already rejected a comparably simplistic view of rules asserted by Dworkin. See sceptical, however, Alexy, 'Comments and Responses', 345.

²⁰³ Poscher, 'The Principles Theory', 238.

As an additional problem, the Principles Theory is based on circular reasoning. While it provides the solution to apply in a situation of conflicting principles, it is unable to state clearly *when* a situation qualifies as such a conflict.²⁰⁴ If, however, for an adjudicator the discovery of a principle is only the result of the application of conflict rules – proportionality *stricto sensu* – then the premises of the method to apply for conflict resolution only become apparent in the aftermath of the decision.²⁰⁵

As a theory of adjudication, the Principles Theory thus suffers from the overstretched distinction between two extremes – the application of rules by subsumption as opposed to the application of principles by balancing – which do not find themselves confirmed in adjudicative reality. Instead of black and white, adjudicators find themselves between various shades of grey, where elements of both subsumption and proportionality analysis can come into play.²⁰⁶

D Conclusion

Consequently, the norm-theoretic side of the Principles Theory and its findings on proportionality analysis are valuable as an attempt to bring structure into the thinking on proportionality analysis. However, its overarching attempt to structure legal norms is not completely convincing. As long as one remains at the norm-theoretic level, an adjudicator finds himself or herself stuck with the circularity of the rules-principles distinction and the virtual impossibility of pointing towards any *ex ante* help to identify principles or rules. Adjudicative reality, it seems, features norms which sometimes simultaneously feature characteristics requiring subsumption and proportionality analysis. Balancing vs. subsumption is thus a useful descriptive account, but it does not constitute the opposition that tells us most about proportionality analysis as a tool of norm application. In particular, it does not provide a strong justification for adjudicators to engage in the difficult exercise of proportionality analysis. The picture becomes much richer, however, if we go one level deeper into matters and examine the Principles Theory at the level of argumentation and the relationship between law and morals. At this stage, we learn to fully apprehend Alexy's writings by opposing his model of balancing as the central element of practical reasoning to the opposite concept of 'exclusionary reasons'. It is at this stage that

²⁰⁴ Jestaedt, 261.

²⁰⁵ *Ibid.*, 273.

²⁰⁶ This also becomes visible in the recent attempt by J.J. Moreso, 'Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism' (2012) 25 *Ratio Juris* 31, 40-41, to introduce a 'specificationist' account as an alternative to proportionality analysis in the application of constitutional rights. Though Moreso first suggests the introduction of more categorical 'relevant properties' of a case in order to streamline the decision-making process and avoid case-by-case ad hoc balancing, he must admit that the very creation of such categories cannot avoid balancing and may, at the end of the day, be nothing more than a 'variation' of Alexy's account (at 44).

we discover both a convincing justification for judicial review combined with the use of proportionality and the link to judicial review itself.

IV Balancing vs. Exclusionary Reasons: The Justification of Proportionality Analysis at the Level of Moral Argumentation and Practical Reasoning

While the norm-theoretic level of the Principles Theory could not provide a definitive understanding of the justification for adjudicators to use proportionality analysis, a discussion of the level of moral argumentation is able to do so. The present section thus aims to clarify the possibilities of adjudicators to justify the use of proportionality analysis by setting out the level of argumentation, which – in Alexy’s view – quite directly connects law and morals. Other views differ. For adjudicators, this matters crucially as they could be accused of judicial activism and law-making when engaging in moral argumentation in the way suggested by proportionality analysis. We explain in this section that proportionality analysis mirrors practical reasoning, and the debate in the latter field can be transferred to an adjudicator’s decision of whether or not to use proportionality analysis.

At the level of practical reasoning, there is some difficulty surrounding the notions of ‘rule’ of positive law and of ‘authority’. Put simply, if decision-making by individuals is generally based on weighing reasons at the level of morals, why should an individual defer their weighing to rules of positive law or authorities at all? One argument could be that there always remains an underlying exercise of individual balancing of reasons for the decision to defer. An opposing position is taken by proponents of the concept of exclusionary reasons: Such a reason would exclude the individual’s reasons and establish authoritative force of positive law and its authorities.

Finding the concept of exclusionary reasons rather difficult to sustain, we conclude that for adjudicators there always remains some room to engage in a balancing of reasons. Instead of a clear-cut exclusion of proportionality analysis, we therefore suggest that there are differing strengths of the justification for an adjudicator to rely on proportionality analysis – which can legitimately lead to different applications of proportionality analysis based on the institutional context. This latter claim is substantiated in the next section and eventually leads us to the connection between proportionality analysis and judicial review.

A The Principles Theory and the Relationship between Law and Morals

As a starting point, the relationship between law and morals as perceived by Alexy and the Principles Theory should be clarified. The close relationship explains why proportionality analysis comes so naturally to proponents

of the Principles Theory, as it suggests a similar procedure for decision-making as that applicable in practical reasoning.

There are a number of relationships that can be perceived between law and morals. At one end of the spectrum, exclusive positivists refuse every connection between law and morals.²⁰⁷ On the opposite end, exclusive non-positivists require an absolute validity connection between morals and the law. Any legal norm which is contrary to morals is thus precluded from being legally valid.²⁰⁸

In his treatise on the Principles Theory, Alexy does not accord a highly specific position to values (*Werte*). In his view, the definition of a value comprehends the object of valuation and the criterion of valuation. The difference to principles lies with the deontological character of the latter: Principles tell us what *ought* to be *prima facie*, while values simply indicate what the best *is*.²⁰⁹ This points us towards the non-positivist position that Alexy takes.

The Principles Theory as developed by Alexy is based on a validity relation between law and morals.²¹⁰ Alexy suggests in this context a ‘super-inclusive’ non-positivist approach, where there is both a ‘classifying’ and a ‘qualifying’ connection between law and morals. The first concerns the validity of legal norms. The second, however, does not act at the level of validity, but at the level of correctness of a legal norm. Thus, a legal norm contrary to morals is not invalidated, but considered as defective without thereby losing its validity or character as a legal norm.²¹¹ Moral defects do not always affect the validity of a norm, but only if a threshold of ‘extreme injustice’ is transgressed.²¹²

In this way, Alexy opens the law to moral principles. According to his view, the law necessarily²¹³ contains a claim to correctness.²¹⁴ The first order claim points towards the principle of justice as correct distribution and compensation – the ‘ideal dimension’.²¹⁵ The existence of human or constitutional rights is also inextricably linked to and based on this ideal dimension and the claim

²⁰⁷ See e.g. J. Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Clarendon Press, 1979), 47.

²⁰⁸ See e.g. D. Beyleveld and R. Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford: Oxford University Press, 2001), 76.

²⁰⁹ Alexy, *Theorie der Grundrechte*, 129-133.

²¹⁰ R. Alexy, *The Argument from Injustice. A Reply to Legal Positivism* (Oxford: Clarendon Press, 2002), 35ff.

²¹¹ *Ibid.*, 26.

²¹² Alexy, ‘The Dual Nature of Law’, 177, refers to the well-known Radbruch-formula at this point, see G. Radbruch, ‘Gesetzliches Unrecht und übergesetzliches Recht’ (1946) *Süddeutsche Juristenzeitung*, 107.

²¹³ As D. Patterson, ‘Alexy on Necessity in Law and Morals’ (2012) 25 *Ratio Juris* 47, 53, demonstrates, the ‘necessary’ features of the law according to Alexy can be divided into coercion and correctness. While the first features is, as Patterson correctly points out, somewhat problematic, it is the second one that is of higher relevance for the present study.

²¹⁴ From a ‘cognitivist’ perspective, G. Pavlakos, ‘Correctness and Cognitivism. Remarks on Robert Alexy’s Argument from the Claim to Correctness’ (2012) 25 *Ratio Juris* 15, 23, recently clarified that the propositional content of norms (i.e. their claim to correctness) is independent of whether individuals assert such a claim at the mere performative level.

²¹⁵ Alexy, ‘The Dual Nature of Law’, 171 and 174.

to correctness.²¹⁶ The second order claim to correctness concerns the reconciliation of the ideal and the real. It includes the principle of legal certainty which requires the creation of positive law. The two principles can enter into conflict which again requires balancing in the form of proportionality analysis.²¹⁷ This balancing, however, possesses several possible outcomes.²¹⁸ There is, in Alexy's view, room for reasonable disagreement, as long as the boundaries of the reasonable are respected.²¹⁹ In this manner, Alexy aims to weaken the consequence of the Principles Theory and proportionality analysis.

There is considerable criticism of this perspective. According to Alexy, in the field of constitutional rights the result of proportionality analysis exercised by an adjudicator excludes all other possible outcomes. This again potentially subjects every political decision to adjudication and proportionality analysis. As a consequence, substantially all final decisions are transferred to judges. The role of the law as a general and predictable solution found in a political process is considerably weakened as a consequence.²²⁰

Advancing a more positivistic account, Poscher suggests that the overemphasis on proportionality and the influence thereby given to moral considerations go too far. He is unwilling to open up the law to moral principles in the way Alex suggests. According to Poscher, law borrows concepts from other disciplines, including moral philosophy, but the borrowed concepts are translated into law.²²¹ Moral principles and law would thus merely share a relationship of empirical functionality: A legal system which disregards the moral rules of its community on too many occasions would become dysfunctional.²²² Moreover, if such moral principles were correct and accepted by a community, then in any hard case a judicial decision would be followed by the conversion of the group losing the case. This, however, cannot be observed in practice. A hard case merely creates law, leaving moral convictions intact and offering an impartial decision which creates a distance between legal and moral issues.²²³ Arguably, the connection between law and morals is, however, of a different nature than e.g. the connection between law and mathematics, as moral norms could in theory decide a case just like legal ones, while mathematical norms typically could not.²²⁴ Their resemblance is thus much closer and their relationship of a different nature. In hard cases, a judicial decision also need not necessarily be understood as a case

²¹⁶ See in more detail on this point R. Alexy, 'Law, Morality, and the Existence of Human Rights' (2012) 25 *Ratio Juris* 2.

²¹⁷ Alexy, 'The Dual Nature of Law', 174.

²¹⁸ Here Alexy disagrees with Dworkin's 'right answer' thesis, Alexy, *Theorie der Grundrechte*, 143.

²¹⁹ R. Alexy, 'Comments and Responses' in M. Klatt (ed.), *Institutionalized Reason – The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press, 2012), 339.

²²⁰ Jestaedt, 271.

²²¹ Poscher, 'The Principles Theory', 223.

²²² *Ibid.*, 225.

²²³ *Ibid.*, 228.

²²⁴ Alexy, 'Comments and Responses', 341.

of moral conversion. This would only be the case if a one-right-answer thesis were upheld by the Principles Theory, a claim that Alexy does not, however, espouse. Moral disagreement is perfectly possible, so that the hard case example arguably cannot successfully refute the Principles Theory's position on the connection between law and morals.

The openness of the Principles Theory helps to understand why the Principles Theory treats the exact nature of values with negligence: If the law is infused with moral principles, a value must not be clearly defined in legal terms. Its true impact will only result from the exercise of proportionality *stricto sensu*. Any legal definition and subsumption will in any case give way to the result of the weighing exercise in a situation of value conflict. For adjudicators, this perspective makes recourse to proportionality analysis easier because it suggests that they are authorized to engage in the moral argumentation it requires based on the close relationship between law and morals.

B Exclusionary Reasons

However, the openness of law that the Principles Theory suggests at the level of practical reasoning remains contested. For some, the omnipresence of proportionality analysis would exclude any true independent authority for positive law; all seems to be permeated by the balancing of underlying values. We subsequently assess the concept of exclusionary reasons which should serve at the level of practical reasoning to explain why for some scholars in some cases a rule should just be considered to be a rule without any need to weigh its underlying reasons.

In his writings on practical reasoning, Raz in particular has uttered scepticism towards the omnipresence of balancing in the form of proportionality analysis. In his view, there must be cases of moral reasoning where balancing of reasons is excluded. He terms this concept 'exclusionary reasons'. In his understanding, reasons are the classic motivation for acting. Exclusionary reasons are reasons which require not acting based on specific – excluded – reasons.²²⁵ If there is a conflict between reasons, there must indeed be a balancing exercise. Reasons for action can be understood as reasons for compliance or only for conformity: In the first case action must be taken with the correct reason in mind. In the second case, only whether the action itself corresponds to the reason is examined; a person might even have taken the action for the wrong reasons.²²⁶

Departing from the notion of reasons as reasons for conformity, Raz suggests that there are cases where aiming for compliance increases the chances of conformity; but inversely, in other cases aiming for compliance reduces the likelihood of conformity of action with the correct reasons. In those situations, there is a case for an exclusionary reason which should prohibit an individual

²²⁵ J. Raz, *Practical Reason and Norms* (Oxford: Oxford University Press, 1999), 183.

²²⁶ *Ibid.*, 179 ff.

from acting based on a reason excluded by that exclusionary reason.²²⁷ In Raz' example, a father deciding which school his son should attend could, for example, be guided either by his own preferences or by what he believes will be best for the child. If the father promises to disregard his own preferences, he introduces an exclusionary reason which excludes him from acting on his own interest. The best likelihood for acting in conformity with the son's preferences is thus to exclude relevance of the other reason.²²⁸

With this technique, Raz can explain the apparent paradox of 'rules' and 'authorities'. Why would anyone follow a rule if it is only constituted by a compromise reached by balancing reasons? Why should an individual not rely directly on his or her own balancing of reasons, but instead follow the deviation of a rule? In this light rules appear either as redundant if the underlying reasons require a certain action anyway, or unjustified if the underlying reasons do not.²²⁹

For Raz, 'rules' thus act as exclusionary reasons, because their purpose is to prevent individuals from trying to comply with reasons underlying the rule. Individuals have decided in advance and delegated authority to rules, so that they then follow an indirect strategy of basing their action on rules rather than balancing themselves the underlying, excluded reasons.²³⁰

A similar explanation is offered for the case of 'authorities'. Authorities function in particular to overcome coordination problems: Similar to the case of rules, a trusted authority's decision excludes underlying reasons, i.e. the need for an individual to judge for him- or herself whether there exists a coordination problem. Instead, coordination is secured by transferring the decision to an authority and by subsequently following the latter's decision as a rule and reason for action instead of trying to comply with reasons oneself.²³¹

In situations of exclusionary reasons, Raz thus underlines that no balancing of reasons takes place. Exclusionary reasons do not compete in weight with other reasons, but always win by their very nature.²³²

Raz division between law and morals rests on the concept of exclusionary reasons: The law claims authority by providing exclusionary reasons in order to claim authority. Through its 'mediating' function, it creates intermediate reasons to comply and thereby excludes individuals from relying on underlying moral reasons.²³³

We can therefore conclude that adjudicators who follow an approach of exclusionary reasons see leeway for the exclusion of full-scale proportionality analysis: Where a rule exists that seems to exclude certain reasons, an adjudica-

²²⁷ *Ibid.*, 190.

²²⁸ *Ibid.*, 186.

²²⁹ *Ibid.*, 194.

²³⁰ *Ibid.*

²³¹ *Ibid.*, 195.

²³² *Ibid.*, 189.

²³³ See on the mediating function of the law Raz, *Morality of Freedom*, 58.

tor does not have to weigh reasons through means of proportionality analysis. Rules of positive law are thus interpreted based on their wording without leeway for proportionality analysis if it is not expressly required by them. In the case of an exclusionary reasons approach to human rights, an adjudicator would not balance rights against public interests for interference, but instead assess whether action has been taken based on an excluded reason. If that is the case, the action is not justified by reasons. We have already briefly set out the latter possible application of exclusionary reasons in constitutional rights adjudication.²³⁴

There are, however, some legitimate doubts as to whether there is truly a possibility of fully ‘excluding’ reasons in practical reasoning: The very idea of the autonomy of the individual seems to run counter to such a full-scale abdication of reasoning.

C Sceptical Views on Exclusionary Reasons

Raz’ concept of exclusionary reasons has not met with uniform approval. In Raz’ account, the law claims authority by providing exclusionary reasons. As a central point of critique, however, the concept of the exclusionary force of some reasons conflicts with another central concept that even Raz himself relies upon in other contexts: the concept of autonomy.

A central problem for autonomy arises if full exclusionary force of the law is adopted. An individual would thus fully abdicate their autonomy to authority – here to the authority of the law. Mian suggests that one should distinguish between the law’s claim to exclusionary force and the validity of that claim.²³⁵ In his view, the promulgation of a law on performing a certain action does not yet exclude the underlying reasons, but in itself only adds an additional reason: the fear of sanction. He thus introduces an additional ‘normal justification’ condition that must be fulfilled so the law can claim exclusionary force.²³⁶ This condition being satisfied, autonomy can again be reconciled with the authority of law in a positivistic account. The normal justification condition is fulfilled if a rule enables an individual to better comply with the reasons applying to him or her. For this purpose, the individual must assess the moral expertise of the authority in the concrete circumstances: Again, the individual will have to refer to – and balance – the underlying reasons for this purpose. Even if ‘aggregated’ exclusionary force were granted to the law based on a long-term submission to its authority by an individual, it is hard to imagine that an individual would truly be excluded from reassessing the higher moral expertise of the authority in indi-

²³⁴ See section II.A.i.b.

²³⁵ E. Mian, ‘The Curious Case of Exclusionary Reasons’ (2002) 15 *Canadian Journal of Law and Jurisprudence* 99, 103.

²³⁶ *Ibid.*, 104.

vidual cases.²³⁷ The notion of autonomy appears virtually impossible to reconcile with the full exclusion of balancing of reasons that exclusionary force proposes.

In the field of human rights reasoning, exclusionary reasons accounts can similarly be criticized based on the structure of autonomy. The problem of exclusionary force lies in the fact that in order to establish it *ex ante*, a point of view external to an individual's own reasoning would be indispensable.²³⁸ Since such an external point of view is difficult to ascertain, reflection is an individual's only source to create and recognize reasons.²³⁹ With this in mind, deontological views of human rights are difficult to maintain. Such accounts in most cases adapt some vision derived from Dworkin's trump conception of rights.²⁴⁰ Limitations on rights which are based on the public interest could in such an account not acquire the same status as rights because of substantive moral principles which – in the core of rights – exclude optimisation and mutual weighing. However, it can easily be argued that the exact moment of accepting a public interest as a reason is in itself already an instance of balancing, if even the operation of assigning value as a valid or invalid reason is understood as an exercise of 'maximisation', i.e. balancing within the framework of practical argumentation.²⁴¹

As a consequence, we find the concept of exclusionary reasons unconvincing. For adjudicators in our discussion of proportionality analysis, this means that there may be some weighing of reasons that leads them not to resort to proportionality analysis in the application of norms of positive law.²⁴² However, there is always a weighing process to determine whether there should be proportionality analysis.

D Conclusion

While the norm-theoretic claim of the Principles Theory was not able to provide a convincing justification for the use of proportionality analysis, the discussion at the level of practical reasoning has proven more fruit-

²³⁷ *Ibid.*, 106-107. Mian suggests, however, that exclusionary reasons can be more usefully understood as distinguishing between the levels of deliberation and execution: In the first phase, reasons are balanced; in the second, a once promulgated law excludes underlying reasons in principle, unless its application is questioned in specific circumstances, which would then send a law back to the deliberation stage, Mian, 117.

²³⁸ Pavlakos, 149, speaks of a 'Kantian' perspective of reflecting on how we reflect.

²³⁹ *Ibid.*, 150-151.

²⁴⁰ See e.g. G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007).

²⁴¹ Pavlakos, 136-137.

²⁴² This, of course, is not to suggest that no weight should be given to the formal text of the law. See for a defence against dismissal of the relevance of legal texts because of Alexy's findings F. Schauer, 'Balancing, Subsumption, and the Constraining Role of Legal Text' (2010) 4 *Law & Ethics of Human Rights* 35, 45.

ful. Discussing practical reasoning and the level of morals, we have discovered that proportionality analysis mirrors the process of balancing reasons for action individuals undertake. This in turn raises the question of why there are general norms of positive law and authorities. Individuals seem to defer their individual balancing decision to such institutions based on good reasons such as coordination problems or higher moral expertise of an authority. Centrally, however, the claim of proponents of ‘exclusionary reasons’ has not been found convincing. Such exclusionary reasons – on which rules of positive law and authorities would be based – should fully exclude balancing. Instead, the autonomy of the individual suggests that there is an inalienable exercise of balancing.

This perspective also justifies the use of proportionality analysis for adjudicators: Norms of positive law may simply apply as they are set with the implicit balance of values they enshrine. However, there may also be cases where the adjudicator’s own balancing of reasons shows that there must be a further step to reassess the balance of values enshrined in a norm.

We described this feature of proportionality analysis before: Full-scale proportionality analysis allows adjudicators to weigh values which have been enshrined in a norm of positive law in a more abstract way. As an advantage, the judge is thus no longer bound strictly to the text of the law and can freely evaluate arguments. However, to accept the need for moral argumentation on this basis could lead to a judge’s authority being called into question because of seemingly subjective assessments of values and their weights.

The question that now remains is how adjudicators should undertake this balancing of reasons in order to determine to what extent they should engage in proportionality analysis or not. For this purpose, the subsequent section turns the spotlight on judicial review, its conceptual justification and its institutional characteristics as the elements that interplay in the decision with what intensity proportionality analysis is to be appropriately used. For the sake of clarity, we introduce the notions of pre-balancing and of models of judicial review at this stage. It is thus shown that the benefits of proportionality analysis may outweigh the costs in a model of equal representation review, but that this may be the case in a more limited number of situations in a model of special interest review.

V Proportionality Analysis and Judicial Review: Towards Pre-Balancing and Models of Judicial Review

Proportionality analysis possesses an institutional dimension: apart from its use by legislators it is also inextricably linked to a court or tribunal applying it and reviewing ‘lower level’ decisions, be they those of lower courts, administrative decisions or legislation. It is thus linked with the topic of judicial review of legislative and administrative acts. The historic development of constitutional adjudication in the domestic legal system of many states has

brought about a notable shift of power towards judiciaries,²⁴³ which is mirrored by the considerable interest in the Principles Theory at the level of legal theory. This shift of power comes, however, with increased concern about the legitimacy of adjudication: Should courts and tribunals be allowed to decide in the last instance about policy choices taken beforehand by democratically elected parliaments or by administrative agencies with powers often delegated by the legislature? Do they thereby ‘replace’ the legislator without necessarily having the legitimacy to do so?

As just discussed above, we can understand the use of proportionality analysis as the result of a balancing exercise by an adjudicator on whether or not to grant the law exclusionary force over the values enshrined in the law. We designate this balancing exercise as ‘pre-balancing’ exercise, as it precedes proportionality analysis weighing the substantive values at issue in a concrete case. We thus turn to judicial review as the institutional dimension of proportionality analysis.

Initially only concerned with the level of substantive law and argumentation, in its later stages of development also the Principles Theory reacted to these concerns moving from a ‘substantial theory of legal decision-taking’ towards a ‘theory of constitutional review’.²⁴⁴ However, the reflection on differences in the setting of judicial review has to date not moved beyond general suggestions to use appropriate deference. Some would even reject linking the debates on judicial review and proportionality analysis altogether: Barak suggests that as soon as judicial review is accepted, none of the arguments present in the debate on this topic can be brought up again when discussing proportionality analysis.²⁴⁵ In our view, because of such views an unduly uniform view on judiciaries vested with the authority of judicial review prevails. Presently, we thus introduce the idea of pre-balancing.

In terms of structure, we substantiate our claim by first discussing how the Principles Theory established the link between proportionality analysis and judicial review. The notion of formal principles used for the purpose of marking the required deference seems to require some additional fleshing out in this regard. As a consequence, it is suggested that closer attention must be paid to the context of judicial review. This context provides arguments for the pre-balancing exercise. There is some need to also discuss descriptively the features of context in order to be able to fully understand these arguments; only the latter are, however, arguments with normative strength. Based on the contextual arguments, in a pre-balancing exercise the strength of the justification of judicial review can be identified. Simplifying for the sake of clarity, we suggest that pre-balancing has two somewhat typical outcomes and that these outcomes can be depicted in the form of ‘models of judicial review’, determining in more detail

²⁴³ For a comprehensive account of the developments in various domestic legal orders see Stone Sweet and Mathews, 112 ff.

²⁴⁴ Rivers, ‘The Second Law of Balancing’, 169.

²⁴⁵ Barak, 382-383.

how proportionality analysis is to be used. We suggest a distinction between an equal representation model and a special interest model of judicial review.

A Formal Principles, the Principles Theory and the Link between Proportionality Analysis and Judicial Review

Proponents of the Principles Theory have introduced the notion of formal principles as a tool for describing the tension between the usefulness of proportionality analysis in judicial review and the danger of creating an unduly dominant position of the judiciary with broad authority to question legislative choices. Other approaches have focused on why adjudicators should choose proportionality analysis, suggesting that the reason may lie in the powerful position they are vested with by the power of judicial review. Principal-Agent Theory or the right to justification have emerged in the debate. Yet, these descriptive approaches still do not sufficiently explain the impact of differences between various settings of judicial review on the pre-balancing exercise whether an adjudicator should use proportionality analysis.

i. Formal principles, proportionality analysis and judicial review

Formal principles have been introduced in the Principles Theory's account to bring institutional elements into the picture – in particular the appropriate deference of courts towards legislators. However, as the subsequent discussion shows, the concept of formal principles has not yet been sufficiently elaborated to take into consideration the specific context of judicial review. There are also some doubts as to why formal principles operate at the substantive level of balancing. According to the Principles Theory, formal principles seem to influence in a rather awkward way the weighing of values against each other in the framework of proportionality analysis.

Generally, some scholars have suggested that Alexy has neglected the institutional dimension in elaborating the Principles Theory, which gives such a strong position to judicial balancing.²⁴⁶ Indeed, his writings show a tendency to link institutional questions back to his views on deliberation and the argumentative role of principles. Constitutional review by a court cannot be legitimized by democratic election, as the legislative process driven by elected members of parliament. However, a different dimension of representation is highlighted instead: Constitutional courts are the institutions of argumentative representation²⁴⁷ and create a connection between a parliament and the people 'by argument' instead of elections.²⁴⁸ While such representation by argument

²⁴⁶ M. Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law & Ethics of Human Rights* 140, 142.

²⁴⁷ Alexy, 'Balancing, constitutional review, and representation', 578.

²⁴⁸ *Ibid.*, 579.

could, as Alexy admits, run wild without limits, in fact it is indispensable that a majority of the people accept in the long run that the arguments deliberated by a constitutional court are those of the people and recognized by them as correct. Such discursive constitutionalism is, then, justified in its potential to overrule representation based on election as an 'enterprise of institutionalizing reason and correctness'.²⁴⁹

Conceptually, this does not, however, necessarily facilitate the determination of the necessary intrusiveness of judicial review. At the mere conceptual level, scholars have addressed the thorny question of the appropriate standard of review. The latter has to be perceived in the light of the threshold of rationality that can be expected from the legislative or administrative decision-maker. The problem of second-guessing such a decision-maker can be remedied by more lenient scrutiny applied by the adjudicator. It has been suggested, for example, that the assessment should focus on complete or bounded rationality in the situation of the decision-maker. An adjudicator should not intervene merely because some abstract notion of 'complete rationality' or 'bounded rationality' has not been achieved. Instead, the assessment must be based on a 'sufficientist reasonableness threshold' within which the legislator's choices remain uncontested.²⁵⁰ To set out such a standard, however, requires a closer assessment of every individual situation of review. A general claim for appropriate deference is insufficient for this purpose.

Similarly, Barak colourfully describes the appropriate deference using the picture of a 'zone of proportionality' as the legislator's kingdom, while the judge's kingdom is to keep the zone's boundaries intact.²⁵¹ The judge typically derives the authority not to act with full deference to the legislative branch from the constitution,²⁵² but the extent of the actual discretion in a concrete case is hardly more closely defined by Barak's approach.

The proponents of the Principles Theory reacted to the challenge of defining and justifying the appropriate level of judicial deference. Alexy took up ideas by Dworkin and developed the concept of formal principles to describe the practical relationship between courts and legislators.²⁵³ Dworkin had already identified 'legislative supremacy' as one example which prescribes that courts should pay deference to the acts of the legislature. Similarly, according to him 'the doctrine of precedent' requires a measure of consistency in the decisions of the judi-

²⁴⁹ *Ibid.*, 580-581.

²⁵⁰ G. Sartor, 'A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review' in G. Bongiovanni, G. Sartor and C. Valentini (eds.), *Reasonableness and Law* (Dordrecht: Springer, 2009), 55.

²⁵¹ Barak, 417.

²⁵² *Ibid.*, 398.

²⁵³ R. Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers) (New York: Oxford University Press, 2002), 82.

ciary.²⁵⁴ Thus, according to Alexy, a formal principle intervenes to clarify the distribution of competences between the adjudicative and the legislative branch.

Next to this formal principle, the ‘Second Law of Balancing’ also prescribes that the more important the interference with a principle is, the more certain the empiric premises underlying the interference have to be.²⁵⁵ This creates a ‘sliding scale of competence’ in cases of uncertainty between legislator and adjudicator.²⁵⁶

Others continued the debate by embedding formal principles into the model of principles, including their application in the framework of the Law of Balancing.²⁵⁷ Formal principles were described by Sieckmann as *prima facie* commitments to the result of a procedure. While some persons or institutions take a decision within the framework of a procedure, other persons are committed to the results in the end.²⁵⁸ As to their structure, formal principles as opposed to substantive principles do not possess a goal to be optimised. Instead, they imply a commitment of optimisation for the result of a procedure. Still, the subsequent proportionality analysis weighing a formal and a substantive principle should follow the same lines as the weighing of two substantive principles.²⁵⁹ Formal principles thus possess a ‘competence element’.²⁶⁰ Alexy argues that formal principles cannot by themselves outweigh a substantive principle, but can only do so in combination with at least one substantive principle. This finding is referred to as the ‘Law of Combination’.²⁶¹ Subsequently, research has suggested a distinction between independent and dependent formal principles.²⁶² The latter demand *prima facie* that an authoritative decision based on proportionality analysis must be accepted. An example would be the relative authority of decisions of the parliament. The formal principle acts as a second-order principle here, while the two principles to be balanced could be termed first-order principles. Still, in the proportionality analysis all are balanced against each other simultaneously, the dependent formal principle weighing in on one side of the balance. Independent formal principles can be weighed against substantive principles on their own, as is demonstrated by the example of the legislature’s discretion to set legislative objectives.²⁶³

Some doubt has been cast on such a use of formal principles together with substantive principles. They mirror some of the concerns already discussed

²⁵⁴ Dworkin, 37-38.

²⁵⁵ Alexy, *A Theory of Constitutional Rights (translated by Julian Rivers)*, 418-419.

²⁵⁶ Rivers, ‘The Second Law of Balancing’, 170.

²⁵⁷ See already section II.A.iv.a. on the operation of the Law of Balancing.

²⁵⁸ Sieckmann, 147 ff.

²⁵⁹ Borowski, *Grundrechte als Prinzipien*, 128.

²⁶⁰ M. Borowski, ‘The Structure of Formal Principles – Robert Alexy’s ‘Law of Combination’ in M.

Borowski (ed.) *On the Nature of Legal Principles* (Stuttgart: Franz Steiner Verlag, 2010), 29.

²⁶¹ Alexy, *A Theory of Constitutional Rights (translated by Julian Rivers)*, ‘Postscript’, 423.

²⁶² Borowski, ‘Structure of Formal Principles’, 31.

²⁶³ *Ibid.*, 35.

earlier on the weighing of substantive principles in constitutional law.²⁶⁴ The emergence of the concept of formal principles threatens to transform even constitutional norms of a clear rule-character. The distribution of competences within a federal entity or the separation of powers are often enshrined expressly in constitutional law. Formal principles could unduly transform such taxative prescriptions into mere *prima facie* obligations.²⁶⁵ In addition, in any situation of proportionality *stricto sensu* involving formal principles, a simple law would be balanced against a constitutional principle without respect for the differing ranks and legal nature of the two.²⁶⁶

The use of formal principles could furthermore lead to an additional competence for the adjudicator to limit a legislator's powers on the epistemic level. It is at this point that Alexy's 'sliding scale of competence' raises some doubts, as it leaves it mostly to the adjudicator to judge the delineation of competences.²⁶⁷ This criticism has in the meantime been weakened by the introduction of empiric and normative uncertainty into the Weight Formula and the subsequent establishment of normative and empiric margins of discretion for the legislator.²⁶⁸

Most centrally, however, it remains unclear why a competence element in the form of a formal principle should form part of the substantive weighing exercise between two substantive values.²⁶⁹ If the role of this competence element is to establish the appropriate deference to legislative decisions under review, it should – to return to the mathematical terms in which Alexy portrayed the functioning of proportionality analysis – rather act by allowing a greater variety of results of the balancing equation, rather than by increasing or lowering the weight assigned to the values at stake. Consequently, rather than introducing formal principles in the balance, it would appear more useful to examine their influence at an independent level which does not 'distort' the weighing and comparing taking place under the Law of Balancing.

Formal principles in their present form thus do not yet present a convincing solution to the problem of fully integrating the context of judicial review in the justification for the use of proportionality analysis. Other suggestions have been offered, but as is shown subsequently, they either do not pay sufficient attention to differences of situations of judicial review or have to date not taken up with sufficient detail the differences they seem to accept implicitly.

²⁶⁴ See section II.A.i.b.

²⁶⁵ Jestaedt, 274.

²⁶⁶ Klatt and Schmidt, 62.

²⁶⁷ M. Jestaedt, *Grundrechtsentfaltung im Gesetz : Studien zur Interdependenz von Grundrechtsdogmatik und Rechtsgewinnungstheorie* (Tübingen: Mohr Siebeck, 1999), 226 f.

²⁶⁸ Klatt and Meister, 138-139. See also the discussion of Klatt, Schmidt and Meister's contributions in section II.A.iv.d.

²⁶⁹ S.-P. Hwang, 'Verfassungsgerichtliche Abwägung: Gefährdung der gesetzgeberischen Spielräume? Zugleich eine Kritik der Alexyschen formellen Prinzipien' (2008) *Archiv des öffentlichen Rechts* 606, 621.

ii. Principal-Agent Theory and the concept of ‘trustee courts’ as the justification for proportionality analysis in judicial review

As a first account, Stone Sweet has suggested Principal-Agent Theory as underlying the decision of courts vested with the power of judicial review to engage in proportionality analysis. This theory suggests at its basis that there are special costs in situations of delegation. Where a principal entrusts an agent with a specific task, there are costs because of asymmetric information between the actors. The principal incurs monitoring and compensation costs, while there are also bonding costs for the agent to provide insurance to the principal or principals. The latter serve to reduce the principal’s risk of dealing with the agent.²⁷⁰

Stone Sweet suggests that there should be a distinction between systems of legislative sovereignty and other models. In the first system, courts act in a small zone of discretion and their decisions can be overruled by the legislator. This setting would follow the principal-agent logic. In other situations, in particular constitutional courts and international courts and tribunals, the discretion of adjudicators is wider and the possibility to overrule its decisions *ex post* is low or virtually inexistent in view of the factual or legal circumstances. In such a situation, a model of ‘trusteeship’ should replace the classic principal-agent scheme.²⁷¹ Such a trustee court possesses authority over the delegating principals. There is not so much a fear of reversal of its decisions as a sort of ‘punishment’, but rather fear of non-compliance with its decisions.²⁷² This model should apply, in Stone Sweet’s view, not only to the situation of constitutional courts, but also to other settings such as arbitration in international law.²⁷³ They all act in a constitutional situation of ‘structural judicial supremacy’, which creates a particular need for a doctrinal framework – which, in Stone Sweet’s view, is supplemented by proportionality analysis.²⁷⁴

Stone Sweet and Mathews suggest that trustee courts have ‘every interest in building doctrine’, with proportionality analysis providing the ‘argumentation framework’ in their view.²⁷⁵ They simultaneously link this construction of proportionality analysis with rights review and constitutional rights.²⁷⁶ However,

²⁷⁰ M.C. Jensen and W.H. Meckling, ‘Theory of the firm: Managerial behavior, agency costs and ownership structure’ (1976) 3 *Journal of Financial Economics* 305, 307.

²⁷¹ A. Stone Sweet, ‘Constitutional Courts and Parliamentary Democracy’ (2002) 25 *West European Politics*, 88.

²⁷² A. Stone Sweet and F. Grisel, ‘Transnational Investment Arbitration: From Delegation to Constitutionalization?’ in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (New York: Oxford University Press, 2009), 122.

²⁷³ *Ibid.*, 127.

²⁷⁴ Stone Sweet and Mathews, ‘Proportionality Balancing’, 87.

²⁷⁵ *Ibid.*, 87.

²⁷⁶ See *Ibid.*, 88.

in their account no specific explanations are offered as to how the different patterns of institutionalisation of judicial review interact with the use of proportionality analysis. Automatic reliance on the model of proportionality analysis seems, however, to neglect – as has already been suggested for the case of Alexy – the institutional dimension and questions such as the appropriate standard of review as the link between the adjudicator and the adjudicated. The model of trusteeship takes into account the difficulty of reviewing decisions taken by an adjudicator, yet fails to account for other contextual factors.

iii. Proportionality analysis in judicial review as a right to justification.

Others have moved to explain the link between judicial review and proportionality analysis beyond formal principles as conceptually justified: Kumm suggests that the function of courts engaged in judicial review should be understood as ‘Socratic contestation’ of the legislator’s choices rather than as an attempt to substitute parliament with a court.²⁷⁷ The problem of lack of democratic legitimacy of courts should consequently not be overestimated: The right to vote and the right to contest a legislator and to require appropriate reasons for the action undertaken are complementary in his view.²⁷⁸ This does not mean, however, that a legislator is replaced by judges, as long as judges engage in critical questioning of the legislator’s motives rather than merely suggesting their own views.²⁷⁹ Discussing Kumm’s thesis, Alexy has confirmed that one can conceptualize his vision of constitutional rights as enshrining a ‘right to justification’.²⁸⁰

Yet Kumm refrains from suggesting a simple vision of how such ‘Socratic contestation’ ought to be institutionalized. Instead, he correctly points towards various ‘outcome-related’ and ‘democracy-related’ considerations in the institutionalisation of the judiciary that play a crucial role.²⁸¹

B Introducing Pre-balancing and Models of Review

We have thus detected insufficient conceptualisation of the pre-balancing exercise undertaken by adjudicators in deciding whether to use proportionality analysis and how to do so. In our view, a number of factors comes in to bear upon this decision. For the sake of clarity, we presently suggest that there

²⁷⁷ Kumm, ‘Right to Justification’. See also M. Cohen-Eliya and I. Porat, ‘Proportionality and the Culture of Justification’ (2011) 59 *American Journal of Comparative Law* 463.

²⁷⁸ Kumm, ‘Right to Justification’, 171.

²⁷⁹ S. Gardbaum, ‘A Democratic Defense of Constitutional Balancing’ (2010) 4 *Law & Ethics of Human Rights* 78, 99, suggests with similar arguments that judicial balancing must depart from a deferential standard in order to ‘reduc[e] democratic tensions rather than adding to them’.

²⁸⁰ Alexy, ‘Comments and Responses’, 340.

²⁸¹ Kumm, ‘Right to Justification’, 171-172.

are two models according to which judicial review can operate. In each of them, the various considerations play out differently.

As a starting point, some scholars have already proposed a distinction between a substantive and an institutional level in order to discuss proportionality analysis. We discuss their approach in the subsequent section. However, the solution found by them seems to still be based on a rather narrow vision of constitutional adjudication. Instead, we suggest a distinction between two models taking up more broadly the specific characteristics of a setting of judicial review: While at some points, judicial review operates to reach the best possible representation of the various values at issue, in other cases the setting is different. Rather than to aim for such representation, review focuses on one value with more emphasis. We briefly present these two models here, and point out how concrete settings of judicial review can be attributed to one model or the other.

i. Splitting up the Law of Balancing

The use of formal principles in the Weight Formula, as has previously been concluded, rests on rather fuzzy premises. It is only in newer accounts that a distinction between the level of substantive principles and formal principles is suggested. Formal principles should thus merely intervene after a margin of discretion has been found because of empiric or normative uncertainty; they then serve to decide upon the competence to take a decision within that margin of discretion.²⁸²

Klatt, Schmidt and Meister have thus suggested distinguishing between a 'level of balancing' and a 'review level' (*Abwägungs- und Kontrollebene*).²⁸³ The required standard of review on the second level may differ accordingly and does not depend on the first level. In the relationship between a constitutional court and lower courts, the more intense the interference with a constitutional right is, the more intense the standard of review will often be as a result. In the relationship between a first instance court and an appellate instance, there is often only review of legal issues, which again means that there is an epistemic margin of discretion for the first instance court, while there is no normative margin of discretion.²⁸⁴ The standard of review debate must therefore be separated from the substantive test of proportionality *stricto sensu* in their view.

Klatt, Schmidt and Meister's contribution usefully keeps apart proportionality analysis for substantive values and the 'review level', i.e. the appropriate standard of review which is established by considerations independent of the substantive values.²⁸⁵

²⁸² Klatt and Schmidt, 65, Klatt and Meister, 141.

²⁸³ Klatt and Schmidt, 66-67, Klatt and Meister, 142-143.

²⁸⁴ Klatt and Schmidt, 69, Klatt and Meister, 146.

²⁸⁵ It should be noted that because of this exclusion of some elements from substantive proportionality analysis, for Klatt and Schmidt, 63 formal principles no longer possess the status of principles, since

On the review level, Klatt, Schmidt and Meister distinguish between review of the internal and the external justification of proportionality analysis done by the legislator or administrative authority under review. The review of the internal justification focuses on the more formal side of proportionality analysis based on Alexy's arithmetic formula of the Law of Balancing: Have all the relevant variables been used and been assigned values, does the resulting decision flow logically from the 'calculation' suggested by the previous findings? The review of the external justification allows adjudicators to even reassess the values assigned by a legislator or administrative authority, thereby replacing these latter's evaluations with its own. Such review requires the adjudicator to claim ultimate decisional authority.²⁸⁶

ii. Introducing the idea of pre-balancing

These findings are convincing as they solve the problem of the application of formal principles previously identified. Institutional elements apply at a different level and adapt the standard of review.

Klatt, Schmidt and Meister's point of departure is a specific model of judicial review used for examples in their theoretical account. As the pertinent chapter shows,²⁸⁷ in Germany there is a specialized judiciary – the Federal Constitutional Court – entrusted with a broad power of judicial review, i.e. adjudication of conflicts between rights and other constitutional values. The setting and overall rationale of judicial review is on finding a balance between various constitutional values: fundamental rights, public interests, competences at various levels of the federal system.

A different situation is presented e.g. by the WTO Appellate Body.²⁸⁸ While it is the highest court adjudicating on the WTO covered agreements, its focus is much narrower. The rationale of dispute settlement demonstrates a clear focus on trade and trade-related issues.

The usefulness of Klatt, Schmidt and Meister's contribution lies in the capability of their two-level distinction to accommodate 'different relations of control' without compromising substantive balancing and the concept of proportionality analysis.²⁸⁹ We can adopt this idea to flesh out the pre-balancing exercise. While Klatt, Schmidt and Meister's focus lies on margins of discretion and issues of empiric and normative uncertainty in judicial review, their idea of a separate balancing exercise can also arguably be used as a blueprint for the pre-balancing of arguments emerging from the specific relationship of control in one particular situation of judicial review.

they no longer apply by proportionality analysis. They suggest that the principle of legislative supremacy actually applies as a rule and not a principle. See also Klatt and Meister, 141.

²⁸⁶ Klatt and Schmidt, 67.

²⁸⁷ See chapter 3.

²⁸⁸ See chapter 7.

²⁸⁹ Klatt and Meister, 146.

We suggested earlier that there is a pre-balancing exercise undertaken by an adjudicator to assess whether he or she will engage in full-scale proportionality analysis or rather refrain from it. There are substantially two ways in which the application of proportionality analysis can be fine-tuned by adjudicators. The standard of review, i.e. the breadth of results of a balancing exercise that is accepted, is one side. While this feature is well presented in the model suggested by Klatt, Schmidt and Meister, in practice we also observe a rather wide variety of ‘versions’ in which proportionality analysis is applied.²⁹⁰ Adjudicators effectively use the various sub-tests of proportionality analysis with shifting emphases; some rely heavily on necessity to reduce the use of proportionality *stricto sensu*, while others see no inconvenience in engaging in all prongs of proportionality analysis.

The idea of pre-balancing arguably helps in explaining these differences. To date, the individual features have not been sufficiently taken into account in explaining proportionality analysis as applied in the context of a particular setting of judicial review. A unifying, but also simplifying perspective has prevailed.

However, such a perspective which posits one version of proportionality analysis as the scheme to follow, runs the risk of all too easily considering other versions as ‘wrong’ in comparison to one ideal form of proportionality analysis. In the light of the setting of judicial review, however, there seem to be quite plausible arguments for different forms as they have evolved. Rather than thus considering these versions as deviations from the ‘correct’ model, we suggest that it is more useful to also structure the explanation and justification of these deviations based on the idea of pre-balancing. This can be understood as an addition to Klatt, Schmidt and Meister’s contribution towards fleshing out the notion and function of formal principles and their impact on the relationship between courts and legislators.

iii. Consequences of pre-balancing for the use of proportionality analysis and models of judicial review

Before we turn to the arguments which are actually weighed during the pre-balancing exercise, there remains a need to set out in what sense proportionality analysis is influenced by the results of pre-balancing. To illustrate our proposal, we thus present two outcomes of pre-balancing which in our view are typical.

On the one hand, judicial review sometimes calls for broad representation of potentially all claims. The prime example is domestic constitutional review: Constitutions contain a variety of values, and also encompass the need for an overall balance of the competing values. However, there are also more technical, specialized forms of judicial review, which focus on a rather narrow legal text concerned with a particular topic. Treaties in international economic law are

²⁹⁰ See already section II.B.ii.

the prime example for this latter setting. Adjudicators are here called to focus on a rather narrow set of obligations, which encompass, but do not necessarily emphasize, a balance of values, with the consequence that the focus lies on one particular value. It should be noted that this does not necessarily mean that this value is to be represented as hierarchically higher, unless there is a specific justification for doing so.

These two situations are, in our view, typical outcomes of a pre-balancing of arguments taken from the contextual background of judicial review. Terminologically, we suggest the terms of equal representation review and of special interest review as designations.

In the case of an equal representation model of review, the adjudicator is more empowered to undertake the step of weighing underlying values as competing arguments, because the setting of judicial review emphasizes this need. Proportionality analysis and its claim of non-hierarchical weighing of competing values can prosper in this context.

Under the model of special interest review, the normative conflict between values in principle also calls for a weighing exercise and thus seems to justify the use of proportionality analysis. However, the setting of judicial review here is more limited, which calls for a different approach in the use of proportionality analysis; one which relies less on proportionality *stricto sensu*. An adjudicator should resolve cases primarily in examining matters based on its specific focus and only resort to full-scale proportionality analysis if a severe imbalance of values makes it indispensable.

As these models only represent typical outcomes of a pre-balancing exercise influenced by a multitude of possible arguments, they cannot operate as strict categories or enable a 'subsumption' exercise of types of judicial review. Furthermore, as the comparative studies will demonstrate, some regimes may even 'change' their model over time.²⁹¹ However, the use of models seems appropriate as a heuristic to present and contrast our findings in the comparative section more vividly.

Also, one might raise the claim against the two-model distinction that appropriate representation of values must always be a central priority, so that based on what has just been stated, proportionality analysis in its full shape is the only appropriate solution. This claim can only be rebutted by fleshing out what arguments could actually convince an adjudicator to conceptualize their task differently because of its specific situation of judicial review. We therefore now turn to the arguments to be weighed in the pre-balancing exercise. Centrally, contextual features which help us to understand fully the situation of judicial review ought at this point to be kept separate from the arguments of a normative nature on the justification of judicial review, which will play a role in the pre-balancing exercise.

²⁹¹ See chapter 6 on European Union law.

iv. The justification of judicial review

The need for a justification for proportionality analysis arises from its empowerment of a judiciary to review the balance of values enshrined in legislation. Judicial review itself is the decision that a court is entitled at all to review legislation, using proportionality analysis or not. Scholars have tried to justify the practice of a court supervising a legislator's decisions through various arguments. Crucially, review is always based on the participation in the democratic process of decision-making.²⁹² In the subsequent section, the doctrine of procedural democracy helps us to understand why good reasons can suggest that adjudicators ensure representation of special values in the democratic debate. As a consequence, the structure of representation of values also determines the appropriateness of judicial review – and as a consequence the use of proportionality analysis.

For this purpose, we first explore the countermajoritarian problem. Subsequently, we will examine whether judicial review can be justified based on the institutional qualities of judiciaries. Following a different line of thought, some scholars have attempted to justify the practice of judicial review as part of a dialogue with legitimizing force. However, neither of these accounts offers truly convincing reasons. As a third avenue, the doctrine of procedural democracy is more promising. This doctrine suggests that based on the predominant concept of democracy, courts and judicial review serve to rectify failures of the democratic process. Such review is thus justified in those cases where values central to the functioning of the democratic process have been unduly neglected. It is based on the procedural democracy doctrine that we can subsequently flesh out the arguments for the pre-balancing exercise of how to apply proportionality analysis.

a. Judicial review and the countermajoritarian problem

The problem of judicial review at the very basis is that it could potentially contradict a majority decision – usually a law decided upon in a parliament. The 'countermajoritarian dilemma'²⁹³ describes the difficulty inherent in the fact that judicial review questions the decision taken by a democratic majority. Adjudicators are thus constantly required to 'simultaneously legitimate and limit their exercise of power'.²⁹⁴

Perhaps one of the best-known claims in this regard comes from Waldron. Assuming a well-functioning democracy, in his view there is no need for judicial review of legislation. However, he qualifies his findings. He only asserts such a rejection based on a model of functioning democratic and judicial institutions within a state where the members of society are committed to the ideals of the

²⁹² As the debate has mostly taken place in the context of United States constitutional law, a democratic constitutional model has always served as the starting point.

²⁹³ The term has been shaped by A. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merill, 1962).

²⁹⁴ Bomhoff, 567.

state and engage in reasonable debate and disagreement on rights which they are truly interested in.²⁹⁵ Judicial review of legislation may become a useful tool if this ideal state is not given.²⁹⁶

This is the starting point for more pragmatic arguments for judicial review: The idealistic majoritarian perception is rather simplistic and in practice the relationship between courts and legislators turns out to be much more complex.²⁹⁷ Democracy in general cannot truly be reduced to mere considerations of majorities, but also necessarily includes the protection of some higher values for its own functioning. The identity and influence of such values have shaped other contributions to the debate. As a starting point in the penumbra of the Principles Theory, the idea of ‘Socratic contestation’ of legislation before courts has already been evoked, which suggests that the right to vote should be read in a complementary manner to the right to contest legislation as to its rationality.²⁹⁸ One central idea is thus the rationality of decision-making, which cannot be ensured merely by democratic – i.e. majority-based – decision-making.

It is, however, unclear why courts should be the solution to this problem. We explore some possible arguments in the following sections.

b. The debate on the institutional qualities of courts and legislators

Certain institutional characteristics of a process of judicial review by courts are typically highlighted to strengthen the claim in favour of judicial review. Fallon lists the central points in his defence of judicial review. In his view, constitutional review can perform a highly useful role by giving interests overlooked in the legislative process a voice immediately instead of sending them to a process of legislative amendment in an uncertain future.²⁹⁹ The existence of constant jurisprudence on constitutional rights is also an important reminder for the legislator of important interests to be taken into account.³⁰⁰ Most crucially and contrary to some earlier criticism, a court proceeding to constitutional review does not necessarily have to supplant the views of the legislator, but can operate with a certain degree of deference.³⁰¹

There are, however, voices against these points. Aleinikoff suggests that the voicing of concern should not happen through a process of contestation of legislation under judicial review, but in social interaction such as the election of

²⁹⁵ J. Waldron, ‘The Core of the Case against Judicial Review’ (2005) 115 *Yale Law Journal* 1347, 1360.

²⁹⁶ *Ibid.*, 1402.

²⁹⁷ K. Tuori, *Critical Legal Positivism* (Aldershot: Ashgate, 2002), 233, qualifies the majoritarian conception of the relationship between courts and democracy even as ‘vulgar’.

²⁹⁸ See section V.A.iii.

²⁹⁹ A. Walen, ‘Judicial Review in Review. A four-part defense of legal constitutionalism’ (2009) 7 *International Journal of Constitutional Law* 329 343.

³⁰⁰ *Ibid.*, 349.

³⁰¹ *Ibid.*, 340.

parliament.³⁰² It also is unclear for him why a court should be able to do what a legislator could not do; here this would mean taking social interests represented by legislation and confronting such interests with interests enshrined in the constitution in order to reach a result based on a somehow more appropriate balance of the importance of both interests.³⁰³ Furthermore, since a constitutional court is in most cases confronted with a value enshrined in the constitution and a much more diffuse social value enshrined in the legislation under review, there exists a danger that such a court will focus with inappropriate intensity on the less clear non-constitutional value.³⁰⁴ Inadequate representation of values could ensue.

From a technical perspective, it has been suggested that judicial decision-making and even law-making as it regularly occurs in the use of proportionality analysis in judicial review is advantageous. This claim is centrally based on the so-called ‘many minds’ argument: legal development through case law and precedent aggregates collective knowledge of many judges over time. Therefore, judicial law-making is justified next to the ‘many minds’ in legislative bodies, whose knowledge and competence stems more from deliberation.³⁰⁵ However, many minds arguments must be qualified based on who is included in the group of minds; the quality of minds may decrease with the number of minds included and from a certain number onwards an oligarchy, e.g. in the form of an agenda-setter, will necessarily emerge.³⁰⁶ Consequently, there is hardly any ground to suggest that generally, courts are the better decision-makers than legislators or vice versa.³⁰⁷ Ultimately, there is no single convincing answer to the question of whether judges or members of parliament are better suited to reconcile competing values.

Others have argued that the interaction between courts and legislators is not so much a competition on who is the better ultimate decision-maker, but rather a dialogue which in itself legitimizes judicial review.

c. Legitimizing judicial review as dialogue between courts and legislators

In particular in Canadian constitutional law, another suggestion to bolster the justification of judicial review has emerged. Based on ideas of legitimacy through deliberative processes and dialogue, some authors have suggested that judicial review and its interaction with the legislative process should be understood as a dialogue on constitutional values, led between the judiciary and the

³⁰² Aleinikoff, 993.

³⁰³ *Ibid.*, 985-986.

³⁰⁴ *Ibid.*, 989.

³⁰⁵ See on many minds generally C.R. Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* (Princeton: Princeton University Press, 2009).

³⁰⁶ A. Vermeule, *Law and the Limits of Reason* (New York: Oxford University Press, 2009), 54-55.

³⁰⁷ *Ibid.*, 122, would even suggest that the best solution is a deferent judiciary combined with an active constitutional legislator.

legislature.³⁰⁸ Judicial review should thus not be seen as the end of the conversation with the final word on the interpretation of constitutional rights, but rather as drawing attention towards these rights, but then putting the ball back in the legislator's court. The legislator is then supposed to take the court's findings into account in the future.³⁰⁹

However, this suggested legitimacy through deliberative dialogue remains conceptually difficult to accept. Even if the setting of judicial review should leave to the legislator sufficient leeway to later overrule or at least question the findings of an adjudicator, judges must base them on their pre-existing views on the correct interpretation of the constitution. The benchmarks for this decision thus remain in place, so that even if a legislator overrules a judicial decision, the new law would again meet with the pre-established standards if it falls under judicial review. Since this means that judges necessarily have if not the last, then still a somewhat more weighty say, the conditions of a deliberative dialogue are hardly fulfilled and the justification through dialogue cannot be sustained.³¹⁰

This point also casts doubt on Alexy's view of judicial review with proportionality analysis as deliberative representation of arguments, as the latter also seems to rest to no small extent on a similar assumption of a dialogue.³¹¹ There is, however, no small amount of hierarchy inherent in the phenomenon of judicial review – of course depending on the institutional context and possibilities for the legislator to overrule judicial decisions.

At the same time, there are also constraints on the judges. Depending on the system of review, they will be more or less able to answer abstract or only concrete questions. Even if some systems have broadened the actual possibilities for courts' review in practice,³¹² this still leaves courts at a disadvantage because they are constrained in setting the agenda of questions that will be asked.

The justification of judicial review as dialogue therefore seems equally unsatisfactory. A more promising approach focuses on the actual function of representation of specific values which judicial review ensures. Put simply, judicial review operates as a safeguard against grave neglect for specific values central to the functioning of the democratic process.

³⁰⁸ See most notably P.W. Hogg and A.A. Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75.

³⁰⁹ K. Roach, 'Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures' (2001) 80 *Canadian Bar Review* 481, 530-531. See also Barak, 466.

³¹⁰ L.B. Tremblay, 'The Legitimacy of Judicial Review: The Limits of Dialogue between Courts and Legislatures' (2005) 3 *International Journal of Constitutional Law* 617, 643.

³¹¹ See for Alexy's view section V.A.i.

³¹² See for example in United States constitutional law chapter 4 section II.D.

d. The procedural democracy doctrine

The seminal contribution establishing the doctrine of procedural democracy stems from United States constitutional law.³¹³ Discussing whether there should be intrusive judicial review, Ely suggested that reasonableness of democratic decision-making, be it at the legislative or administrative level, can be assessed by looking at the procedure. If there are major defects to an extent that the quality and legitimacy is likely to be corrupted, judicial review must intervene as a corrective mechanism. To assess when this is the case, Ely suggests that certain signs are indicative: A first sign is serious neglect for or misapplication of fundamental constitutional values, which in Ely's view are in particular electoral rights or the freedom of expression as core elements of the democratic process.³¹⁴ A second sign could be outcomes which systematically disadvantage the interests of specific groups, because it appears likely that such discrimination is caused by a defective procedure in which the legislator neglects the interests of such groups.³¹⁵

Judicial review should thus act as a counterweight in such situations of majoritarian excess. The main idea is to protect certain fundamental values. However, there is disagreement as to what values should be protected and – as already discussed³¹⁶ – whether courts are the best guardians for this purpose.

The concept of democracy and of what affects the democratic process thus determines what values are deemed important as a justification for judicial review. As the comparative assessment shows, there are different approaches: United States constitutional law particularly emphasizes equal treatment for vulnerable minorities and rights as liberties in their shield function against public interference.³¹⁷ By contrast, the German Federal Constitutional Court also emphasizes its review power for socioeconomic rights and positive obligations under rights and even extends its review to the sphere of private law.³¹⁸ Similarly, for the European Court of Human Rights, judicial review must also encompass positive obligations under human rights and even extend to the private sphere.³¹⁹

Hence, positions visibly diverge on the justification of judicial review in cases of classic liberal fundamental rights as opposed to cases of social and economic rights. As an example, Fallon suggests that fundamental rights are important values that merit special protection, with the consequence that well-designed judicial review can be useful. In such cases, under-protection presents a more serious risk than over-protection, and consequently a system with judicial review

³¹³ At this point, only selected examples from the debate in United States constitutional law are presented, while a more comprehensive discussion is left for chapter 4.

³¹⁴ J.H. Ely, *Democracy and Distrust – A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 103.

³¹⁵ *Ibid.*

³¹⁶ See above section V.B.iv.b.

³¹⁷ See chapter 4.

³¹⁸ See chapter 3.

³¹⁹ See chapter 5.

can be seen as advantageous.³²⁰ Walen rejects this view as over-simplistic. It reduces the case for constitutional review and balancing to the setting of certain fundamental rights facing socio-economic interests enshrined in legislation and implicitly suggests that the former should trump the latter.³²¹ The central problem with Fallon's case for judicial review is its foundation on a libertarian perspective: Legislation is primarily perceived as a potential intrusion into the freedom of the individual rather than as a potential protection of rights, in particular socioeconomic ones. Judicial review for Fallon is thus an additional point of veto to ensure that there is less rather than more legislation.³²² The focus on certain fundamental rights, however, unduly excludes other violations that may legitimately be perceived as similarly serious. Private violations of fundamental rights may just as well be seen as justifying judicial review of state action in the light of positive obligations incumbent upon the state.³²³

Next to the question of what values qualify as a justification for judicial review, there are also calls to exclude some values as justifying judicial review in all circumstances. Typically, provisions on trade, both in domestic constitutional as well as international economic law, provide that local regulatory autonomy should only be exercised to meet the needs of the public interest and not unnecessarily restrict trade. Proportionality analysis can be used in the framework of judicial review to assess whether an appropriate balance between trade and the opposing public interest has been found. Regan, however, has developed a critique of such 'virtual representation': With the example of the Dormant Commerce Clause in United States constitutional law,³²⁴ he suggests that judicial review including intrusive proportionality analysis is not required in cases where local regulation of public interests has to be scrutinized as to whether it unduly restricts trade. The justification would here rest on the idea that traders as foreigners are not duly represented in the domestic regulatory decision-making process, and therefore require virtual representation through judicial review. In Regan's view, this argument cannot apply. In order to achieve efficiency, representation itself is only required for all the interests within a state. If consumers are appropriately represented, then protectionism will not harm only out-of-state producers, but these consumers as well. Accordingly, their representation within the democratic institutions is already ensured and efficiency will be achieved as well as protectionism avoided. Conceptually, there would thus be no reason to represent any out-of-state producers by means of judicial review.³²⁵ While the argument in itself can be considered valid, one may wonder whether

³²⁰ R. Fallon, 'The Core of an Uneasy Case for Judicial Review' (2008) 121 *Harvard Law Review* 1693, 1699.

³²¹ Walen, 335.

³²² See on this 'libertarian presupposition' in Fallon's argument M. Tushnet, 'How Different are Waldron's and Fallon's Core Cases For and Against Judicial Review?' (2010) *Oxford Journal of Legal Studies* 49, 52.

³²³ *Ibid.*, 61.

³²⁴ See chapter 4 on United States constitutional law for a detailed account.

³²⁵ D.H. Regan, 'Judicial Review of Member-State Regulation of Trade within a Federal or Quasi-Federal System: Protectionism and Balancing, "Da Capo"' (2001) 99 *Michigan Law Review* 1853, 1860.

a full exclusion of judicial review is warranted. There may indeed be a weaker claim for review if representation of consumer interests seems sufficiently warranted. However, there may be cases where this is not the case, and one could argue that where a court discovers elements of evidence pointing in that direction, the justification of procedural democracy may still apply. Sometimes, the 'virtual representation' of out-of-state traders in the political process may be ensured by the representation of local consumers. In other cases, this mechanism may fail, so that again judicial review is warranted.

Summing up, the procedural democracy doctrine has thus introduced the idea that judicial review should operate as a corrective mechanism for defective democratic processes. However, arguments can be exchanged as to what values should be seen as important enough to justify judicial review. Put differently, one needs to justify how values are classified; i.e. why some are perceived as a more central to the democratic decision-making process, which again justifies intrusive judicial review in order to avoid that their neglect produces inadequate outcomes.

v. Linking the procedural democracy doctrine, pre-balancing and models of judicial review

The most apt justification of judicial review thus lies in the correction of those errors in the democratic process that interfere with specific values. The procedural democracy doctrine thus suggests that the strength of the claim of judicial review must be established by weighing arguments on what values must be protected with what vigour. We can now understand the varying strength of the justification of judicial review as also answering the question of pre-balancing, i.e. to what extent adjudicators are entitled to use proportionality analysis. The procedural democracy doctrine conceptually shows what arguments are to be weighed by adjudicators during the pre-balancing exercise.

Adjudicators pre-balance the elements surrounding their setting of judicial review and the justification of their review power in order to determine whether they are operating rather in what we have designated as a model of equal representation or in a model of special interest review.

Under a model of equal representation review, an adjudicator is required to pick and choose the values that appear to be most important and to adapt the standard of review in his or her use of proportionality analysis accordingly to ensure sufficiently intrusive review. Ideally, the adjudicator should also expressly justify what values are protected with more intrusive review and for what reasons, as explained in the procedural democracy doctrine.

A different situation is presented by a model of special interest review. The focus of review lies only on one particular value, while the appropriate representation of all values is not the main goal. Accordingly, full-scale proportionality analysis does not necessarily play a central role as discussed above. However, to justify judicial review, the adjudicator can and should still rely on the doctrine of

procedural democracy. The particular value singled out for protection must be assessed as to its relevance and need for protection in the democratic process, so that the intrusiveness of review can be adjusted. This can e.g. lead to a decision by the adjudicator to predominantly rely on necessity, i.e. a comparison with less restrictive alternatives, rather than full-scale optimisation under proportionality *stricto sensu* because the main importance is given to one value being represented, rather than that same value being optimised in its relationship to other impacted values. The value at issue does not necessarily become hierarchically higher.

Take the example of WTO law. If the interest to be represented is trade, a panel may be content to simply compare whether a particular trade-restrictive measure for public health purposes could also be replaced by less trade-restrictive alternatives. If no such alternative is brought up, the measure will pass review even though it does perhaps not represent the optimal ratio between trade and public health. If a high degree of public health protection is sought, there may even be virtually no alternatives, which means that the interest of trade is somewhat disadvantaged in comparison to the interest of public health.

At the same time, based on our previous discussion of proportionality analysis and exclusionary reasons, we do not think that proportionality analysis can be fully excluded. Even under a special interest review model, adjudicators could thus argue that they will engage in full proportionality analysis because it is the only way to prevent non-representation of the value at issue. Still, this is likely to be the case less often, and often also accompanied by a less intrusive standard of review.

The values to be protected under the procedural democracy doctrine are thus central to the pre-balancing that we have proposed. However, other elements of the setting of judicial review are also of relevance, as they shed light on the values that judicial review seems to be actually about in a particular setting of judicial review. At this point, the assessment also needs to take into account empirical knowledge about legal regimes in order to better understand the normative arguments to be made about the values that are protected by judicial review.

vi. Normative arguments and empirical elements and the pre-balancing exercise

If we want to examine the use of proportionality analysis by different adjudicators in the subsequent comparative studies through the lens of pre-balancing, it is indispensable to gain a thorough understanding of the functionality of a particular legal regime. Judicial review is an expression of normative substantive values and institutional choices, all of which must be understood for this purpose.

To assess the values that seem to be protected by judicial review in a particular legal regime, we could simply look at legal texts. A constitution would thus

have a high likelihood of qualifying for the model of equal representation review. International treaties like a bilateral investment treaty or the WTO covered agreements would probably look more like a representation of one particular interest, therefore qualifying for the model of special interest review. However, arguably such a look at mere legal materials is insufficient. There has been a broad academic debate on ‘constitutionalisation’ of various regimes of international law,³²⁶ which suggests a reading of such regimes along the lines of domestic constitutional law and could also mean that a broader range of interests is to be represented in such international legal regimes. Consequently, rather than advocating a rather simplistic divide between domestic constitutional legal regimes and others, we examine legal regimes with their broader context of judicial review to establish whether they qualify for one or the other of the two models.

A number of contextual factors play a role in helping us to understand the values judicial review aims to protect throughout the democratic process of a legal regime. We consequently suggest that the context of the setting of judicial review must be examined concerning various elements, depending on which are considered most important to provide a clear picture. The contextual features of judicial review are, of course, innumerable. We could take into account historical development. As an example, the WTO Appellate Body is perceived as the end point of a development of increasing judicialisation of GATT dispute settlement, and compared by some to a constitutional court in its powers. Should this lead us to assume that it belongs to a model of equal representation review? Another possible feature are institutional characteristics. Institutionally, arbitral tribunals are *ad hoc* bodies whose members do not enjoy tenure comparable to judges in a constitutional court and who typically are experts only in the limited field of investment law and arbitration. Should this point towards a model of more specialized review?

Arguably, these features help us to understand legal regimes and their underlying values more broadly than a mere look at legal texts. At the same time, we must keep them apart from the normative arguments relevant for the pre-balancing. The latter arguments are the values most relevant to protection by judicial review. For this reason, the subsequent comparative studies distinguish between the context of judicial review and the justification of judicial review, and examine each of them in separate sections.

While the potential number of features is thus unlimited, the following rough, non-exhaustive breakdown can be suggested and is also used for the subsequent comparative studies.

As a first group of factors, *historical elements* come into play. Constitutional courts in particular are often marked by the perception of their role as it has developed over the course of history. Over time, different values become central to protection by judicial review. This also introduces a somewhat dynamic

³²⁶ See J. Klabbers, A. Peters and G. Ulfstein (eds.), *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009).

element into the perspective on judicial review. As an example, the German Federal Constitutional Court was expressly introduced for the purpose of ensuring the appropriate adjudication and protection of fundamental rights and other constitutional values.

Second, questions of *constitutional adjudication and political economy* play a role. Courts and tribunals may perceive their role under judicial review as the ultimate interpretative authority. A classic example would be the Court of Justice of the European Union, which accordingly developed an approach that is at least very consistent in the form of the ‘principle of proportionality’ across the various fields of its activity. By contrast, adjudicators may see themselves not so much as constitutional adjudicators, but rather as dispute settlement bodies limited in their role and thus in their review competence, as the example of arbitral tribunals in international investment law suggests. An influential factor at this level is the chosen form of judicial review.³²⁷ Review can operate in a centralized or decentralized manner, concrete or abstract, and judgments rendered under judicial review can have different effects.³²⁸ There is also an influence of this political economy of judicial review on the underlying values and the justification of their protection through judicial review, as will be shown.

Third, *institutional factors* are highly relevant. The composition of courts and tribunals, including questions of the tenure of judges is relevant. International judges may feel less competent in adjudicating an intrusive form of proportionality analysis if they are not familiar with the domestic socio-economic context

³²⁷ There is a wide range of views on the appropriate design of judicial review and the legitimate function of courts. Views vary as different emphasis is put on several central arguments, which mirror the procedural democracy doctrine’s findings: the importance of entrusting democratically elected bodies with decisions, the appropriateness of judicial protection of fundamental and minority rights, the danger of a powerful judicial branch, the need to ensure procedural conditions of democratic legitimacy through adjudication and so forth, see E.-U. Petersmann, ‘Constitutional Theories of International Economic Adjudication and Investor-State Arbitration’ in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds.), *Human rights in international investment law and arbitration* (New York: Oxford University Press, 2009), 181.

³²⁸ Generally, several types of judicial review can be distinguished based on some central features. Centralized review means that only one specialized court may overrule legislation, whereas in a system of decentralized review any court is able to do so. Concrete judicial review requires a specific case to review a law or administrative act against the relevant benchmark, while abstract review is not dependent on a case. A judgment in judicial review may have effects only *inter partes* or *erga omnes*. Even temporal elements can be used for distinction: Judicial review may occur before a law enters into force or *ex post*; the effects of a judgment may be purely *ex nunc*, i.e. for the future, or apply retroactively *ex tunc*. For an overview see A.-R. Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge: Cambridge University Press, 1989), 91 ff. Furthermore, one can also distinguish between ‘weak’ and ‘strong’ forms of judicial review: Weak forms do not have immediate legal effects such as striking down laws, but allow adaptation and also ultimately overruling of a court decision, while strong forms put the court in a position as ultimate authority. See M. Tushnet, *Weak Courts, Strong Rights – Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008), 25-33.

including the appreciation of certain values. Specialisation of adjudicators may also add to institutional factors pointing towards a model of special interest review if there seems to be a particular 'bias', e.g. in the case of the WTO Appellate Body as a 'trade court'.³²⁹

This broader context should aid in understanding which values a legal regime purports to protect, i.e. under which model of review the outcome of the pre-balancing seems to fall. The normative character of the pre-balancing exercise also enables us as commentators to both suggest our own solution and contrast it with the solution found by the pertinent adjudicators.

Summing up, in order to ascertain whether a setting of judicial review should be ascribed to the model of equal representation review or of special interest review, we need to look at the broader context of history, political economy and institutional elements and can use the results to inform our discussion of the justification of review in the pre-balancing exercise, which again is based on our findings on the procedural democracy doctrine. This latter assessment should enable us to assess and criticize the actual approach to proportionality analysis taken by a particular adjudicator.

C Conclusion

This section has focused in detail on the link between proportionality analysis and judicial review in order to prepare the conceptual ground for the subsequent comparative studies. Examining proportionality analysis as such, we have observed that it contains the potential to provide for equal representation of claims. At the same time, however, its application often requires difficult moral argumentation and is therefore contested. Its use empowers adjudicators to weigh directly the values underlying legal norms. This important power given by proportionality analysis must thus be appropriately justified.

The Principles Theory's account of formal principles has been examined, but not found to be sufficiently comprehensive. Other proponents or sympathizers of the theory have, however, offered useful accounts: the use of principal-agent theory has led to the development of the 'trustee courts' concept, and the idea of a right to justification has provided an underlying rationale for judicial review as a sort of right to contest irrational legislation. Still, Klatt, Schmidt and Meister have suggested useful first steps out of the dilemma of adequate representation of the multiple versions of proportionality analysis found in adjudicative practice: They split up the Law of Balancing and establish a review level which is separated from the level of balancing where substantive weighing of values takes place.

Taking an additional step, we suggest that there is a pre-balancing exercise adjudicators undertake to decide how they are going to use proportionality analysis. Models of judicial review are the tool to schematise typical outcomes of this pre-balancing. A model of equal representation supports extensive use

³²⁹ See on this point already section II.A.i.c.

of full-scale proportionality analysis because the latter furthers representation of arguments at an *a priori* equal stage. Other settings of judicial review may, however, correspond more to a model of special interest review, where one value is the central reason for the very existence of judicial review. In such a system, proportionality analysis does not play the same role. However, it still should not be rejected, but should rather be used with a more pronounced reliance on the early stages of suitability and necessity and less reliance on proportionality *stricto sensu*.

The arguments to be weighed during pre-balancing are best explained on the basis of the procedural democracy doctrine. Judicial review is justified to different degrees by specific values' being neglected in the democratic decision-making process; a neglect which review purports to remedy. Discussing these values, weighing them as arguments, enables us to conceptualize the weighing adjudicators should undertake. To fully assess what values judicial review is about in a particular legal regime, we need to look beyond the legal texts and also assess the broader context, which includes historical, politico-economic and institutional features of judicial review. These non-normative elements are needed to engage in a more informed pre-balancing discussion of the actual values at issue. The subsequent comparative studies thus try to keep these two kinds of elements separated.

The stage is now basically set to embark on our comparative study. Nevertheless, there is still a need to set out the reasons for the choice of the legal regimes subject to comparative study. Also, the scheme of the individual chapters should be explained in the light of the theoretical findings so far.

VI The Structure for a Comparative Study on Proportionality Analysis and Judicial Review

Comparative studies on proportionality analysis are becoming ever more popular as a research topic. Earlier work has already identified some pitfalls of comparative studies in the field of proportionality analysis.³³⁰ Therefore, to engage in a useful comparative study, the danger of terminological fuzziness must be remedied. This has been done in the present study by discussing in detail the denominations for sub-tests of proportionality analysis and proportionality analysis itself.

The benefits of a comparative study for our purposes lie in the potential ability to explain the varying uses of proportionality analysis in various legal regimes in a systematic manner. With the help of the concepts of pre-balancing and of the two models of judicial review, it should become possible to discuss and compare all arguments at their appropriate level. It does not seem correct to observe diversity in the use of proportionality analysis through a lens of simplification and unification, which would necessarily lead us to suggest one-size-

³³⁰ See Bomhoff, 557.

fits-all solutions and to criticize deviations as ‘wrong’ against the benchmark of one preferred model. Instead, the distinction of the two models of review and the splitting up of factors should lead us to an informed explanation of different uses of proportionality analysis, including criticism at the right level where inappropriate weight seems to have been given to some arguments.

For this purpose, we now set out the selection of the comparative studies and the structure of the comparative chapters that should help to put in clearer contrast the different approaches of proportionality analysis as applied in each legal regime.

A The Choice of the Legal Regimes to be Compared

The choice of the objects of the comparative studies mainly follows the idea that a variety of situations of judicial review ought to be combined with a certain variety of value conflicts, so that the possible operation of pre-balancing and the differences in outcomes in the form of the models of judicial review become more easily observable and can claim general usefulness beyond particular settings. In particular, we can examine the impact of different values enshrined in positive law on substantive proportionality analysis, but also on the level of judicial review. The value conflicts selected for comparison encompass classic situations of human rights conflicting with public interests, but also with other human rights.³³¹ We use as examples norms of competence as well as the old conflict between regulatory autonomy and norms regulating trade, including in particular non-discrimination norms as enshrined in international economic law and partly in domestic constitutional law.³³²

Apart from diversity in the values in the adjudicated norms we also aim to include a variety of adjudicators and situations of judicial review to test the claim that the two-model distinction does not operate along the lines of domestic constitutional versus international law; instead, some regimes fall into one category independent of their domestic or international character. Thus, the comparative studies include specialized courts³³³ and general supreme courts,³³⁴ international³³⁵ and domestic courts, permanent courts and arbitral tribunals³³⁶ all operating in institutional settings with varying degrees of embeddedness in a legal regime and varying degrees of intensity of their judicial powers.

For this purpose, based on the framework of pre-balancing and the two models of judicial review we examine the use of proportionality analysis in the

³³¹ See the respective chapters on German and United States constitutional law, on European Union law and on the law of the European Convention on Human Rights and Fundamental Freedoms.

³³² See the chapters on German and United States constitutional law, on European Union law, on WTO law and on international investment law.

³³³ E.g. the German Federal Constitutional Court.

³³⁴ E.g. the United States Supreme Court or the Court of Justice of the European Union.

³³⁵ E.g. the WTO Appellate Body or the European Court of Human Rights.

³³⁶ The arbitral tribunals operating in international investment law.

areas of German constitutional law, United States constitutional law, the law of the European Convention on Human Rights and Fundamental Freedoms, European Union law, World Trade Organisation law and international investment law. The breadth of the study comes, of course, to some extent at the expense of its depth: it is not the objective of the study to present an exhaustive insight into each regime. Rather, we use typical examples and well-known cases to describe the use of proportionality analysis and also focus on predominant arguments at the three levels rather than presenting each regime of judicial review in every possible detail.

B The Structure of the Comparative Chapters

In order to ensure comparability of the comparative chapters, a somewhat uniform structure is indispensable. At the level of sections all chapters depart from an examination of the broader context of judicial review. These elements enable us to receive a preliminary impression of what objectives judicial review seems to pursue, which can subsequently assist in discussing what values are actually the core objective of protection for judicial review in a particular legal regime. In practice, in this section some divergence in the focus on particular elements is useful in explaining the lines along which proportionality analysis has developed in each legal regime.

The second section assesses the justification of judicial review in the light of the procedural democracy doctrine, as far as the latter can be ascertained in the various legal regimes. It thus aims to assemble the normative arguments as to what values are to be protected with what intensity by judicial review.

Once the theoretical normative benchmarks have thus been set by this preliminary pre-balancing, a third section then confronts theory with reality. We assess a number of typical cases and the doctrinal debate in order to show how proportionality is actually applied.

Eventually, we evaluate and, where appropriate, criticize the use of proportionality analysis. At various points, we benefit from our comparative focus and are able to suggest a look into other legal regimes for alternative solutions which seem to better reconcile the suggestions developed in the pre-balancing of the second section.

VII Conclusion

The theoretical ground should now be well prepared for the construction of the comparative studies.

We have started off with a discussion of proportionality itself with the double aim of clarifying and establishing the terminology and describing the difficulties of adjudicating proportionality analysis. Proportionality analysis offers the advantage of equal representation of claims and arguments, but at the same

time implies moral argumentation as a difficulty of adjudication. Adjudicators may be subject to reproaches of judicial activism and judicial law-making because they are empowered by proportionality analysis to balance the underlying values freely.

Proportionality analysis therefore requires a solid conceptual justification. For this purpose, we have first assessed the Principles Theory and its offer of the balancing-subsumption opposition as a justification: substantially, it claims that at the norm-theoretic level, we can distinguish strictly between rules and principles. The norm structure of principles justifies the use of proportionality analysis. However, the division thesis seems difficult to sustain at this level.

Aiming for a deeper understanding, we continued our exploration at the level of argumentation theory. It became clear that proportionality analysis and the balancing it involves replicates the balancing of reasons for action in practical reasoning. Opposition to the omnipresence of balancing in practical reasoning has formed under Raz' concept of exclusionary reasons: some reasons would thus exclude balancing by excluding other reasons. If that claim is accepted, rules such as positive law can exclude balancing of underlying values. There are, however, conceptual difficulties with the account of excluded reasons, in particular since even for the process of excluding reasons a certain pre-balancing of exclusionary force is required and the *a priori* decision of exclusionary force would require an external point of view that a rational decision-maker cannot simply assume. In our view, this pre-balancing exercise of weighing is where adjudicators decide to what extent they will grant exclusionary force to positive law or decide to engage in proportionality analysis.

It is at this point that the connection to judicial review is established. Consequently, we have to explain the effects of this pre-balancing exercise and the factors which play a role in it. To explain the effects on the use of proportionality analysis, we have designed two models as typical outcomes. The elements to be weighed are the values and the importance given to their protection as the justification of judicial review, as the findings of the procedural democracy doctrine suggests. For a more informed discussion, it is, however, also indispensable to discuss the broader, non-normative context of judicial review, in particular the historical development, political economy and institutional setting of judicial review in each legal regime. We therefore discuss these features in the first section of every chapter, using them as valuable information for a more thorough discussion of the values to be protected under judicial review in the second section. Suggesting our own pre-balancing, we can then contrast our outcome and the model that we assign to it with the actual way in which proportionality analysis was used by an adjudicator.

In the case of the equal representation model, judicial review aims for the full representation and balance between all values. Extensive use of proportionality analysis is thus justified. In the second case of a model of special interest representation, the setting points more towards scrutiny in the light of one particular value, so that tests differing from proportionality analysis are more

appropriate. Proportionality analysis is not excluded, but used less often. The main benefit of these models is a simplification to describe our findings more succinctly, while in practice the weighing of arguments is, of course, different in the context of each legal regime examined.

Based on a unified structure for the comparative chapters, we are now well equipped to depart on the comparative journey. As soon becomes clear, the outcomes of pre-balancing and their ordering under the two models do not, as one might expect, run along the lines of domestic constitutional and international law, but rather separate various settings of judicial review from others without such obvious boundaries.

I Introduction

While it is difficult to speak of an ‘inventor’ of proportionality analysis, the most elaborate pedigree for the development of proportionality analysis can certainly be ascribed to German constitutional law. It is also in this light that historical insights are examined with particular emphasis in this section.

These historical insights demonstrate that judicial review and the codification of fundamental rights emerged at a late stage in German constitutional law, after long political struggles. As a result, the Federal Constitutional Court is a particularly strong institution, which facilitates the use of proportionality analysis, should a model of equal representation result from pre-balancing. The predominant status of constitutional adjudication has also been confirmed by doctrinal discussion, which criticized the principle of proportionality as the central legal test as sometimes inappropriate, but recognized it nonetheless as a structuring feature of the system of the Basic Law. With this favourable context of judicial review, we turn to the justification of judicial review in a pre-balancing exercise.

The strength of the authority of the Federal Constitutional Court has led to less emphasis on the debate on the procedural democracy doctrine. Consequently, we discover an unsatisfactory mixture of debates on the appropriateness of proportionality analysis and the appropriate standard of review. Generally, German constitutional law seems appropriate for a model of equal representation, as it aims to appropriately reconcile constitutional values such as fundamental rights with public interests. The principle of proportionality has been used as a fairly consistent legal test across a variety of potential topics in fundamental rights adjudication. In a number of fields, however, the Court refrains from using the principle of proportionality even though it could operate usefully, while a more deferent standard of review could arguably have taken into consideration the perceived over-intrusiveness of full-scale proportionality analysis.

Only in one instance does the Court seem to deviate from the model of equal representation review: When indirect horizontal effect is given to fundamental rights in private law disputes, the Court – correctly in our eyes – perceives the role of private law courts as following a special interest review model, in this case of the value of private autonomy, which already incorporates a balance of interests. The Court thus only intervenes with deferent use of proportionality analysis, thereby adapting its model of review.

We thus start off with an overview of the broader context of judicial review, focusing in particular on the historical developments that have led to the establishment of the Federal Constitutional Court as such a powerful judiciary. The subsequent discussion on the justification of judicial review and the procedural democracy doctrine shows the above mentioned mixture of levels of debate and the resulting confusion. Next, we briefly assess the principle of proportional-

ity as a consistent judicial practice, before concluding with an outlook towards United States constitutional law.

II The Broader Context of Judicial Review in German Constitutional Law

In assessing the broader context of judicial review, history plays a central role in a legal regime as old as German constitutional law. In this section, we therefore discuss first how we can classify judicial review as exercised by the Federal Constitutional Court today as the consequence of historical developments. Both the creation of systematic judicial review and the introduction and protection of fundamental rights are the results of a protracted political struggle, which eventually gained huge momentum after the horrors of the Nazi dictatorship. The newly created Federal Constitutional Court's adjudication on the basis of Basic Law (*Grundgesetz*)¹ and its catalogue of fundamental rights are a consequence of the perceived need to ensure appropriate representation of a variety of values and the protection of minorities in the democratic process.

This conclusion is reinforced by looking at the constitutional debate on proportionality, which perceives the latter as an indispensable, structural element of the Basic Law. Institutional aspects of the Federal Constitutional Court show that it is primarily vested with representativeness in its features, facilitating the use of proportionality analysis.

Concluding thus that the context of judicial review in German constitutional law could offer an appropriate setting for a model of equal representation review, we then turn to the debate on the justification of judicial review and the procedural democracy doctrine to discuss pre-balancing as it could be undertaken by the Federal Constitutional Court.

A Historical Insights: The Development of Judicial Review and Fundamental Rights in German Constitutional Law

In the subsequent section, we note a marked change in the perception of the State and its objectives as the basis of the construction of comprehensive judicial review based on the Basic Law after the Second World War. We first discuss the slow institutionalisation of judicial review, before then turning to fundamental rights and the use of proportionality analysis and similar tests. Historically, the somewhat sluggish progress on both fronts gives way to the institutional leap after the Second World War; a war before and during which all democratic institutions had so fatally failed. During this leap, we see the emergence of a powerful judiciary apt to adjudicate constitutional claims on a broad variety of norms – among them a broad catalogue of fundamental rights.

¹ All subsequent English quotes from the Basic Law are based on the translation offered by the German Parliament, see <https://www.btg-bestellservice.de/pdf/80201000.pdf> (accessed on 6 March 2012).

i. The historical development of judicial review

Until the 20th century, the institutions of judicial review grew only slowly. Centrally, administrative review acted for a long time as a supplement to constitutional review. While Weimar saw first developments of judicial review by higher courts, only the Federal Constitutional Court fulfilled the promise of fully fledged judicial review.

a. Administrative review as a precursor of constitutional review

One starting point of judicial review was the system of administrative courts.² Judicial review therefore started most prominently as administrative review before moving to constitutional review.

Generally, the 19th century knew no particular predominance of constitutional law, the latter – like general legislation – emanating from the sovereign's will. Also, the newly found trust in parliaments was difficult to reconcile with the awarding of a competence for difficult, highly political legal decisions to judges. Vigorous academic debate arose over the question of whether the concept of the separation of powers binds a judge to the words of a validly proclaimed statute or whether, inversely, such a statute requires a judge to verify its validity.³

Despite this debate, some precursors of constitutional review emerged. The Constitution of St. Paul's Church, for example, had provided for a system of constitutional review including a power for abstract review of legislation. In practice, however, this legal text failed to enter into force and the procedure therefore never had any true impact.⁴ The subsequent constitution put in place under Bismarck knew neither a catalogue of fundamental rights nor constitutional review.⁵

The intervention of administrative courts can thus be understood against the background of a lack of appropriate review of the State's potential intrusions into the sphere of the individual's liberty. Administrative courts intervened and developed review of administrative action as an alternative.

Politically, the introduction of administrative review first met with resistance from conservative forces. Liberal forces advocated such a reform of administrative justice as an auxiliary means to control the executive power, because the parliament appeared unwilling to do so as a consequence of the reactionary views held by the majority of its members. However, eventually even conserva-

² R. v Krauss, *Der Grundsatz der Verhältnismässigkeit in seiner Bedeutung für die Notwendigkeit des Mittels im Verwaltungsrecht* (Hamburg: Kommissionsverlag Ludwig Appel, 1955), 3.

³ K. Schlaich and S. Koriath, *Das Bundesverfassungsgericht – Stellung, Verfahren, Entscheidungen* (Munich: C.H. Beck, 2010), 78 para 116.

⁴ A. Hopfauf, 'Zuständigkeit des Bundesverfassungsgerichts' in B. Schmidt-Bleibtreu and others (eds.), *Kommentar zum Grundgesetz* 12 edn (Neuwied: Carl Heymanns Verlag, 2011), 1887 para 7.

⁵ U. Scheuner, 'Überlieferung der deutschen Staatsgerichtsbarkeit' in C. Starck (ed.) *Bundesverfassungsgericht und Grundgesetz: Festgabe aus Anlass des 25jährigen Bestehens des Bundesverfassungsgerichts* (Tübingen: J.C.B. Mohr/Paul Siebeck, 1976), 41.

tive forces supported the reform because it implemented a formalistic, process-based vision of liberalism which could be reconciled with their own views.⁶

Newly created administrative courts thus began to review administrative decisions as to whether they were appropriately based on the law. As the most prominent and prolific actor, the Prussian Supreme Administrative Law Court established in 1875 soon began to elaborate a range of principles of administrative law in its case law.⁷ However, even judges themselves initially had difficulties with the task of administrative review entrusted to them. The *Kreuzberg* decision can be cited as one of the earliest and most central references to a legal test close to necessity. It simultaneously contains some remarks on administrative review. The Court uttered doubts in an *obiter dictum* about the competence of the administrative judge to examine the relationship between ends and means of administrative action.⁸

Despite such doubts, the system of administrative courts generally helped to strengthen the idea that the exercise public power should be reviewed by the judiciary. At the same time, review remained restricted to administrative acts, not laws, and the benchmark for review was mostly the underlying law. Over time, however, administrative review, developed into a 'functional equivalent' to later constitutional review.⁹ In some limited cases, the administrative courts could review an administrative act against guarantees drawn from constitutional law such as property rights and individual freedoms enshrined in Prussia's 1850 Constitution. At least implicitly, the underlying law could therefore be measured against constitutional law.¹⁰ Arguments drawing on constitutional law and the rights enshrined therein generally became more and more common during the early 20th century.¹¹

b. *Constitutional Review in the Weimar Republic*

The 1918 revolution and the emergence of the Weimar Republic changed the legal situation dramatically. The new republican constitution created a shift of power to the parliament and a catalogue of fundamental rights. The text, however, contained no basis for constitutional review of federal laws.¹² Still,

⁶ K.F. Ledford, 'Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876-1914' (2004) 37 *Central European History* 203, 223.

⁷ See *Ibid.*, 212-214, for an overview of the establishment and work of the Supreme Administrative Court.

⁸ *Kreuzberg Entscheidung*, Preußisches Oberverwaltungsgericht 1882, Volume 9, 353 ff, 378. See closer on the case section II.A.ii.c.

⁹ M. Stolleis, 'Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic' (2003) 16 *Ratio Juris* 266, 270.

¹⁰ *Ibid.*, 270 footnote 8.

¹¹ See for example the overview of cases concerning the use of the Polish language by the Polish minority in Eastern Prussia in Ledford, 218.

¹² For a detailed account of the pertinent provisions of the Weimar Constitution and the scholarly debate see B.J. Hartmann, 'The Arrival of Judicial Review in Germany under the Weimar Constitution of 1919' (2003-2004) 18 *Brigham Young University Journal of Public Law* 107, 114-119.

an intense debate soon broke out on the topic. Left-wing political forces, while generally in favour of the new constitution, opposed such constitutional review as weakening the parliament's power. Right-wing forces, by contrast, advocated review because they saw in it a safeguard against a perceived left-wing rule by the parliament.¹³ Among legal scholars, anti-positivists generally spoke out in favour of constitutional review, while positivists were against it.¹⁴ However, the lines were not quite so clearly drawn: Kelsen as a positivist also advocated such review. In Kelsen's view, only a body other than parliament could be entrusted to review general laws as to their compatibility with higher-ranking constitutional law. The creation of a constitutional court neither thwarted the sovereignty of parliament nor violated the separation of powers, because the claim that laws comply with the constitution was not in any way different from the general claim of legality, i.e. that judicial and administrative activity comply with the laws. Furthermore, the fact that a constitutional court would possess legislative powers – at least as a 'negative' legislator – gave expression, in Kelsen's view, to a division of legislative power and ought not to be perceived as a breach of the separation of powers.¹⁵

Courts finally settled the issue. After some initial hesitation by the *Reichsgericht*¹⁶ other courts such as the *Reichsfinanzhof*¹⁷ and the *Reichsversorgungsgesicht*¹⁸ spoke out in favour of judicial review of laws against the benchmark of the Constitution. The *Reichsgericht* followed in a decision in 1925 and took for itself the power of verifying whether legislation complied with the Constitution.¹⁹ However, the decision was not to have much practical impact, as the following years saw the failure of the law which had been suggested to formalize constitutional review. Afterwards, the massive use of executive emergency decrees substantially deprived parliament of most of its power in the early 1930s. Judicial review became a non-issue as a consequence.²⁰

c. *The Basic Law and the creation of the Federal Constitutional Court*

A new era began with the Basic Law, as it fundamentally enshrined the idea of a democracy capable of defending itself against those misusing the system to abolish democracy. As a consequence, the primacy of constitutional law was

¹³ Stolleis, 271.

¹⁴ For an instructive account of the 1926 meeting of the prestigious association of German State law scholars (*Vereinigung der deutschen Staatsrechtslehrer*) which sparked the debate on judicial review see M. Friedrich, *Geschichte der deutschen Staatsrechtswissenschaft* (Berlin: Duncker & Humblot, 1997), 324.

¹⁵ H. Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' (1929) 5 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (Verhandlungen der Tagung der Deutschen Staatsrechtslehrer zu Wien am 23 und 24 April 1928)* 30, 53-54.

¹⁶ The federal Supreme Court for criminal and civil matters.

¹⁷ Supreme Court of fiscal jurisdiction.

¹⁸ Supreme Court for matters of public officials' benefits.

¹⁹ Hartmann, 124.

²⁰ *Ibid.*, 126-127.

secured more extensively than previously and a strong constitutional judiciary was established.²¹ The *Bundesverfassungsgericht* (Federal Constitutional Court) was thus established as the ‘guardian of the constitution’.²²

Summing up, the historical development is thus marked by a slow start leading via the somewhat circuitous route of administrative review towards true constitutional review. At the crossroads of the Weimar Constitution, the topic of judges striking down legislative decisions provoked an intense debate. Interestingly, even individual positivist voices agreed with the idea of judicial review. The failure of the Weimar institutions then led to the introduction of a specialized court with the main task of safeguarding the interpretation and priority of the new Basic Law and its central values.²³ In light of this history, the relative ease with which the Federal Constitutional Court was able to impose influential developments in its case law – the *Lüth* decision being but one crucial example – is remarkable in comparison to other high courts that faced much stronger opposition such as the United States Supreme Court.²⁴ The Court was thus also able to follow through with its vision of the principle of proportionality in its case law, which has led to a remarkably unified vision of the test in the case law and of the doctrine at large.

ii. The historical development of fundamental rights

The historical development of fundamental rights describes changing perceptions of the State which eventually – after the democratic breakdown of the Weimar Republic and the subsequent national-socialist dictatorship – resulted in a paradigmatic shift that gave rise to the spread of the ‘principle of proportionality’. The present account shows that the introduction and codification of fundamental rights was intertwined with the development of earlier forms of proportionality analysis, which shows an increasing need for better representation of neglected values. The culmination is the introduction of the Basic Law and the subsequent coming of age of the principle of proportionality in the Federal Constitutional Court’s case law; the latter therefore being somewhat of an organically evolved consequence of earlier experience in fundamental rights review.

a. *Natural law thinking in the 17th century and the objective of the State*

The very idea of fundamental rights as protection against the State could only come from changes in the perception of the State as such. During the middle ages, the perception of law as the expression of divine will for order had prevailed for many natural law scholars.²⁵ In the 17th century, however, Grotius

²¹ Hopfauf, 1888 para 9.

²² ‘Hüter der Verfassung’, see for an early reference a case in 1952 *BVerfGE* 1, 184 (195 ff.).

²³ Hopfauf, 1888 para 10.

²⁴ See chapter 4 section II.A.

²⁵ See e.g. on the moral theology of Thomas Aquinas H. Welzel, *Naturrecht und materiale Gerechtigkeit* 4 edn (Göttingen: Vandenhoeck & Ruprecht, 1980), 58.

argued that the limitations of law were to be derived from human reason instead of divine will.²⁶ Such an understanding raised the question of the foundations of exercise of public power by the State.

In parallel, contractual conceptions of the relationship between the State and the individual had developed. Pufendorf, the first holder of a chair of natural law in Germany, perceived all human beings as initially free. In order to protect themselves, they came together in communities and concluded a mutually binding contract as a society. By means of a further contract they subjected themselves to the State. Consequently, the authority of the ruler of the State was not only founded on this second contract, but also limited by it.²⁷ This limitation was, however, not yet perceived as central to explaining the exercise of public power because the main purpose of the exercise of State authority remained external security, rather than the happiness of the individual.²⁸

Wolff developed an understanding of the State which focused on its purpose of ensuring common welfare. Humans should strive for perfection, as a duty towards themselves, other humans and God. This obligation gave rise to rights to be able to perform the obligation. The creation of the State was the act of human beings who, individually, would have been incapable of achieving the objective. Consequently, the State's overall objective had to be the furtherance of the common welfare; common welfare was, however, perceived as being identical with the welfare of the individual.²⁹

As a consequence of such natural law thinking, the idea of the limitation of the sovereign's power flourished, as scholars inquired both into the limits of the State's action and the remaining liberty of the individual. Conceptually based on the natural law tenet of *pacta sunt servanda* the liberty of the individual could only be restrained by the State for the purpose of furthering the common welfare.³⁰

b. The Allgemeines Landrecht and the changing perception of the State's objective

The set-up of the institutions and practice of law began to be influenced by these thoughts in the late eighteenth century. Prussia's transformation from authoritative rule towards a more law-based system – i.e. the emergence of a *Rechtsstaat* – provided a suitable scene for reflection on limitations of the public power such as through fundamental rights. At that time, Friedrich the Great ruled the country guided by the ideas of enlightened absolutism, which included

²⁶ H. Grotius, *De iure belli ac pacis libri tres : in quibus ius naturae & Gentium: item iuris publici praecipua explicantur* (Hildesheim: G. Olms, 2006), Vorrede Nr. 11.

²⁷ S. v Pufendorf, *De jure naturae et gentium libri octo* (Leipzig 1688) (Berlin: Akademie Verlag, 1998), chapter II para 7.

²⁸ *Ibid.*, chapter II para 13.

²⁹ C. Wolff, *Jus naturae (1740-1748)* (Hildesheim: G. Olms, 1968-1972), part I chapter I para 23.

³⁰ S. Heinsohn, *Der öffentlichrechtliche Grundsatz der Verhältnismäßigkeit – Historische Ursprünge im deutschen Recht, Übernahme in das Recht der Europäischen Gemeinschaften sowie Entwicklungen im französischen und im englischen Recht* (Münster: Westfälische Wilhelms-Universität, 1997), 9.

the idea that the monarch should use his power as the servant of his state.³¹ Scholars, in particular in the field of police law (*Polizeirecht*), took up the State concepts of natural law. Police law at the time encompassed most interventions by the state in society for purposes of public welfare and public morals. Justi disengaged himself from the prevailing views which equated common welfare as an objective with the welfare of the individual. Instead, he gave more preference to the individual and family as influential factors for the wellbeing of a State as a whole.³² As a consequence, in his writings he emphasized the need for police laws to be strictly directed towards a purpose. In stronger terms than other scholars he demanded that these laws as means had to be suitable for the ends pursued. The judgment upon this question of suitability was, however, left to the sovereign.³³

Friedrich the Great's endeavours to modernize the Prussian state resulted in the vastest effort of legal codification of that time, the *Allgemeines Landrecht*. The previously discussed ideas found entry into the legal texts of the *Landrecht*.

Next to Johann Heinrich Casimir von Carmer and Ernst Ferdinand Klein, Carl Gottlieb Svarez was one of the main drafters³⁴ of the *Landrecht* which encompassed civil law, criminal law and other rules of public law. In his earlier work, he had already endorsed contractual approaches to the relationship between the individual and the State. In particular in his lectures to the crown princes, which were intended to prepare the latter to rule, he taught that individuals had given up part of their natural freedom to achieve 'common happiness' in a State, but that this contract not only legitimized the State, but also drew the boundaries of its actions.³⁵ To settle the dilemma between public authority and individual freedom, he identified in his lectures an early form of proportionality analysis, according to which in case of doubt the freedom of the individual as a sort of fundamental right prevailed in a balancing exercise. Still, these prescriptions were addressed as guidance for the sovereign in exercising his power and could not yet be read as binding legal rules; neither did Svarez think of rights of the individual which could be enforced before courts.³⁶

In its codification the *Allgemeine Landrecht* followed the ideal of high determinateness of the law and intended to repel judicial lawmaking by means of

³¹ M. Cohen-Eliya and I. Porat, 'American balancing and German proportionality: The historical origins' (2010) 8 *International Journal of Constitutional Law* 263, 271.

³² J.H.G. v Justi, *Natur und Wesen der Staaten als die Quelle aller Regierungswissenschaften und Gesetze* (Mitau, 1771) (Aalen: Scientia, 1969), para 19.

³³ *Ibid.*, paras 33 and 39.

³⁴ For a detailed account of the three drafters see M. Albrecht, *Die Methode der preußischen Richter in der Anwendung des Preußischen Allgemeinen Landrechts von 1794* (Frankfurt am Main: Peter Lang, 2005), 55-58.

³⁵ A. Stone Sweet and J. Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 73, 99.

³⁶ Heinsohn, 25.

legislative precision.³⁷ Consequently, Svarez also put his early conception of limits on the power of the State in the text of the codification in the form of paragraph 10 second part 17th title:

‘It is the task of the police to take the necessary measures to maintain public peace, security and order and to prevent imminent danger for the public or its individual members.’³⁸

Some have read this early provision as a complement to the German *Rechtsstaat* idea: State action would thus always have to be based on an explicit permission by a written legal rule.³⁹ Based on the rule of the *Rechtsstaat*, a State could only act based on permission; there was thus a strict limitation on the cases in which it could be permitted to act at all by prescribing a necessary link to a public objective for the subsequent intrusion into individual freedom.

However, a closer reading of the drafting process of the *Allgemeines Landrecht* casts doubts on such a straightforward understanding of the provision. An earlier version of the codification still contained an understanding of the State and its police powers which was much more focused on the pursuit of public welfare.⁴⁰ With such a broad vision of police as the general furtherance of public welfare, written rules on the limitation of the State’s interventionist powers could hardly be understood as effective if the State’s very purpose was to be understood in such a broad and necessarily interventionist manner.

The explicit purpose of furthering public welfare was subsequently deleted because of fears based on the experience of the French revolution: discontent citizens could have based claims for revolt on such provisions.⁴¹ While some concrete provisions were deleted or amended, we can legitimately assume that the overall purpose of the *Allgemeines Landrecht* proclaimed in 1794 still contained a concept of the State based on the general purpose of public welfare.⁴²

³⁷ Albrecht, 75.

³⁸ Title 17, first section, §10 *Allgemeines Landrecht*: ‘Die nöthigen Anstalten zur Erhaltung der öffentlichen Ruhe, Sicherheit und Ordnung, und zur Abwendung der dem Publico, oder einzelnen Mitgliedern desselben, bevorstehenden Gefahr zu treffen, ist das Amt der Polizey.’ (author’s translation).

³⁹ For a differentiation from the more natural rights centred concept of the rule of law see Cohen-Eliya and Porat, 271 footnote 31. In their view, the notion of *Rechtsstaat* gives a much more central role to the State. There are, however, also competing views, see for an overview Ledford, 206-207.

⁴⁰ See articles 77 and 79 of the *Allgemeines Gesetzbuch für die Preußischen Staaten* (1791). See also the precursor provision of paragraph 10 second part 17th title, paragraph 8 title 5 section III of part 1 of the *Allgemeines Gesetzbuch für die Preußischen Staaten*.

⁴¹ A. Schwennicke, *Die Entstehung der Einleitung des Preußischen Allgemeinen Landrechts von 1794* (Frankfurt am Main: Klostermann, 1993), 312 ff.

⁴² Heinsohn, 22.

c. 19th century legal thinking and the emergence of fundamental rights and traces of proportionality analysis in the case law of the administrative courts

The *Allgemeines Landrecht* as a codification did not yet cause a paradigmatic change in the perception of the function of police powers of the State. Its judicial application in early days bolsters this conclusion.⁴³ Only 19th century changes in legal and philosophical thinking led to a more limited role for police powers, the latter being confined predominantly to the prevention of dangers. As a general intellectual tendency, legal thinking moved from the earlier jurisprudence of concepts (*Begriffsjurisprudenz*) towards a jurisprudence of interests (*Interessenjurisprudenz*) during the late 19th century and early 20th century.⁴⁴ The development of fundamental rights protection by means of proportionality analysis was certainly furthered by this change. However, even earlier a shift in the perception of what purpose the State should serve can be noted as a basis for the developments to come in the field of fundamental rights protection.

The changing perception of the State's purpose can be traced back to the work of philosophers. Generally, the 19th century gave rise to a more critical attitude towards the faith in human reason as displayed by 18th century natural law thinking. Kant in particular argued that the purpose of the State had to be understood as the reconciliation of the freedoms with which individuals were born.⁴⁵ Rather than furthering the overall welfare of the public, the State should thus promote the highest protection of individuals' liberties. Based on such liberal thinking of the early 19th century, legal scholars developed more classic liberal conceptions of fundamental rights as a tool to prevent the state from unduly intervening in the sphere of freedom of the individual.

An important scholar, Günther Heinrich von Berg, expressly discussed the limits of police action. According to some views he was the first to speak of an obligation of proportionality for police action.⁴⁶ In his opinion, police action could only restrict the natural freedom of individuals to the extent required by a legitimate purpose.⁴⁷ Simultaneously, he continued to adhere to a rather broad view of the purpose of the State, according to which police powers encompassed both measures for public welfare and measures for public order, i.e. to prevent dangers. As a crucial difference to earlier legal thinking, however, he subordi-

⁴³ Examining judges' use of the norms of the *Allgemeines Landrecht* in the first years, Albrecht, 221, shows that judges tended to avoid their application altogether, falling back as often as possible on the known rules of the customary law of the time.

⁴⁴ A. Barak, *Proportionality – Constitutional Rights and Their Limitations* (Cambridge: Cambridge University Press, 2012), 177.

⁴⁵ I. Kant, *Grundlegung zur Metaphysik der Sitten; mit einer Einleitung von Bernd Kraft* (Hamburg: F. Meiner, 1999), second part, introduction VI.

⁴⁶ K. Stern, 'Zur Entstehung und Ableitung des Übermaßverbots' in P. Badura and R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens: Festschrift für Peter Lerche zum 65 Geburtstag* (Munich: C.H. Beck, 1993), 168.

⁴⁷ G.H. v Berg, *Handbuch des Deutschen Polizeyrechts* (Hannover: Gebrüder Hahn, 1802-1809), Volume 1, 89.

nated public welfare to public order.⁴⁸ Other scholars followed this tendency and paved the way for an ever stronger understanding of police powers as an exclusively preventive concept.⁴⁹ In early writings on the trade-off between public objectives and individual freedom, it was consequently suggested that the latter should prevail in case of doubt.⁵⁰

The creation of a system of administrative courts⁵¹ eventually allowed adjudicative development of legal tests. These courts were regularly called to examine whether police action caused only proportionate intrusion into political and economic rights of individuals. In parallel, such rights were now enshrined in some of the constitutions of the *Länder*. Some early traces of proportionality analysis can be traced to this period, in particular in the case law of the Prussian Supreme Administrative Law Court.⁵²

One well-known example is the *Kreuzberg* decision of 1882.⁵³ A police ordinance prohibited the construction of buildings in Berlin which could impede the view from and of the national monument on top of the Kreuzberg. A citizen filed a complaint after having been denied a building permission. The administration defended the ordinance as protecting ideal goods, in this case patriotism. Finding no specific legal basis for the police's action in this case,⁵⁴ the Court used paragraph 10 second part 17th title of the *Allgemeines Landrecht* as the applicable provision. It distinguished between the task of furthering public welfare ascribed to the police and the limitation of police powers both enshrined in the provision.⁵⁵ Based on the latter, the Court held that the regulation would have to be verified as to whether it was suitable to achieve the claimed objective and did not go beyond what was necessary. The Court seemed to expressly endorse a legal test close to suitability and necessity. However, it must be noted that the decision to strike down the ordinance was finally based on the lack of an appropriate legal basis, as it was not the business of the police to defend the interest of aesthetics and city planning.⁵⁶

⁴⁸ Heinsohn, 34.

⁴⁹ See e.g. J.L. Klüber, *Öffentliches Recht des teutschen Bundes und der Bundesstaaten* (Frankfurt a.M: Andreäische Buchhandlung, 1817), para 381, who distinguishes between police for the purpose of public order as directly linked to the purpose of the State and welfare police which is only indirectly related to that purpose.

⁵⁰ See e.g. F.F. v Mayer, *Grundsätze des Verwaltungsrechts mit besonderer Rücksicht auf gemeinsames deutsches Recht, sowie auf neuere Gesetzgebung und bemerkenswerthe Entscheidungen der obersten Behörden zunächst der Königreiche Preußen, Baiern und Würthemberg* (Tübingen 1862), 461-462.

⁵¹ See section II.A.i.a.

⁵² L. Hirschberg, *Der Grundsatz der Verhältnismässigkeit* (Göttingen: Otto Schwartz & Co., 1981), 3.

⁵³ *Kreuzberg Entscheidung*.

⁵⁴ *Ibid.*, 370 ff.

⁵⁵ *Ibid.*, 376.

⁵⁶ With some references to erroneous readings of the judgment Heinsohn, 56.

Because of this, the judgment is read by some as no definite recognition of sub-tests of proportionality analysis in administrative review.⁵⁷ Indeed, the subsequent case law appears divided: some rulings adopt such a similar legal test resembling tests of suitability and necessity while others perceive such intrusive review of police action as outside the administrative judge's competence.⁵⁸ The latter cases can also be understood as an expression of the often highly political nature of many legal disputes of the time, which concerned in particular prohibitions of assemblies or protests of social-democrats.⁵⁹

The doctrine, however, took up the issue of proportionality analysis. Connecting proportionality with the activities of the police, Mayer found that no general law could be assumed to authorize police action beyond the natural threshold of proportionate prevention of dangers.⁶⁰ In his work, only suitability and necessity appeared to be available tests.⁶¹

Some groundwork for the development of proportionality analysis as part of fundamental rights review was thus laid at the conceptual level as well as in the case law of the administrative courts. However, values of fundamental rights seemed to remain under-represented. Only the introduction of fundamental rights in the federal constitution and strengthened constitutional review paved the way on from these early stages.

d. From administrative review to constitutional review: The Weimar Republic

In the early 20th century, case law of the Prussian as well as other Supreme Administrative Law Courts continued to use legal tests resembling subtests of proportionality analysis more and more frequently.⁶² Simultaneously, the doctrine added theoretical underpinning in administrative law before and after the First World War. Jellinek⁶³ identified four sources of errors in police actions: He distinguished unsuitable, insufficient, harmful and overreaching action.⁶⁴

⁵⁷ Doubtful *Ibid.*, 41.

⁵⁸ See for an extensive overview of the case law B. Remmert, *Verfassungs- und verwaltungsrechtsgeschichtliche Grundlagen des Übermaßverbotes* (Heidelberg: C.F. Müller, 1995), 145 ff. The doctrine at that time distinguished between the theory of motive and the theory of necessity, see K. Friedrichs, 'Notwendigkeit und Zweckmäßigkeit einer polizeilichen Verfügung' (1909) 25 *Preußisches Verwaltungsblatt* 320. According to the first theory, administrative decisions could not be reviewed if they were based on a valid regulation. According to the second theory, such review was possible. It was used in particular in cases of overly broad prohibitions of specific behaviour.

⁵⁹ See for an overview including the famous case about the theatre play 'The Weavers' Ledford, 219-220.

⁶⁰ O. Mayer, *Deutsches Verwaltungsrecht* (Leipzig: Duncker & Humblot, 1895-1896), 267.

⁶¹ Hirschberg, 4.

⁶² *Ibid.*, 4 footnote 20 with further references. See e.g. *Preußisches Oberverwaltungsgericht* 1904, Bd. 45, 416 ff, 423-424.

⁶³ For a concise discussion of Oskar von Arnstedt's and Richard Thoma's views as two other representatives see Heinssohn, 54-55.

⁶⁴ W. Jellinek, *Verwaltungsrecht* (Berlin: J. Springer, 1928), 432 ff. Jellinek refers back to Mayer, Svarez and von Berg to found his views on proportionality. He also coined the German term of *Übermaß* (excess).

Overreaching action was explained in terms equivalent to a necessity test. Similarly, Fleiner used the distinctive phrase that the police should not ‘use cannons to shoot sparrows’ to express that police action had to respect proportionality.⁶⁵ It does not result clearly, however, whether Fleiner was already considering proportionality analysis *stricto sensu* with this phrase. Necessity had thus strengthened its hold in adjudication and the related doctrine, at least as far as administrative law was concerned.

At the level of constitutional law, the Weimar Constitution contained a catalogue of fundamental rights. These ‘basic rights’ were initially only seen as political declarations. However, the pertinent section of the Weimar Constitution came swiftly to life in the 1923 political crisis which was mainly caused by inflation and the connected threat to private property.⁶⁶ The very concept of basic rights was supported by a group of conservative, anti-parliamentarian and anti-positivist scholars who perceived it as a useful device to limit the powers of parliament.⁶⁷

On the other hand, eminent scholars such as Kelsen, while accepting constitutional review, rejected the concept of constitutional rights. In his view judges, in adjudicating such rights, would become positive lawmakers, acting based on a concept that could easily become a disguised entry point into the law for natural rights concepts.⁶⁸

At the level of the case law, the newly established *Reichsgericht* had to back up its claim for substantial constitutional review. It seized the opportunity of a series of takings cases to strengthen its self-proclaimed power of judicial review by giving a strong position to property rights, although with limited practical impact.⁶⁹ At the same time, the regional supreme administrative courts continued the tradition in the case law to protect individual rights in reviewing administrative acts.⁷⁰ Proportionality analysis could arguably have played a central role in continuing to develop the jurisprudence of the *Reichsgericht*,⁷¹ but the Weimar Republic did not survive long enough.

Summing up, the early 20th century saw the liberal conception of the State gaining ground with fundamental rights being enshrined in the Weimar Constitution. The representation of the rights of individuals were perceived as sufficiently important to justify the expansion of judicial review powers. With

⁶⁵ F. Fleiner, *Institutionen des deutschen Verwaltungsrechts* (Tübingen 1928) 8 edn (Aalen: Scientia Verlag, 1963), 404.

⁶⁶ Stolleis, 273.

⁶⁷ Stone Sweet and Mathews, 104, cite Carl Schmitt as one example.

⁶⁸ H. Kelsen, ‘La Garantie Juridictionnelle de la Constitution – La Justice Constitutionnelle’ (1928) 45 *Revue du droit public* 197.

⁶⁹ Stolleis, 272.

⁷⁰ *Ibid.*, 274. See also for references on academic debate involving proportionality analysis in the law of criminal procedure Hirschberg, 6-7.

⁷¹ Stone Sweet and Mathews, 104, argue in this direction comparing the situation to the Swiss Supreme Court which indeed took steps towards a proportionality *stricto sensu* test.

the increasing weight of fundamental rights in the legal order, the use of proportionality *stricto sensu* emerged after 1945.

e. The coming of age of the principle of proportionality in the case law of the Federal Constitutional Court

Equipped with the comprehensive catalogue of fundamental rights, in the early 1950s the Federal Constitutional Court began developing the classic four-pronged test of proportionality analysis. In a first decision on a compulsory quorum of signatures for small parties in a *Land's* election law, the Court referred to the limits drawn by the principle of proportionality.⁷²

The subsequent landmark case of 1958 was the *Apothekenurteil*. In this case the Federal Constitutional Court elaborated the need for a ‘balancing act’ (*Abwägung*) between two competing social interests – in the present case, freedom of profession versus the proposed aim of limiting the number of pharmacies for the purpose of ensuring continuous high quality provision of medical supplies for the health of the public. The Court strongly emphasized the need to go beyond the constitutional text which only protected the ‘essence’ of fundamental rights⁷³ for this purpose, then examined in great detail the public purpose brought forward by the Bavarian government – the alleged impossibility of remedying the perceived problem by other, less restrictive means – and finally found the law at issue in violation of the constitution.⁷⁴

In subsequent case law, the Federal Constitutional Court continued to require the respect of the ‘principle of proportionality’ as soon as an interference by the State into the sphere protected by the fundamental rights of the Basic Law occurred.⁷⁵

At about the same time, the doctrine also advanced comprehensive contributions on the principle of proportionality. Rupprecht von Krauss analysed the principle’s role in administrative law. He established the notion of ‘proportionality *stricto sensu*’ (*Verhältnismäßigkeit im engeren Sinn*) and clearly separated this test from necessity. Simultaneously, he laid down the need for a three-pronged test under the principle of proportionality, holding that a progression from suitability via necessity to proportionality *stricto sensu* was necessary. This need resulted from the fact that only after a necessity test could one specific measure be determined, which could then be subject to the weighing exercise of proportionality *stricto sensu*.⁷⁶

⁷² BVerfGE 3, 383 (399).

⁷³ Article 19 (2) of the Basic Law.

⁷⁴ BVerfGE 7, 377 (405, 406 ff.).

⁷⁵ See e.g. on the need to respect the principle of proportionality for price stabilisation measures BVerfGE 8, 274 (310); very comprehensive on all three stages of suitability, necessity and proportionality *stricto sensu* of the qualification requirements for craftsmen and the related restrictions on the freedom of profession BVerfGE 13, 97 (117 ff.).

⁷⁶ R. v Krauss, *Der Grundsatz der Verhältnismäßigkeit in seiner Bedeutung für die Notwendigkeit des Mittels im Verwaltungsrecht* (Hamburg: Kommissionsverlag Ludwig Appel, 1955), 15 ff.

Peter Lerche took matters to the level of constitutional law in his *Habilitation*. Based on the distinction between the sub-tests of the principle of proportionality introduced by Krauß, he focused in more detail on the third subtest. In his view, the test would offer an additional safeguard because any measure could pass the test of necessity if only it was attributed a purpose broad enough and adapted to its effects.⁷⁷ Simultaneously, he did not deny the difficulties of the weighing exercise intrinsic to proportionality *stricto sensu*. Even at this early stage, Lerche criticized a perceived over-stretch of the use of the principle of proportionality.⁷⁸ Consequently, he developed a precise categorisation, in which he suggested that the principle should be used exclusively under Article 19 (2) of the Basic Law as a factor to determine the essence of a fundamental right and for the more general limitation of fundamental rights.⁷⁹

iii. Conclusion

As a conclusion to the historical overview, the initial under-representation of fundamental rights and inexistent institutionalisation of judicial review has given way over the years to fundamental changes of perception of the State. Constitutional law has evolved and become the stage of representation for a much broader variety of values, based on the acknowledgement that the State's purpose should be limited and intrusions into the freedom of the individual must be limited and justified. This preliminary conclusion is bolstered if we look more closely at the constitutional normative debate on proportionality analysis: In Germany, there is an intense and fruitful debate on the anchorage of the 'principle of proportionality' in the very structure of the Basic Law.

B Constitutional Adjudication and The Principle of Proportionality as a Structural Feature of German Constitutional Law

The present section examines the role of the principle of proportionality both in doctrinal discussion and in sceptical accounts of the Federal Constitutional Court's emphasis on the principle. The discussion shows that there is wide-spread recognition of the structural embeddedness of the principle in the Basic Law. This supports our understanding that contextually, judicial review in German constitutional law is strongly marked as aiming for the equal representation of a broad range of constitutional values. In a second section, we show that there is also criticism of the omnipresent role of proportionality analysis in the doctrine, but that scholars do not contradict the findings of the first section; rather, voices call for reduced use of proportionality analysis, but not for its abolishment.

⁷⁷ P. Lerche, *Übermass und Verfassungsrecht* (Cologne: Heymann, 1961), 20.

⁷⁸ See *Ibid.*, foreword.

⁷⁹ *Ibid.*, 78 ff. and 106 ff.

i. The debate on the constitutional rank of the principle of proportionality

The debate on the constitutional rank aims to answer the crucial question whether all powers of the state are bound by the principle, in this case in particular the legislative power. If the latter is bound by the principle, control of adherence to it by courts is a logical consequence of the idea of the *Rechtsstaat*. The legislator still carries a different responsibility, because its role is the independent identification of regulatory objectives and the weighing of values and interferences. The principle of proportionality has thus been qualified as to its function for the legislator as a ‘mandate to form the law’, while for the executive and the judiciary it simply constitutes part of their binding attachment to the law.⁸⁰ Still, in purely normative terms, the unity and acceptance of proportionality analysis in German constitutional law can be derived to a large extent from this debate.

We subsequently assess various contributions on how to integrate the principle of proportionality into the structure of the Basic Law, showing thus that its function is linked with cornerstones of the Basic Law such as the principle of equality, fundamental rights and the *Rechtsstaat*.

a. *Deriving the principle of proportionality from equality*

Early views conceptually linked the principle of proportionality to the principle of equality.⁸¹ For Krauss, there was a distinction between rights to freedom which regulated where interferences by the State could take place and rights which protected freedom and regulated how interference had to be undertaken. The latter encompassed the principle of equality and because of its conceptually similar approach also the principle of proportionality.⁸²

However, other voices contend that there are important differences in the rationale of both principles. It has been pointed out that in particular the starting point of equality must be comparison and the availability of objects of comparison.⁸³ Proportionality, on the other hand, requires the decision of individual cases regardless of comparative cases. While the principle of equality thus demands that the decision-maker put measures in the legal and factual context, the principle of proportionality calls for the adaptation of ends and means in a single case, independently of the comparative context.⁸⁴ Conceptually, a distinc-

⁸⁰ P. Kirchhof, ‘Gleichmaß und Übermaß’ in P. Badura and R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens: Festschrift für Peter Lerche zum 65 Geburtstag* (Munich: C.H. Beck, 1993), 147.

⁸¹ See also for a strong view P. Wittig, ‘Zum Standort des Verhältnismäßigkeitsgrundsatzes im System des Grundgesetzes’ (1968) *Die öffentliche Verwaltung* 817, 819 ff.

⁸² Krauss, 29. Heinsohn, 67, notes, however, that Krauss does not *expressly* derive the principle of proportionality from the principle of equality.

⁸³ See e.g. Hirschberg, 121 ff.

⁸⁴ Kirchhof, 143.

tion between both the principle of equality and the principle of proportionality thus appears sustainable.

b. Deriving the principle of proportionality from fundamental rights

An alternative view proposes that the constitutional rank of the principle of proportionality can be derived from fundamental rights. Alexy's norm-theoretic account has already been discussed in this regard. Beyond this norm-theoretic account, others have focused more closely on the wording of the Basic Law. This thesis, which takes various forms, is most commonly based on an early landmark decision of the Federal Constitutional Court. The Court held that the principle of proportionality was invested with constitutional rank because it resulted from 'the principle of the *Rechtsstaat*; essentially already from the very nature of the basic rights, which, being an expression of the general entitlement to freedom of the citizen against the State, must be restricted by the public power only to the extent that it is indispensable for the protection of public interests'.⁸⁵

Reference can also be made to the concept of human dignity in Article 1 (1) of the Basic Law. Human dignity is made operational by Article 2 (1) of the Basic Law as a general freedom of action of the individual. This maximal concept of individual freedom can then be used as a basis to require justification for interference by means of opposing public or private interests which are recognized by the Constitution.⁸⁶

Others argue in favour of looking more closely at the wording of the Federal Constitutional Court's case law which spoke of the 'nature' of basic rights. Accordingly, the principle of proportionality should find its foundation in the concept of the untouchable core of basic rights, the 'essence' of a fundamental right which is explicitly enshrined in Article 19 (2) of the Basic Law. This view has for example been endorsed by the Federal Court of Justice, holding that the 'essence' of a fundamental right would be violated if an interference with the right went beyond what the reasons for the interference rendered 'unconditional and compulsory'.⁸⁷

However, the principle of proportionality conceptually reaches further than the prohibition of interference with the 'essence' of a fundamental right. There may be interferences which violate the principle of proportionality without, at the same time, causing such strong interference that the very core of a right is affected. Furthermore, the prohibition to impair the 'essence' of a right should be understood as 'absolute', while proportionate interference with fundamental rights in general constitutes only a 'relative' obligation.⁸⁸

⁸⁵ BVerfGE 19, 342 (348-349), author's translation.

⁸⁶ See e.g. A. Bleckmann, 'Begründung und Anwendungsbereich des Verhältnismäßigkeitsprinzips' (1994) *Juristische Schulung* 177, 178, who then however opts for the rule of law as the definite basis for the principle of proportionality.

⁸⁷ '[U]nbedingt und zwingend', see BGH St 4, 375 (377).

⁸⁸ See for these two arguments H. Krüger, 'Der Wesensgehalt der Grundrechte im Sinne des Art. 19 GG' (1950) *Die öffentliche Verwaltung* 597, 597 ff.

Yet another approach bases itself on a systematic reading of the Basic Law: The Basic Law has thus put freedom at the top of the Constitution, with a rule-exception system that requires interference with freedom by the State to pursue a public purpose and to respect a relationship of proportionality.⁸⁹

c. Deriving the principle of proportionality from the Rechtsstaat

Apart from fundamental rights, the *Rechtsstaat* is advanced as a possible conceptual ground for the principle of proportionality. Scholars have given great weight to the aforementioned reference by the Federal Constitutional Court to the ‘principle of the *Rechtsstaat*’⁹⁰ and point towards subsequent case law which held that the principle of proportionality had been derived by the Court in earlier case law⁹¹ from the *Rechtsstaat* as a fundamental decision of the Basic Law.⁹² Furthermore, the Bavarian Constitutional Court had already, from 1955 onwards, referred to the *Rechtsstaat* and the guarantees of fundamental rights of the Bavarian Constitution as the basis of the binding force for the principle of proportionality.⁹³

Consequently, scholars suggested that the *Rechtsstaat* and its entrenchment in the Basic Law could on its own serve as the basis for deriving a principle of proportionality of constitutional status which would bind all three powers of the State in their action.⁹⁴ Generally, this position is taken by a number of scholars, without however always going into detail on the notion of *Rechtsstaat* which underlies this assumption.⁹⁵

The problem connected with the foundation of the vague notion of *Rechtsstaat* lies in the potential leeway of an interpreter to fill the term with meaning; the shape of a principle of proportionality as a requirement for the exercise of public powers thus depends on the specific conception of the State. Furthermore, the non-applicability of the principle of proportionality in several areas of the Constitution, beyond doubt part of the *Rechtsstaat*, belies attempts to ground the principle in the notion of the *Rechtsstaat* itself.⁹⁶

As an example, to fill the term *Rechtsstaat* with meaning some have suggested a distinction between the subjective and objective aspects of the *Rechtsstaat*. The subjective side refers to the possibility for the individual to defend him- or herself against undue interference by the State or another

⁸⁹ D. Merten, ‘Der Verhältnismäßigkeitsgrundsatz’ in D. Merten and H.-J. Papier (eds.), *Handbuch der Grundrechte – Band III Grundrechte in Deutschland: Allgemeine Lehren II* (Heidelberg: C.F. Müller, 2009), 539 paras 37-38 with further references to various provisions of the Basic Law.

⁹⁰ *BVerfGE* 19, 342 (348-349), author’s translation.

⁹¹ Referring here to the aforementioned *Apotheken-Urteil* (405, 406 ff.).

⁹² *BVerfGE* 30, 1 (20).

⁹³ See for an overview of the case law Stern, 171-172.

⁹⁴ See for recent support for this conception H. Hofmann, ‘Artikel 20 GG’ in B Schmidt-Bleibtreu and others (eds), *Kommentar zum Grundgesetz* 12 edn (Neuwied: Carl Heymanns Verlag, 2011), 685 para 73.

⁹⁵ See with further references Stern, 172 and footnote 53.

⁹⁶ See for a concise overview Merten, 536 paras 32 ff.

individual, while a more objective approach would suggest that all action taken by the State must be taken with the public interest as an objective and must therefore be subject to the principle of proportionality.⁹⁷ For this purpose, it is necessary to develop an understanding of the rule of law as aimed at substantive justice, with proportionality as a tool to achieve such justice.⁹⁸

Based on this theory, a broad scope of application for the principle of proportionality would be supported: Rather than limiting the principle's use to cases where measures of the State interfere with an individual's position and rights, the Basic Law can be read as generally requiring all State action to pursue the public interest. The objective reading of the *Rechtsstaat* therefore requires weighing exercises under the principle of proportionality's auspices even if State organs only have to weigh public interests against each other.⁹⁹ For some commentators, however, unlike the situation of fundamental rights, such a weighing exercise is not to be undertaken by judges, but ought to be entrusted to parliament.¹⁰⁰

Such a broad recognition for optimisation through the principle of proportionality has been criticized as overreaching. The mandate for optimisation might easily become an authorisation for weighing without a clear benchmark and an obligation to reach the best possible result without much tangible normative content beyond empty formulas.¹⁰¹

d. A reconciliatory approach: Simultaneously deriving the principle of proportionality from fundamental rights and the Rechtsstaat

Eventually, as a reconciliatory approach, some suggest a compromise between the two broad claims of deriving proportionality analysis as a constitutional principle from fundamental rights or the rule of law.¹⁰² The historical development of both fundamental rights and the rule of law have been intertwined, in particular in the history of 19th century constitutional law, where most debate focused on the defence against undue interference by the State. Consequently, both contribute their share to the conceptual rooting of a principle of proportionality in the Constitution.¹⁰³ With this understanding, a limited reading of proportionality analysis as linked purely to the text of the Constitution, i.e. the catalogue of fundamental rights, can be overcome. This is due

⁹⁷ Bleckmann, 181.

⁹⁸ See for a closer analysis of this point E. Grabitz, 'Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts,' (1973) 98 *Archiv des öffentlichen Rechts* 568, 584.

⁹⁹ Bleckmann, 182, suggests that even here there remains a subjective side of this weighing obligation, because the public interests at stake can again be traced back to a 'sum of private interests'.

¹⁰⁰ *Ibid.*, 182.

¹⁰¹ See e.g. Kirchhof, 136-137, who warns of 'exaggerated' expectations which constitutional law and the organs of the constitution face in this scenario.

¹⁰² See for a simultaneous deduction from the *Rechtsstaat* and the concept of fundamental rights A. Voßkuhle, 'Der Grundsatz der Verhältnismäßigkeit' (2007) *Juristische Schulung* 429, 430.

¹⁰³ Heinsohn, 72.

to the fact that the reading together with the idea of the *Rechtsstaat* leads to a structural understanding, in which case the interference with specific private interests – enshrined in fundamental rights – requires, based on the *Rechtsstaat*, the respect of a principle of proportionality which can be controlled by courts. Simultaneously to this enlarged reading of fundamental rights, the notion of the *Rechtsstaat* is not overstretched to require a rather ominous benchmark of proportionate optimisation from all organs of the constitution at all times, a requirement that seems to unduly do away with the constitutional texts. It also reflects the subjective and objective dimension of fundamental rights as defending the individual, but simultaneously incorporating certain specially protected legal values with a spill-over force beyond the sphere of the individual. They also act in particular as negative competence norms limiting the legislator's margin of manoeuvre and create an objective order of values capable of expanding into the private realm – as the *Lüth* decision has shown.¹⁰⁴

e. Conclusion

The goal of the above discussion has not been to support one particular theory on the constitutional rank of the principle of proportionality. Rather, the discussion shows broad support to structurally understand the German constitution as a broad system of values that requires representation of those values, which for many scholars happens through the constitutional status given to proportionality analysis. In particular theories basing the principle of proportionality on the broad concept of the *Rechtsstaat* make it easier to understand the spread of proportionality analysis throughout German constitutional law: As is subsequently discussed, the test has not only been used in the classic opposition between public interests and fundamental rights as shields, but also to weigh public interests against each other and positive obligations under fundamental rights, socio-economic rights and fundamental rights in their private law dimension.

At the same time, this broad recognition of the need to appropriately represent constitutional values has not always resulted in praise for proportionality analysis. As the subsequent section shows, the over-reliance on the latter has been criticized by a number of scholars. However, as the discussion shows, there is hardly any rejection of proportionality analysis as such. Criticism of the potential difficulties of its application have been issued, but have only led to calls for a limited standard of review¹⁰⁵ and not the rejection of the principle as such.¹⁰⁶ The constitutional rooting that has been identified for the principle has

¹⁰⁴ See on these two dimensions or functions of fundamental rights S. Müller-Franken, 'Vorbemerkung vor Art. 1. Allgemeine Grundrechtslehren' in B. Schmidt-Bleibtreu and others (eds.), *Kommentar zum Grundgesetz* 12 edn (Neuwied: Carl Heymanns Verlag, 2011), 95 paras 11 ff. and 97 paras 15 ff.

¹⁰⁵ See e.g. Kirchhof, 148-149.

¹⁰⁶ Stern, 165, refers to the principle as 'undisputed'.

ensured that the principle is perceived as binding for the legislative, executive and judicial power.¹⁰⁷

ii. Doctrinal criticism of the principle of proportionality

The principle of proportionality began to spread further across the Constitution and was referred to more and more by the Federal Constitutional Court and by the doctrine. This led to a backlash of doctrinal criticism and some meandering in the case law. The present section briefly discusses the general points of criticism that were advanced against the perceived ‘overexpansion’.¹⁰⁸

Lerche already identified the problem of an overexploitation in his early writing. His *Habilitation* aimed at the establishment of categories of fundamental rights where the principle of proportionality should apply and others where it should not.¹⁰⁹ His classification was not, however, subsequently taken up by the judiciary; it also was rejected in the doctrine because he suggested that even for certain central fundamental rights, in particular Article 12 of the Basic Law on the freedom of profession, the principle of proportionality should not apply.¹¹⁰

General criticism continues to attack the massive use of the principle as a problem of legal thinking and legal culture at large. The excessive use of proportionality analysis is perceived as provoking an ‘atomisation’ of the normative material of the Constitution.¹¹¹ The process of weighing is denounced as irrational and even references to the constitutional order as a general benchmark to rationalize the classification of constitutional values are rejected as futile.¹¹²

Another line of scholars denounces the loss of dogmatic thoroughness caused by reliance on the principle of proportionality. In the field of interference with fundamental rights, where the principle has been used the longest, it was already remarked in the late 1970s that the case law abandoned more and more an exact analysis of which fundamental right had been violated in a concrete case by what means, in order to rely summarily on the weighing exercise of proportionality analysis instead. The phrase of an ‘osteomalacia’ of the legal order was coined later, because soft ‘topoi’ arguably replaced directing norms.¹¹³

Some also seem to perceive the use of the principle of proportionality as intellectual laziness, whereas dogmatic work would be required to develop a

¹⁰⁷ Merten, 543 para 43.

¹⁰⁸ Many use the term *Überdehnung* here, see e.g. Stern, 175.

¹⁰⁹ Lerche, 140 ff.

¹¹⁰ Heinsohn, 68.

¹¹¹ Ridder, quoted in F. Ossenbühl, ‘Maßhalten mit dem Übermaßverbot’ in P. Badura and R. Scholz (eds.), *Wege und Verfahren des Verfassungslebens: Festschrift für Peter Lerche zum 65. Geburtstag* (Munich: C.H. Beck, 1993), 157.

¹¹² B. Schlink, ‘Der Grundsatz der Verhältnismäßigkeit’ in P. Badura and H. Dreier (eds.), *Festschrift 50 Jahre Bundesverfassungsgericht* (Tübingen: Mohr Siebeck, 2001), 460.

¹¹³ Ossenbühl, 157.

solution for the relevant situation of value conflict. Pieroth and Schlink cite as an example the traditional dogmatics of legitimate expectations and the prohibition of retroactive effect which come into play more and more in the test of proportionality *stricto sensu* of the Federal Constitutional Court, but which would in practice offer the opportunity to overcome formless balancing by rigorous dogmatics.¹¹⁴

Much of this criticism resembles points already discussed by opponents of the Principles Theory. It is noteworthy, however, that criticism does not reject the principle of proportionality *per se*, but rather an over-reliance on it in a large variety of cases.¹¹⁵ Since proportionality analysis has been recognized as a seemingly 'scientific' method of neutral representation of values, unlike in United States constitutional law criticism focused on its scientific attributes rather than on a misrepresentation of values.¹¹⁶ We can thus safely conclude that the general acceptance of the principle of proportionality in the doctrinal discourse can be taken as part of the context of judicial review.

iii. Conclusion

The present section has aimed to show that the broader debate on proportionality analysis in German constitutional law leaves little doubt that constitutional adjudication using proportionality analysis is recognized in its function of reconciling and representing a broad range of values enshrined in the constitution. There are numerous voices that give constitutional status to the principle of proportionality based on structural features of the Basic Law. Furthermore, criticism attacks the use of proportionality analysis because of its typical difficulties as discussed earlier.¹¹⁷ They do not, however, question its very existence and use by the Federal Constitutional Court, but only denounce over-reliance on it. As a last topic, we turn our attention to institutional features, only to find that the Federal Constitutional Court in itself also fulfils the requirements of a representative institution for judicial review.

C Institutional Aspects of Judicial Review in German Constitutional Law

The institutional features of the Federal Constitutional Court in our opinion point towards a strong position in the constitutional system of institutions foreseen by the Basic Law.

¹¹⁴ B. Pieroth and B. Schlink, *Grundrechte* 21 edn (Heidelberg: C.F.Müller, 2005), 69 para 295a.

¹¹⁵ As Ossenbühl, 158, also suggests, the problem does not lie in the principle as such, but rather the need to cut back some rank growth.

¹¹⁶ J. Bornhoff, 'Genealogies of Balancing as Discourse' (2010) 4 *Law & Ethics of Human Rights* 109, 127 and 134.

¹¹⁷ See already chapter 2 section II.A.

The prerogatives of the Federal Constitutional Court are far-reaching and exclusive: While every German judge possesses the power to review statutes as to their compatibility with the constitution, the competence to invalidate laws lies exclusively with the Federal Constitutional Court.¹¹⁸ A law can thus be brought before the Court within the framework of concrete review as a referral from a lower judge. Simultaneously, there is also the possibility of abstract review if there is a dispute about the constitutionality of a statute which is brought before the Court by the federal government, the government of a *Land* or a quarter of the members of parliament.¹¹⁹ The individual constitutional complaint gives individuals direct access to the Federal Constitutional Court – if all other legal remedies have been exhausted.¹²⁰ The effect of a judgment on the compatibility of a statute with the Constitution is *inter omnes*.¹²¹ There are thus a number of ways for complaints to reach the Court.

Also, its members are experienced in domestic law and appointed based, to some degree, on a representative political compromise. The 16 judges on the bench of the Court are all fully qualified lawyers, 6 of them must come from the federal high courts.¹²² They are elected for 12 years without the possibility for renewal of their term. As a peculiarity, they sit in two senates that both act as the Court when deciding cases. This represents a political compromise between a model where one court with a set of fairly well-known judges – comparable to the United States Supreme Court¹²³ – adjudicates cases and a model where this task is done by a more flexible and anonymous system of rotation, where a group of judges would be picked out of the whole body of judges for each case.¹²⁴ Senates of eight judges also mean that there is a possibility for stalemate, which is, as some suggest, based on the preference for concordant solutions over majority decisions.¹²⁵

Given the accessibility of the Court, its specialisation and the radiant effect of constitutional law and in particular fundamental rights, scholars have – not without reason – spoken of ‘overarching powers’ of the Federal Constitutional

¹¹⁸ Article 100 (1) of the Basic Law.

¹¹⁹ Article 93 (1) pt. 2 GG.

¹²⁰ See for a more detailed analysis of the subject J. Fedtke, ‘*Drittwirkung in Germany*’ in D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere – A Comparative Study* (London/New York: Routledge-Cavendish, 2007), 134–135.

¹²¹ Schlaich and Koriath, 79 para 117.

¹²² C. Schönberger, ‘Anmerkungen zu Karlsruhe’ in M. Jestaedt and others (eds.), *Das entgrenzte Gericht – Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht* (Suhrkamp, Berlin 2011), 17.

¹²³ See chapter 4 section II.D.

¹²⁴ Schönberger, 18.

¹²⁵ *Ibid.*, 19, suggests that this preference even goes back to the days of the reformation, where a compromise between Catholic and Protestant factions, rather than a decision by majority, constantly had to be sought.

Court.¹²⁶ The Court claims high authority in the domestic realm.¹²⁷ In particular through the *Lüth* decision, the Court has engaged an ‘expanding constitutionalisation’ of the German legal system,¹²⁸ which involves the Court itself as the ultimate authority on decisions of how to optimize constitutional values.

D Conclusion

As the discussion of the broader context of judicial review shows, over the course of history institutionalisation of judicial review and codification of human rights were initially hampered over a long period by political struggles. Then, however, the post-War period brought forward an all the more powerful judiciary equipped with the comprehensive text of the Basic Law and the multiplicity of values enshrined in it. Also, there is an intense debate on proportionality analysis and constitutional adjudication which has, however, hardly ever questioned the principle of proportionality as such. Criticism focused on its over-expansion or some of its features, while a broad discourse has even propagated the principle as possessing constitutional status as a virtually indispensable structural feature of the broad provisions of the Basic Law and the variety of values enshrined in the latter. Lastly, even the institutional setting of the Federal Constitutional Court provides it with broad powers, which it has extensively used to become the supreme authority to ensure equal representation and weighing of constitutional values. With these descriptive features in place, we can now engage in an informed assessment of the procedural democracy doctrine as the conceptual justification for judicial review in German constitutional law. It becomes clear that to a great extent, the review powers of the Court are based on a broad view accepting a wide variety of values as potentially threatened by the democratic process. This broad justification for review has to be qualified to some extent, however, as the Court has indeed made an effort to nuance the intrusiveness of its scrutiny and in particular take a different approach in the field of horizontal effects of fundamental rights.

¹²⁶ Fedtke, 153.

¹²⁷ This authority is not only claimed in domestic law, but also in relation to international courts. The relationship with the Court of Justice of the European Union is briefly addressed in chapter 6. Also, in its relationship to the European Court of Human Rights, the Federal Constitutional Court has emphasized that, although it accepts the former’s interpretation of the European Convention on Human Rights and Fundamental Freedoms in principle, the ultimate test for the application of the Convention remains its own reading of the German Constitution, see *BVerfGE* 2 BvR 1481/04 of 14 October 2004 (para 62).

¹²⁸ Fedtke, 153.

III The Justification of Judicial Review in German Constitutional Law

In this section, we contrast the findings of the previous discussion of the broader context with the debate on the justification of judicial review. As discussed in the theoretical chapter,¹²⁹ the procedural democracy doctrine appears to be the most fruitful approach in assessing how adjudicators perceive that their power of review is justified, and thus how it is to be shaped. In German constitutional law, we discover that the debate is not necessarily as vivid and explicit as that in United States constitutional law.¹³⁰ Yet, we identify varying standards of review and applications of proportionality analysis at various occasions. A closer examination shows that generally, the Federal Constitutional Court seems to follow the ideas of the procedural democracy doctrine. Furthermore, in the field of effects of fundamental rights in private law, the Court seems to perceive its review function differently from other cases. Our general conclusion thus classifies judicial review in German constitutional law as following an equal representation review model, but qualified accordingly for fundamental rights in their private law dimension.

A General Discussion on the Appropriate Standard of Review

The problem of the appropriate relationship between the judiciary and the legislator was already discussed early on in the literature on the principle of proportionality. However, the debate has not progressed as far as in the context of United States constitutional law, where a heated debate on the limits of justification of judicial review is ongoing to this date.¹³¹

In Germany, early literature tried to deny that the legislator could be bound at all by the principle of proportionality. The perceived danger was that such binding force of the principle could give an undue measure of control to the judiciary and would endanger the separation of powers.¹³² Opposing views, however, developed the idea that the ‘spirit of the Constitution’ could actually require the application of a principle of proportionality.¹³³

Generally, there is a claim for a more intrusive standard of review in cases of interference with fundamental rights as values highly protected by the Constitution. The intensity of control grows with the intensity of interference. But at the same time, scholars constantly caution that the Federal Constitutional Court must be aware of its position as an instance of control and not of alternative

¹²⁹ See chapter 2 section V.B.iv.

¹³⁰ See chapter 4 section III.A.

¹³¹ See chapter 4 section III.

¹³² O. Pohl, *Ist der Gesetzgeber bei Eingriffen in die Grundrechte an den Grundsatz der Verhältnismässigkeit gebunden?* (Cologne: Kleikamp, 1959), 119.

¹³³ Günter Dürig, quoted by Stern, 171.

legislator in applying proportionality *stricto sensu*.¹³⁴ Some have also termed the relationship between the legislative and the judicial power in this field as being between the ‘first’ and the ‘second’ interpreter of the Constitution, the first being called to continuously foster and expand the legal order with a margin of discretion. The Federal Constitutional Court as the ‘second interpreter’ cannot take over this task of the legislator.¹³⁵ The margin of discretion for a decision-maker is thus much larger in cases where the principle of proportionality serves as the benchmark of control of the legislator’s action than in cases where the law-applying powers, the executive and judicial branch, are the focus of control. The legislator enjoys a margin of prognosis, appreciation and evaluation.¹³⁶

Beyond these general remarks, the procedural democracy doctrine would, however, also require the Court to adapt its intrusiveness of review based on the substantive justification of judicial review – i.e. based on the values at issue and to what extent the Court fears failure of the democratic process which requires judicial review to step in for protection. We thus assess a variety of specific situations where the Court has reacted to this challenge, though not always with sufficiently explicit reasoning. The consequent process of adapting the use of proportionality analysis and the standard of review has sometimes been termed ‘respecification’ in the doctrine.¹³⁷

B Respecification of Review and Proportionality Analysis

We can subsequently assess three different situations where the procedural democracy doctrine seems to have played a major role in the Court’s reflection on its appropriate exercise of review. Under the principle of equality, the reasoning mirrors that adopted by the United States Supreme Court to some extent.¹³⁸ In the case of positive obligations under fundamental rights, the potential to restrict the legislator’s discretion has led to the use of truncated tests, without a pertinent justification for why a lower standard of review could not have achieved similar outcomes. In the case of effects of fundamental rights in the sphere of private law, we suggest that what the Federal Constitutional Court has effectively done in developing its review by means of indirect horizontal effect can best be explained as the recognition that in this special case, courts of private law are reviewing with special emphasis on one particular interest. As a consequence, the Court has – appropriately in our eyes – adapted its pre-balancing and thus scrutiny to this model.

¹³⁴ L. Michael, ‘Die drei Argumentationsstrukturen des Grundsatzes der Verhältnismässigkeit’ (2001) *Juristische Schulung* 148, 150.

¹³⁵ Kirchhof, 148.

¹³⁶ See Merten, 543 para 45 and 544 para 47 with further references to case law.

¹³⁷ The term of ‘respecification’ (*Respezifizierung*) for this process was coined by Schmidt-Assmann (quoted in Ossenbühl, 163).

¹³⁸ See chapter 4 section III.A.

i. The procedural democracy doctrine and the variable standard of review under the principle of equality

The Federal Constitutional Court's reflections on the required intrusiveness of scrutiny are observable mostly in the case law on the principle of equality. Under this principle, the Court adapts its scrutiny by distinguishing two situations in which the standard of review becomes stricter. It should be noted that in principle, the Court has for a long time only relied on a loose verification of suitability before adopting a new formula which appears to come closer to an application of more fully-fledged proportionality analysis. It can be shown that the German discussion to some extent takes up the ideas of procedural democracy, but in essence revolves around whether full-scale proportionality analysis should be used. In fact, we suggest that the standard of review with which to apply proportionality analysis could be the more essential question.

The standard for violation was initially arbitrariness: to treat fundamentally same matters in an arbitrarily different way or to treat fundamentally different matters in an arbitrarily equal way.¹³⁹ The scrutiny of such arbitrariness (*Willkürkontrolle*) consists in searching for reasonable explanations for a measure which result from the nature of the matter or other objective reasons.¹⁴⁰ With the countless different characteristics of matters, to define sameness under such a loose standard of review must as a result prove impossible, and only a focus on differences and their weight proves conceptually feasible.¹⁴¹

The door towards a more comprehensive reasoning on the justification of differentiations and differential treatment has been opened with the adoption of the 'new formula' in the Federal Constitutional Court's case law of the early 1980s.¹⁴² A continuum between rather loose and rather strict control has been developed in the case law and should mirror the discretion of the legislator. The stricter control effectively comes close to the principle of proportionality.¹⁴³

Two situations can be highlighted in the Federal Constitutional Court's case law. First, differentiations based on characteristics which are closely tied to persons and difficult to change by an individual are treated with closer scrutiny, because they can be understood as similar to the prohibited criteria for differentiation under the specific prohibitions of discrimination of minorities enshrined in Article 3 (3) of the Basic Law.¹⁴⁴ These are to be distinguished from mere differential treatment based on factual circumstances.¹⁴⁵ Cases of indirect

¹³⁹ See e.g. *BVerfGE* 1, 14 (52).

¹⁴⁰ See e.g. *BVerfGE* 7, 305 (315).

¹⁴¹ See also Michael, 152.

¹⁴² *BVerfGE* 55, 72 (88).

¹⁴³ The development is concisely summarized in *BVerfGE* 88, 87 (96-97).

¹⁴⁴ Article 3 (3) of the Basic Law lists less favourable treatment based on the criteria of sex, descent, race, language, geographical origin, belief, religious or political views and handicaps as prohibited.

¹⁴⁵ See e.g. on certain delays of preclusion in procedural law which apply differently to the same party at different stages of the procedure, *BVerfGE* 55, 72 (89).

discrimination which arise in the process are again subject to a more strict control as far as a certain group of persons who suffer differential treatment can be clearly identified.¹⁴⁶ The control is less rigid if the concerned persons can adapt to the regulation by adopting a certain conduct to avoid negative consequences.¹⁴⁷

Second, differential treatment which causes interference with constitutional rights to freedom is also assessed more strictly. The discretion of the legislator is thus reduced if by treating persons in a different manner it simultaneously interferes with other constitutionally granted positions.¹⁴⁸

In both situations, it has been suggested that the full version of the principle of proportionality should apply.¹⁴⁹ The safeguard against arbitrariness otherwise applicable under the principle of equality comes down to a mere test of suitability. As a reaction, in the later case law, the further steps of proportionality analysis are applied by the Court, though not always systematically. Some confusion emerges in particular as regards the separation between the principle of proportionality applied in the case of interference with a fundamental right and a parallel potential breach of the general principle of equality.¹⁵⁰

With these observations in mind, it can be suggested that the battle seems to be taking place on the wrong front. There is arguably a plausible claim that the discretion of the legislator to differentiate in legislation should not be restricted too heavily. However, the solution could be not so much the refusal of full proportionality analysis under the principle of proportionality, but rather an adaptation of the standard of review, as the example of United States constitutional law shows.¹⁵¹ Through such a weaker standard, review would only question the legislator's discretion if a threshold of plausibility in the differentiation has been transgressed. United States constitutional law distinguishes different 'tiers of scrutiny', under which the intrusiveness of review is adapted to the case at issue.¹⁵² More intrusive scrutiny is triggered by differential treatment based on 'suspect classifications', which go back to the ideas of procedural democracy. German constitutional law seems to react similarly by identifying situations where differential treatment is based on characteristics that can hardly be changed and seem to identify and disadvantage a particular group beyond the

¹⁴⁶ See e.g. on the differential treatment of social security contributions for certain kinds of salaries in comparison to others which cause differential treatment between groups of employees, *BVerfGE* 92, 53 (69).

¹⁴⁷ *BVerfGE* 55, 72 (89).

¹⁴⁸ See e.g. the exclusion of students from unemployment benefits which interferes with their right to property as regards the contributions paid to the unemployment insurance, *BVerfGE* 74, 9 (24-25).

¹⁴⁹ See for further references Michael, 153 footnote 56.

¹⁵⁰ See e.g. the rather obscure analysis in *BVerfGE* 88, 87 (96-99).

¹⁵¹ See for the distinction between the debate on 'balancing' and on the appropriate standard of review chapter 4, sections III and IV.

¹⁵² See in detail chapter 4 section III.A.iii.

groups already expressly identified as particularly vulnerable in Article 3 (3) of the Basic Law.¹⁵³

The second prong of procedural democracy suggests that failure of the democratic process as the justification for intrusive review can not only be observed in outcomes that disadvantage specific groups, but also in outcomes that disadvantage particular values. In United States constitutional law, there is a tendency at this point to emphasize rights closely connected to the democratic process, such as the right to free assembly or the freedom of expression.¹⁵⁴ The case law of the German Federal Constitutional Court shows far more breadth here. Violation of any other constitutionally protected position, i.e. any fundamental right,¹⁵⁵ requires closer scrutiny. Thus, for the Court a violation of fundamental rights is more broadly a sign of failure of the democratic process that justifies judicial review, with no limitation on particular groups of rights as in the United States' example.¹⁵⁶

Summing up, the Federal Constitutional Court seems to follow similar lines of thought in the case law on equality as the United States Supreme Court. The distinctions just discussed have also been generally welcomed in the doctrine.¹⁵⁷ However, there is an unfortunate overlap between the debate on whether full-scale proportionality analysis should be used and the debate on the intrusiveness of review.¹⁵⁸ Separating both issues could, in our view, produce the useful result that proportionality analysis would be used as conceptually defensible solution, while a carefully selected and well-argued standard of review ensures appropriate discretion to the legislator's need to differentiate in legislation. There is in particular hardly a fully convincing suggestion why the principle of equality should fall outside the realm of equal representation of values before the judge that proportionality analysis suggests. The equal representation review which predominantly seems to be followed by the Court is a convincing solution in the light of these arguments.

¹⁵³ See on the structure of Article 3 of the Basic Law section IV.A.

¹⁵⁴ See chapter 4 section III.A.

¹⁵⁵ See e.g. *BVerfGE* 92, 53 (69).

¹⁵⁶ Compare chapter 4 section III.A.ii.

¹⁵⁷ See for further references Pieroth and Schlink, 108 para 444.

¹⁵⁸ See also in this light misguided criticisms of comparisons with the system of tiers of scrutiny in United States constitutional law. See e.g. W. Heun, 'Artikel 3 GG' in H. Dreier (ed.) *Grundgesetz Kommentar* 2 edn (Tübingen: Mohr Siebeck, 2004), 246 para 28, who rejects the use of proportionality analysis because the tiers of scrutiny in United States constitutional law in his view would only mirror the prohibited classifications codified in Article 3 (3) of the Basic Law. This view does not accord any attention to differences in the standard of review, which is the main feature of the debate in United States constitutional law rather than the discussion on full proportionality analysis or 'balancing'. Neither does it take into account that the Federal Constitutional Court has – just like the United States Supreme Court – proven flexible in the identification of vulnerable groups and has thus gone beyond the text of Article 3 (3) Basic Law, mirroring the findings of the procedural democracy doctrine.

ii. The case of positive obligations for the State derived from fundamental and socioeconomic rights: The procedural democracy doctrine and the *Untermassverbot*

Early on the German doctrine had developed the concept of two functions of fundamental rights, as protecting the individual from interference by the State and as obliging the State to protect individuals from interference through other private entities.¹⁵⁹ While it remains disputed whether the principle of proportionality can be applied to assess whether the State's measures satisfactorily fulfil the duty of protection at stake, at least conceptually, the two functions can of course be understood as complementary: The State as the protector of liberty must not unduly interfere with this liberty, which is granted by the respect of the principle of proportionality. At the same time, however, it must not go below a certain threshold of protection for freedom.

Some have suggested that the principle of proportionality could effectively be applied in the same manner for duties of protection.¹⁶⁰ Others, however, have contended that a standard of its own should apply. This principle, referred to as *Untermassverbot*, can be more clearly based in the Constitution than the principle of proportionality itself as *Übermassverbot*. In particular, the former can be based in the nature of the duties of protection of fundamental rights and the explicit codification of Article 19 (2) of the Basic Law, which prohibits all impairment of the 'essence' of a fundamental right.¹⁶¹

As soon as positive action by the State is required, the application of proportionality analysis in judicial review meets with the reproach of unduly restricting the discretion of the legislator. In German constitutional law, the situation of positive obligations and of socioeconomic rights requiring positive action by the State have led in principle to two lines of case law. We can observe reluctance to engage in full-scale proportionality analysis. The procedural democracy doctrine could, however, to some extent justify, as in the previous case of the principle of equality, an adaptation of the standard of review rather than the abandonment of proportionality analysis as such.

A first line of cases suggests judicial control based on whether measures taken by the legislator are 'sufficient for an effective and adequate protection' of the endangered right.¹⁶² A second line emphasizes the need to give an appropriate space for deliberation and decision to the parliament and reduces the

¹⁵⁹ The German terminology has developed the notion of *Untermaßverbot* (prohibition of inadequate action) in contrast to the often used *Übermaßverbot* (prohibition of excessive action), see in particular C.-W. Canaris, 'Grundrechte und Privatrecht' (1984) *Archiv für die civilistische Praxis* 201, 228.

¹⁶⁰ See for a representative of this so-called congruency thesis (*Kongruenzthese*) K.-E. Hain, 'Der Gesetzgeber in der Klemme zwischen Übermaß- und Untermaßverbot?' (1993) 108 *Deutsches Verwaltungsblatt* 982.

¹⁶¹ See in particular J. Dietlein, 'Das Untermaßverbot, Bestandsaufnahme und Entwicklungschancen einer neuen Rechtsfigur' (1995) *Zeitschrift für Gesetzgebung* 131, 136.

¹⁶² *BVerfGE* 88, 203 (254, author's translation).

control of the judiciary. As a consequence, a violation is only found if the State's organs have not acted at all or if their action is 'evidently insufficient' in order to achieve the objective of protection.¹⁶³ A last line of case law seems to combine the two standards and asks both for 'adequate and effective protection', while a violation will only be found if the State's authorities have not acted at all or if the measures taken are 'evidently insufficient'.¹⁶⁴ Scrutinizing newer legislation on the minimum subsistence level, the Court has again applied the 'evidently insufficient' standard to find violations only where certain statistical models for calculating payments had been deviated from without justification.¹⁶⁵

Reading this case law, some understand the stricter standard as similar to the principle of proportionality, only exchanging the middle step of necessity with a need to look for 'effectiveness': Alternatives would thus be measures which grant more effective protection, but cause only the same degree of interference with another fundamental right or constitutional value.¹⁶⁶ The problem is, however, the apparent absence of a third level of proportionality *stricto sensu* which is not reflected in the case law to date.

Conceptually, in the situation of duties to protect derived from fundamental rights the benchmark of control goes beyond the means-ends control of specific legislative measures and assesses in more breadth whether a mandate of protection enshrined in the Constitution has been fulfilled adequately by the legislator.¹⁶⁷

Other views have thus suggested that a different test operates for the case law on positive obligations. The second step of the test should be a test looking for an 'already sufficient' minimum of protection. A measure must thus not remain below the required level of protection, while the State has the right to realize a right to a higher degree unless another fundamental right is violated by such action.¹⁶⁸ As an example, sometimes a State must sanction certain violations of the law by means of criminal law for the sake of deterrence.¹⁶⁹

Summing up, the situation of duties of protection derived from fundamental rights has raised claims in the doctrine to extend the principle of proportionality as a benchmark of control for constitutional review. Parts of the doctrine as well as the Federal Constitutional Court have, however, opted for a different, less intrusive test based fundamentally on the argument that more discretion

¹⁶³ See in particular *BVerfGE* 56, 54 (80-81, author's translation).

¹⁶⁴ *BVerfGE* Beschluß vom 27.04.1995 AZ 1 BvR 729/93, *Neue Juristische Wochenschrift* 1995, 2343 (author's translation).

¹⁶⁵ *BVerfGE* 125, 175 (225-226).

¹⁶⁶ Michael, 151.

¹⁶⁷ Dietlein, 136. It appears remarkable that even some proponents of the Principles Theory whose initial reflex was to adhere to the congruency thesis seem to eventually embrace a distinction between two different legal tests, see M Borowski, *Grundrechte als Prinzipien* 2 edn (Nomos: Baden-Baden, 2007), 150 ff.

¹⁶⁸ Merten, 564 para 85.

¹⁶⁹ *Ibid.*, 565 para 89.

must be granted to the legislator in fulfilling its duties of implementation of the protection of a fundamental rights.

On the one hand, claims to respect the discretion of the legislator are convincing in the light of the latter's complex task to coordinate and reconcile a variety of constitutional and public values. Constitutional review can here only remain a final, loose check.

However, it remains unclear why deviation from the principle of proportionality should occur if a lower standard of review could achieve the same. In particular, taking as the baseline the procedural democracy doctrine, it is difficult to see why a failure of the democratic process could not occur in the field of positive obligations and thus justify judicial review by means of proportionality analysis. In German constitutional law, this view is bolstered by the seemingly comprehensive set of fundamental rights whose neglect appears to be a problematic failure of the democratic process in the eyes of the Federal Constitutional Court.

Indeed, one can argue that the strength of the justification of judicial review is less strong in the field of positive obligations. However, we suggest that it reveals a rather classic, nearly libertarian conception of fundamental rights and judicial review as defensive shields if such review by means of full-scale proportionality analysis is only accepted for the classic case of interference by the public power with the individual's sphere of liberty. Positive obligations may be just as relevant for the appropriate protection of fundamental rights as tools ensuring the smooth functioning of the democratic process. It appears difficult to grasp why there could not be a problem of disproportionate realisation of a fundamental right by the legislator. To take up the earlier example, if criminal sanctions are taken e.g. to protect the right to privacy, such sanctions could simultaneously have a substantial impact on other public interests or rights – e.g. the freedom of expression. A test consisting of a reduced version of the principle of proportionality appears incapable of appropriately taking into account the second interest. Proportionality analysis applied with a sufficiently lenient standard of review, however, could arguably remedy the problem.

Summing up, again a more explicit distinction between the standard of review and the use of proportionality analysis could resolve a number of problematic features in the case law and more consistently represent pre-balancing and the procedural democracy doctrine. Again, substantially there is hardly any convincing reason why departure from the model of equal representation review should lead to a rejection of full-scale proportionality analysis. Systematic use of the standard of review should be sufficient to ensure discretion for the legislator.

iii. The procedural democracy doctrine, judicial review and the effects of fundamental rights in private law

In a landmark decision, the Federal Constitutional Court has set out the radiating effect that fundamental rights possess even beyond the

vertical relationship between the individual and the public power. The present section first briefly sets out the theories of direct and indirect horizontal effect of fundamental effects in private law, before turning to the question of the procedural democracy doctrine and the appropriate model of review. We conclude that private autonomy as the central pillar of private law suggests that a model of special interest review is more appropriate.

a. Theories of horizontal effect in German constitutional law

The question has arisen whether and to what extent fundamental rights may also protect individuals from interference by other individuals. If the principle of proportionality is closely linked to fundamental rights, this could also extend its reach beyond public into private law.

Generally, the idea of such horizontal effect of fundamental rights (*Dritt-wirkung*) was first developed in the field of labour law by Nipperdey, who argued that it should apply to grant equal pay for men and women.¹⁷⁰ Scholars supporting this idea argued that the changing societal landscape led to situations where individuals were in a situation of inequality of power and dependence which required protection through fundamental rights, including from intervention by other private actors. Certain fundamental rights, depending on their content, thus should also apply in private relationships as the expression of principles that should always be valid in a well and justly ordered society.¹⁷¹

The problematic consequence of such an approach of direct horizontal effect is that in private law, the legal position of every individual and their freedom is thus limited because of the compulsory respect for others' fundamental rights. Leisner has suggested that a distinction between two situations of private law should be drawn: On the one hand, in the field of contracts contractual freedom remained unharmed, because contracts could be understood as a waiver of fundamental rights protection. Outside the law of contracts, however, no similar construct could be used, and a collision of fundamental rights becomes unavoidable. More special fundamental rights and rights granted without derogations should prevail over other fundamental rights in such situations.¹⁷²

Sceptical scholars have insisted, however, on the fact that fundamental rights apply according to the express wording of the Basic Law between the individual and the State.¹⁷³ Furthermore, a virtually unlimited number of collisions of fundamental rights would be caused in private relations at every occasion, leading to an enormous amount of necessary weighing operations, implying wide-spread use of the principle of proportionality.¹⁷⁴ Again others have argued

¹⁷⁰ H.C. Nipperdey, *Grundrechte und Privatrecht* (Krefeld: Scherpe, 1961), 13 ff.

¹⁷¹ *Ibid.*, 20 ff.

¹⁷² W. Leisner, *Grundrechte und Privatrecht* (Munich: C.H. Beck, 1960), 384 ff.

¹⁷³ Article 1 (3) of the Basic Law.

¹⁷⁴ H.-J. Papier, 'Drittwirkung der Grundrechte' in D. Merten and H.-J. Papier (eds.), *Handbuch der Grundrechte – Band II Grundrechte in Deutschland: Allgemeine Lehren I* (Heidelberg: C.F. Müller, 2006), 1339 para 18.

that the general right to freedom as enshrined in Article 2 (1) of the Basic Law includes the right not to use one's rights in private relations, which is in addition pointed out by certain norms of private law that prohibit particularly disadvantageous contracts and would be pointless if fundamental rights applied directly in a horizontal manner.¹⁷⁵ Furthermore, the application of the principle of proportionality would result in a much more restrictive standard and would heavily limit contractual freedom.¹⁷⁶ In addition, the application of proportionality analysis is criticized as it would lead to a reduction of legal certainty in private law generally. The result of the weighing exercise required by each and every single of the many possible collisions between fundamental rights would be unpredictable.¹⁷⁷

With these points in mind, Dürig has suggested an alternative thesis. In his view, fundamental rights should apply with indirect horizontal effect. Fundamental rights thus apply in the relationship between individuals only indirectly, because they include a right to autonomy which may derogate from fundamental rights and is shaped in the form of a special law – private law – which primarily applies between individuals. The respect for the outer boundaries of fundamental rights is granted by the general clauses of private law which are applied with the guarantees of fundamental rights in mind, thereby assuring the autonomy of private law and simultaneously the conceptual unity of the legal order as a whole.¹⁷⁸

Although these theories were developed with a focus on contract law, courts subsequently took them up in virtually all fields of private law. The Federal Court for Labour Matters (*Bundesarbeitsgericht*) under Nipperdey as its first president endorsed the theory of direct horizontal effect in its case law as early as 1954, arguing that certain fundamental rights could bind private employers as part of the *ordre public* of the legal order.¹⁷⁹

The Federal Constitutional Court, on the other hand, took a different position in the 1957 landmark decision in *Lüth* and adopted the thesis of indirect horizontal effect. It held that a civil court judgment can violate the fundamental right to free speech if the relevant general clause of the accepted principles of morality was interpreted without taking due account of the special value of this fundamental right.¹⁸⁰ As suggested by Dürig, private law must thus be interpreted against the background of fundamental rights, but without them having direct horizontal effect.

¹⁷⁵ G. Dürig, 'Grundrechte und Zivilrechtsprechung' in T Maunz (ed.) *Vom Bonner Grundgesetz zur Gesamtdutschen Verfassung: Festschrift zum 75 Geburtstag von Hans Nawiasky* (Munich: Isar Verlag, 1956), 158 ff., for example points at Article 138 of the Civil Code (*Bürgerliches Gesetzbuch*) in this respect.

¹⁷⁶ *Ibid.*

¹⁷⁷ Papier, 1340 para 20.

¹⁷⁸ Dürig, 176 f.

¹⁷⁹ BAGE I, 185 (193).

¹⁸⁰ BVerfGE 7, 198 (212).

Indirect horizontal effect of fundamental rights has thus over the years become dominant in the case law as well as legal doctrine and has effectively extended the reach of the principle of proportionality to private law.¹⁸¹

b. The procedural democracy doctrine, fundamental rights and private law

Bringing the procedural democracy doctrine into the picture, one may wonder whether and how the principle of proportionality should be extended to the sphere of private law. The question for the Federal Constitutional Court is therefore what failure of the democratic process it can tackle by means of its review in the sphere of private law, where *a priori* only private individuals interact. Centrally, the system of private law and of courts adjudicating private law matters is institutionally separated from the constitutional realm, insofar as the latter only addresses vertical citizen-state relationships.

As scholars have underlined, the principle of the separation of powers would be seriously compromised if, for example, direct horizontal effect of fundamental rights is accepted. As a matter of competence, the legislator is the designer of the legal order of private law and is therefore required to take the necessary decisions by weighing fundamental rights. By applying fundamental rights directly, this power would effectively be transferred to a large extent to the judiciary, as it would then be the judge who has to execute the same weighing decision again in every single case.¹⁸²

The problem of judicial review at this stage was already identified by the Federal Constitutional Court in *Lüth*: Should intrusive proportionality analysis be adopted here to scrutinize whether appropriate space has been attributed to fundamental rights, the Federal Constitutional Court could become – contrary to its position as a specialized court as designated by the Constitution¹⁸³ – an extraordinary instance of review for all private law cases. To avoid this scenario, the test adopted asks only whether the civil court has in its judgment correctly recognized the relevance and scope of a fundamental right and weighed it against the interests of the claimants.¹⁸⁴ In a number of subsequent cases, the Federal Constitutional Court continuously applied the reasoning of *Lüth* and struck down private law judgments. The Court generally used the principle of proportionality, but with a lenient standard of scrutiny: it seems to only strike down judgments of other courts if arguments based on fundamental rights had been left aside or erroneously used by courts.¹⁸⁵ In all cases, however, the Court

¹⁸¹ Papier, 1342 para 24. Even the Federal Court for Labour Matters abandoned the thesis of direct horizontal effect in its later case law and started to follow the Federal Constitutional Court's line of reasoning, see Papier, 1343 para 26.

¹⁸² Papier, 1341 para 21.

¹⁸³ See Fedtke, 133.

¹⁸⁴ *BVerfGE* 7, 198, (214). See Schlaich and Koriath, 177 para 281, on the self-restraint of the Federal Constitutional Court when reviewing judgments of other specialized courts.

¹⁸⁵ The Court held, for example, that in advertising cases the law against unfair competition had not been applied with due regard to the freedom of expression of companies or had prohibited advertising with

left no doubt that it aimed not to reassess the balance found in the framework of private law, but simply aimed at sanctioning courts that had not undertaken the effort to use the margin of discretion granted by general clauses to correct imbalances in the light of fundamental rights.

The solution of using the principle of proportionality but combining it with a rather low standard of review seems convincing if the division of labour in the legal system is taken into account appropriately. The application of fundamental rights in itself may justify the use of proportionality analysis and gives some teeth to the argument for judicial review. Procedural democracy is thus, in the eyes of the Court, also to be understood as extending to violations of fundamental rights in the private sphere. Indeed, it appears difficult to sustain that private actors cannot cause interferences with fundamental rights that could require the intervention of the Federal Constitutional Court. However, two aspects must be taken into account: First, the Federal Constitutional Court acts here as a review instance for other courts. Second, the main balancing exercise for competing values has already been undertaken by the creation of the system of private law in itself, which also includes the realisation of competing public interests.¹⁸⁶ The choice of a deferent standard of review can thus be justified as in principle empowering the Federal Constitutional Court to intervene in extreme cases, while leaving the resolution of conflicts primarily to the sphere of private law, respectful of the idea of private autonomy.¹⁸⁷

For the situation of private law, the Federal Constitutional Court has thus accepted that private law courts act under a special interest review model, which aims to uphold private autonomy as the balance of fundamental rights created by the legislator. Consequently, it has adapted its own scrutiny to special interest review, only intervening by means of proportionality analysis if a truly severe imbalance has occurred.

C Conclusion

A number of reflections on judicial review have marked the way in which the principle of proportionality has been applied by the Federal Constitutional Court. The present section has aimed to channel these concerns into the spectrum suggested by pre-balancing and the procedural democracy as the justification of judicial review. Indeed, next to general remarks on the standard of review between different courts, it was also shown that the use of proportionality analysis seems to react to the strength of the justification of judicial review. As an example, stricter review takes place under the principle of equality if discrimination for specific minorities based on immutable characteristics takes place; as the procedural democracy thesis suggests, this indicates a failure of the

insufficient reasons, see *BVerfGE* 102, 347 (362) and *BVerfGE* 107, 275 (284 f.).

¹⁸⁶ See M. Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341, 362-363.

¹⁸⁷ Fedtke, 153. See also Kumm, 364-365.

democratic process. Generally, while the doctrinal debate has unduly focused on whether full proportionality analysis should be used, the more appropriate concern should arguably be the appropriate standard of review. There is hardly any reason to deviate from the model of equal representation review found when examining the broader context of judicial review.

A different situation is present for the review in cases of horizontal effect of fundamental rights. Here we found the justification of judicial review to be weaker because the Federal Constitutional Court only intervenes at second level after the system of private law and other courts have already intervened to resolve a conflict. Consequently, we have suggested that the solution found by the Court appropriately reflects a model of special interest review, where only a severe imbalance of values reaching the threshold of virtual neglect for one fundamental right can lead to intervention of the Court.

IV The Principle of Proportionality

The present section sets out in detail the way in which proportionality analysis has been used by the Federal Constitutional Court. We have found that generally, the context of judicial review in German constitutional law is conducive to the use of proportionality analysis, and also a pre-balancing exercise speaks out in favour of its use under a model of equal representation review. Only in the field of fundamental rights in private law does the predominance of the interest of private autonomy call for a different approach. Accordingly, we agree with the Court's comprehensive assessments of proportionality set out in the subsequent section.

As a starting point, we assess fundamental rights norms in the Basic Law, before showing how the Court has interpreted them by developing the 'principle of proportionality' in its classic form.

A Fundamental Rights in the Basic Law

The Basic Law contains a catalogue of fundamental rights in its title I. The perhaps most classic example is offered by the rights to freedom. Such rights grant a certain amount of autonomy to the individual and require that interference by the State be justified to some extent. There are special rights to freedom such as the freedom of faith and conscience,¹⁸⁸ freedom of assembly¹⁸⁹ and association¹⁹⁰ or the right to property and the protection against expropriation.¹⁹¹

¹⁸⁸ Article 4 of the Basic Law.

¹⁸⁹ Article 8 of the Basic Law.

¹⁹⁰ Article 9 of the Basic Law.

¹⁹¹ Article 14 of the Basic Law.

Some rights are coupled with an express provision on restrictions. As a typical example, Article 8 reads in full:

Article 8

[Freedom of assembly]

(1) All Germans shall have the right to assemble peacefully and unarmed without prior notification or permission.

(2) In the case of outdoor assemblies, this right may be restricted by or pursuant to a law.

The provision lays down one value, the fundamental right to freedom of assembly, while providing only for restrictions based on a law. As another example, this also applies to the general right to personal freedom in Article 2 of the Basic Law which operates in a subsidiary manner to the more special freedoms.¹⁹² The provisions on fundamental rights of the Basic Law generally do not spell out in more detail how interference with fundamental rights may occur. There is neither a list of public interests which could justify interference nor a provision that would spell out a requirement of proportionality. There are, however, also rights without an express reference to restrictions. Article 4 (1) of the Basic Law reads for example:

Freedom of faith and of conscience, and freedom to profess a religious or philosophical creed, shall be inviolable.

In spite of the absence of an express possibility for restrictions, it is assumed that a coherent and unitary reading of the Constitution requires that limitations (*Schranken*) on such rights must also be possible.¹⁹³ A similar reasoning thus applies across the various rights.

Beyond the individual provisions on specific rights, Article 19 of the Basic Law provides generally for the ‘restriction of basic rights’ that any law interfering with rights must apply generally and not only to an individual case; it must also indicate which right is affected.¹⁹⁴ Furthermore, the ‘essence’ of a basic right must not be affected.¹⁹⁵

A slightly different situation is presented by the principle of equality enshrined in Article 3 of the Basic Law. It spells out general equality before the law,¹⁹⁶ prescribes equal treatment of men and women¹⁹⁷ and prohibits differential treatment based on specific grounds.¹⁹⁸ Under the principle of equality, not

¹⁹² See on the subsidiary application of Article 2 of the Basic Law *BVerfGE* 21, 227 (23).

¹⁹³ See e.g. Michael, 150.

¹⁹⁴ Art 19 (1) of the Basic Law.

¹⁹⁵ Article 19 (2) of the Basic Law.

¹⁹⁶ Article 3 (1) of the Basic Law.

¹⁹⁷ Article 3 (2) of the Basic Law.

¹⁹⁸ Article 3 (3) of the Basic Law.

all differential treatment is prohibited. Rather, differential treatment must be based on objective grounds.

As a third category, fundamental rights may also result in obligations for the State to protect certain interests. Article 2(1) of the Basic Law for example provides for comprehensive protection of the right to life. Not only are certain interventions by the State prohibited, but duties are also imposed on the State to create conditions which favour e.g. the birth and upbringing of children, in order to prevent abortions.¹⁹⁹ In these cases entailing positive obligations of the State, the value conflict is marked by the fact that the State has to weigh its possibilities to further one value against its actual technical and financial capacities.

B The classic form of the principle of proportionality

Examining the use of the principle of proportionality, we rediscover the classic four-pronged scheme that was initially set out as the ‘prototype’ of proportionality analysis. As has previously been shown in the discussion of the justification of judicial review, there is a lot of emphasis on the applicable legal test in German constitutional law, but insufficient discussion is dedicated to the appropriate standard of review.

i. Determining legitimate objectives

The initial classic concept of the principle of proportionality applies to the limitation of fundamental rights by legislative, administrative or judicial measures; it is thus a ‘limitation of limitations’ (*Schranken-Schranke*).²⁰⁰ If, for example, a judge is called to apply the principle, as a starting point the means and the purposes of a law in question have to be determined carefully. Individual means should be examined separately, while the multiple purposes most regulation pursues are relevant for each examination of an individual measure.²⁰¹ It must also be determined to what extent certain regulatory purposes receive specific emphasis in the law, e.g. by means of an obligation to protect or further a purpose enshrined in constitutional law.²⁰² For basic rights without an explicit possibility of derogation by means of laws, only colliding constitutional law can justify interference. As not all constitutional policy objectives are laid down in the formal Constitution, it is often suggested that one ought to

¹⁹⁹ See e.g. *BVerfGE* 88, 203 (259).

²⁰⁰ Michael, 148.

²⁰¹ L. Michael, ‘Grundfälle zur Verhältnismässigkeit’ (2001) *Juristische Schulung* 654, 655.

²⁰² As an example, Article 20a of the Basic Law codifies as a policy objective the protection of nature and animals. By contrast, Article 22 (2) of the Basic Law which determines the colours of the national flag does not in itself create a policy objective to protect the flag, *BVerfGE* 81, 278 (293).

use a wider notion of ‘material’ constitutional law, which includes non-written public interests and purposes.²⁰³

As an example, in one case, the Court had to deal with the claim that the crafts code unduly restricted the freedom of profession, because it made access to certain professions conditional upon the successful completion of an apprenticeship and the relevant exams. The Court held that the State could indeed open access to the crafts and leave it to the free market to sort out less able competitors to the benefit of good craftsmen. However, it chose not to do so and introduced the crafts code pursuing the goal of protecting the reputation of the profession, in order to make sure that incompetent persons could not take up a craft and damage the reputation of the profession in the first place.²⁰⁴

ii. Suitability

The first step of suitability only excludes measures which in no way further any of the regulatory purposes that have been previously identified. Even a partial positive effect on one pursued purpose is sufficient. Simultaneously, an erroneous prognosis by the legislator on the expected effect of a measure falls within the margin of discretion and does not render a measure unsuitable.²⁰⁵

In the case of the crafts code mentioned above, the Federal Constitutional Court explained that the code’s requirements could be accepted as suitable because it strengthened the need for the individual to acquire the skills and knowledge necessary to exercise a profession, a need that would also exist independently of state regulation in the individual’s self-interest.²⁰⁶

iii. Necessity

The subsequent step, the test of necessity, incorporates two prongs. First, it must be assessed whether an alternative measure can be identified that causes a weaker interference with the fundamental right at issue or an interference with a weaker protected area.²⁰⁷ An alternative measure can be a milder form of the original measure, but it must in any case achieve all the purposes of the original measure at least to the same extent. Even if there appears to be a much less restrictive measure available that would result in only a small loss in the achieved benefit, such a measure cannot qualify as an alternative.²⁰⁸

²⁰³ Müller-Franken, 108 para 45.

²⁰⁴ *BVerfGE* 13, 97 (115).

²⁰⁵ See e.g. *BVerfGE* 30, 250 (263).

²⁰⁶ *BVerfGE* 13, 97 (116).

²⁰⁷ Michael, ‘Grundfälle I’, 656-657, names as one example an interference with the general right to freedom in Article 2 (1) of the Basic Law instead of an interference with a specific right to freedom from the catalogue of fundamental rights.

²⁰⁸ See for a comprehensive analysis e.g. *BVerfGE* 81, 70 (90 ff.).

In the case of the crafts code, the less restrictive measure of allowing very specialized professional profiles was suggested, with the idea that such profiles could then be accessible with less extensive apprenticeship and examination requirements. However, the Court found that a certain latitude in the definition of the crafts professions and the related professional requirements was indispensable, which could justify to some extent over-reaching examination requirements.²⁰⁹

iv. Proportionality *stricto sensu*

The third step of proportionality *stricto sensu* allows a weighing of costs and benefits. At that point, the legislator must carefully weigh the relationship between the competing constitutional values, a process which has been described as ‘gentlest balance’ (*schonendster Ausgleich*)²¹⁰ or ‘practical concordance’ (*praktische Konkordanz*)²¹¹. For the collision the mutual interference of constitutional values must thus be limited as far as possible to give the most scope to both for all persons concerned in the circumstances of the case. If it is unavoidable, the circumstances of the case should determine which value has to step back.²¹² The test fundamentally evaluates interests, but does not – unlike the previous stage – compare with alternative measures.²¹³ Generally, the exercise includes an abstract assessment of the values at issue, a concrete assessment of the intensity of the interference with the fundamental right and the conflicting value and a third step of weighing which questions whether the relationship between means and ends can be considered as adequate in the light of the previous assessments.

Sometimes it has been suggested that an additional test of individual reasonableness applies within the framework of the principle of proportionality. Such a test would delineate the outer line of proportionality and inquire whether an unacceptable burden is being imposed on one person.²¹⁴

In the case on the crafts code, the Federal Constitutional Court denied that the requirements of the final examination were disproportionate; the inclusion of business-related skills in the subjects of the examination was indispensable for future self-employed craftspersons. Furthermore, statistics showed that only a small number of individuals failed the exam in practice.²¹⁵

²⁰⁹ BVerfGE 13, 97 (117-118).

²¹⁰ See on this formula P. Lerche, ‘Stil und Methode verfassungsrechtlicher Entscheidungspraxis’ in P. Badura and H. Dreier (eds.), *Festschrift 50 Jahr Bundesverfassungsgericht* (Tübingen: Mohr Siebeck, 2001), 349 with further references.

²¹¹ K. Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (Heidelberg: C.F. Müller, 1995), para 72.

²¹² The landmark case in this regard is the *Lebach* decision, see BVerfGE 35, 202 (225).

²¹³ Michael, ‘Grundfälle I’, 657.

²¹⁴ Merten, 558-559 paras 75-76.

²¹⁵ BVerfGE 13, 97 (118-119).

C Exclusion of the principle of proportionality

It should be noted that there are cases where the principle of proportionality has been excluded. In the so-called ‘renegade’ case, a law provided that a civilian airplane could be shot down if it had been hijacked by terrorists to be used as a weapon, taking into account the likely death of the passengers taken hostage. The Federal Constitutional Court based its reasoning in particular on the fact that by such a measure the State treats the passengers as mere objects for the purpose of saving the lives of others, which fundamentally contradicts the concept of human dignity enshrined in Article 1 (1) of the Basic Law together with the right to life in Article 2 (2) of the Basic Law.²¹⁶ This highest constitutional value could not be made subject to the weighing exercise suggested by proportionality analysis.²¹⁷

D Conclusion

The section has briefly examined the principle of proportionality as the form in which proportionality analysis is applied in German constitutional law. Based on the broadly worded provisions in particular on fundamental rights of the Basic Law, the Federal Constitutional Court has indeed put into practice its judicial review following the model of equal representation review, extensively using proportionality analysis in the form of the principle of proportionality. The previous section has pointed out why we largely assign the German setting of judicial review to the model of equal representation review. As a result, the widespread use of proportionality analysis to its fullest extent comes as no surprise.

V Evaluation and Conclusion

This first comparative study on German constitutional law serves to gauge our instruments of comparison. It features a rather broadly accepted practice of proportionality analysis by the generally accepted authority of the Federal Constitutional Court. Going into more detail, however, some first criticism can be levelled against the state of the case law, in particular if we compare it with the reasoning in United States constitutional law, which proves

²¹⁶ *BVerfGE* 115, 118 (152 ff.). It should be noted that the Court left open the question of whether under certain limited circumstances, a duty to sacrifice oneself can exist for the individual in the case of an attack directed at the polity at large and the destruction of the public order of law and freedom (at 159).

²¹⁷ See on the intense doctrinal debate surrounding the decision H. Hofmann, ‘Artikel 1 GG’ in B. Schmidt-Bleibtreu and others (eds.), *Kommentar zum Grundgesetz* 12 edn (Neuwied: Carl Heymanns Verlag, 2011), 119 para 19. On a possible theoretical justification for this exclusion of proportionality *stricto sensu* see chapter 2 section II.A.i.b.

somewhat more insightful on the topic of the justification of judicial review through the procedural democracy doctrine.

The Federal Constitutional Court has effectively weakened or intensified its scrutiny in each case under the equality clause, mirroring to some extent the procedural democracy doctrine. However, the Court has not accompanied the flexibility of its standard of scrutiny with sufficient explanation of its reasoning.

Generally, fragmentation prevails in the use of proportionality analysis beyond the field of fundamental rights as shields. In the latter field, a unified, consistent and convincing practice of proportionality analysis has emerged. However, under positive obligations and socioeconomic rights, the debate on the *Untermassverbot* has led to the rejection of proportionality analysis instead of to a clearer, better argued choice of the appropriate standard of review.

On the other hand, in the case of horizontal effect of fundamental rights, the Court deserves more praise: It has set out well the reasons why it applies proportionality analysis, but only with due deference based on private autonomy and the relevant balance of values that should only be upset through its review in cases of severe under- or non-representation of particular fundamental rights.

It becomes apparent that the Court has not yet fully overcome a view that predominantly perceives fundamental rights as shields against public interference. This perspective is unconvincing, in particular in the light of the substantial amount of provisions of the Basic Law that prescribe a broader view of fundamental rights which includes their socioeconomic dimension and positive duties upon the State.

Summing up, the Court has thus not fully realized the potential of its model of equal representation review. The subsequent chapter on United States constitutional law shows that more comprehensive reasoning on the procedural democracy doctrine is a helpful tool; yet it forewarns us of a different danger currently not present in German constitutional law: In United States constitutional law, categorisations and particular levels of scrutiny have developed into a system that seriously restrains the Supreme Court in its analytic capacities. In German constitutional law, as some have pointed out, it does not even necessarily matter that much which precise right is being infringed, since the scrutiny under the principle of proportionality ends up being so similar.²¹⁸

²¹⁸ See sceptical voices on this point discussed in section II.B.ii.

United States Constitutional Law

I Introduction

The most noticeable difference in a comparison of German constitutional law and its rather uniform principle of proportionality with the parallel case law in United States constitutional law is fragmentation. There seem to exist two separate, though sometimes overlapping debates in United States constitutional law, which also influences the structure of this chapter. On the one hand, there is intense debate on the level of scrutiny, based on the procedural democracy doctrine. On the other hand, there is debate as to whether the Supreme Court should use ‘balancing’ as a loose form of proportionality *stricto sensu*¹ at all. The scepticism towards balancing is partly based on concerns about the institutional capacities, but predominantly on the fear of an under-protection of rights.² The historical context and the strong perception of rights as shields against undue public interference have a constant impact on the Court’s case law. While in German constitutional law fundamental rights and judicial review establishing appropriate protection of rights has been a slow fight to, in United States constitutional law the same two pillars were established early, with constitutional debate following different lines as a consequence. It is in this comparative angle that historical elements play an important role and are thus also emphasized in this chapter in the same way as in the previous one.

United States constitutional law presents a variety of conflicts of values. For the present chapter, two main areas have been chosen because of the intense debate surrounding ‘balancing’ as a legal test in both of them. We assess fundamental rights review and the Dormant Commerce Clause as a provision which protects inter-state trade. In assessing the justification of judicial review in the second section, we find that the Dormant Commerce Clause provides a useful example of special interest review which is in contrast to the situation of equal representation present under fundamental rights review. Although the Supreme Court seems to take a rights-based view of the Clause, it has subsequently established a rather rigid system of categorisation where ‘balancing’ only plays a role in a limited number of cases.

For the review of fundamental rights we conclude that the Supreme Court operates under a model of equal representation review just like the German Federal Supreme Court, but has found a different way to pre-balance the arguments resorting from the context of judicial review. Under the Dormant Commerce Clause, review tends more to follow a model of special interest review. Categorisation has, however, led to some rigidity in the scrutiny which leads to unfavourable representation of the competing values of trade and regulatory autonomy.

¹ See on the definition of balancing already chapter 2 section II.B.ii.

² See insightful on this point M. Cohen-Eliya and I. Porat, ‘American balancing and German proportionality: The historical origins’ (2010) 8 *International Journal of Constitutional Law* 263, 276.

II The Broader Context of Judicial Review in United States Constitutional Law

The central phenomenon of the case law in United States constitutional law is fragmentation. We subsequently aim to flesh out the claim that the Supreme Court – much more than the German Federal Constitutional Court – sees itself confronted with political contestation of its authority and the reach of its review function. For this purpose, the history of judicial review, the continuing debate on its features and the institutional setting of review by the Supreme Court are assessed in closer detail. These features in our eyes do not justify a different use of proportionality analysis, but can merely explain the prevailing fragmentation, which we assess critically in the last section.

The historical insights show a continuous movement between strong assertions of authority by the Supreme Court followed by contestation from the other institutions of the constitutional system. However, in light of the incomplete text of the Constitution, the Court has had to engage in far-reaching interpretative struggles to broaden the scope of rights protection.

The resulting debate on the appropriateness of judicial review continues to this date, despite the fact that institutional features would bolster the conclusion that the Supreme Court is generally well equipped for a use of proportionality analysis.

A The Emergence of Judicial Review in United States' Constitutional History

Judicial review in the United States began with vagueness. Because of the excesses of British Parliament, American colonies developed a degree of scepticism against uncontrolled parliamentary supremacy as known from the British constitutional system.³ As a consequence, the American constitutional system put more trust in legal texts right from the start, which led to the adoption of a written constitution as a more powerful constraint on the power of Congress.⁴ The written form raised the question of who should be in charge of interpreting the text.

i. The early advent of judicial review

Judicial review is understood by some as a logically connected step, since the drafters of the Constitution rejected other mechanisms of control over the legislator.⁵ Views opposed to judicial review, however, feared that a

³ D.A. Farber and S. Sherry, *Judgment Calls – Principle and Politics in Constitutional Law* (New York: Oxford University Press, 2009), 13.

⁴ *Ibid.*, 14.

⁵ S.B. Prakash and J.C. Yoo, 'The Origins of Judicial Review' (2003) 70 *The University of Chicago Law Review* 887, 982.

court, given the power of judicial review, might become dangerous as it would inevitably seek to accrue its powers at the expense of the other institutions.⁶

As a consequence of such profound disagreement, the actual words in the Constitution dedicated to the Supreme Court and judicial review remained sparse: Article III Section 2 of the Constitution states that the ‘judicial power shall extend to all cases, in law and equity, arising under this Constitution’. Yet, it also gives power over cases arising under the ‘laws of the United States’ generally. A second textual foundation can be found in the supremacy clause of Article VI, Section 2. The text declares that the Constitution and federal law as made ‘in pursuance thereof’ are the supreme law of the land. It then states that ‘judges in every state’ are bound by this clause. There is thus no clear textual basis holding that the Supreme Court is invested with a power of judicial review as the ultimate authority over constitutionality of federal and state law. This vagueness has led to an ongoing debate over judicial review.

The Judiciary Act of 1789 which created the Supreme Court did not clarify to which extent the new court would use its potentially wide jurisdiction and powers. The new court itself only slowly started working, with about fifty decisions during its first decade.⁷

Marshall as the new Chief Justice seized the opportunity of the case of *Marbury v. Madison* to hand down a landmark decision on the question of judicial review.⁸ The case was received with substantial criticism and threats to impeach at least one justice, but subsequent judicial restraint helped in navigating these troubled waters to slowly accustom the other branches of government to the new role claimed by the Supreme Court. Similar criticism re-emerged against the Court after its decision in the *Dredd Scott* case,⁹ where it held that Congress lacked power to prohibit slavery in various territories of the United States.¹⁰

ii. Continuous contestation of the Supreme Court’s review function

After the Civil War, the Court took up with more vigour the task of scrutinizing regulation of economic affairs. Based on prevailing business-friendly attitudes among the justices, the Supreme Court used intense scrutiny in its fundamental rights review and struck down many laws. Fundamental rights’ foundation and reach was increased by the use of substantive due

⁶ See for an insight into these ‘anti-federalist’ voices opposed to ‘federalist’ views M.J. Faber, *Our Federalist Constitution – The Founder’s Expectations and Contemporary American Government* (El Paso: LFB Scholarly Publishing, 2011), 150 ff.

⁷ L. Baum, *The Supreme Court* 10 edn (Washington: CQ Press, 2010), 20.

⁸ *Marbury v. Madison*, 5 U.S. 137 (1803). See for a closer discussion of the legal arguments section II.C.i.

⁹ *Scott v. Sandford*, 60 U.S. 393 (1857).

¹⁰ See on these turbulences R.G. McCloskey, *The American Supreme Court* 5 edn (Chicago: University of Chicago Press, 2010), 62–63.

process.¹¹ This strengthening of review provoked increasing opposition by the federal legislator, whose extension of powers the Court had previously supported with a rather low-profile use of its review powers. In 1937, Roosevelt responded to the repeated attacks on his plans of socio-economic legislation under the New Deal with the ‘court-packing plan’. This law aimed to add more justices favourable to Roosevelt’s plans for socio-economic regulation to the Court.¹² In a manoeuvre often referred to as the ‘switch in time that saved nine’, the Supreme Court prevented this plan and reversed its case law. It introduced varying degrees of scrutiny for individual categories of fundamental rights problems, effectively upholding from then onwards most socio-economic regulation under the New Deal.¹³

Eager to assert its authority, the Court did not refrain from bold statements. As an example, it held in *Cooper* that based on *Marbury* ‘the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the country as a permanent and indispensable feature of our constitutional system’.¹⁴

Yet, not all other branches of government or commentators were willing to accept the ultimate interpretative authority of the Constitution. Later years, in particular the 1960s, saw a Court mainly occupied with the development and protection of civil liberties.¹⁵ In its series of clashes with the other branches of government, particularly in the aftermaths of the decision in *Roe v. Wade*, the Supreme Court faced massive opposition. In this decision a limited right to abortion during the first trimester of a pregnancy had been found to be part of the right to privacy enshrined in the Constitution. The Republican party started to openly pursue a strategy of using future appointments of Supreme Court justices with the clear aim of creating a majority to overturn *Roe v. Wade*.¹⁶ The result has been an increasing politicisation of the appointment process and a conservative shift in the views represented among the Supreme Court justices, although perhaps not as strong a shift as some may have hoped for.¹⁷

iii. Conclusion

To conclude, an introductory overview of the establishment of judicial review in United States constitutional law leaves one with the impression of a pendulum swinging between strong, assertive positions taken by the Court and subsequent judicial restraint or change of direction because of

¹¹ See section II.B.i.

¹² Baum, 22.

¹³ Prakash and Yoo, 895. See section III.A.ii. on the tiers of scrutiny and the decision in *Carolene Products*.

¹⁴ *Cooper v. Aaron*, 358 U.S. 1 (1958) at 19.

¹⁵ As perhaps the landmark decision, *Brown v. Board of Education* 347 U.S. 483 (1954) should be mentioned here.

¹⁶ McCloskey, 188-189.

¹⁷ Baum, 24.

opposition by the public, doctrine or political institutions. The Supreme Court constantly faced such opposition, which has even gone as far as to various plans to change the composition of the Supreme Court to reduce its power or enable reversals of its jurisprudence. The Court departed from a fairly weak textual basis to construct its authority. In particular, it had to engage in extensive interpretative endeavours to both extend the number of rights protected under United States constitutional law and ensure the recognition of fundamental rights by both the state and the federal level. Contestation can be understood in light of these practically law-making interpretations to which the Supreme Court had to resort.

B Completing the Constitution: Interpretative Strategies towards a More Inclusive Model of Equal Representation Review

Two controversies plagued the drafting process of the United States Constitution. As a starting point, dispute arose as to whether a list of fundamental rights should be drafted, in particular because of the effect of an exhaustive listing which would potentially exclude the protection of other rights. Second, the drafters disagreed as to whether such a list should apply only to the federal government – seen as a bigger threat by some – or also to state governments. The resulting incompleteness had to be filled by the Supreme Court. The use of the concepts of the doctrine of incorporation and of unenumerated rights demonstrates that the Supreme Court was willing to engage in an almost law-making interpretation in order to ensure that constitutional values are appropriately represented in its review.

i. Unenumerated rights

During the drafting of the Constitution, debate arose on whether an explicit Bill of Rights should be included in the text or not. Federalists such as Hamilton were in favour of fundamental rights, but suggested that the Constitution as it was – without a special Bill of Rights – already enshrined them; an explicit list of rights might actually end up limiting the possibility to protect other rights not mentioned in such a list.¹⁸ Eventually, however, the Ninth Amendment was adopted together with what is commonly referred to as the Bill of Rights in 1791. The Amendment stated that the ‘enumeration [...] of certain rights [,] shall not be construed to deny or disparage others retained by the people’.

A number of rights are thus explicitly mentioned in the Constitution. Among others, the Bill of Right most prominently protects the freedom of

¹⁸ Faber, 250-251.

speech, of the press, of assembly¹⁹ and the free exercise of religion, the latter combined with a prohibition of an establishment of one religion by the federal public power.

The Ninth Amendment has been ‘studiously avoided’ by the Supreme Court despite parties’ reliance on it on various occasions,²⁰ but it is the conceptual basis of the protection of values which are not explicitly enshrined in the Constitution.²¹ The Court noted early that some vital interests – property, life and freedom of persons – found no explicit protection under the Bill of Rights. It eventually found a basis for the protection of such rights in the clauses on due process in the Fifth and Fourteenth Amendments, respectively. The Supreme Court thus developed the concept of substantive due process.

a. Substantive due process and the protection of non-written interests as rights

As early as in 1798, Justice Chase already suggested striking down a state law based very broadly on the spirit and underlying principles of the Constitution without linking his claim to one specific limitation on government power.²² On several occasions, the case law relied on unwritten principles to protect rights such as property.²³ However, sceptical scholars pointed out that the written Constitution should represent the supreme will of the people and primarily be relied upon, and that according to the idea of police powers, legislation not forbidden by the written constitution should be presumed to serve the public good.²⁴ At this stage, the Bill of Rights was only applied routinely to the federal government,²⁵ so that the Constitution’s enumerated rights seemed unavailable to be invoked against state action. As a consequence, state courts turned to state constitutions and in particular the due process clauses contained therein to review state legislation, in particular in cases where the protection of private property was at stake.²⁶

¹⁹ It should be noted that the text gives a right ‘of the people peacefully to assemble, and to petition the government for a redress of grievances’, so that a right to assembly had to be derived based on supporting other constitutional provisions, see section II.B.i. on the doctrine of substantive due process.

²⁰ K.T. Lash, ‘Three Myths of the Ninth Amendment’ (2007-2008) 56 *Drake Law Review* 875, 875.

²¹ See for the classic reading R.E. Barnett, ‘The Ninth Amendment: It Means What It Says’ (2006) 85 *Texas Law Review* 1, 13-14. For a federalist reading according to which the amendment simply grants freedom to the peoples of the various states to recognise rights in their constitution and laws see Lash, 887 ff. A third view would only recognize judicially unenforceable rights under the Amendment, see on this point L.G. Sager, ‘You Can Raise the First, Hide behind the Fourth, and Plead the Fifth – But What on Earth Can You Do with the Ninth Amendment’ (1988) 64 *Chicago-Kent Law Review* 239, 251-252..

²² See Chase’s opinion on a property restricting state law in *Calder v. Bull*, 3 U.S. 386 (1798) at 388.

²³ E.S. Corwin, *Liberty against Government: The Rise, Flowering and Decline of a Famous Juridical Concept* (Baton Rouge: Louisiana University Press, 1948), 58.

²⁴ *Ibid.*, 173.

²⁵ *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet) 243 (1833) at 250-251.

²⁶ Corwin, 174.

Only the Fourteenth Amendment created a textual basis for review of state legislation against fundamental interests. Such review was not uncontested, since the only meagre textual basis was the due process clause of the Amendment.²⁷

The Supreme Court thus had to base its review on a finding that the violation of a fundamental right not explicitly laid down in the Constitution would violate due process. In the seminal decision of *Allgeyer*, the Court struck down a state law prohibiting the conclusion of insurance contracts with companies not licensed in that state. It held emphatically that liberty to contract as enshrined in the Fourteenth Amendment ‘embrace[s] the right of the citizen to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned’.²⁸ For about four decades, the Court relied on the doctrine of substantive due process to protect economic rights.

The concept of substantive due process has been vividly criticized, some pointing towards its virtually oxymoronic phrasing.²⁹ The *Lochner* line of case law gave rise to particularly vivid controversy. As Holmes put it in his dissent, the concept of liberty of contract set out in the case seemed based on a strong presumption of *laissez-faire* capitalism.³⁰ But concern about *Lochnerian* review also grew particularly strong because of the high number of laws which the Supreme Court began striking down based on unenumerated rights. Some claimed that the Court was simply making these rights up.³¹

At the same time, the *Lochner* era was also the time of the emergence of substantive due process to protect other civil liberties.³² In defence of *Lochner*,

²⁷ The *Slaughter-House Cases* had effectively made the Privileges and Immunities Clause virtually inoperative, see subsequent section II.B.ii.a. on the latter clause. There are still indications that the latter interpretation is doubted in the case law and some suggest that the Privileges and Immunities Clause would have the potential to protect unenumerated economic rights often perceived as insufficiently protected. Anonymous, ‘Case Notes: Fourteenth Amendment – McDonald v. City of Chicago’ (2010) 124 *Harvard Law Review* 229, 237. See on the under-protection of economic rights section III.A.ii.

²⁸ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) at 589.

²⁹ See J.H. Ely, *Democracy and Distrust – A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), 18, who refers to the use of substantive due process as ‘green[ing] pastel redness’.

³⁰ See closer on the scrutiny and standards of review in the so-called *Lochner* era subsequently section III.A.ii.

³¹ The Court held in roughly 160 cases between 1899 and 1937 that statutes were unconstitutional, see B.F. Wright, *The Growth of American Constitutional Law* (Boston: Reynal & Hitchcock, 1942), 154. Still, some authors contend that one should not forget that on the whole more laws were upheld than struck down, L. Tribe, *American Constitutional Law* 2 edn (Mineola N.Y.: Foundation Press, 1988), 567 note 2.

³² See e.g. *Meyer v. Nebraska*, 262 U.S. 390 (1923) at 399, where the Due Process Clause is held to protect a freedom which includes ‘the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to

some have thus pointed towards the inconsistency that some critics would denounce the very same resort to substantive due process by the Supreme Court in *Lochner*, but would applaud it in cases where fundamental rights preferred by them were at stake.³³

b. Contestation of the results of the doctrine of substantive due process

The flexibility of the doctrine of due process led to a situation where the distinction between an enumerated right and an unenumerated right partly inspired by constitutional provisions became blurry in some cases. The right to assembly as an example seems partly enshrined in the Constitution, but not in words as an independent right, but linked to the right to petition the government for redress of grievances. In *Hurley*, the Court upheld a right to assemble for expressive purposes without clearly stating whether it was applying substantive due process or deriving the right from existing rights provisions of the Constitution.³⁴

Even more contentious results were achieved in cases where a fundamental right was recognized and defended by the Supreme Court in the absence of truly pertinent provisions in the Bill of Rights. The right to privacy is perhaps the most prominent example.³⁵ Perhaps as a reaction to criticism of the concept of unenumerated rights, there is at times notable confusion in the case law as to the very notion of the right to be protected and the competing public interest.³⁶

worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.'

³³ D.N. Mayer, *Liberty of Contract – Rediscovering a Lost Constitutional Right* (Washington: Cato Institute, 2011), 116.

³⁴ *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995).

³⁵ In the landmark case *Griswold v. Connecticut*, 381 U.S. 479 (1965) at 484-486, on a state law prohibiting the use of contraceptives by married couples, the lead opinion established a right to privacy derived from the Bill of Rights. The concurring opinion by Harlan, which only later became more influential, suggested, on the contrary, that the Due Process Clause could enshrine such a right on its own without reliance on the Bill of Rights, see *Griswold v. Connecticut* at 499-500. As one of the perhaps most contentious decisions of the Supreme Court's history, the Court subsequently decided that the right to privacy as developed in previous jurisprudence was 'broad enough to encompass a woman's decision whether or not to terminate her pregnancy', though subsequently limiting this right as not absolute, see *Roe v. Wade*, 410 U.S. 113 (1973) at 154. See for one well known sceptical account of the decision J.H. Ely, 'The Wages of Crying Wolf: A Comment on *Roe v. Wade*' (1973) 82 *Yale Law Journal* 920.

³⁶ Referring to the right to privacy as a 'liberty interest' rather than a right, the Court seemed at some points willing to protect it with less vigour, before it returned to a virtually similar treatment in later case law, compare here *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) at 520 to *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) at 278. There was also some confusion as to the opposing value to the right to privacy: While in *Roe v. Wade*, the Supreme Court required a 'compelling state interest' to justify abortion regulations, see *Roe v. Wade* at 155, it later introduced a weaker test whether an 'undue burden' was imposed by abortion regulation on a woman's decision, see *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) at 874.

In the field of unenumerated rights the Supreme Court has thus used its power carefully but with massive impact to recognize and defend fundamental rights beyond the narrow circle of rights expressly set out in the Bill of Rights. It has construed the Constitution as a system protecting a broad number of values and aimed to reconcile these values. Similar to the subsequently examined case of the doctrine of incorporation, the safeguards erected by the text of the Constitution seemed insufficient and required judicial intervention and creativity. Despite the constant attempts by Supreme Court justices to underpin their case law with doctrinal foundations, the reproach of judicial activism was a constant companion of the case law³⁷ and a constant reminder of the contested power of the judiciary in the United States constitutional system. In our view, this contestation is the reason for the fragmented development of fundamental rights case law which we observe in later sections.

ii. The doctrine of incorporation

The Bill of Rights only addresses the federal government. The Supreme Court thus developed the doctrine of incorporation, which describes the process by which a fundamental right formerly only addressing the federal level also becomes active as a protective safeguard against the states.

a. *The narrow interpretation of the Privileges and Immunities Clause*

Initially, the judiciary refused to enforce the Bill of Rights against state legislatures.³⁸ The Fourteenth Amendment adopted in the aftermaths of the Civil War, however, directly addressed the states, requiring them not to abridge the ‘privileges or immunities of citizens’, not to ‘deprive any person of life, liberty, or property, without due process of law’ and to grant all persons in their jurisdiction the ‘equal protection of the laws’.

The Privileges and Immunities Clause presented a first opportunity. This clause could arguably provide an adequate textual basis to incorporate the rights enshrined in the Bill of Rights as obligations imposed on the states. The similar clause in Article IV of the Constitution had been construed previously as extending the protection of fundamental rights to non-state citizens, prohibiting the state from discriminating against them.³⁹ When first asked to interpret the new privileges and immunities clause in the Fourteenth Amendment, the Supreme Court acknowledged Article IV and the previous construction. Then, however, it gave a very narrow reading to the clause, holding substantially that the clause only prohibited states interfering with a limited number of nationally

³⁷ See for an example of a vigorous dissent by Scalia *Stenberg v. Carhart*, 530 U.S. 914 (2000) at 955, reproaching his colleagues for having undertaken a ‘policy-judgment-couched-as-law’.

³⁸ *Barron v. Baltimore* at 250-251.

³⁹ See the *Corfield* case as described in M.C. Dorf and T.W. Morrison, *The Oxford Introductions to U.S. Law – Constitutional Law* (New York: Oxford University Press, 2010), 192-193.

granted rights such as the right to demand protection abroad or to travel to the national capital.⁴⁰

b. The Due Process Clause of the Fourteenth Amendment

With the narrow reading given to the Privileges and Immunities Clause, the Supreme Court resorted to the Due Process Clause of the Fourteenth Amendment to incorporate the Bill of Rights against the states. As a consequence, the Supreme Court had to rely on the doctrine of substantive due process in this field as well.

Some suggested that the Fourteenth Amendment as a whole should be read in light of the historical objective to make the safeguards deemed necessary to constrain federal power also binding on the states' powers. As a consequence, the Bill of Rights as a whole would become incorporated through the Amendment.⁴¹ Instead, the Supreme Court opted for a step-by-step approach, finding that some rights enshrined in the Bill of Rights may also be safeguarded against action by the states, because otherwise a 'denial of due process' would arise.⁴² A right would thus be recognized based on whether it fell within the 'concept of ordered liberty'⁴³ or whether it was sufficiently 'fundamental'.⁴⁴ The Supreme Court had to walk a tightrope to avoid all too personal or moral judgments in recognizing which rights fulfil the threshold of being incorporated through this due process test.⁴⁵ As a result of continuous incorporation, most of the Bill of Rights has in the meantime been incorporated against the states, since the Court looked consistently in the Bill of Rights for guidance when assessing potential rights against states.⁴⁶

The incorporation of enumerated rights was yet another difficult interpretative enterprise imposed on the Supreme Court because of the sparse textual basis given by the Constitution. The Supreme Court has developed a similar, flexible, case-by-case method of incorporation for unenumerated rights. It asked whether they fulfilled the requirements set out previously, while simultaneously moving towards a more culturally coloured formula of rights that were 'deeply rooted in this Nation's history and tradition'.⁴⁷

Summing up, the Supreme Court extended the scope of protection of the rather weak textual foundations of fundamental rights protection in United States constitutional law considerably. Again, we note the Court's willingness

⁴⁰ *In Re Slaughter-House Cases*, 83 U.S. 36 (1872) at 77-78.

⁴¹ See explicitly Black dissenting in *Adamson v. California*, 332 U.S. 46 (1947) at 72-73.

⁴² *Twining v. New Jersey*, 211 U.S. 78 (1908) at 99.

⁴³ *Palko v. Connecticut*, 302 U.S. 319 (1937) at 325.

⁴⁴ *Ibid.* at 327.

⁴⁵ As already observed by S.H. Kadish, 'Methodology and Criteria in Due Process Adjudication – A Survey and Criticism' (1956-1957) 66 *Yale Law Journal* 319, 327.

⁴⁶ *Duncan v. Louisiana*, 319 U.S. 145 (1968) at 147-148.

⁴⁷ See e.g. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) at 503.

to fully unfold the potential of the Constitution to represent a broad number of values, this time taking into account the federal structure of the United States.

iii. Conclusion

The Supreme Court's development of the doctrines of unenumerated rights and of incorporation extended the Court's fundamental rights review power. The Supreme Court worked hard to enlarge the number of rights protected under the Constitution and to ensure that rights are protected both at the federal and the state level. In its generally convincing case law, a broad variety of values is thus weighed against each other under the Court's review. However, the far-reaching interpretations of the Court also opened its case law up to criticism. To no small extent, the fragmented development that we perceive in the subsequent sections scrutinizing the case law goes back to this constant contestation.

There are, however, more than just disagreements in the substantive law with the Court. In academic debate, scholars also continue to question the function and extent of judicial review from an institutional point of view.

C The Continuous Debate on Judicial Review and the Appropriate Institutional Balance under the Constitution

We subsequently assess the various aspects of the debate on judicial review. The purpose is not to reassess the strength of the justification of such review; rather, a picture of the arguments opposed to the Court should emerge and clarify why the Supreme Court perceived the need to resort to rule-like adjudication and to refrain at many occasions from balancing solutions. It is in particular the breadth of the debate which is impressive as compared with German constitutional law.

i. The text of the Constitution and the arguments in *Madison v Marbury*

The central question is whether and based on which reasons the Supreme Court should have the ultimate power to construe the Constitution. This ultimate interpretative authority enables the Supreme Court to strike down a state law or a law passed by Congress by means of its power of judicial review because it finds the law in violation of its understanding of the Constitution. The power of judicial review can be answered easily in the case of state laws: the need for a central judicial power lies here in the avoidance of having a different reading of the Constitution in every state, which would run counter to the objective of the Constitution 'to form a more perfect union'.⁴⁸

⁴⁸ See on this point already O.W. Holmes, *Collected Legal Papers* (New York: Harcourt and Brace and Co., 1920), 295-296.

Review of federal laws is, however, more difficult to justify. At this point, two lines of attack can be distinguished. First, the arguments used in *Marbury* have been challenged as an unsatisfactory basis for judicial review. Second, there exist conceptual criticisms of judicial review.

Based to a large extent on Hamilton's views in a *Federalist* article,⁴⁹ Marshall had developed three major arguments in *Marbury* to establish that the Supreme Court should be empowered to judicial review against the benchmark of the Constitution and to strike down laws passed by Congress.⁵⁰ These three arguments rest, however, on shaky foundations, as is subsequently shown.

First, he suggested that the Court must possess these powers because of the written character of the Constitution. In absence of judicial review, the legislator would be free to ignore the provisions of the Constitution.⁵¹ However, the mere written form of the Constitution can just as easily be understood as a mere effort of codification to retain one original text. Also, an adjudicative mechanism is not an indispensable condition for a legal text to unfold binding force.⁵²

Second, in Marshall's view the supremacy clause required that courts be generally enabled to set aside laws that violated the Constitution. Apart from obvious cases of violation, this judicial power would also include cases where the court itself had to interpret the Constitution to establish whether a law violated it, as '[i]t is emphatically the province and duty of the judicial department to say what the law is'.⁵³ For Marshall, the Supreme Court was thus the ultimate interpretative authority of the Constitution. Marshall's idea that supremacy requires judicial review seems deficient, as the mere higher rank enjoyed by the Constitution may give a clear power to strike down laws that obviously violate the Constitution; however, it leaves the question open as to whether the Supreme Court is entitled to impose its own reading as authoritative in cases where there is no one obvious understanding of the Constitution.⁵⁴

As a third argument, he based his views on the broad powers given to federal courts in Article III, finding it unlikely that the Constitution 'should not be looked into' when courts used this power.⁵⁵ The Constitution's text is, however, not perfectly clear, so that Marshall's arguments on Article III and VI assume rather broadly that the power to hear cases arising under the Constitution includes full judicial review.⁵⁶ To conclude, the ambiguity of the constitutional

⁴⁹ A. Hamilton, 'The Judiciary Department' (1788) *The Federalist* No. 78.

⁵⁰ A few years later it also claimed the power to review state acts, Baum, 20.

⁵¹ *Marbury v. Madison* at 176.

⁵² Dorf and Morrison, 24.

⁵³ *Marbury v. Madison* at 177.

⁵⁴ See in particular sceptical on this point J.B. Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129, 152.

⁵⁵ *Marbury v. Madison* at 179.

⁵⁶ H. Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 73 *Harvard Law Review* I, 3 ff., developed the argument that in a hypothetical scenario where Congress had not used its power to create federal courts, the Supreme Court would be the only instance of appeal and therefore would necessarily

provisions and several unconvincing arguments in *Marbury* have left ample room for debate.

ii. Conceptual contestation of judicial review

There is, furthermore, also a more conceptual debate on judicial review next to the one strictly based on the text of the Constitution. One could also question the higher institutional competence of courts to decide questions under judicial review that a legislator has already tried to tackle. It could thus be claimed that if the method for resolution of hard cases is the same in judicial as well as legislative decision-making – i.e. one proceeds to voting – there is no obvious reason why unelected judges should vote rather than elected representatives of the people.⁵⁷ In the extreme, one could thus question whether there should be judicial review at all.

Less extreme proposals focus on the appropriate degree of deference that the judiciary owes to the legislator. A typical suggestion is to leave Congress leeway as one legitimate interpreter of the Constitution. In such a scenario, judicial review means that the Supreme Court would only intervene to strike down a federal law if it finds the interpretation given to the Constitution by the legislator sufficiently unreasonable.⁵⁸

Others embrace such deference, but with some caveats added for specific situations: for fundamental rights essential to responsible democratic decision making such as the freedom of speech, press or assembly, judicial review should be more strict in order to ‘err on the side of less regulation’ in cases of doubt.⁵⁹ Alternative proposals would limit judicial review of the decisions of other branches of government on structural provisions of the Constitution such as federalism or the division of powers.⁶⁰

The central difficulty with judicial review was coined by Bickel in a seminal work as the counter-majoritarian problem: since judicial review implies striking down legislation reached by a majority, there is a tension with the democratic, majority-based decision-making process.⁶¹ Structurally, judicial review also

possess – based on the text of the Constitution – the power to review such decisions by state courts. Yet, this suggestion cannot account for judicial review of federal laws.

⁵⁷ J. Waldron, ‘The Core of the Case against Judicial Review’ (2005) 115 *Yale Law Journal* 1347, 1391-1392.

⁵⁸ Typically, this is referred to as ‘Thayerian deference’, after the early and perhaps most prominent proposal by Thayer, 152.

⁵⁹ M.J. Perry, *Constitutional Rights, Moral Controversy, and the Supreme Court* (New York: Cambridge University Press, 2009), 180-181.

⁶⁰ See generally J.H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: Chicago University Press, 1980).

⁶¹ A. Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merill, 1962).

implies the idea of a bias towards more freedom of the individual, as the Court is not capable of producing legislation, but only of striking it down.⁶²

To justify judicial review, scholars have thus pointed towards the need to protect certain fundamental interests in particular in situations where the majority decides to interfere with them. The classic case are rights which protect minorities. Because of their security of tenure and the general task of securing equality, courts are often perceived as ideal guardians of such rights which are vulnerable to the normal majority-based democratic process.⁶³

Over the course of history, however, the Supreme Court did not stand up to this task on several occasions, while Congress championed the defence of the rights of minorities.⁶⁴ Still, there is still merit in the claim of strengthening minority rights by judicial review in light of the rather crude assumption underlying the counter-majoritarian objection. The latter opposes ‘majoritarian’ decision-making by the other institutions to judicial intervention by judicial review. Yet, reality is nowhere near that simple: in the United States constitutional system, the Senate’s claim to represent the people truly in a majoritarian manner is unpersuasive, while the presidential elections have several times led to a victory of a candidate despite his receiving only a minority of the votes. Constituencies for all the institutions vary substantially. Majoritarianism is thus only one central, but not the cardinal rule in the Constitution.⁶⁵

Constitutional reality is thus rather a complex interaction of the various branches than the clear-cut situation of majority-based decision-making by the legislative power as opposed to the judiciary. The doctrine has thus focused on the appropriate interpretation of rights in the Constitution to justify judicial intervention as a protective safeguard for specific constitutional values.

iii. The procedural democracy doctrine as a middle ground

In his seminal contribution, Ely suggested finding a happy medium between total deference to the legislator and all too intrusive scrutiny under fundamental rights by the judiciary. According to the procedural democracy doctrine judicial review should ensure that in principle, deference is given to democratic decision-making procedures, unless it is claimed that the

⁶² R. Fallon (Jr.), ‘The Core of an Uneasy Case for Judicial Review’ (2008) 121 *Harvard Law Review* 1693, 1705-1706.

⁶³ See e.g. L.H. Tribe, *God save this honorable court : how the choice of Supreme Court justices shapes our history* (New York: Random House, 1985), 20.

⁶⁴ See L. Fisher, *Defending Congress and the Constitution* (Lawrence: University Press of Kansas, 2011), 104-105 with examples.

⁶⁵ Farber and Sherry, 25. In more closely examining the decision-making process for federal legislation in the United States, some scholars have suggested that to pass a law requiring the assent of the House of Representatives, the Senate and the President is in fact just as difficult as to require a supermajority in a unicameral parliamentary system, see J.M. Buchanan and G. Tullock, *The Calculus of Consent – Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962), 234 ff.

democratic process was corrupted because fundamental rights had not been respected. This would be the case if the political process was malfunctioning or if one particular group of society was constantly excluded because of prejudice.⁶⁶ Review is thus perceived as rather process-based and requires varying standards of review depending on the right at issue. A court must decide what rights are linked to the democratic process. The variety of values pursued by the Constitution renders it difficult to suggest judicial review in some and deference in other cases, as even deference may again unduly privilege certain interests in a way similar to the initial counter-majoritarian problem.⁶⁷

Ultimately, the debate on judicial review led to suggestions that the Supreme Court, despite its power of review, does not necessarily have the final word on constitutional issues.⁶⁸ Against such ‘strong form’ review, one could construe a model of ‘weak form’ review where the highest judiciary’s interpretation of the constitution can be overruled in the short-term by a legislative, constitutionally qualified majority instead of only granting onerous overruling by the judiciary itself.⁶⁹

iv. Conclusion

The debate on judicial review has led from sharply opposing views into the intricacies of the political constitutional system of the United States. A number of arguments demystify any strong case against judicial review such as the counter-majoritarian problem. Yet, neither is there a clear-cut case in favour of a court to ensure the protection of minority rights. The battle lines in the meantime seem to be drawn along questions of *how* to use judicial review in specific situations, while hardly any scholar seriously questions anymore *whether* there should be judicial review at all.⁷⁰ The continuous debate and constant questioning of the Supreme Court’s role as an interpreter of the Constitution have left their mark on the development of the case law. There was a fragmented development of review under various categories of rights. Furthermore, the

⁶⁶ Ely, *Democracy and Distrust*, 101 ff.

⁶⁷ J.E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (Chicago: Chicago University Press, 2006), 19 ff.

⁶⁸ Scholars noted that the Supreme Court’s decisions are on various occasions effectively overridden by legislative efforts, see for examples Baum, 204; on other occasions, the case law is voluntarily disregarded by legislative or administrative measures to get the Court to reconsider its precedent, see Dorf and Morrison, 36. The Court insisted that it remained its own power to define the substance of fundamental rights, striking down Congressional legislation that challenged earlier Supreme Court jurisprudence, see *City of Boerne v. Flores*, 521 U.S. 507 (1997) at 519.

⁶⁹ M. Tushnet, *Weak Courts, Strong Rights – Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008), 33-34. This proposal could also operate as a sequence, giving all actors time to accustom themselves to weak judicial review and gain experience before moving to more intrusive strong review, see Tushnet, 263-264.

⁷⁰ Farber and Sherry, 31.

notable scepticism towards ‘balancing’ by the judiciary is also stronger than e.g. in German constitutional law, a scepticism which was often phrased in institutional terms. If we compare the situation of the Federal Constitutional Court in Germany, there is criticism of its decisions on many occasions, but no such fundamental scepticism towards its very review function.⁷¹ Arguably, only in such a more accepting climate could the principle of proportionality emerge as the dominant legal test. We find these factors an explanation, yet no satisfactory justification for the resulting case law, as is subsequently discussed. Before that, we also note that the hesitance of the Supreme Court to use balancing appears particularly remarkable since it is well equipped for its role of equal representation review, as the subsequent section shows.

D Institutional Aspects of Judicial Review and the Supreme Court in United States Constitutional Law

The Supreme Court stands for a peculiar system of judicial review. As an important point, the Supreme Court is a court of general jurisdiction and no specialized constitutional court. Consequently, it had to adapt its standard of review to a very diverse set of contexts. However, its features point towards a powerful, well-equipped Court that could successfully engage in proportionality analysis in our view.

Quite some elements point towards a powerful position of the Court. The nine justices⁷² are appointed for life tenure⁷³ and are usually lawyers of high merit with distinguished careers in private practice, academics or public service.⁷⁴

Also, in matters of jurisdiction the Supreme Court possesses large powers. Next to the rather rare number of situations of original jurisdiction, it mainly is in charge of a broad appellate review power⁷⁵ and possesses significant control over its docket, i.e. what cases are heard.⁷⁶ Having decided which cases to hear, the Court then possesses discretion as to whether it would like to give a case full consideration or whether it only remands the decision, giving some guidance to the lower court on how to reconsider the case.⁷⁷

⁷¹ See chapter 3 section II.B.ii.

⁷² Note that long before the mentioned ‘court-packing plan’ there have been several changes in the number of Supreme Court justices before the present day number of nine was reached in 1869, Baum, 11.

⁷³ See sceptically on this ‘anomaly’ Sanford Levinson, in McCloskey, 284. In an extreme case, a change of view in the Supreme Court would require it to wait until judges die or retire, as constitutional amendment or impeachment of judges have proven as hardly feasible in practice, Tushnet, 22.

⁷⁴ See for an overview of the present Supreme Court justices’ backgrounds Baum, 52-53.

⁷⁵ See for more details *Ibid.*, 7-8.

⁷⁶ Farber and Sherry, 119. The case load of the Court is not overwhelming, with currently about 80 decisions rendered per year, see Baum, 69.

⁷⁷ Baum, 106-107.

In deciding cases, the Court has a broad scope to express its views. Judgments are discursive in United States constitutional law, with the option for judges to sign a majority opinion, to join concurring opinions, but also for minority judges to express their views in dissenting opinions.⁷⁸ This allows for a wide variety of viewpoints to find themselves represented; it is common that earlier concurring or dissenting opinions become the stepping stone for new adjudicative developments and case law reversals.

By contrast, one could argue that the Court's power seems somewhat restricted since in theory the Supreme Court can only decide concrete cases, while there is no system of abstract review.⁷⁹ A system of constitutional advisory opinions exists in some state constitutions, but not for the Supreme Court.⁸⁰ Also, the Constitution in principle vests all courts with the power of judicial review, which gives review a decentralized structure and makes the Supreme Court only the highest, but not the only court to be able to set unconstitutional legislation aside.⁸¹ As a consequence of the limitation to the decision of concrete disputes, some have developed the concept of strong 'departmentalism', which suggests that the solution of a question of constitutionality found by the Supreme Court is strictly limited to the case at issue. As a consequence, all other political actors as well as voters remain free to adhere to different interpretations and advocate them to change the Supreme Court's interpretation.⁸² Yet, in reality the exercise of review by the Supreme Court developed beyond mere concrete review and functionally operates comparable to a system of abstract review, answering broadly to constitutional questions brought before it even in cases of facial challenges.⁸³ There appears to be broad consensus that the Supreme Court operates in what is at various points referred to as a 'special functions', 'public rights' or 'law declaration' model.⁸⁴

Summing up, the Supreme Court seems in theory well-positioned for even intrusive judicial review and the use of full-scale proportionality analysis. The justices are familiar with the constitutional legal system, enjoy life tenure and have control over their docket.

⁷⁸ See in more detail *Ibid.*, 112-113.

⁷⁹ See Article III of the Constitution on federal judicial power, which only extends to 'cases and controversies'.

⁸⁰ See for a sceptical account of such advisory opinions M.A. Topf, *A Doubtful and Perilous Experiment – Advisory Opinions, State Constitutions, and Judicial Supremacy* (New York: Oxford University Press, 2011).

⁸¹ B.J. Hartmann, 'The Arrival of Judicial Review in Germany under the Weimar Constitution of 1919' (2003-2004) 18 *Brigham Young University Journal of Public Law* 107, 110-111.

⁸² See e.g. E.I. Meese, 'The Law of the Constitution' (1986-1987) 61 *Tulane Law Review* 979, 985, who argues for a distinction between the binding effect of constitutional law including decisions by the Supreme Court and the Constitution itself.

⁸³ M. Shapiro and A. Stone Sweet, *On Law, Politics, and Judicialization* (New York: Oxford University Press, 2002), 347 ff.

⁸⁴ See for an overview R. Fallon (Jr.), and others, *Hart and Wechsler's The Federal Courts and the Federal System* 6 edn (New York: Foundations Press, 2009), 73-75.

E Conclusion

Judicial review in United States constitutional law is marked by the early beginnings of substantive review powers exercised by one supreme judicial authority and simultaneously by the constant contestation of such important powers. Despite rather vague constitutional language, the Supreme Court established its position of judicial review very early. However, critics denounced judicial review by the Supreme Court as a potential disturbance of the appropriate balance between the various branches of government under United States constitutional law. The central point of debate was the question of who ought to have the final word on the interpretation of the Constitution. Debate on the appropriate role and scope of judicial review has thus been ongoing ever since, focusing sometimes more on the concrete foundations as interpreted in *Marbury*, sometimes more on conceptual foundations such as the counter-majoritarian problem of judicial review or the purported need for judicial review to defend the rights of minorities disadvantaged and excluded from the democratic decision-making process. In its fundamental rights jurisprudence the Court has met the criticism of engaging in judicial law-making, because it developed the doctrines of incorporation and of unenumerated rights to complete the number of rights protected and make them operational against the states next to the federal government.

Two notable developments can be better understood with this knowledge. First, there is a remarkably fragmented development concerning the standard of review, which is influenced by the contestation of the Court's authority and the discussion of the procedural democracy doctrine. Second, there is a notable reluctance by the Court to engage in balancing, i.e. the ultimate stage of proportionality analysis, which goes back to the debate on the appropriateness of judicial review and also draws arguments from this debate. This can explain features of the case law, but does not, in our view, accurately justify them.

Turning now to the normative assessment of arguments surrounding pre-balancing and the justification of judicial review, we note in the subsequent section that there is a particular perception of fundamental rights which predominantly perceives them as crucial safeguards against public interference, i.e. in their function as shields. From this stems a rather low importance given to horizontal effects.

This perception is also a decisive reason for the widespread reluctance to engage in balancing observed in United States constitutional law. Balancing is not only contested based on the perceived lack of legitimacy of the Supreme Court, but also because there is fear of under-protection of rights. Contrary to our findings on fragmentation, these arguments seem based in a particular normative conception of rights and thus arguably justify a different approach to proportionality analysis.

III The Justification of Judicial Review in United States Constitutional Law

In the present section, we first focus on the justification of judicial review for the protection of fundamental rights. The Court's case law and the doctrinal discussion provide rich insights into how review is perceived. Yet, we note at this stage that there is strong fragmentation, caused by the case-by-case development of the case law and the constant contestation of judicial review. Also, we note the particular perception of fundamental rights when assessing that there is only very limited development in the field of horizontal effects of fundamental rights in United States constitutional law. Arguably, a model of equal representation is the result of pre-balancing, although some justified differences to e.g. German constitutional adjudication exist.

Under the Dormant Commerce Clause, review seems to follow the model of special interest review. There continues to be disagreement as to whether the procedural democracy doctrine requires intrusive or rather deferent scrutiny under the clause.

A The Procedural Democracy Doctrine and Fundamental Rights Review: The Development of Tiers of Scrutiny

The Supreme Court has tailored the solutions to cases as they crossed its path following a case-by-case approach of categorisation of the appropriateness of scrutiny. The case law under the Equal Protection Clause is particularly insightful, as it was under this provision that the Court began developing the tiers of scrutiny and the procedural democracy doctrine. In the Supreme Court's view, certain violations of rights thus deserve more intrusive scrutiny than others. Despite the sometimes rigid categorisation of cases that followed, it can be welcomed that the Supreme Court has set out in more detail than e.g. the German Federal Constitutional Court⁸⁵ the reasoning upon which it based its application of different degrees of scrutiny. Remarkably, the Supreme Court did not adapt its review power to the cases of positive obligations under fundamental rights, socioeconomic rights and the horizontal effect of fundamental rights in a manner similar to the German Federal Constitutional Court.⁸⁶ The prevailing conception of rights as shields prevented the Court from giving such effects to rights. We find the latter different conception of rights more convincing as a justification than the fragmented and overtly rigid development of the tiers of scrutiny.

⁸⁵ See chapter 3 section III.B.i.

⁸⁶ See chapter 3 sections III.B.ii and III.B.iii.

i. Equal protection in United States constitutional law

The United States Constitution was drafted before the background of an irreconcilable conflict on slavery. The Constitution thus did not contain a general equality clause, and it was only post Civil War that the Fourteenth Amendment introduced in its first paragraph the Equal Protection Clause. In the run-up to the Civil War the Supreme Court had already found that Congress had no power to restrict slavery or confer citizenship on African Americans in the badly reputed *Dredd Scott* case.⁸⁷ But equality did not only play a role in cases of racial discrimination. During the *Lochner* era, several laws were also overturned by the Supreme Court based on the Equal Protection Clause. Then, there was a remarkable shift in the case law of the Court at the time of the New Deal.

ii. *Carolene Products*, procedural democracy and the system of tiers of scrutiny

After years of constant intense scrutiny of the *Lochner* era,⁸⁸ the Supreme Court reversed its jurisprudence in the seminal *Carolene Products* case. It loosened its scrutiny of socioeconomic regulation.

From this case onward, the Court developed a system of varying degrees of scrutiny based substantially on what was later described by Ely as the doctrine of procedural democracy. For most socioeconomic regulation, the Court decided to apply only a lenient test of rationality, which comes down to a deferent assessment of suitability.⁸⁹ In later cases, the Court itself admitted between the lines just how weak this assessment could turn out.⁹⁰ Some fears arose on whether there could be ‘underenforcement’ of the Equal Protection Clause.⁹¹

However, simultaneously to this weakening of the intrusiveness of review, the Supreme Court introduced the need for a ‘more searching judicial inquiry’ in the well-known footnote four of the decision. This more searching inquiry was to take place in cases where the political process failed to protect ‘discrete and insular minorities’ from prejudice.⁹² The notion of ‘discrete and insular

⁸⁷ *Scott v. Sandford*, 60 U.S. 393 (1857).

⁸⁸ See closer on *Lochner* section IV.A.ii.

⁸⁹ See e.g. *New Orleans v. Duke*, 427 U.S. 297 (1976), where the Court merely asserted whether the objective brought forward for a classification was ‘legitimate’ and accepted the regulation as it ‘rationally further[ed]’ the purported objective.

⁹⁰ See e.g. the Court’s statement in *Williamson v. Lee Optical, Inc.*, 348 U.S. 483 (1955) at 487, holding that the law at issue ‘may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.’

⁹¹ L.G. Sager, ‘Fair Measure: The Legal Status of Underenforced Constitutional Norms’ (1978) 91 *Harvard Law Review* 1212, 1212, suggests that the lenient review constitutes a judgment about the possibility to enforce such provisions rather than an interpretation of the Equal Protection Clause.

⁹² *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) at footnote 4.

minorities' has been subject to criticism, as prejudice also operates against other groups, so that 'anonymous and diffuse' groups have been suggested as perhaps more adequate.⁹³ The Court thus narrowed down its presumption of constitutionality in certain cases, leading to a more intrusive standard of review.

For enumerated and unenumerated fundamental rights, the Court subsequently developed a heightened standard of review, so-called strict scrutiny, as opposed to the normal scrutiny which is often referred to as minimal scrutiny.⁹⁴ The more stringent standard involves a shift of the burden of proof to the state government having to justify a measure, requires the establishment of a 'compelling state interest' and 'narrow tailoring' of the regulation to the interest identified.⁹⁵

Not all of these intensifications of the standard of review were new. The requirement of narrow tailoring had already been present in the 'police powers' cases during the *Lochner* era, while the shift in the burden of proof was nothing other than the reversal of the presumption of constitutionality for socio-economic legislation that had emerged in *Carolene Products*.⁹⁶

Strict scrutiny including the 'compelling state interest' requirement developed only in the early years after the Cold War out of a controversy over the appropriate scrutiny to protect freedom of speech as enshrined in the First Amendment.

The Court was deeply divided between two factions, one favouring a rather low protection of freedom of speech and the other preferring high protection for the right. The dispute was often presented to confront pro-balancers and 'absolutists'.⁹⁷ Only towards the end of the 1950s did the latter group have a majority in the Court⁹⁸ and was it able to further the 'compelling state interest' test as set out for example in *Sweezy v. New Hampshire*. The majority in this case relied on narrow grounds to decide the case, noting, however, that even if much more fundamental reasoning had been required, they could not conceive a 'state interest' proper to justify the restriction at issue.⁹⁹ Low protectionist Frankfurter reacted with a separate opinion containing an explicit balancing test.¹⁰⁰ He

⁹³ B. Ackerman, 'Beyond Carolene Products' (1985) 98 *Harvard Law Review* 713, 731-732.

⁹⁴ The designation 'strict scrutiny' has been adopted after similar language of the Supreme Court in the two decisions in *Skinner v. Oklahoma*, 316 U.S. 535 (1942) and *Korematsu v. United States*, 323 U.S. 214 (1944).

⁹⁵ S.A. Siegel, 'The Origin of the Compelling State Interest Test and Strict Scrutiny' (2006) 48 *American Journal of Legal History* 355, 359-360.

⁹⁶ *Ibid.*, 360.

⁹⁷ S. Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7 *International Journal of Constitutional Law* 468, 470.

⁹⁸ See in detail on the factions and changes in membership within the Supreme Court Siegel, 362-363.

⁹⁹ *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) at 251.

¹⁰⁰ Frankfurter, concurring in *Ibid.* at 267.

referred to the interest using the term ‘compelling’.¹⁰¹ Only in later case law did the same term become a tool for ‘absolutists’ to restrict the use of balancing.

In *Gibson*, the Court struck down a speech-restrictive measure holding that the record was insufficient to show an ‘immediate, substantial, and subordinating state interest’.¹⁰² In *Sherbert*, a case on the free exercise of religion, the Court held that under a compelling state interest, only the ‘gravest abuses’ could be understood, which ‘endanger[ed] paramount interest’.¹⁰³ By emphasizing the role of the ‘compelling state interest’, a hierarchy in favour of fundamental rights could be achieved, while at the same time justices in favour of high protection of freedom of speech were also able to avoid balancing.

iii. The proliferation of the system of tiers of review

Once established, the standard of strict scrutiny proliferated in all areas of enumerated and unenumerated fundamental rights. Yet, criticism of the different tiers of review for different rights already arose in the 1970s, the system being perceived as oversimplifying matters, while in reality the Supreme Court applied a whole ‘spectrum of standards’.¹⁰⁴ Strict scrutiny had also shown itself as “strict” in theory and fatal in fact’, leading to a high number of laws failing to meet its high standard.¹⁰⁵

The Court introduced an intermediate standard of scrutiny to refine the system of tiers of scrutiny. This standard first emerged in the case law under the Equal Protection Clause, under which the system of tiered review had also been adopted by the Court.¹⁰⁶ Under the intermediate scrutiny standard, the Court would uphold a measure if it was ‘substantially related’ to the achievement of ‘important government objectives’.¹⁰⁷ Attempts to form a uniform standard by Justice Marshall were short-lived.¹⁰⁸ In the early 1980s, again several cases departed from the system of tiers of scrutiny, which led commentators to predict a breakdown of a system that was ‘fundamentally flawed and destined

¹⁰¹ *Ibid.* at 262.

¹⁰² *Gibson v. Florida Legislative Investigative Committee*, 372 U.S. 539 (1963) at 551.

¹⁰³ *Sherbert v. Verner*, 374 U.S. 398 (1963) at 406, quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

¹⁰⁴ Marshall, dissenting in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) at 98.

¹⁰⁵ G. Gunther, ‘Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection’ (1972) 86 *Harvard Law Review* 1, 8.

¹⁰⁶ See J. Shaman, ‘Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny’ (1984) 45 *Ohio State Law Journal* 161, 163 and footnote 23 for further references.

¹⁰⁷ See e.g. *Craig v. Boren*, 429 U.S. 190 (1976) at 197. In *Craig v. Boren*, the Court found statistical evidence produced by the state unconvincing to support a differentiation in terms of sex for the legal drinking age as pursuing the objective of traffic safety.

¹⁰⁸ In *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92 (1972) at 95, Justice Marshall formulates for the majority: ‘As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment.’

to collapse'.¹⁰⁹ In *Rostker v. Goldberg*, Congress had allowed the registration and conscription of men, but not of women despite the more comprehensive request by the President. The Supreme Court had to choose between the minimal scrutiny applicable for military statutes and intermediate scrutiny for equal protection cases. It decided the case based on both standards,¹¹⁰ insisting that the levels of scrutiny should be respected. The reasoning reveals somewhat involuntarily the potential shortcomings of a strict categorisation into tiers of scrutiny. The Court held that if the levels of scrutiny were not respected, they could become 'facile abstractions used to justify a result' and that mere 'labelling' of the decision under scrutiny could not 'guide a court to the correct constitutional result'.¹¹¹

In a variety of cases, the Court effectively adapted its scrutiny to the case at issue, examining minimal scrutiny cases with more vigour,¹¹² giving more deference in intermediate scrutiny cases¹¹³ and exempting some cases from strict scrutiny.¹¹⁴ As a consequence, scholars already called for a uniform and consistent approach in the mid 1980s, a call that has recently been complemented with the suggestion to use proportionality analysis as a 'more stable, principled alternative'.¹¹⁵ The use of proportionality analysis is a useful suggestion, but mixes two debates: as we have shown, the debate on 'balancing' takes place based on different considerations, while here the appropriate level of discussion should focus on the standard of review. While the use of proportionality analysis itself is a useful suggestion, the tiers of scrutiny should rather be replaced by an appropriately sliding scale of the standard of review rather than mere proportionality analysis as the applicable substantive test. The problem of rigidity seems to stem from the Court's technique of categorization, which again is based, in our view, on the constant fear of contestation of its authority noted in the first section of the chapter.

The overview over the development of the standard of review shows an inextricable intertwinement between the interpretative test applied, the burden of proof and the standard of review. The Supreme Court juggled all these elements to build a legal test, aiming for a set of clearly defined categories. In practice,

¹⁰⁹ Shaman, 163.

¹¹⁰ See *Rostker v. Goldberg*, 453 U.S. 57 (1981) at 79, finding the law 'not only sufficiently, but also closely' related to the claimed purpose.

¹¹¹ *Ibid.* at 69-70.

¹¹² See e.g. the strict review of the legislative motive in *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973) at 534-535.

¹¹³ See e.g. the Court upholding a criminal statute which made only males liable for statutory rape, *Michael M. v. Superior Court*, 450 U.S. 464 (1981).

¹¹⁴ See e.g. the Court tailoring an exception to strict scrutiny under the right to travel for a statute that rendered abandonment of a child a misdemeanour, but a felony if the parent left the state, *Jones v. Helms*, 452 U.S. 412 (1981).

¹¹⁵ A. Stone Sweet and J. Mathews, 'All Things in Proportion? American Rights Doctrine and the Problem of Balancing' (2011) 60 *Emory Law Journal* 101, 164.

however, the complexity of the cases rendered such clear categories an unworkable concept. Yet, it remains commendable that the early findings on procedural democracy in *Carolene Products* have acted as a catalyst for the development of tiers of review, which then have spread throughout all fundamental rights. At the same time, the exact importance of rights for the democratic process itself has not always been clarified by the Court. We can perceive a somewhat neglectful treatment of positive obligations, socioeconomic rights and the potential horizontal effect of rights in the Court's review. As suggested, this stems from the particular view of rights predominant in United States constitutional law. In itself, however, this view seems able to justify normatively different uses of proportionality analysis, much more so than the categorization of the tiers of scrutiny which seem based somewhat on non-normative fears.

iv. Deferent review of fundamental rights in the dimensions of positive obligations and horizontal effect

There is a remarkable absence of a number of features of fundamental rights review in the United States constitutional system in comparison with the case law of the German Federal Constitutional Court. Without expressly basing itself on the procedural democracy doctrine, the German Federal Constitutional Court developed extensive review in the fields of positive obligations arising under fundamental rights, of socioeconomic rights and also – though qualified by the setting of special interest review as discussed with the example of the *Lüth* case – of horizontal effect of fundamental rights.¹¹⁶ By contrast, there is hardly any comparable development in United States constitutional law. Two points can be distinguished for this purpose.

First, as noted there is a marked tendency in United States constitutional law towards more sympathy for political rights in their defensive function. This can be shown on the one hand by the fact that economic and social rights which would require positive action are not enshrined in the Constitution and generally observed with suspicion. Some scholars in United States constitutional law are highly sceptical of socioeconomic rights, because in their perception positive obligations entail over-restrictive constraints on the legislator, and would inevitably lead to severe conflict between branches of government.¹¹⁷ Also, there is a suspicion going back to the times of *Lochner* whether the state should have any positive duties at all, although the New Deal reforms seem to have somewhat embraced the modern regulatory state.¹¹⁸

¹¹⁶ See generally chapter 3 section III.B.iii.

¹¹⁷ See e.g. F.R. Cross, 'The Error of Positive Rights' (2001) 48 *UCLA Law Review* 857, 887.

¹¹⁸ See insightful on this point C.R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004), 61 ff. Newer accounts suggest that in fact a large share of the scepticism is due to the perception that rights review always comes down to 'strong' review leaving hardly any leeway to the legislator, while a weaker form of review could be

Second, the Court insists with remarkable vigour on the doctrine of state action. As some suggest, this insistence is best explained by the uneasiness with which the United States' constitutional system has actually accepted the transformation into a regulatory, social democratic state with positive duties on state authorities.¹¹⁹ As a consequence, since the early *Civil Rights Cases*, violations of fundamental rights caused by private individuals have constantly been examined by the Supreme Court under the angle of whether there was state action. There was development within the doctrine of state action. Private entities such as companies were found to have infringed fundamental rights when they exercised what amounted essentially to government functions,¹²⁰ but not for example for the mere fact of operating in a situation of monopoly.¹²¹ But there was no paradigmatic change comparable to the *Lüth* decision in German constitutional law to coat private law extensively with judicial review based on proportionality analysis or another similar legal test, neither under a theory of direct nor of indirect horizontal effect.

As a paradigmatic case, in *Shelley v. Kraemer* the Court accepted a claim that racially discriminatory private covenants among house owners had been enforced by private courts. The discriminatory action by the private house owners had thereby been transformed into state action subject to scrutiny by the Supreme Court.¹²² If this loose link was found sufficient, a broader number of private interactions could have come under judicial review because of the possibility to enforce dubious private obligations by the public court system. However, the Court subsequently narrowed down the potential applicability of its findings and continues to uphold a division between the public and private spheres, the latter not being subject to judicial review despite the difficulty of drawing a clear boundary.¹²³

In the United States constitutional system, the predominant conceptualisation of fundamental rights is uncomfortable with far-reaching positive duties of the State. The same applies to obligations imposed on private parties through fundamental rights. As a consequence, the Supreme Court has not extended its review under the procedural democracy doctrine to these dimensions of fundamental rights. There is, however, hardly an argument to counter such a view of rights as embedded in a constitutional system as a whole. Rather, this perception seems to be itself part of the normative substantive constitution and can thus be accepted as an argumentative justification for a different standard of review for constitutional rights adjudication.

successfully combined with the concept of social and economic rights before moving to more intrusive review, see Tushnet, 256.

¹¹⁹ Tushnet, 181.

¹²⁰ *Marsh v. Alabama*, 326 U.S. 501 (1946).

¹²¹ *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

¹²² *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹²³ See closer on the aftermaths of *Shelley v. Kraemer* M.D. Rosen, 'Was *Shelley v. Kraemer* Incorrectly Decided? Some New Answers' (2007) 95 *California Law Review* 451, 458 ff.

v. Conclusion

The discussion on the procedural democracy doctrine as the justification for judicial review has substantially bolstered our view of fundamental rights review as generally following the model of equal representation review. The Supreme Court set out the reasons why it scrutinizes violations of fundamental rights more intensely in some cases than in others in a commendably explicit manner. The early findings under the Equal Protection Clause were extended to other fundamental rights. Remarkably, however, the Court did not extend its review to positive obligations or the horizontal effect of fundamental rights. These dimensions seem to play no predominant role justifying judicial review, which seems in our view based on the predominant conception of fundamental rights as shields against public intervention in United States constitutional law. While the categorization of the tiers of review seemed somewhat unjustified, this latter perception of rights seems an appropriate argument in the pre-balancing process based on which the Court could legitimately decide not to extend its review and use of proportionality analysis in a manner comparable to the German Federal Constitutional Court.

B Elements of The Procedural Democracy Doctrine and Judicial Review under the Dormant Commerce Clause

The case law under the Dormant Commerce Clause oscillates between a more categorical excluded reasons approach and a resort to balancing in order to solve questions of even-handed measures. The main reason for the different interpretative approaches, which also lead to varying standards of review, can be found in disagreement on how to conceptualize not only the Dormant Commerce Clause as a norm, but also its underlying justification for judicial review.

i. The Dormant Commerce Clause as a competence norm

As part of the complex regime regulating federalism in the Constitution, the Commerce Clause prescribes that '[the Congress shall have power] to regulate commerce with foreign nations, and among the several states, and with the Indian tribes'.¹²⁴ In the early case law, the Court had to elaborate on the extent of the power of Congress itself before truly turning to the restrictive side of the clause on regulatory powers of states.¹²⁵ In *Gibbons v. Ogden*, the Court found that the power of Congress under the clause was very broad and included measures targeting commercial exchange with even only indirect inter-

¹²⁴ Article I Section 8 Clause 3 of the Constitution.

¹²⁵ M. Lawrence, 'Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework' (1998) 21 *Harvard Journal of Law and Public Policy*, 407.

state impact.¹²⁶ This power was, however, not fully exclusive.¹²⁷ As the conflict between the state and the federal law in the case was very clear, no further clarification of the states' powers was given.

In *Willson v. Black-Bird Creek Marsh*, the Court held that states were authorized to regulate commerce in the form of police powers until federal pre-emption occurred. Federal courts would supervise this exercise of competence.¹²⁸ Apart from the express power given to Congress, the Commerce Clause was, however, silent on the extent of regulatory powers of the states which influenced trade, but did not directly regulate it. The Supreme Court was thus called to interpret the scope of regulatory powers remaining with the states in light of this 'dormant' side of the Commerce Clause.¹²⁹ The Court had to decide what power to regulate remained with the states, while preventing protectionist measures from unduly hindering inter-state commerce.

Our suggestion is that the Dormant Commerce Clause justifies judicial review including the use of proportionality analysis – but only in rare cases and with the use of due deference, as review should follow a model of special interest review. The special interest at stake is the avoidance of protectionism. We assess the various accounts on the justification of review under the Dormant Commerce Clause to bolster this suggestion.

ii. Competing conceptual readings of the Dormant Commerce Clause

Theoretical accounts often point back to the ideas contained in footnote four of *Carolene Products*: They suggest that review should be based on the idea that some interests – here out-of-state traders – are not adequately represented in the political process and should therefore be defended by the Court in its review.¹³⁰ Others oppose such views and suggest that the aim of the Clause is to protect economic union rather than personal rights.¹³¹

If the procedural democracy doctrine is endorsed, it is still not clear what exact 'right' of traders is protected. In part of the case law, there seems to persist the view that by means of judicial review traders as out-of-state interests ought

¹²⁶ *Gibbons v. Ogden*, 22 U.S. 1 (1824), 189 ff.

¹²⁷ *Ibid.*, 209-210. States might, according to the Court, pass some laws regulating commerce insofar as they would neither interfere with nor be contrary to federal legislation.

¹²⁸ *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829). It should be noted that scholars disagree as to whether proportionality analysis was used in the case or not, T.A. Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 96 *Yale Law Journal* 943, 950.

¹²⁹ The origin of this term was traced back to a statement by Chief Justice Marshall in *Gibbons v. Ogden*, according to which the power to regulate interstate commerce 'can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant'.

¹³⁰ See e.g. M. Tushnet, 'Rethinking the Dormant Commerce Clause' (1979) *Wisconsin Law Review* 125, 125.

¹³¹ See e.g. R.B. Collins, 'Economic Union as a Constitutional Value' (1988) 63 *New York University Law Review* 43.

to be allowed to claim a substantive right of access to local markets. As an example, the decision in *C&A Carbone v. Clarkstown* can be understood in this light.¹³² Despite the fact that both local and out-of-state operators were excluded by the regulation at issue, the Supreme Court found the measure discriminatory and struck it down. The Court thus seemed to suggest that non-local economic operators must possess a right to access the local market.

According to Ely, contrary to such a substantive perception, the right granted under the Dormant Commerce Clause can only be understood as procedural in nature. The clause erects a system of ‘virtual representation’, which links out-of-state interests to local interests and political representation.¹³³ Since, for example, a state cannot tax out-of-state traders higher than local traders, the latter simultaneously represent the out-of-state interests in their struggle for no unreasonable tax burden through their own political representation in the state.¹³⁴

There are, however, voices who doubt the usefulness of such an analysis. The centrality of reasoning on interest group participation in the political process led Chief Justice Rehnquist to complain in one of his dissents on the over-reliance on process-based views in the use of judicial review under the Dormant Commerce Clause: ‘Analysis of interest group participation in the political process may serve many useful purposes, but serving as a basis for interpreting the dormant Commerce Clause is not one of them.’¹³⁵

More substantive criticism has been uttered by Regan.¹³⁶ In his view, out-of-state traders do not require virtual representation through intrusive judicial review under the Dormant Commerce Clause, because they are already represented in the local political process through consumers. Local consumers can engage in lobbying at the local level in cases of inefficient, protectionist regulation, if such regulation imposes an unreasonable burden not only on out-of-state traders, but also on them.¹³⁷

However, a full rejection of the justification of judicial review through the procedural democracy doctrine as a consequence seems exaggerated. In fact, Regan’s findings certainly call for a careful adaptation of the standard of review and a careful use of proportionality analysis. In particular, the use of balancing is likely to be required only rarely. However, we suggest that pre-balancing these arguments suggests that review should follow the lines of a model of special interest representation. There may be cases of severe imbalance between the values of trade and of regulatory autonomy, which require rebalancing. Judicial review should thus be examined as to its justification on a case-by-case basis.

¹³² See the subsequent discussion of the case in section IV.B.ii.

¹³³ Ely, *Democracy and Distrust*, 83.

¹³⁴ *Ibid.*, 84.

¹³⁵ Chief Justice Rehnquist, dissenting, in *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) at 215.

¹³⁶ See already chapter 2 section V.B.iv.d.

¹³⁷ D.H. Regan, ‘The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause’ (1986) 84 *Michigan Law Review* 1091, *passim*.

The usefulness of this suggestion is bolstered if we look at cases like *West Lynn Creamery, Inc. v. Healy*.¹³⁸ Against the background of a non-discriminatory tax on milk wholesalers, whose receipts were subsequently used to subsidize local milk producers, the Supreme Court turned to analyse the political process to justify its review. Through the combination of measures, in-state interests had been ‘mollified’¹³⁹ and were not reliable as safeguards in the legislative process to lobby unreasonable regulation. Consequently, stricter review failed the measure under the Dormant Commerce Clause. Lenient review would have arguably ignored the fact that local representation of one value had been reduced by the measure itself.

iii. Conclusion

Summing up, the continuing dispute on the appropriate justification of judicial review under the Dormant Commerce Clause has not produced one single solution. As a consequence, over the years the Court has developed a rather crude categorical distinction between discriminatory and non-discriminatory measures combined with a fairly superficial use of balancing. In the discussion of balancing, we thus aim to suggest a less categorical and more flexible approach which gives more weight to various stages of proportionality analysis and even balancing, as far as appropriate under a model of special interest review.

C Conclusion

For the review of fundamental rights in United States constitutional law the Supreme Court has developed and discussed the procedural democracy doctrine in detail as the justification of its review. Overall, its findings make a plausible claim supporting a model of equal representation review as the outcome of pre-balancing. The extension of a system of tiers of scrutiny throughout fundamental rights jurisprudence has been criticized by some as over-categorical and unable to operate in practice. While there may be some merit to these claims, we observed as a commendable feature that the debate focused on the appropriate standard of review and was not overshadowed by the discussion on whether or not to use balancing. The confusion in the case law caused by such a mixture of two debates has already been shown with the example of German constitutional law.¹⁴⁰ In the German case, the rejection of proportionality analysis in some cases based on considerations of procedural democracy overshadowed the question of the appropriate standard of review. However, we also note some peculiarities and shortcomings in United States constitutional law. In particular, the fragmentation of the tiers of review may

¹³⁸ See a closer discussion of the case in section IV.B.iii.

¹³⁹ *West Lynn Creamery, Inc. v. Healy* at 200.

¹⁴⁰ See chapter 3 section III.B.i.

be appropriately explained by the context of the Supreme Court's contested authority, but it does not seem justified in a normative manner. Contrary to this finding, the fact that review remains limited in fields of positive obligations and horizontal effect of fundamental rights seems justified by the normative perception of rights as shields against public interference. Contestation of the Court's authority and fear of under-protection of rights are again central to the subsequent section. The debate on balancing is marked by a specific perception of judicial balancing – i.e. as weakening the protection of rights – which does not seem normatively justified. However, as a fortunate consequence of the fragmented debate, this battleground remains to some extent separated from the discussion of the system of tiers of scrutiny.

In the case of the Dormant Commerce Clause, we argued that the Court's pre-balancing should result in a model of specialized interest review, which thus calls for specific justification of the appropriate standard of review and a reduced role given to balancing. In the case law and the doctrine, there are competing positions. A full rejection of review by scholars like Regan, however, seems exaggerated in our view. Consequently, we observe an unfortunate fragmentation in the case law discussed in the subsequent section, which all too strictly distinguishes between cases of discrimination and non-discriminatory measures, the role of balancing thereby being unduly reduced.

IV 'Balancing' in United States Constitutional Law

Based on our findings in the previous two sections, pre-balancing suggests to different results: fundamental rights review operates under a model of equal representation review, while under the Dormant Commerce Clause a model of special interest review is more appropriate. At the same time, debate on the justification of judicial review can be observed as remarkably separate from the one on the use of balancing. This division also informs the present section.

Under fundamental rights review, contrary to the situation in German constitutional law¹⁴¹ rights had been enshrined in the Constitution and judicial review been established from the beginning. However, changes in legal thinking were the necessary point of departure for the emergence of balancing. As a central feature of the debate, balancing is perceived as a technique which weakens rights in their shielding function against interference based on public interests. This predominant view, together with institutional concerns which go back to the contestation of the function of judicial review exercised by the Supreme Court, produced a fragmented jurisprudence, where balancing is sometimes embraced, but on other occasions firmly rejected. We find these features rather unconvincing, as they do not seem to be based on truly normative concerns capable of forming arguments in the pre-balancing exercise.

¹⁴¹ See chapter 3 sections II.A.i and II.A.ii.

Under the Dormant Commerce Clause, we found some inconclusive debate on the justification of judicial review. This uncertainty about the true nature of the Clause also influenced the use of balancing. Over the years a strict dichotomy of discriminatory and non-discriminatory measures was developed by the Supreme Court. Only for the second category does the Court resort to a rather superficial balancing – mostly in favour of regulatory autonomy. The rigidity of the distinction and its consequences can thus be criticized in the light of our suggested pre-balancing.

A Balancing and Fundamental Rights in the United States Constitution

Fundamental rights are codified in a fairly incomplete manner in the United States Constitution. Substantial interpretative work had to be dedicated by the Supreme Court to make them operational and also to somewhat complete a list of rights found to be insufficient for the concerns of a modernizing regulatory state.¹⁴² Having put great efforts in construing a full-scale system of fundamental rights protection based on a rather tenuous textual basis, the Court seemed generally motivated by a classic reading of fundamental rights as shields against public interference. This reading, while in itself a legitimate perception of rights, also provoked scepticism towards weighing rights against public interests, a process which seemed to weaken the predominant nature of rights. Changes in legal thinking influenced the Supreme Court and made it abandon an early, highly categorical approach. At some points, ‘balancing’ was indeed applied to fundamental rights. But contrary to the example of German constitutional law, there is no overall recognition that the Supreme Court should actually balance.

The piecemeal strategy followed by the Supreme Court in developing the case law can be observed in the field of balancing. Notably, the very development of the idea of balancing is only the consequence of changes in legal thinking, but then follows the lines of fragmented case law under various fundamental rights provisions. We can contrast this impression with the fairly unitary principle of proportionality developed in German constitutional law.¹⁴³

i. Changes in Legal Thinking in the Early 20th Century

The very starting point for legal tests going beyond pure subsumption had to be progress in legal thinking. During the 19th century, the Supreme Court exhibited a formalistic, categorical approach to adjudication of the Constitution and in particular the fundamental rights enshrined in it.¹⁴⁴ Preeminent scholars of that time also strongly advocated formalist ideals.

¹⁴² See section II.B.

¹⁴³ See chapter 3 section IV.

¹⁴⁴ See e.g. *Lawton v. Steele*, 152 U.S. 133 (1894).

Langdell described law and its interpretation as a virtually scientific exercise of deduction, based on the ideas that the law was determinate, systematized and autonomous.¹⁴⁵

Already towards the end of the 19th century, these thoughts met increasing criticism from other scholars. Holmes suggested perceiving the law as a tool to achieve social ends rather than as a mere exercise of logical deduction. As a consequence, applying legal rules would come with the delineation of competing rights or interests, including weighing. Distinctions of degree were more appropriate than clear-cut conceptions of absolute rights. He warned against a mathematical conception of law where everything could be logically deduced from 'some general axioms of conduct'.¹⁴⁶

In a similar vein, Pound argued that the scientific character of law should be understood in a more instrumental manner, as a 'means'.¹⁴⁷ The overall objective had to be a sociological legal science whose principles adapted to the 'human conditions they are to govern' and not the other way round.¹⁴⁸ Pound set out perhaps the most explicit account of judicial balancing in the sense of proportionality *stricto sensu* in a 1921 paper, outlining a broad number of 'social interests' that should be realized to the highest extent possible with the lowest sacrifice to the others.¹⁴⁹

Cardozo underlined in his writings that it was judges who created law¹⁵⁰ and that there could be no general ritualistic application of an inflexible set of rules. Instead, such formalistic examinations had to be limited to certain areas, while on many occasions a more balanced approach using several methods of interpretation and application were required for a satisfactory solution.¹⁵¹ The law's application by the judge was shaped by the judge's intuitions, assumptions and prejudices.¹⁵²

American realism launched the next attack on formalism. Realist scholars argued that there was judicial creation of law, that law should be perceived as a means of pursuing social ends and that the rule to be interpreted could not be considered as the only factor which led to the final decision.¹⁵³ Law in itself and the decision reached by legal interpretation was in their view not at all based on logic, but rather on a set of arguments to make a legal solution appear plausi-

¹⁴⁵ See for a more detailed account T. Grey, 'Langdell's Orthodoxy' (1983-1984) 45 *University of Pittsburgh Law Review* 1, 6-11.

¹⁴⁶ O.W. Holmes, 'The Path of the Law (1897)' (1996-1997) 110 *Harvard Law Review* 991, 998.

¹⁴⁷ R. Pound, 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605, 605.

¹⁴⁸ *Ibid.*, 609.

¹⁴⁹ Published later as R. Pound, 'A Survey of Social Interests' (1943) 57 *Harvard Law Review* 1, 39.

¹⁵⁰ B.N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 10.

¹⁵¹ B.N. Cardozo, *Lebendiges Recht (The Growth of the Law, 1924)* (Munich: Biederstein, 1949), 40.

¹⁵² *Ibid.*, 49.

¹⁵³ For a good overview of realist arguments, see K.N. Llewellyn, 'Some Realism about Realism – Responding to Dean Pound' (1930-1931) 44 *Harvard Law Review* 1222, 1236-1238.

ble, while it was in reality based on intuitions, political views or psychological factors.¹⁵⁴

The outcome of these intellectual battles was a general turn towards more pragmatism, according to which legal rules should be valued more as to their consequences. Consequently, scholars should avoid over-restrictive analytical studies.¹⁵⁵

ii. From *Lochner* to *Carolene Products*: the persistence of categorisation and definitional approaches

Whereas the controversy between formalists and progressives emerged at the beginning of the 20th century, the Supreme Court took its time in noting and truly implementing the newer ideas of weighing interests. A categorical, definitional approach to the adjudication of fundamental rights cases remained predominant despite crucial changes in the actual protection and scrutiny of fundamental rights that occurred during the first decades. While categorical approaches served to protect economic fundamental rights in particular, balancing came up at a period where that protection was significantly weakened, as we show below. Consequently, it comes as no surprise that balancing was criticized as unduly weakening rights by commentators who disagreed with the ongoing changes in fundamental rights protection.

At the beginning of the 20th century, the Court turned to an ever stronger focus on certain economic constitutional rights which it defended with particular vigour. *Lochner v. New York* constituted one of the landmark decisions which lent its name to the era.¹⁵⁶ Relying on the due process clause of the Fourteenth Amendment, the Court struck down the labour law of the state of New York which had prescribed maximum hours of work per day and week for employees in bakeries. The Court stated that the central question asked should be whether this was 'a fair, reasonable and appropriate exercise of the police power of the State, or [...] an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family'.¹⁵⁷ This passage was followed by a rather categorical approach to interpreting the notion of police powers.¹⁵⁸ The resulting bias favouring the right to freedom of contract is omnipresent in the judgment.

¹⁵⁴ See in particular J. Frank, *Law and the Modern Mind* (1930) (London: Stevens, 1949). See on the parallel to the German Free Law Movement J. Herget and S. Wallace, 'The German Free Law Movement as the Source of American Legal Realism' (1987) 73 *Virginia Law Review* 399, 422.

¹⁵⁵ Aleinikoff, 957-958.

¹⁵⁶ *Lochner v. State of New York*, 198 U.S. 45 (1905).

¹⁵⁷ *Ibid.* at 56.

¹⁵⁸ See for similar non-balancing readings of *Lochner* also Aleinikoff, 951, or Ely, 'Roe v. Wade', 941.

The Court – or rather a close majority¹⁵⁹ – rejected any justification based on public health, as bread would be baked in the same fashion independent of the working hours of bakers, while the latter would need no specific protection as a profession and should be free to contract their labour under conditions they so chose.¹⁶⁰ There was disagreement also in the lower courts as to whether baking should qualify as a profession dangerous to the health of individuals. For the majority, this also meant that the health of bakers as individuals was an excluded justification, since otherwise a law could go to any length to protect such an uncertain interest; they found thus that ‘the limit of the police power ha[d] been reached and passed in this case’.¹⁶¹

A more fact-based weighing exercise akin to proportionality *stricto sensu* was undertaken by three dissenting justices, who declared the law a reasonable measure in light of the state of research on work-related health risks and a comparison with working hours regulations for bakers in other countries.¹⁶² Categorical reasoning coexisted thus with a more flexible balancing approach.

Next to the *Lochner* line of case law, as mentioned earlier the Supreme Court also started to use substantive due process as a means to protect other civil liberties.¹⁶³ It again relied predominantly on categorical approaches, as the example of *Meyer v. Nebraska* shows. In this case, a statute prescribed English as the only teaching language combined with a prohibition to teach living foreign languages at school before students had passed the eighth grade. The aim was to promote civic development by teaching to students primarily English and American ideals and also to protect children’s health by not forcing them to learn a foreign language at young age. The Court held that the means adopted ‘exceed exceed the limitations upon the power of the State and conflict with rights’ of the plaintiff.¹⁶⁴ To underline this point, the Court, however, did not weigh competing interests, but instead explained the limits of the state’s powers using examples of matters that still fell within these powers, such as requiring English as a teaching language or drafting a curriculum for the schools. By contrast, a regulation such as the one at stake could only be taken in situations of emergency; the justification of protecting a child’s health was excluded as a reason based on the evidence.¹⁶⁵

Still, the majority of cases focused on the defence of economic rights. The legacy of *Lochnerism* was mixed, although the case itself soon faced acerbic criti-

¹⁵⁹ *Lochner* was the result of a 5-4 vote, with some indications that the other dissenting opinion by Justices Harlan, White and Day was initially written as the majority opinion, D.E. Bernstein, ‘*Lochner v. New York: A Centennial Retrospective*’ (2005) 83 *Washington University Law Quarterly* 1469, 1496-1497.

¹⁶⁰ *Lochner at 57*.

¹⁶¹ *Ibid.* at 58.

¹⁶² *Ibid.* at 70-71.

¹⁶³ See section II.B.i.a.

¹⁶⁴ *Meyer v. Nebraska at 402*.

¹⁶⁵ *Ibid.* at 402-403.

cism.¹⁶⁶ In some important decisions, the Court continued to protect predominantly economic freedoms such as liberty of contract and property rights. It struck down laws that prohibited employers from forbidding to their employees to join unions, thereby weakening the union movement.¹⁶⁷ On the other hand, in a number of cases laws for labour market reform were upheld by the Court, as in the case of *Muller v. Oregon* basing itself on categorical thinking such as the difference between sexes as justifying legislation protecting female workers.¹⁶⁸

Categorisation thus became an important tool for the Court for both economic and non-economic liberties, supporting in general a nearly libertarian, anti-regulatory agenda. In the landmark case of *Adkins v. Children's Hospital*, minimum wage legislation for female employees was invalidated.¹⁶⁹ The case epitomizes the categorical approach taken by the Court towards substantive due process review of constitutional rights. The majority of judges found that freedom of contract had to be perceived as the 'general rule', while restraint could only be the 'exception'.¹⁷⁰ Consequently, the Court listed the possible exceptions to the rule and tried unsuccessfully to fit the law at issue in the category of police powers measures.

However, economic thinking had already abandoned the sceptical stance towards socioeconomic regulation which was still maintained in the Court's jurisprudence, and the Great Depression of the end of the 1920s left the Court even further out of touch with reality. The Court's intense review clashed with the new socioeconomic regulation adopted under President Roosevelt's New Deal initiative.¹⁷¹ With the *Lochner* approach becoming virtually untenable, the Supreme Court – after several new appointments, including Benjamin Cardozo¹⁷² – reversed case law like *Adkins*.¹⁷³

In the seminal decision of *Carolene Products*, the Court developed a 'presumption of constitutionality'¹⁷⁴ in favour of socioeconomic legislation. It held that 'the existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in light of the facts made known or generally assumed, it is of such a character as to preclude the assump-

¹⁶⁶ See e.g. L. Hand, 'Due Process of Law and the Eight-Hour Day' (1908) 21 *Harvard Law Review* 495, 502-503. Pound also suggests *Lochner* as one instance of mechanical jurisprudence, see Pound, 'Mechanical Jurisprudence', 616.

¹⁶⁷ See e.g. *Adair v. United States*, 208 U.S. 161 (1908).

¹⁶⁸ See e.g. *Muller v. Oregon*, 208 U.S. 412 (1908) on women's working hours.

¹⁶⁹ *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

¹⁷⁰ *Ibid.* at 546.

¹⁷¹ See concisely on Roosevelt's various regulatory initiatives Sunstein, 41 ff.

¹⁷² See on these changing majorities and minorities on the Court's bench in detail Bernstein, 1510-1511.

¹⁷³ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). See also for an important earlier decision rejecting the imposition of a particular economic vision on the states through the Due Process Clause *Nebbia v. New York*, 291 U.S. 502 (1934).

¹⁷⁴ *United States v. Carolene Products Co.* at footnote 4.

tion that it rests upon some rational basis within the knowledge and experience of the legislators.¹⁷⁵ Examination of the ‘rational basis’ of legislation would thus be the future test, as the starting point of the development of tiers of scrutiny. However, as indicated in the famous footnote four of the decision, the presumption of constitutionality would operate in a more narrow fashion in cases where ‘prejudice against discrete and insular minorities’ could seriously curtail the political process which normally protected them, which would then require a ‘more searching judicial inquiry’.¹⁷⁶ At the same time, the era was also marked by the emergence of balancing approaches. Consequently, in United States constitutional discourse there is a mixture between the often perceived under-protection of economic fundamental rights resulting from the paradigmatic change of *Carolene Products* and the emergence of balancing. Balancing is thus rejected conceptually as necessarily entailing the weakening of rights protection.¹⁷⁷

The early 20th century was marked by an emphasis on the defence of economic rights, which was subsequently overturned in the landmark *Carolene Products* decision. Categorical approaches seem, however, to have been used detached from this paradigmatic change in how rights should be protected. *Carolene Products* should rather be understood as a concern about the over-protection of economic rights, combined with a potential problem of under-protection of important civil liberties, which formed the basis of footnote 4.¹⁷⁸ The consequence was the varying standards of scrutiny discussed previously.¹⁷⁹ In our view, the link between balancing and *Carolene Products* should not necessarily be made, because an understanding of balancing as a reaction to the overemphasis on economic rights in the *Lochner* era appears a simplistic conclusion.¹⁸⁰ As shown, the Supreme Court used similar categorisation-based reasoning in other fundamental rights cases. Arguably, for some justices the limits of categorisation as a tool of rights adjudication became visible more generally beyond a particular category of fundamental rights and led to attempts to introduce more flexible weighing tests. Issues of the justification of judicial review and the debate on balancing ought to be kept deliberately separate in this light. The comparative experience of the German Federal Constitutional Court also testifies amply to the fact that reliance on proportionality analysis did not cause under-protection of fundamental rights.

The scepticism towards balancing, however, continued in doctrinal comment and the case law. This conceptual scepticism as well as scepticism of the institutional aspects of balancing by the Supreme Court produced fragmented case

¹⁷⁵ *Ibid.* at 152.

¹⁷⁶ *Ibid.* at footnote 4. See section III.A.ii.

¹⁷⁷ See on this accusation of a social progressive agenda being necessarily pursued by the use of balancing J. Bornhoff, ‘Genealogies of Balancing as Discourse’ (2010) 4 *Law & Ethics of Human Rights* 109, 129.

¹⁷⁸ Stone Sweet and Mathews, 129-130.

¹⁷⁹ See section III.A.ii.

¹⁸⁰ As correctly emphasized by Bernstein, 1508-1509.

law, where balancing continues to be sometimes accepted, but fiercely rejected in other cases.

iii. The emergence of balancing

Balancing made its appearance in constitutional jurisprudence following the example of ‘wild clover, not poison ivy’.¹⁸¹ In a variety of the cases in the late 1930s and early 1940s that also served to develop the various levels of scrutiny, the Court weighed objectives brought forward by states as to whether they could qualify as sufficiently important, depending on the level of scrutiny that was sought.¹⁸² In *Schneider v. State*, faced with a prohibition on distributing leaflets in order to prevent littering and keep the streets clean, the Court held that ‘the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights’.¹⁸³ Balancing thus followed the strictness of the tiers of review, as can be seen in the early freedom of speech cases which applied a more speech protective weighing than from 1949 onwards.¹⁸⁴

Elements of weighing consequently spread throughout constitutional law, used for example to recognize new rights and simultaneously limit new burdens on states, or to lessen the impact of the choice of a particular tier of scrutiny.¹⁸⁵ Balancing as used in United States constitutional law is thus hard to assess without taking into account the system of tiers of scrutiny developed over time.¹⁸⁶

Balancing has faced constant criticism and has thus not been applied consistently. Much of the criticism against proportionality *stricto sensu* relates to the already discussed methodological difficulties for the judiciary. Another group of critics, however, perceived balancing not as a safeguard against absolute conceptions of rights, but instead pointed to the reduced protection for rights that it might enshrine. In the debate on balancing in freedom of speech cases, Frantz argued that the weighing test applied assured ‘little, if any, more freedom of speech than we should have had if the First Amendment had never been adopted’.¹⁸⁷ If constitutional protection would only prescribe protection as appropriate in a particular case after weighing all competing considerations, there seemed in his view hardly any specific protection given by the Constitution.

A less comprehensive criticism is applied by critics who suggest that balancing should not be rejected outright, but rather limited to certain areas of

¹⁸¹ Aleinikoff, 963.

¹⁸² Compare also the emergence of balancing under the Dormant Commerce Clause in *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), discussed in the subsequent section IV.B.i.

¹⁸³ *Schneider v. State*, 308 U.S. 147 (1939) at 161.

¹⁸⁴ See J. Fallon, Richard H., ‘Strict Judicial Scrutiny’ (2007) 54 *UCLA Law Review* 1267, 1288–1289.

¹⁸⁵ See for an insightful overview Aleinikoff, 969–971.

¹⁸⁶ As discussed in section III.A.iii.

¹⁸⁷ L.B. Frantz, ‘The First Amendment in the Balance’ (1962) 71 *Yale Law Journal* 1424, 1448.

constitutional law. Pildes suggests that in a variety of situations, rights should be understood as ‘structures’, which require no balancing against interference. Rather, a structure conception perceives rights as spaces of freedom into which interference is only allowed based on specific reasons.¹⁸⁸ Judicial review must therefore not engage in balancing, but inquire into the purpose of public intrusion into the sphere of a right, and reject the latter if it is based on excluded reasons.¹⁸⁹

The debate on the use of balancing has continued not only in the doctrine, but also in the case law. As one constant opponent to balancing by the judiciary, Justice Scalia pronounced profound disagreement with the approach of balancing. In one case, he wrote that balancing would use a scale analogy in an inappropriate manner, as both interests were simply ‘incommensurate’, and balancing was tantamount to comparing ‘whether a particular line is longer than a particular rock is heavy’. In his view, the task of weighing interests should be left completely to Congress.¹⁹⁰

In the more recent decision of *District of Columbia v. Heller*, Justice Scalia again crossed swords with Justice Breyer over a potential balancing test under the Second Amendment. The case recognized an individual right to bear arms and struck down a law banning handguns in the home. Scalia suggested that the amendment was the ‘product’ of an interest balancing, and that no new weighing could thus be undertaken by the judiciary. To use such an approach to establish a constitutional right could not be permitted, as a ‘constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all.¹⁹¹ Contrary to the majority’s position, Breyer, writing for a minority of four, contended that such a “‘proportionality’ approach” had already been applied in various contexts of the Court’s case law and could produce useful results in combination with appropriate deference.¹⁹²

iv. Conclusion

The use of balancing in United States constitutional law is marked by particularly strong fragmentation and persistent attempts of categorisation. Balancing emerged in the case law, but remains contested to this day, which is based in particular on the idea that rights would not be sufficiently protected under a balancing approach. This prolongs the rather sceptical stance taken towards public interests and socio-economic regulation in much of United

¹⁸⁸ See already chapter 2 section II.A.i.b.

¹⁸⁹ R.H. Pildes, ‘Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law’ (1993-1994) 45 *Hastings Law Journal* 711, 724.

¹⁹⁰ See Scalia, dissenting, in *Bendix Autolite v. Midwesco Enterprises*, 486 U.S. 888 (1988) at 898.

¹⁹¹ *District of Columbia v. Heller*, 128 U.S. 2783 (2008) at 2821.

¹⁹² *Ibid.* at 2852. See for a more detailed analysis of this reference to proportionality M. Cohen-Eliya and I. Porat, ‘The Hidden Foreign Law Debate in *Heller*: The Proportionality Approach in American Constitutional Law’ (2009) 46 *San Diego Law Review* 367, *passim*.

States constitutional doctrine, which seems to persist even after the *Caroline Products* turnaround in the Court's case law, and seems to be caused to no small extent by the parallel development of tiers of scrutiny and balancing. As has been shown in the chapter on German constitutional law, however, an automatic inference that balancing weakens rights seems largely overstated. Rather, the German Federal Constitutional Court's constant reliance on the principle of proportionality has led to a more predictable and consistent approach to fundamental rights adjudication. This approach also manages to operate without the omnipresent tendency of categorisation, which treats cases in a very different manner based on which rights category they belong to. We therefore find the scepticism towards balancing unconvincing based on our earlier pre-balancing.

B Balancing and the Dormant Commerce Clause

As discussed, the case law under the Dormant Commerce Clause oscillates between a more rights-based conception of the clause and a more categorical approach based on excluded reasons. Under the first conception, balancing the effect of regulation on trade against the purported benefits of regulation plays a predominant role. Under the second conception, the Court looks for indications that a measure should be qualified as protectionist and therefore as based on an excluded reason. The older case law shows vacillation between the two poles, while later a division was introduced into measures causing facial discrimination – which are virtually always excluded as protectionist – and incidental restrictions of commerce, where a balancing test is used. Generally, it is suggested that no predominant role must necessarily be played by full-scale proportionality analysis, as we have found review under the Dormant Commerce Clause to follow a model of special interest representation review. However, the division undertaken by the Court arguably seems to some extent over-restrictive and reduces the role of balancing to a mere rubber-stamp for measures found to be non-discriminatory. We therefore venture to suggest a more flexible approach which falls more in line with our result of pre-balancing, a model of special interest review.

i. Early developments before the two-tier framework

The starting point for legal tests under the Dormant Commerce Clause seemed to be a very vague form of balancing. In *Cooley v. Board of Wardens of the Port of Philadelphia*, the Supreme Court held that in the absence of measures taken by Congress, states should be able to regulate aspects of inter-state commerce which were so local as to require diverse treatment, while aspects which required a uniform rule should be regulated by Congress.¹⁹³ The criteria for implementing this local-national distinction were not set out. As a

¹⁹³ *Cooley v. Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851).

consequence, the doctrine shows division on what test actually applied in this case.¹⁹⁴

Later, after the civil war, a high number of traders sought to challenge state legislation which imposed a burden upon inter-state commerce under the Commerce Clause.¹⁹⁵ While the *Cooley* distinction could be rather easily applied in cases of purposefully discriminatory measures favouring local interests, in many other cases matters were not as clear.

On closer examination, the test applied seemed to be somewhat akin to necessity. In cases such as *Railroad Co. v. Husen*, state regulation for public purposes such as health protection, public order or public morals was in principle accepted, but then struck down because the measure at issue went beyond what was 'absolutely necessary' for the protection of the state interest at stake.¹⁹⁶

At the same time, a rights-conception of the clause emerged. The Court started to emphasize that a constitutional right to free trade for the individual could be derived from the Commerce Clause. It did so most notably in *Minnesota v. Barber*, holding that a regulation prescribing in-state health inspections ignored 'the right which the people of other States have in commerce between those States and the State of Minnesota'.¹⁹⁷ In the language of *Reid v. Colorado*, this 'right' seemed to move in the direction of an individual right. The Court found that while the trader certainly had a right under the Commerce Clause, the state was still entitled to protect important interests, granted that the 'measures employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States'.¹⁹⁸ Despite such indications of rights-based thinking and unreasonable burdens as a potential starting point for proportionality analysis, the Court took a different direction. It developed a distinction based on state measures having a direct effect on inter-state commerce,¹⁹⁹ which were found in violation of the Commerce Clause, and measures having merely an indirect effect,²⁰⁰ which could be accepted.²⁰¹

Justice Stone found the distinction between indirect and direct effect on commerce unpersuasive and suggested instead a broader test resembling balancing which should consider 'all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual

¹⁹⁴ See, e.g. reading the case as 'balancing' C.L. Black, *Perspectives in Constitutional Law* (Englewood Cliffs: Prentice-Hall, 1970), 34. See for a contrary view L. Henkin, 'Infallibility under Law: Constitutional Balancing' (1978) 78 *Columbia Law Review* 1022, 1027-1028.

¹⁹⁵ Stone Sweet and Mathews, 119.

¹⁹⁶ *Railroad Co. v. Husen*, 95 U.S. 465 (1877), 471.

¹⁹⁷ *Minnesota v. Barber*, 136 U.S. 313 (1890), 329.

¹⁹⁸ *Reid v. Colorado*, 187 U.S. 137 (1902), 151.

¹⁹⁹ See e.g. *DiSanto v. Pennsylvania*, 273 U.S. 34 (1927); *Seaboard Air Line Ry. v. Blackwell*, 244 U.S. 310 (1917).

²⁰⁰ See e.g. *Smith v. Alabama*, 124 U.S. 456 (1888); *Chicago, Rock Island & Pac. Ry. Co. v. Arkansas*, 219 U.S. 453 (1911).

²⁰¹ See generally Tribe, *American Constitutional Law*, 408.

effect on the flow of commerce'. This balancing would then lead to a conclusion on whether a regulation concerned local interests and would not infringe the 'national interest in maintaining the freedom of commerce'.²⁰² The doctrine in the late 1930s also argued that despite the seemingly formal approach taken by the Court, in reality a balancing process was actually taking place, so that the Court should also state openly that it was applying a test akin to proportionality analysis.²⁰³

In *Southern Pacific v. Arizona*, a case concerning the regulation of the permissible length of trains for safety reasons, the Court thus adopted a weighing exercise. It found a 'substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service'.²⁰⁴ The justification of public safety brought forward by the state seemed unpersuasive, as shorter trains also raised safety concerns. Consequently, the Court held that '[t]he decisive question is whether, in the circumstances, the total effect of the law as a safety measure in reducing accidents and casualties is so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it and subject it to local regulation which does not have a uniform effect on the interstate train journey which it interrupts'.²⁰⁵ Dissenting Justice Black argued that the Court should not impose itself as a 'superlegislature' and had in the present case thrown together two entirely different causes of danger to evaluate the safety effect of the state's legislation, thereby unduly restricting the latter's regulatory powers.²⁰⁶

The apparent tendency towards balancing was subsequently cut short by the introduction of a two-tier framework in the case law. On the one hand, state regulation that discriminated against inter-state commerce was found invalid by the Court unless a justification could meet a rather high threshold. On the other hand, merely 'incidental' restrictions of interstate commerce were subject by the Supreme Court to a balancing test weighing the local interest against the national one. As has already been explored, this distinction can be explained by the impossibility of agreeing on one specific reading of the Dormant Commerce Clause.²⁰⁷ Still, this explanation is in our view no convincing justification for the rigidity of the case law and the abstention from using proportionality analysis and its sub-tests more extensively.

²⁰² Stone, dissenting in *DiSanto v. Pennsylvania* at 44.

²⁰³ N.T. Dowling, 'Interstate Commerce and State Power' (1940-1941) 27 *Virginia Law Review* 1, 21-22.

²⁰⁴ *Southern Pacific v. Arizona* at 774.

²⁰⁵ *Ibid.* at 775-776.

²⁰⁶ *Ibid.*, 789-791.

²⁰⁷ See section III.B.ii.

ii. Discriminatory measures under the two-tier framework

In the first line of cases, the doctrine suggested focusing on protectionist intent in state laws.²⁰⁸ The Court has not done so explicitly. Instead, it seems to rely on a number of factors, the effect of a measure and possible alternatives playing a crucial role, to identify the true purpose – and its potential protectionist character. As was put in one decision, a statute can discriminate facially, purposefully or in practical effect.²⁰⁹ A wide notion of discrimination is thus embraced,²¹⁰ which seems, however, problematic in light of the highly different treatment accorded to the categories of discriminatory and non-discriminatory measures.

In a classic decision the Court struck down a prohibition on the sale of milk not processed at approved pasteurisation plants which were placed close to Madison and inspected by local public health authorities. A local ordinance with higher standards of public health protection than the national standards applied to the Chicago plants at issue in the case. In its decision, the Court relied mainly on the fact that ‘reasonable and adequate alternatives’ were available such as inspection of the other factories by Madison’s own officials including the imposition of costs on the controlled facility. As a consequence, a discriminatory burden ‘not essential’ for the protection of local health interest had been imposed.²¹¹ Yet, in the dissenting opinion the lack of analysis as to whether the alternatives suggested could truly grant the same high level of public health protection was deplored, as it led to a *de facto* superiority of the right to traffic in commerce over the power of the people to protect the quality of milk.²¹²

In another public health-related decision, the Court found that a New Jersey statute prohibiting the import of waste originating from other states for public health and safety reasons was invalid. The Court held that it did not need to decide whether the ultimate purpose was protectionism or public health protection, because the ‘evil of protectionism can reside in legislative means as well as legislative ends’.²¹³ Protection of the environment could here, however, only be achieved through restriction of the flow of all waste. There had been no claim made that waste had to be disposed of ‘as soon as and close to its point of generation as possible’.²¹⁴ With the problems related to waste emerging only after its

²⁰⁸ See Regan, 1112 ff.

²⁰⁹ *National Association of Optometrists & Opticians Lenscrafters, Inc. v. Brown* 567 F3d 521 (9th Cir 2009) at 525.

²¹⁰ In *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Oregon* 511 U.S. 93 (1994) at 99, the Supreme Court held that “discrimination” simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’

²¹¹ *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) at 355-356.

²¹² Justice Black, dissenting, in *Ibid.*, 359-360.

²¹³ *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) at 627.

²¹⁴ *Ibid.* at 630.

disposal, New Jersey was thus not allowed to distinguish between out-of-state waste and local waste under the Commerce Clause.

A finding of discrimination thus led the Court in most cases to declare state legislation invalid, based on the fact that some sort of strong effect on out-of-state economic actors could not easily be explained by other reasons. Only in very few cases can a justification be successfully brought forward by a state. In *Maine v. Taylor*, the Court allowed import restrictions on live baitfish into Maine because of uncertainty surrounding the potential introduction of a parasite living on out-of-state baitfish into the ecosystem of Maine. Strong evidence supported in the Supreme Court's view the legitimate reasons for Maine, apart from the origin of fish, to regulate out-of-state fish differently.²¹⁵

In cases of discriminatory effect, the Court started to operate a shift of the burden of proof based on a sliding scale of the impact on out-of-state traders compared to that on local traders. In *Hunt v. Washington State Apple Advertising Commission* the Court struck down a prohibition on the sale of closed apple containers bearing any grade mark except a national or non-graded mark. The effect of the measure was to exclude apples from out-of-state apple growers who packed their apples in containers with their own state grade marks. The mere fact of legislation furthering 'matters of legitimate local concern' such as health or consumer protection was insufficient, if in practice a discriminatory effect was caused. In the present case, this happened through the non-recognition of Washington's successful state grading system and the forced 'down-grading' of out-of-state apples.²¹⁶ With discriminatory effect being found, the burden of proof shifted to the defending state to justify its measure 'in terms of the local benefit' and the 'unavailability of non-discriminatory alternatives adequate to preserve the local interests at stake'.²¹⁷

Finding discrimination has, however, not always proven obvious. In *C&A Carbone v. Clarkstown*, the Court declared invalid a flow control ordinance for waste as facial discrimination against out-of-state operators. This ordinance operated as a local processing requirement, in the sense that it required all non-recyclable waste to be processed at a particular transfer station at a higher rate to ensure the economic viability of the facility.²¹⁸ The facility was privately operated, but was scheduled to subsequently revert to municipal ownership. Two opinions contended that the measure was non-discriminatory, as it excluded both out-of-state and local waste operators from business. Justice O'Connor's concurring opinion held that the ordinance should be handled as an even-handed measure, but struck it down because of its disproportionate impact on interstate commerce in relation to the local benefits.²¹⁹ By contrast, Justice Souter, joined by two other justices, dissented because the entity in question simply spread

²¹⁵ *Maine v. Taylor*, 477 U.S. 131 (1986) at 152-153.

²¹⁶ *Hunt v. Washington Apple Commission*, 432 U.S. 333 (1997) at 351-353.

²¹⁷ *Ibid.* at 354.

²¹⁸ *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383 (1994) at 391.

²¹⁹ *Ibid.* at 401.

the burden for a traditional government task among all local generators of trash rather than disadvantaging competing private actors unequally; in his view, there was thus no concern under the Commerce Clause at all.²²⁰ Later case law overturned the classification of a similar measure as discriminatory.²²¹

The strictness of scrutiny has also not always resulted in a very balanced examination of measures, as the example of extraterritorial effect of measures shows. Most extraterritorial measures have been placed in the category of discriminatory measures. The Supreme Court thus found it inadmissible that a local law ‘directly’ regulate out-of-state transactions.²²² The stricter scrutiny applicable to discriminatory measures should thus apply to regulation that attempted to ‘control conduct beyond the boundary of the state’.²²³ In recent case law, this strict approach led to the rejection of measures adapting locally standards of production which are also applicable to imported products. Under a California emission reduction scheme, a ‘lifecycle’ analysis of biofuels took account of greenhouse gas emission throughout the whole cycle of production of such fuels. Since the scheme penalized out-of-state producers in order to force them to adopt production methods resulting in lower emissions, a lower court found that the scheme impermissibly attempted to ‘control conduct beyond the boundary of the state’.²²⁴ Classified to fall under strict scrutiny as a discriminatory measure, the scheme did not withstand judicial scrutiny, because although it pursued the fight against global warming as a legitimate objective, the defendants could not discharge the heavy burden of proving that no non-discriminatory alternatives were available. The lower court conceded that the non-discriminatory alternatives suggested by the plaintiffs could be considered ‘less desirable’, but still decided in favour of the plaintiffs.²²⁵ More careful scrutiny would have probably been available had the measure been classified as non-discriminatory. The strict division between discriminatory and non-discriminatory measures thus also shows its shortcomings in the case of

²²⁰ *Ibid.* at 411.

²²¹ See *United Trash Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*, 127 U.S. 1786 (2007) at 1796-1797. The Court stated that the Commerce Clause could not control the decision of voters on whether government or private actors should provide waste management services, in particular since the costs caused by the ordinance would be borne by voters themselves. A law simply favouring local government could be directed at many purposes apart from protectionism, and the responsibility of protecting health, safety and welfare of citizens set government apart from private enterprises. A plurality of judges then upheld the ordinance based on a balancing test, while in a concurring opinion another justice suggested to give up the entire Dormant Commerce Clause application as it was based only on mere ‘policy considerations’, see *United Trash Haulers* at 1798 and Justice Thomas’ dissent at 1802-1803, respectively.

²²² *Brown-Forman v. N.Y. State Liq. Auth.*, 476 U.S. 573 (1986) at 583.

²²³ *Healey v. Beer Inst.* 491 U.S. 324 (1989) at 336-337.

²²⁴ *Rocky Mountain Farmers Union v. Goldstene* US District Court for the Eastern District of California, Order on preliminary injunction motion (29 December 2011) at 20.

²²⁵ *Ibid.* at 23.

measures of extraterritorial effect, where the categorisation as discriminatory leads to much stricter and in most cases fatal scrutiny for extraterritorial effects. As subsequent chapters show, a more balanced approach to extraterritoriality is possible and has been developed in EU law and WTO law.²²⁶

Summing up, scrutiny under this tier has thus been strict and has struck down most measures. The Court seems to be looking for the excluded reason of protectionism, using for this purpose definitional approaches to what constitutes discrimination and subsequently an often very strict necessity test. The latter test has in early decisions not always respected the level of protection sought for by states as discussed, and has imposed a considerable burden of proof on the defending state.

Arguably, this categorical approach appears difficult to defend if classification into the first category nearly always means that a measure is struck down, while balancing as available for non-discriminatory measures nearly always results in a decision favourable to the state measure. The highly categorical approach by the Supreme Court can here be contrasted with the Court of Justice of the European Union, which under the case law on trade-restrictive measures as restrictions to internal market freedoms has created a more flexible system of justifications. Despite other shortcomings, the CJEU's approach scrutinizes measures in detail as to their proportionality without putting them as strictly into categories.²²⁷

iii. Non-discriminatory measures under the two-tier framework

In contrast to the intrusive scrutiny for discriminatory measures, an 'incidental' burden on inter-state commerce remaining below the threshold of facial discrimination leads to lenient judicial review of state laws by means of a balancing test under the Dormant Commerce Clause.

The landmark case which established balancing under the Dormant Commerce Clause for even-handed regulation was *Pike v. Bruce Church*. In this case, the Court held that '[a]lthough the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.'²²⁸ The resulting balancing exercise has generally been administered in a manner rather more favourable to state regulatory autonomy.

The line between discrimination and non-discrimination has not always been easy to draw, in particular in cases of rather limited discriminatory effects.

²²⁶ See chapter 6 section IV.C. and chapter 7 section IV.A.iv.c.

²²⁷ See chapter 6 section III.C.i. on the broad scope given to internal market freedoms in EU law.

²²⁸ *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) at 143.

In such cases of weak discriminatory effects, the Supreme Court thus reverted to a balancing test as if a non-discriminatory measure was at stake. The Court upheld a Minnesota prohibition on nonreturnable milk containers made of plastic in light of a very weak discriminatory effect. Plastic producers were predominantly out-of-state operators, while Minnesota pulpwood producers could benefit to some extent from the permission to use pulpwood-based nonreturnable carton milk containers. But the burden on one industry to the advantage of another was not ‘clearly excessive’ in light of the ‘substantial state interest’ of environmental protection, to safeguard natural resources and combat problems of solid waste disposal.²²⁹ Alternatives such as promoting recycling or banning nonreturnables were either not equally effective or more burdensome.²³⁰

Another problem is the unclear scope of the Dormant Commerce Clause. An example is given in subsidies cases. In the seminal *West Lynn Creamery, Inc. v. Healy*, a state imposed a sales tax in a non-discriminatory manner on all milk wholesalers, while the money then went into a fund used to subsidize local milk producers. Confronted for the first time with a challenge of a subsidy, the Court dodged a general reply as to the admissibility of state subsidies as such.²³¹ It found the combined measures unconstitutional, however, holding that the political process in the state could no longer be trusted, since other than in the case of a non-discriminatory tax, one of the important interests groups in the state had been ‘mollified’ by a subsidy and could not be trusted to lobby against legislative abuse.²³² The Court underlined that the Commerce Clause jurisprudence was not so rigid that it could not react to the form in which a state created barriers to trade.²³³ Sceptical views accompanied this perceived extension of the reach of the Commerce Clause.²³⁴

iv. Conclusion

Summing up the case law under the Dormant Commerce Clause, the picture is again marked by fragmentation. The difficulty in deciding whether a rather substantive rights-based perspective or a more definitional vision of a prohibition of protectionism should be adopted led to inconsistent case law. As based on our suggestion that the Dormant Commerce Clause calls for special interest review as the result of pre-balancing, the difference between the two tiers of scrutiny is not watertight and not convincing in all cases, but leads to considerable differences in terms of outcome. This causes concern, as the example of the treatment of extraterritorial measures has shown. In fact,

²²⁹ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) at 474-475.

²³⁰ *Ibid.* at 475.

²³¹ *West Lynn Creamery, Inc. v. Healy* at 199 footnote 15.

²³² *Ibid.* at 200.

²³³ *Ibid.* at 201.

²³⁴ See e.g. D.T. Coenen, ‘Business Subsidies and the Dormant Commerce Clause’ (1998) 107 *Yale Law Journal* 965, 1002.

inspiration from legal regimes such as EU law could be fruitful, as here more emphasis has been put on the justification stage rather than on fighting the battle on the front of discrimination. The problem in United States constitutional law is, again, the contestation of balancing, which leads to the latter's reduced role under the Dormant Commerce Clause. A middle level of scrutiny e.g. for measures which seem to discriminate in their effects could e.g. rely to some extent on proportionality analysis and neither strike all measures down based on the strict necessity inquiry nor merely rubber-stamp them by balancing superficially as suggested by the *Pike* test. Scepticism of balancing is in our view no legitimate argument in pre-balancing to justify the current categorisation.

V Evaluation and Conclusion

Evaluating the approach of the Supreme Court, we note that pre-balancing yields two different results. For fundamental rights review, the Court ought to pursue a model of equal representation review, while under the Dormant Commerce Clause, a reduced role for proportionality analysis following a model of special interest review seems more appropriate.

Still, some points of criticism remain remarkably similar. The central notion to describe the Supreme Court's case law is fragmentation. The initial section has shown that despite the strong institutional setting of the Supreme Court, the latter has remained contested in its authority and its review function throughout its turbulent history as a central player of United States constitutional politics. While it therefore took great care to develop the doctrine of fundamental rights and make them enforceable against the federal and the state level and expand the number of rights, the Supreme Court has at the same time not found a coherent form of rights adjudication. The case-by-case approach has on the one hand led to the remarkably explicit development of various tiers of scrutiny based on the procedural democracy doctrine, which can be applauded in comparison to the rather obscure case law of the German Federal Constitutional Court on the same matter.

However, at the same time the fragmented approach leads to very different levels of protection for different rights, the comparably low protection of economic rights being but one example in this regard. The impossibility of finding a consistent approach to rights adjudication is aggravated by the Supreme Court's virtually systemic scepticism of balancing, which is not only caused by doubts on the institutional capacities and legitimacy of the latter, but also by the particular view of rights predominant in the United States constitutional system. In comparison, it does not appear that the authority of the Federal Constitutional Court or the protection of fundamental rights has suffered severe damage from the continuous and consistent adjudication of rights by means of proportionality analysis over various decades. These elements are not convinc-

ing as a justification for the fragmented results in the case law. The perception of rights as shields which leads to less intrusive review in the field of positive obligations and effects of fundamental rights in the private sphere, however, can usefully be integrated into pre-balancing as a normative conception of fundamental rights in its own right.

Under the Dormant Commerce Clause, fragmentation has been caused by the impossibility to agree on an exact reading of the clause. The model of special interest review we would suggest as the outcome of pre-balancing relies on balancing in rare cases, with other steps of proportionality analysis coming in before. In the Supreme Court's case law, however, most of the burden is borne by the initial distinction between discriminatory and non-discriminatory measures. Discriminatory measures are subject to strict scrutiny including a very restrictive necessity test which they fail in most cases. For non-discriminatory measures, the balancing test applied seems to be rather superficial. As the example of measures with extraterritorial effects has shown, this distinction is difficult to sustain in judicial practice and leads to over- and under-inclusiveness. A middle level of scrutiny for measures with some, but not very clearly discriminatory effect could become a useful tool. Again, the scepticism of balancing which has reduced the test for non-discriminatory measures to a rubber stamp seems overrated and does not appropriately justify the effective reluctance on the part of the Supreme Court to use balancing.

**The Law of the European Convention on Human Rights and
Fundamental Freedoms**

I Introduction

With the present section, we turn to examine regimes of international and – in the case of EU law – supranational law. Arguably, the same assessment based on pre-balancing and the two-models distinction that has guided us up to this point can also be applied to such legal regimes. In our discussion of the context of judicial review, however, some emphases shift. History was a predominant factor in the two chapters on domestic constitutional regimes. While the European Convention on Human Rights and Fundamental Freedoms (ECHR) or the older treaties underlying EU law date back to the mid-20th century, in comparison we do not detect streams of legal thought so influential on the use of proportionality analysis in fundamental rights adjudication, and thus dedicate less space to the historical insights. By contrast, other contextual elements start to play a more important role, as they distinguish typically international legal regimes from domestic constitutional ones. In particular, the institutional setting and the political economy of dispute settlement systems become more relevant.

As an example, international judges and arbitrators are often less familiar with the socioeconomic and domestic legal context of a measure and consequently feel less well equipped to review a measure with proportionality analysis. Some adjudicative instances may represent domestic views here better than others, if we compare, for example, the European Court of Human Rights to the average tribunal in international investment law. Reluctance to engage in proportionality analysis may find its roots here.

As to the political economy of dispute settlement, international dispute settlement systems often provide a different setting of access to adjudication and different remedies as compared with domestic constitutional adjudication. The WTO system only offers state vs. state dispute settlement and provides a particular form of remedy in the form of an authorisation of trade retaliation. By contrast, the Court of Justice of the European Union resembles much more a national court with the variety of remedies and the strong power to influence domestic law in a much more direct manner. Again, the perspective of a judiciary on its own review may explain the use of proportionality analysis. In both cases, however, we must keep apart to what extent elements explain the use of proportionality analysis and to what extent the latter is actually justified because of normative arguments relevant for the pre-balancing exercise.

These aspects are thus considered in more detail in the following, without abandoning the basic structure of our comparative studies. The main point to be shown is that pre-balancing and in particular the model of equal representation are fully applicable to an international setting, here the European Court of Human Rights. The latter is called in its review to represent and reconcile a variety of human rights and public interests, and even though there are some conceptual differences in the context of judicial review compared to domestic constitutional or supreme courts, this mandate remains similar. As one consid-

eration to be examined, the rationale of subsidiarity has caused debate as to whether the Court should provide general guidelines or rather case-specific solutions – a debate known as opposing ‘constitutional’ to ‘individual’ justice as possible functions of the Court’s review.

The comparison with domestic regimes, however, does not stop at this level. Examining the justification of judicial review, we find that in its development of the margin of appreciation doctrine, the Court somewhat more clearly sets out the reasons and the resulting intrusiveness for the exercise of its review powers. It does so more clearly than the German Federal Constitutional Court, more akin to the United States Supreme Court. However, its broader view of the justification of judicial review based on procedural democracy again renders it more similar to the German situation; higher protection is granted to rights even with a less obvious connection to the democratic process and also to rights in their dimension as positive obligations and in relations between private parties.

In assessing the ‘fair balance’ test as the Court’s use of proportionality analysis, again the German example comes to mind. There is no reluctance to engage in full-scale proportionality analysis comparable with the scepticism towards balancing demonstrated by the United States Supreme Court. On the contrary, we even observe a somewhat worrying over-emphasis on the ultimate prong of proportionality *stricto sensu* which is not clearly warranted in our view.

II The Broader Context of Judicial Review under the European Convention on Human Rights and Fundamental Freedoms

The European Court of Human Rights as a quasi-constitutional international court is called to adjudicate on a broad range of fundamental rights, and to reconcile them with public interests. The broader context of judicial review allows us to refine this picture. History and the debate on individual vs. constitutional justice show that within the use of proportionality analysis by the Court, there are debates on how to achieve a balance between case-sensitive solutions and general guidelines, a balance which must respect the mandate of subsidiarity of the Court as well as the problem of an overburdened judicial system. The institutional context shows a remarkably well-established representation of views of the concerned Convention state. The intense use of proportionality analysis can be explained by this last feature, while the rationale of subsidiarity can also be read as influencing pre-balancing and the justification of judicial review. The practical problem of an overburdened system, however, is only difficult to conceptualize as a normative element with potential to appropriately influence pre-balancing and the use of proportionality analysis.

A The Origins of a Permanent Court of Human Rights

The history of judicial review by the European Court of Human Rights is marked by humble beginnings and disagreement as to the exact path of development that a regional human rights regime should take. The coming of age of the Court transformed the Convention into a veritable bill of rights, which explains the strong emphasis on proportionality analysis that we note in the subsequent discussion of this chapter. At the same time, institutional reform could not keep pace with the enlargements of the Council of Europe and a problem of systemic overload emerged, which helps us to understand the criticism of the highly case-sensitive approach to proportionality analysis taken by the Court.

i. Slow beginnings and conceptual disagreements on the ECHR

The fundamental idea prevailing during the negotiations of the ECHR was to provide a safeguard against totalitarianism.¹ The situation was predominantly marked by the context of the end of the Second World War and the danger perceived in the rising tensions of the Cold War, so that Spaak once joked that the most important contributor to the emergence of the Council of Europe was Joseph Stalin.² The ECHR was thus meant to function as a guarantee that states could not undercut a certain minimum standard of protection for rights felt to be essential to the maintenance of democracy and the rule of law. For this purpose, drafters envisaged a standstill obligation concerning the level of rights protection already achieved³ and a system of centralized judicial enforcement including binding judgments.⁴

Disagreements between fervent advocates of strong human rights protection and more reserved advocates who feared an activist court with an all-too open docket led to a watered-down compromise being signed in 1950. The right to individual petition as the central bone of contention was only put in a protocol for states to ratify at their own discretion, leaving only a dispute settlement system between states that many judged unlikely to be of much practical use.⁵ At the same time, states had to accept the jurisdiction of the new court by

¹ E. Bates, *The Evolution of the European Convention on Human Rights – From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford: Oxford University Press, 2010), 6, speaks of an ‘alarm bell’.

² E. Bates, ‘The Birth of the European Convention on Human Rights – and the European Court of Human Rights’ in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011), 18.

³ See today’s Article 53 ECHR.

⁴ L. Wildhaber, ‘Rethinking the European Court of Human Rights’ in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011), 205.

⁵ Bates, *Evolution of the ECHR*, 9. As Wildhaber, 208, notes, not much more than 20 such complaints have reached the Court on the whole.

means of an express declaration, so that the court was not yet established when the Convention entered into force in 1953.⁶ This slow start and initially gloomy perspective for the new human rights instrument was accompanied by an expression of only fairly shallow interest by the academic community.⁷

The system for individual complaints came into life in 1955. It required applicants to first exhaust all domestic remedies⁸ before they could address their case to the European Commission of Human Rights established in 1954. This ‘quasi-judicial, quasi-political’ body would look at matters, and provide a report in which it could conclude to refer the matter to the then non-permanent Court, which was eventually established in 1959.⁹ Only when seized through the Commission or in inter-state cases by a state or the state of an alleged victim could the Court use its powers to declare that there had been a violation and award ‘just satisfaction’.¹⁰ From the beginning, the Committee of Ministers was charged with the task of supervising the implementation of the rulings of the Court in party states.¹¹

After the slow institutional start of the Convention system, the Court experienced a period of rather low profile, referred to by a commentator as the ‘sleeping beauty’ years.¹² There were only few cases brought before the Court, which was even ‘out of business’ between 1960-65.¹³ Up until the mid-1970s, the Court not only received very few applications, but also tended to approach cases with high deference, balancing its scrutiny rather in favour of ‘legal diplomacy’ than tackling the ECHR party states too directly.¹⁴

ii. The coming of age of a European Bill of Rights

With the 1970s, however, a number of cases were brought before the Court which, based on their content, could also have formed the object of a complaint before a domestic constitutional court.¹⁵ The Convention, it was argued, came of age as a veritable European Bill of Rights.¹⁶ In light of such opportunities, the Court abandoned its stance of deference and found violations

⁶ Bates, ‘Birth of the ECHR’, 37.

⁷ Bates, *Evolution of the ECHR*, 9-10.

⁸ Article 35 (1) ECHR.

⁹ Bates, ‘Birth of the ECHR’, 35.

¹⁰ *Ibid.*, 38.

¹¹ See Article 46 (2) ECHR.

¹² Frowein, quoted in Bates, *Evolution of the ECHR*, 10-11.

¹³ M.R. Madsen, ‘The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence’ in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011), 51.

¹⁴ See for an overview of such early cases *Ibid.*, 48 ff.

¹⁵ Bates, *Evolution of the ECHR*, 17, points out that this was due to the fact that no large-scale violations of human rights could be expected from the principally Western European party states of the ECHR.

¹⁶ *Ibid.*, 16.

of the Convention in a number of cases despite the sometimes disputed political or social context in the relevant party state.¹⁷ Cases like *Marckx v Belgium* required the judges to strike a balance between the public interest and individuals' fundamental rights in a setting familiar from domestic constitutional courts, despite the subsidiary nature of the Court's intervention.¹⁸ Furthermore, since increasingly legislation also became the target of applicants, pressure mounted on party states to change their domestic laws after a judgment by the Court had been rendered.¹⁹

The reasons for the paradigmatic change in the jurisprudence of the Court have been sought in empirical studies on the judges sitting on the bench. But in light of no major changes at that level they are probably rather found in the larger historical background of increasing progress of the global movement promoting the respect of human rights.²⁰

In the 1980s, the system of individual petition continued to pick up speed, turning the Commission into a *de facto* court of first instance with hardly any role left for the Committee of Ministers and raising first fears that the system might require reform lest it become clogged up.²¹ The 1990s brought increasing recognition of the 'constitutional' role of the Court, which showed both in the writings on the ECHR²² as well as in the case law. As an example, in *Loizidou v Turkey*, the Court famously referred to the Convention as a 'constitutional instrument of European public order'.²³ After lengthy debate, the proposals for reform culminated in Protocol 11, which was still largely drafted as an agreement amongst ten party states before the enlargement by the Central and Eastern European countries. The protocol abolished the Commission and established the Court as a permanent institution, aiming to speed up proceedings in order to reach a final judgment faster without sacrificing the quality of the legal decision.²⁴

iii. An overburdened Court and efforts of reform

The enlargement of the Council of Europe subsequently opened the floodgates even further. The debate on necessary reforms did not therefore stop after the entry into force of Protocol 11 in 1998, but continued

¹⁷ Madsen, 51, speaks of the 'rise of the integrationist court'.

¹⁸ *Marckx v Belgium*, 13 June 1979, Series A, No 31, (1979-80) 2 EHRR 330.

¹⁹ Bates, *Evolution of the ECHR*, 18.

²⁰ Madsen, 55-57.

²¹ Bates, *Evolution of the ECHR*, 20.

²² See e.g. R. Ryssdal, *The Future of the European Court of Human Rights (Public lecture given at King's College, London, Centre of European Law, 22 March 1990)* (Strasbourg: Cour européenne des droits de l'homme, 1990).

²³ *Loizidou v Turkey (Preliminary Objections)*, 23 March 1995, Series A, No 310, (1995) 20 EHRR 99, para 75.

²⁴ Bates, *Evolution of the ECHR*, 21.

with the drafting and the adoption of Protocol 14. Among other issues Protocol 14 creates a possibility for single judges to declare cases inadmissible that are clearly without merit, allows committees consisting of three judges to rule in repetitive cases where well-established case law exists and permits the dismissal of a case as inadmissible under certain conditions if there has been no significant disadvantage.²⁵ Next to these attempts to increase the performance of the Court by giving it more discretion not to admit cases, repeated failure to comply with judgments can now potentially be sanctioned by the Court's Grand Chamber with suspension or even expulsion from the Council of Europe.²⁶

The systemic crisis of overload has, however, not been resolved by Protocol 14. There continues to be a huge backlog of cases, despite a decade of 'muddling through' by the Court.²⁷

It is before this seemingly gloomy background of an overburdened system that the debate on the future function and role of the Court must be understood. This background is no normative argument capable of being weighed in the pre-balancing exercise, but influences our reading of the rationale of subsidiarity in the protection of human rights. Over the years, the Court has relied on proportionality analysis under its 'fair balance' test to provide relief in a case-by-case manner. Sceptical commentators, however, have started to call for a more predictable test which provides more general guidelines instead of focusing on aspects of individual cases. This claim is better understood if we assess the debate on the role of the Court between the provision of 'individual' or rather 'constitutional justice: as providing relief in every individual case or rather as laying down guiding minimum standards of protection for national authorities and courts. As is shown subsequently, this debate carries with it arguments used to influence the justification of judicial review and accordingly the use of proportionality analysis.

B The Debate on the Role of the Court as a Provider of Individual or Constitutional Justice

As has been demonstrated, over the years the Court has been incapable in terms of its institutional competence to cope with the transformation of the Convention from a limited safeguard mechanism against a slip into totalitarianism into a full-blown European Bill of Rights. The continuous problem of a growing backlog of undecided cases has led to a heated debate on the future of the Convention's system of human rights protection which already dates back to before the adoption of Protocol 14. The central question is how the

²⁵ See for a concise overview of the Protocol's main points A. Lester, 'The European Court of Human Rights after 50 Years' in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011), 105.

²⁶ *Ibid.*, 107.

²⁷ Wildhaber, 223, presents some concise numbers of the exponential increase in applications submitted and the corresponding backlog of pending cases.

subsidiarity rationale of the Court should operate. With individuals having to exhaust domestic remedies before they can raise a complaint under the Convention, it remains unclear whether the Court should function as a further instance of appeal focused on providing justice for each case or whether emphasis should be put on more the provision of constitutional justice, i.e. general guidelines beyond the individual case.

i. The competing positions

On the one hand, several judges,²⁸ civil society²⁹ as well as a ‘majority’ of academics³⁰ have refused more restrictive admissibility criteria as endangering the Court’s authority and have supported the position that the Court should continue to grant ‘individual justice’. This means that individual petition should, as far as possible, be maintained in order to give each individual access to the Court. In particular, suggestions to introduce a procedure akin to the *certiorari* procedure of the United States Supreme Court were vigorously rejected.³¹

By contrast, the then-president of the Court, followed by some practitioners³² as well as academics,³³ proposed to review the Court’s function as essentially a provider of ‘constitutional justice’. A more ‘realistic’ approach should admit that individual application could not be an end in itself, but that instead fewer rulings delivered more rapidly and setting out sufficiently clear principles would be able to better support the rule of law and democracy in Europe.³⁴ The number of cases that the Court should decide ought thus to be limited.

A broader ‘constitutionalisation’ discourse has somewhat clouded the picture.³⁵ Still, several arguments can be made both in favour of individual and constitutional justice as the predominant role to be ascribed to the Court.

²⁸ See J. Casadavell and others, ‘Pour le droit de recours individuel (Annex 3)’ in G. Cohen-Jonathan and C. Pettiti (eds.), *La réforme de la Cour européenne des droits de l’homme* (Brussels: Bruylant, 2003).

²⁹ See on the role of non-governmental organisations R. Harmsen, ‘The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights’ in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011), 131.

³⁰ See *Ibid.*, 130, with further references.

³¹ Lester, 114.

³² P. Mahoney, ‘An Insider’s View of the Reform Debate – How to Maintain the Effectiveness of the European Court of Human Rights’ (2004) 29 *NJCM-Bulletin* 175.

³³ See e.g. S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects* (Cambridge: Cambridge University Press, 2006).

³⁴ L. Wildhaber, ‘A Constitutional Future for the European Court of Human Rights?’ (2002) 23 *Human Rights Law Journal* 161, 164.

³⁵ See e.g. A. Stone Sweet, ‘Sur la constitutionnalisation de la Convention européenne des droits de l’homme’ (2009) 80 *Revue trimestrielle des droits de l’homme* 923. Sceptical on this development S. Hennette-Vauchez, ‘Constitutional v International? When Unified Reformatory Rationales Mismatch

ii. Arguments in favour of individual justice

As a starting point, the actual ability of the Court to provide constitutional justice could be limited. The very nature of the ECHR is based on rather broad standards achieved by a weighing process during the very drafting and negotiation of the Convention. To put these standards into practice, the Court cannot escape using concrete elements of a case to take a decision, so that to some extent its findings are always case-bound.³⁶

Another argument made against the function of constitutional justice of the Court is the restricted possibility for the Court to give advisory opinions. The Court is only entitled to give such opinions if the questions contained are not related to ‘the content or scope of the rights or freedoms’ defined in the Convention.³⁷ The Court, consequently, can only provide answers to questions on the interpretation of the Convention rights if a concrete case arises, while the advisory opinion function is restricted to narrow institutional questions.³⁸

Also, the review function of the Court is in principle not abstract, but limited to concrete cases. Early on, the Court itself stated that it would not engage in abstract review.³⁹ On the other hand, this position has not been upheld consistently, as in other cases the Court held that its ‘judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties’.⁴⁰ The Court was thus willing to adjudicate cases although some newer elements of the case at issue could have permitted it to refrain from its task.⁴¹

iii. Arguments in favour of constitutional justice

One central argument against a pure ‘individual justice’ approach is the subsidiarity rationale underlying the whole of the Convention system. The Court has consistently recognized its institutional and norma-

the Plural Paths of Legitimacy of ECHR Law’ in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011), 152-153.

³⁶ J. Christoffersen, ‘Individual and Constitutional Justice: Can the Power Balance of Adjudication Be Reversed?’ in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011), 189-190.

³⁷ Article 47 (2) ECHR.

³⁸ Christoffersen, 188.

³⁹ In *De Becker v Belgium*, 27 March 1962, Series A, No 4, (1962) EHRR 1, para 14, the Court refused to decide in the abstract because the relevant law had been changed and no longer interfered with the applicant’s rights in the manner that had given rise to his claim.

⁴⁰ *Ireland v United Kingdom*, 18 January 1978, Series A, No 25, (9179-1980) 2 EHRR 25, para 154.

⁴¹ In *Karner v Austria*, 24 July 2003, (2004) 38 EHRR 528, para 26, e.g. the applicant’s death did not hinder the Court.

tive limitations as an international court that was not called to replace national authorities, but simply review them as a subsidiary mechanism of enforcement for the minimum standards enshrined in the Convention.⁴² The margin of appreciation doctrine is the most central expression of this philosophy. The Court exercises restraint on various grounds; it does so in the case of fact assessments by national authorities, or generally because of legitimacy concerns based on the nature and quality of domestic procedures or decision-makers; lastly, the Court also exercises some normative restraint.⁴³ The exact contours of this last normative restraint are, however, part of the subject of the dispute on where the Convention system should be going.

Procedurally, it is difficult not to read the reforms instituted by Protocol 14 as an indicator that the future role of the Court is likely to be more restricted. Said reforms not only point in the direction of efficiency, but also create a power to dismiss cases as inadmissible if no ‘significant disadvantage’ has been suffered.⁴⁴

There is thus an undeniable and arguable move towards constitutional justice. In the literature, there have been daring proposals of institutional innovation such as a Supreme European Court of Human Rights.⁴⁵ In light of likely resistance to such bold moves, other authors emphasize that renewed emphasis has to be placed on the national level. The Convention has always received a national reading at the level of implementation as soon as the party states’ authorities had to put the Court’s findings into practice.⁴⁶ In the future, the Court must thus accept a ‘legitimate’ level of pluralism at the national level.⁴⁷ It has been argued that reflections on where the Convention is going require a less ‘systemic’ and more ‘environmental’ thinking, because the system must be understood in the various political environments in which it actually operates.⁴⁸ National authorities should again become the focus of attention, and should be encouraged to use their independent powers and resources as part of the structure of human rights protection under the Convention.⁴⁹

On the other hand, this very acceptance of the relevance of the national level entails that the adjudicative solutions found by the Court must reconcile a

⁴² *Relating to certain aspects of the laws on the use of languages in education in Belgium (Belgian Linguistics)*, 9 February 1967, Series A, No 6, (1968) 1 EHRR 252, para 10.

⁴³ See Christoffersen, 184.

⁴⁴ Article 35 (3) b ECHR.

⁴⁵ P. Mahoney and J. Sharpe, ‘The Legacy of Carlo Russo: Creation of a Supreme European Court of Human Rights’ in T. Scovazzi, I. Papanicolopulu and S. Urbinati (eds.), *I diritti umani di fronte al giudice internazionale – atti della giornata di studio in memoria di Carlo Russo* (Milano: Giuffrè Editore, 2009).

⁴⁶ Hennette-Vauchez, 145.

⁴⁷ Christoffersen, 197.

⁴⁸ Harmsen, 142. See also generally L. Helfer, ‘Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime’ (2008) 19 *European Journal of International Law* 125.

⁴⁹ Christoffersen, 181-182.

decision for the concrete case with a certain level of abstraction in the general findings in order to establish some more generally applicable principles. Recent case law shows such efforts,⁵⁰ but we also find contestation by some judges and commentators who criticize the Court for a rather unsatisfactory reasoning as a result of this process.

Summing up, the debate over the future role of the Court seems anything but closed, although the account after the introduction of Protocol 14 seems to be leaning towards the more limited, constitutional function. This conclusion suggests that an all-too flexible adjudication is not justified, since more general standard-setting is also central to the adjudicative function of the Court. This does not question, in our view, the use of proportionality analysis. However, it may influence the way in which the justification of judicial review by the Court is read. As a consequence, the precise way in which proportionality analysis is used may require adaptation. For the moment, the system still functions under the rationale of individual justice, which explains, in our view, the particular, highly case-specific use of proportionality *stricto sensu* in the case law discussed below.

C Institutional Aspects of Judicial Review under the European Convention on Human Rights

Institutional aspects of judicial review under the Convention mainly support the possibility of frequently resorting to proportionality *stricto sensu*, because the features of the Court render it suitable for engaging in such balancing exercises. In particular, the composition of the Court embodies and ensures representativeness of the views of party states in each case. The mechanism of sanctions points towards the similarity with domestic constitutional courts.

i. The European Court of Human Rights as a representative court

The European Court of Human Rights is an international adjudicative body, yet in its composition it aims to reflect the diversity of the continent. It has thus been called a 'quasi-Constitutional Court *sui generis*'.⁵¹

⁵⁰ In *EB v France*, 22 January 2008, (2008) 47 EHRR 21, French authorities had rejected the adoption of a child by a lesbian woman based on the lack of a paternal referent and the rather ambiguous commitment of the woman's partner towards the adoption. The majority developed a theory of 'contamination', by which the reference to the paternal referent as a reference to the applicant's sexuality should be understood as an illegitimate ground that contaminated the entire decision (para 80). Several dissenting judges rejected the decision as to its result, finding the contamination thesis not sufficiently connected to the facts of the case (see dissenting opinion of Judge Costa, joined by Judges Türmen, Ugrekhelidze and Jočienė, paras 7-8).

⁵¹ Wildhaber, 'Rethinking the ECtHR', 227 (emphasis in original); Wildhaber, 'Constitutional Future', 161. As Wildhaber notes, a recent influx in cases on the appropriate protection of the right to property

Each party state sends one judge to the Court.⁵² Candidates are elected by the Parliamentary Assembly from among three candidates suggested by the state, which leads to an effective representation of the professional groups of academics, former high court judges and high-ranking public servants on the bench – despite the fact that states had previously rejected entering into an obligation to ensure such representativeness of professional groups – without too much control by the state over who gets elected.⁵³ The qualification requirements of ‘high moral character’, ‘qualifications required for appointment to high judicial office’ or ‘recognised competence’ have been of central importance in this regard since the early days of the Convention.⁵⁴ There were at some points doubts about the independence of judges⁵⁵ because of anecdotal evidence of politically motivated reappointments and non-reappointments during the phase when judges held office for a renewable six-year term.⁵⁶ However, Protocol 14 introduced a non-renewable term of office of nine years as a reaction.⁵⁷

The Court sits in various formations: single judges, committees of three judges, chambers of seven and the Grand Chamber composed of seventeen judges.⁵⁸ In setting up these various sections, their composition must be ‘geographically and gender balanced and shall reflect the different legal systems among the Contracting Parties’.⁵⁹ This leads to a highly complex system of distribution of judges across the various formations, as additionally in practice a fair distribution of workload has to be achieved.⁶⁰ There is also a mechanism for appointing an *ad hoc* judge in cases where the judge of the nationality of a state before the Court is not sitting in the competent formation.⁶¹ The diversity achieved seems to have operated effectively. Empirical evidence suggests that hardly any strong national or geopolitical bias can be evidenced in judicial decision-making behaviour.⁶² Instead, a common judicial legal culture has emerged.⁶³ There exists a division between more ‘activist’ judges and judges

could even lead to the Court becoming a ‘quasi-Supreme Administrative Court of Europe’, Wildhaber, ‘Rethinking the ECtHR’, 228.

⁵² Article 20 ECHR.

⁵³ See with some numbers E. Voeten, ‘Politics, Judicial Behaviour, and Institutional Design’ in J. Christoffersen and M.R. Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford: Oxford University Press, 2011), 64.

⁵⁴ Bates, ‘Birth of the ECHR’, 37.

⁵⁵ Lester, 108–109.

⁵⁶ Voeten, 67.

⁵⁷ See Article 23 (1) ECHR. See also Lester, 103.

⁵⁸ Article 26 (1) ECHR.

⁵⁹ Rule 25 (2) Rules of the Court.

⁶⁰ N.-L. Arold, *The Legal Culture of the European Court of Human Rights* (Leiden: Martinus Nijhoff, 2007), 55.

⁶¹ Article 26 (4) ECHR.

⁶² Voeten, 71 and 74.

⁶³ Arold, 159.

preferring ‘restraint’ exercised by the Court,⁶⁴ but this balance seems to be shifting increasingly in favour of the first position.⁶⁵

The judgments of the Court also reflect a deliberative, diversifying approach. While deliberations are secret, judges have the opportunity to write concurring and dissenting opinions to the judgment.⁶⁶

It can be concluded that both in terms of composition and of adjudication, the Court reflects a high degree of representativeness. It remains an international court with a certain level of aloofness from the concrete domestic context.⁶⁷ Still, the Court is well equipped for balancing if we compare it for example with the WTO Appellate Body. The latter aims to represent the views of the WTO membership of 153 countries as far as possible through a judicial body of seven members, of which only three adjudicate a concrete dispute.

ii. Sanctions under the Convention

As an international tribunal, the Court cannot rely on remedies comparable to a domestic constitutional court. No law is struck down or declared invalid as a result of the Court’s review. Instead, Article 41 ECHR foresees the possibility for the Court to afford ‘just satisfaction’ to the injured party. Proposals during the drafting stage which aimed at giving the Court the power to influence domestic law similar to a constitutional court had been rejected from the start.⁶⁸ Next to monetary compensation, the Court can, however, also award other individual measures such as the reopening of domestic proceedings, and general measures typically requiring a change in legislation in a state.⁶⁹ Still, essentially the Court’s judgment is only enforced by supervision of the Committee of Ministers, i.e. by political means.⁷⁰ In recent years the Parliamentary Assembly has also intensified its monitoring on the execution of judgments in order to increase political pressure on repeatedly non-compliant states.⁷¹ The possibilities of sanctions in such cases are limited and can only take the form of suspension of membership or expulsion from the Council of Europe or a new procedure introduced by Protocol 14 which allows the Committee of Ministers to

⁶⁴ See Voeten, 66, with examples, who points out that professional background is highly relevant for the attitude adopted by individual judges.

⁶⁵ *Ibid.*, 69.

⁶⁶ Article 45 (2) ECHR. See also Arold, 64-65.

⁶⁷ A fact of which the Court is well aware, as the subsequent discussion on the institutional dimension on the doctrine of the margin of appreciation shows, see section III.B.ii.

⁶⁸ Bates, ‘Birth of the ECHR’, 39.

⁶⁹ F.G. Jacobs, R.C.A. White and C. Ovey, *The European Convention on Human Rights* 5 edn (Oxford: Oxford University Press, 2010), 57-58.

⁷⁰ Article 46 (2) ECHR.

⁷¹ E. Lambert-Abdelgawad, *The Execution of Judgments of the European Court of Human Rights* 2 edn (Strasbourg: Council of Europe Publishing, 2008), 59 ff.

bring a state before the Court to receive a declaration of failure to fulfil obligations under the Convention.⁷²

Despite such weak ultimate enforcement, at least in their rationale sanctions can definitely be read as pointing towards the nature of the Court as the international counterpart to a constitutional court. In practice, non-compliance is an increasing problem, and the impression is that some countries simply buy their way out of violations of the Convention. Still, the theoretical aim of the Convention seems to be – without too much doubt on this matter – that members comply with the judgments of the Court.

Summing up, for an international court, the Court is equipped to a remarkable degree with tools of representativeness and sanctions. Its willingness to engage in evaluating under proportionality *stricto sensu* can be understood in light of its suitable institutional features and the rather clear institutional rationale, which very closely resembles that of a domestic constitutional court.

D Conclusion

Judicial review under the Convention resembles domestic constitutional fundamental rights adjudication, although nuanced through the international institutional setting. As we discuss subsequently, the Court relies broadly on proportionality *stricto sensu* in its case law, but excludes strict testing of necessity. Some explanations for this approach have been found in this section. The heavier reliance on proportionality *stricto sensu* to the detriment of necessity seems to be most reasonably explained by the rationale of judicial review of individual as opposed to constitutional justice. The increasing case load over time presented the Court with the question of whether to try to provide solutions to individual cases based on their specific circumstances in its judgments, or to provide ‘constitutional solutions’ in the sense of broader, principled decisions which may take into account less the individual circumstances, but set out more rigid and generalized guidelines. The debate on the future role of the Court is ongoing, but the general tendency continues to be case-by-case balancing. The consequent reliance on proportionality *stricto sensu* has been confirmed examining the institutional features of the Court’s review. The Court is well equipped in the diversity and representativeness of its membership, but also in terms of the rationale of its sanctioning mechanism, which despite frequent practical failure at least in theory appears strongly geared to induce future compliance with the Court’s rulings. In this regard the European Court of Human Rights distinguishes itself from other international adjudicative bodies examined in the later sections.⁷³ Still, it must now be examined to what extent these explanations can usefully be translated into normative justifications for judicial review which bolster the particular use made of proportionality analysis. For this purpose, we turn to pre-balancing and the justification of judicial

⁷² Article 46 (4) ECHR.

⁷³ See the different rationale pursued by international investment tribunals in chapter 8 section II.C.

review and discuss the appropriateness of intrusive review under different rights enshrined in the Convention.

III The Justification of Judicial Review under the European Convention on Human Rights and Fundamental Freedoms

The European Court of Human Rights is in a different position than a domestic constitutional or supreme court in its justification of judicial review. The very idea of the Convention system is to provide an additional, subsidiary safeguard system for the protection of human rights. However, we can observe similar conceptual justifications in the case law as already observed in German and United States constitutional law. As the setting of the Court as an international judiciary complicates the picture, the Court had recourse to the tool of the margin of appreciation doctrine to elaborate its choice of a standard of review adapted to each individual case.

Due to a very broad concept of what rights justify judicial review in both a horizontal and vertical dimension, the Court extended its review to positive obligations and the horizontal effect of fundamental rights. Similar to the German Federal Constitutional Court, the European Court of Human Rights was required adapt its review to a setting where sufficient leeway had to be granted to domestic authorities in particular courts. At the end of the day, the use of proportionality analysis by the European Court of Human Rights is convincing, but we remain unsatisfied as to the particular treatment of necessity in some of the case law.

A Conceptualizing the Justification of Judicial Review under the European Convention on Human Rights for the European Court of Human Rights

The question of the appropriate intrusiveness for the Court's review of the domestic authorities' decisions becomes all the more pressing in the institutional setting of the Convention, where there is no true parliamentary assembly or other body which could overrule an interpretation once given.⁷⁴ The Court emphasized its role as a safeguard for the functioning of democracy to justify its review.

It defined its position towards democracy along the lines of a broader conception of democracy. In the Court's view, 'democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position'.⁷⁵ For the Court, its review thus constitutes part of the system

⁷⁴ Arold, 50.

⁷⁵ *Sørensen and Rasmussen v Denmark*, 11 January 2006, (2008) 46 EHRR 572, para 58.

of protecting democracy in overcoming the latter's potential majoritarian bias. At the same time, some judges have expressed discomfort with all-too intrusive review of the decision-making process at national level.⁷⁶ The Court's mission is thus less appropriately defined narrowly as a defender of the democratic process comparable to United States constitutional law. The effective activity of the Court has consistently been devoted to the refinement of the substance of the Convention rights more generally rather than to countering overall challenges to democracy in Convention states.⁷⁷

Occasionally, some have read statements into the case law of the Court as fulfilling a role of 'virtual representation' of the interests of foreigners.⁷⁸ In a takings case where non-nationals complained of being disadvantaged in terms of compensation, the Court held that there could indeed be a problem because '[...] non-nationals are more vulnerable to domestic legislation: unlike nationals, they will generally have played no part in the election or designation of its authors nor have been consulted on its adoption.'⁷⁹ However, the typical role for the Court is not to represent foreigners neglected in the domestic democratic process. Discrimination on the grounds of nationality is one reason for a complaint, but not the only or a typical one; the Convention also provides for protection of rights of the nationals of a state against that state. Even in the above mentioned decision, the Court's statement were linked to its search for 'legitimate reasons' for a distinction between foreigners and nationals in terms of the burden each group had to carry under the contested regulatory regime for compensation.⁸⁰

The attributes of a 'democratic society' are a crucial benchmark for the Court in assessing when the discretion towards domestic authorities should be overcome and a violation should be found. In reading the preamble of the Convention, the Court has emphasized 'a very clear connection' between the Convention and democracy, as it suggests for the furtherance of its goals an 'effective political democracy' combined with a 'common understanding and observance of human rights'.⁸¹ The Court thus seems to understand its judicial

⁷⁶ In the case of *Hirst v United Kingdom (No 2)*, 6 October 2005, (2006) 42 EHRR 849, para 79, the Court discussed and criticized even the parliamentary debate before the adoption of the law under review, as the competing interests at stake had not been appropriately balanced. Judges Tulkens and Zagrebelsky wrote in their concurring opinion (see para 7) that the Court would put itself on 'slippery terrain' when two sources of legitimacy, the Court and the national parliament, met, in particular since the Court often referred in its case law to the margin of appreciation given to domestic authorities in the implementation of the Convention rights.

⁷⁷ Wildhaber, 'Rethinking the ECtHR', 226.

⁷⁸ See the tribunal in the investment law case *Tecnicas Medioambientales TECMED, SA v. United Mexican States* ICSID Case No ARB/AF/00/2, Award (29 May 2003), para 122, further discussed in chapter 8 section III.B.

⁷⁹ *James and others v. United Kingdom*, 21 February 1986, Series A, No 98, (1986) 8 EHRR 123, para 63.

⁸⁰ *Ibid.*

⁸¹ *United Communist Party of Turkey and others v Turkey*, 30 January 1998, (1998) 26 EHRR 121, para 45.

review as a necessary complement to protect democracy. As a result, we observe in the subsequent section that certain rights connected with the democratic process are indeed protected by more intrusive scrutiny. However, the Court also protects other rights in such a manner, e.g. where intimate aspects of private life are concerned. Furthermore, the Court also began early on to discuss positive obligations under the Convention rights and the horizontal effect of Convention rights. Summing up, pre-balancing under the Convention seems to point towards an outcome following the model of equal representation, with a wide range of rights protected comparable to the range of rights protected in domestic legal regimes like German constitutional law.

B The Margin of Appreciation Doctrine

Based on wide-spread use of proportionality analysis as a consequence of the pre-balancing discussed above, the Court developed a systematic approach to determining the intrusiveness of its review. It continued to rely on full-scale proportionality analysis, but clarified, based on specific reasons, why there should be differences in the intrusiveness of review. The margin of appreciation doctrine should balance out the perceived inconsistency between judicial review under the Convention as a necessary component of safeguarding domestic democracy and the call for deference based on the Court's position as an international court.

The uneasiness on the appropriate degree of deference both on the side of interpretation and the side of national application and interpretation of the Convention is perhaps the central underlying rationale along which the margin of appreciation doctrine has developed. This doctrine having been developed in the case law without concise textual basis in the Convention,⁸² there has been continuous confusion as to its exact operation.⁸³

Early on, the very idea of the discretion given to national authorities by the margin of appreciation raised concerns on whether the idea of universal human rights would be threatened and the promise of defence of minority rights against excesses of majorities in democracies would be defeated.⁸⁴ The highly casuistic use of the concept has also led to claims that the margin of appreciation effectively led to high unpredictability, amounting to a threat to the rule of law.⁸⁵

⁸² G. Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), 80.

⁸³ See for an older overview of the comprehensive case law Y. Arai-Takahashi, *The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR* (Antwerp: Oxford University Press, 2002).

⁸⁴ E. Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1999) 31 *New York University Journal of International Law and Politics* 843, 844.

⁸⁵ J.A. Brauch, 'The Margin of Appreciation and the Jurisprudence of the European Court of Human Rights: Threat to the Rule of Law' (2004-2005) 11 *Columbia Journal of European Law* 113.

Letsas usefully suggested distinguishing between the use of the margin as a substantive and a structural concept, meaning that in the first case the Court is limiting the scope of the right at issue with the effect of not accepting a claim of violation, while in the second case the Court refuses to review intrusively a decision taken by national authorities.⁸⁶ This breakdown is to some extent mirrored here to set out the substantive and the institutional dimension of the margin of appreciation doctrine.⁸⁷

i. The substantive dimension of the margin of appreciation doctrine

There are substantially two elements based on which the Court decides how wide a margin should be granted to the party state. First, the nature of public interests and rights plays a central role. The doctrine is applied in a somewhat complex manner, so that some have argued that by adding a ‘layer of uncertainty’, what the Court actually uses is not a clear legal test but rather ‘a set of highly imprecise justificatory strategies’ that can be made fruitful in different manners by the Court in each case.⁸⁸ Nonetheless, some general trends in the case law can be identified. For certain public interests, the Court thus grants a greater margin of discretion, the classic example being public morals.⁸⁹ At the same time, if the activities concerned by an interference relate e.g. to the ‘most intimate’ aspects of the right to private life, review is more intrusive.⁹⁰ As a consequence, as McHarg puts it, ‘the margin of appreciation varies not only in relation to different exceptions, but in relation to the *same* exceptions in different contexts’.⁹¹

The same can be observed for rights closely related to the democratic process. In describing its understanding of democracy, the Court insists in particular on the value of pluralism, e.g. for the free expression of ideas and opinions or the free exercise of religious beliefs,⁹² but also generally ‘tolerance and broad-

⁸⁶ G. Letsas, ‘Two Concepts of the Margin of Appreciation’ (2006) 26 *Oxford Journal of Legal Studies* 705, 706.

⁸⁷ J. Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) 17 *European Law Journal* 80, 108 ff., usefully suggests a different breakdown of the arguments underlying the application of the margin of appreciation. In her view, the Court acts based on the ‘common grounds’ argument, the ‘better placed’ argument and the ‘importance of the affected right’ argument. For our present purposes, a twofold distinction along substantive and institutional arguments appears, however, better suited.

⁸⁸ A. McHarg, ‘Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights’ (1999) 62 *The Modern Law Review* 671, 688.

⁸⁹ *Dudgeon v United Kingdom*, 22 October 1981, Series A, No 45, (1982) 4 EHRR 149, para 52.

⁹⁰ *Ibid.*

⁹¹ McHarg, 688 (emphasis in original).

⁹² See e.g. *Refah Partisi (the Welfare Party) v Turkey*, 13 February 2003, (2003) 37 EHRR I, paras 89 ff.

mindedness'.⁹³ This leads to strict review in cases where the freedom of expression and the freedom of assembly and association are restricted, the latter in particular as regards the formation of political parties.⁹⁴

As a second element, the Court looks for the existence of a European consensus on moral questions before engaging in intrusive review. The discretion for matters of public morals can also be understood through this lens. Only if there exists common ground for a decision does the Court feel legitimized in using intrusive judicial review, while subsidiarity calls for deference to national authorities in the opposite case.⁹⁵ To ascertain such a European consensus is often a challenging task; the Court's decisions were thus criticized at various occasions as merely following temporary tendencies or insufficiently justifying its findings.⁹⁶

Broader in its setting than the mere democratic process doctrine, the Court thus feels justified to claim authority for judicial review both as protector of rights against intrusions into intimate aspects of individuals as well as a setter of common European standards.

ii. The institutional side of the margin of appreciation doctrine

This broader claim for justified judicial review is countered by the recognition of the Court of the limited institutional capacities of an international court. In its view, as it held in *Handyside v United Kingdom*, '[b]y reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them'.⁹⁷ The second dimension of the margin of appreciation doctrine thus gives the Court leeway to manoeuvre through the difficult waters of its relationship with national authorities.

The Court has recognized that national authorities merit deference in cases where complex technical assessments had to be undertaken.⁹⁸ Similarly, the nature of the national institution under review plays a role. The Court indicates that it grants some deference to court judgments as interpretations of national

⁹³ *Dudgeon v United Kingdom*, para 53.

⁹⁴ See with further references to case law Gerards, 112-113.

⁹⁵ See e.g. *Handyside v United Kingdom*, 7 December 1976, Series A, No 24, (1979-1980) 1 EHRR 737, para 47.

⁹⁶ See Gerards, 109 footnote 195 with further references.

⁹⁷ *Handyside v United Kingdom*, para 48.

⁹⁸ See e.g. for the case of natural disaster prevention *Budayeva and others v Russia*, 20 March 2008, Application No 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, para 135.

law⁹⁹ as well as to judicial interpretations that assess the proportionality of national measures with domestic constitutional rights.¹⁰⁰

iii. Conclusion

The Court operates to some extent based on the ideas also represented by the procedural democracy doctrine, as could be shown above. However, it found that its review was a necessary component of democracy as a broader notion, which meant that its review went beyond strong protection given only to a limited number of rights directly linked to the democratic process. It seems that the Court reads its mandate to protect fundamental rights very broadly, as can be shown subsequently by looking at the case law on positive obligations and horizontal effect of fundamental rights. This solution – proportionality analysis combined with an express discussion of the standard of review – appears highly appropriate in the light of the number of rights protected in the Convention and the comprehensive reading that the Court has given to them and its own role for the protection of democracy in the European Convention party states.

C Judicial Review under the Convention and Positive Obligations

At first glance, the Convention seems to focus predominantly on political and liberal rights and to be the limitation of state action interfering with such rights. Yet, this picture is soon shown to be too simplistic. In a first move examined subsequently, there has been growing recognition that beyond mere refraining from interference, human rights as enshrined in the Convention could require a state to become active. This movement accompanied the increasing abandonment of older typological distinctions between categories of rights. The recognition of positive obligations reminds us of the development in German constitutional law. Interestingly enough, there is, however, no similar rejection of proportionality analysis as observed in the German case.¹⁰¹ Unfor-

⁹⁹ See e.g. *Pla and Puncernau v. Andorra*, 13 July 2004, (2006) 42 EHRR 522, para 59, where the Court held that it would have to exercise ‘the European supervision incumbent on it’ also in private law cases, but only if the relevant court’s interpretation of a legal act appears ‘unreasonable, arbitrary or [...] blatantly inconsistent’ with Convention rights. Also, in *Garcia Ruiz v Spain*, 21 January 1999, (2001) 31 EHRR 22, para 28, the Court emphasized that it was in principle ‘not its function to deal with errors of fact or law allegedly committed by a national court’ unless a violation of Convention rights could be found.

¹⁰⁰ In *A and others v United Kingdom*, 19 February 2009, (2009) 49 EHRR 29, para 184, the Court held that it would ‘in principle’ follow a judgment given by the House of Lords on the question of proportionality of the detention of an applicant unless a misinterpretation of the Convention or a ‘manifestly unreasonable’ conclusion drawn by the national court could be shown.

¹⁰¹ See chapter 3 section III.B.ii.

tunately, however, there is also no clarifying discussion as to what standard of review should accompany the extension of proportionality analysis to the field of positive obligations. We can contrast this with United States constitutional law, where hardly any case law at all has addressed positive obligations or horizontal effect of fundamental rights in light of the particular perception of rights predominant in this legal regime.¹⁰² The European Court of Human Rights adopted a much broader and effectively convincing reading of Convention rights unhindered by a comparably limited perception of rights as in the United States' case.

i. The changing doctrinal perception of Convention rights: towards positive obligations

As early as in the 1970s, the initial concept of dividing human rights into political and liberal or civil rights as opposed to social and economic rights had come under fire, as such a division tended to view the former as 'negative' rights and the latter as 'positive' rights.¹⁰³ Conceptually, this division seemed ever less appropriate. In 1980, a new terminology was suggested by Shue, suggesting that obligations for states encompassed 'to avoid depriving', 'to protect from deprivation' and 'to aid the deprived'.¹⁰⁴ This terminology was then rephrased and introduced as the classic tripartite typology used today which describes obligations to respect, protect and fulfil.¹⁰⁵ This typology aimed to overcome attempts of categorisation which could not stand the test of practice, where all rights seemed to contain a variety of obligations for states. One scholar colourfully suggested perceiving human rights obligations as 'successive waves of duties'.¹⁰⁶

This development has also found its corollary in ECHR related doctrine, where positive obligations are argued to be part of what states signed up to under the Convention. Early on, the doctrine suggested a distinction between treaties *of* and treaties *on* human rights: The first category would create indi-

¹⁰² See chapter 4 section III.A.iv.

¹⁰³ See e.g. under the ECHR the Court in *Airey v Ireland*, 9 October 1979, Series A, No 32, (1979-1980) 2 EHRR 305, para 26: 'Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.'

¹⁰⁴ H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), 52.

¹⁰⁵ See in particular the report prepared by Asbjørn Eide *The Right to Adequate Food as a Human Right*, UN Doc. E/CN.4/Sub.2/1987/23 of 7 July 1987. See also A. Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 *Human Rights Law Journal* 36, 37.

¹⁰⁶ J. Waldron, 'Two Sides of the Coin' in *Liberal Rights: Collected Papers, 1981-1991* (Cambridge: Cambridge University Press, 1993), 25.

vidual rights, while the second would only create governmental obligations.¹⁰⁷ A limited reading ought to be the result in the case of the Convention, as it is commonly designated as the European Convention on Human Rights; but the French title¹⁰⁸ and also the official title ‘European Convention for the Protection of Human Rights and Fundamental Freedoms’ support the argument that the notion of protection ought to be understood in a broad manner, as potentially encompassing a broad number of types of measures states are obliged to take.¹⁰⁹ Article 1 ECHR provides a further argument bolstering a broad mandate for protection resting on party states. The provision requires that states ‘shall secure to everyone within their jurisdiction the rights and freedoms defined’ in the Convention.¹¹⁰ The Court used this provision to suggest that the Convention contains a ‘network of mutual, bilateral undertakings’ and ‘objective obligations’ benefitting from ‘collective enforcement’, which also required state authorities to act if e.g. breaches occur at subordinate levels of the administration.¹¹¹ Arguing in favour of the imposition of duties by socioeconomic rights, some would also use a substantive reading of the notion of ‘effective political democracy’ enshrined in the Preamble in order to suggest that socio-economic rights and corresponding positive obligations for states are justified as necessary to securing participation in such a democracy.¹¹² The method of ‘effective’ interpretation of rights was another reason for the Court to recognise positive obligations for states under rights even if such obligations were not explicitly laid down in the wording of the Convention rights.¹¹³

ii. The emergence of positive obligations in the case law

These doctrinal enlargements of the obligations for states contained in the Convention were accompanied by increasing recognition in the case law that state obligations went beyond merely refraining from interference. The Court was ‘quite ahead of its time’,¹¹⁴ already recognising in the late 1970s and early 1980s positive obligations for states in a number of situations. States

¹⁰⁷ P. Drost, *Human Rights as Legal Rights: The Realization of Individual Human Rights in Positive International Law* 2 edn (Leiden: A.W. Sijthoff, 1965), 174.

¹⁰⁸ *Convention de sauvegarde des droits de l’homme et des libertés fondamentales* (author’s emphasis).

¹⁰⁹ D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (London: Routledge, 2012), 11.

¹¹⁰ I.E. Koch, *Human Rights as Indivisible Rights – The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Leiden: Martinus Nijhoff Publishers, 2009), 276; see also Xenos, 10.

¹¹¹ *Ireland v United Kingdom*, para 239.

¹¹² Koch, 273.

¹¹³ Early observed by J.G. Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press, 1993), 102-103. See also confirming this point A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004), 221.

¹¹⁴ Xenos, 22.

were thus obliged e.g. to enact appropriate administrative measures to ensure that a legal bond is created between an unmarried mother and her child based on the latter's birth,¹¹⁵ to provide for a legal possibility for separation which was also practically accessible in terms of procedure¹¹⁶ and to introduce effectively deterrent criminal sanctions for certain crimes violating human rights as a corollary to an insufficient civil law remedy.¹¹⁷

Since then, positive obligations have been found under virtually all Convention rights. The classic examples often mentioned are obligations to ensure deterrence from violations caused by private parties by means of criminal sanctions and obligations to ensure the accessibility of legal procedures. Furthermore, under the freedom of expression the Court held that a state could be obliged to protect a threatened journalist,¹¹⁸ or to grant legal assistance to defendants in proceedings concerning defamation claims.¹¹⁹ Under the prohibition of discrimination among persons in their enjoyment of Convention rights in Article 14, the Court held that states were subject to an obligation to differentiate in their treatment of individuals if the latter were effectively in different circumstances.¹²⁰ Under the right to property, the Court found a positive obligation for the state to take measures in the presence of known dangerous circumstances.¹²¹

iii. The standard of review and proportionality analysis in the case law on positive obligations

Based on its early recognition that the safeguard of Convention rights may impose positive duties on states as well as obligations to abstain from interference, the Court found that similar principles were applicable in both situations.

In *Powell and Rayner v United Kingdom*, the Court thus confirmed earlier findings and summed up that the 'applicable principles' were 'broadly similar', which meant that in both contexts a 'fair balance' had to be struck between the interests of the individual and of the community.¹²² The margin of appreciation doctrine also applies in principle to situations of positive obligations.¹²³

¹¹⁵ *Marckx v Belgium*.

¹¹⁶ *Airey v Ireland*.

¹¹⁷ *X and Y v Netherlands*, 26 March 1985, Series A, No 91, (1986) 8 EHRR 235. The doctrine could just barely keep up with these developments, see a general proposal for the relevance of rights violations by private parties only issued later in A. Clapham, *Human Rights in the Private Sphere* (Oxford: Clarendon Press, 1993), 343.

¹¹⁸ *Özgür Gündem v Turkey*, 16 March 2000, (2001) 31 EHRR 49, paras 42-43.

¹¹⁹ *Steel and Morris v United Kingdom*, 15 February 2005, (2005) 41 EHRR 403, para 95.

¹²⁰ *Thlimmenos v Greece*, 6 April 2000, (2001) 31 EHRR 411, para 44.

¹²¹ *Öneryıldız v Turkey*, 30 November 2004, (2005) 41 EHRR 325, para 136.

¹²² *Powell and Rayner v United Kingdom*, 21 February 1990, (1990) 12 EHRR 355, para 41.

¹²³ *Rees v United Kingdom*, 17 October 1986, (1986) 9 EHRR 56, para 37.

In the literature, some have welcomed the development of a seemingly parallel test, while others showed less enthusiasm. Some have simply emphasized the need for flexibility in adjudicating positive obligations, that would not lend themselves to categorical approaches. A broad 'reasonableness' standard would thus be more useful.¹²⁴

There may, however, be more concrete problems with this approach. The Court indicated that e.g. in cases of positive obligations under Article 8, the aims mentioned in that provision's second paragraph 'may be of a certain relevance'.¹²⁵ Although the legitimate aims mentioned in the various provisions of the Convention thus seem, in their phrasing, aimed at the situation of interference with a right, in practice they should, in the Court's view, also play a role for positive obligations. Yet, as the Court's language indicates, the list is not perceived as exhaustive, and in practice a broad range of 'general interests' is accepted as a justification for the state to counterbalance the required positive action to ensure a right.¹²⁶

Another conceptual problem lies in the strict distinction of individual as opposed to community interests suggested by the Court. In the case of positive obligations, in light of the principle of equality in most situations such obligations apply to a larger number of persons, and may be considered justified not only for the individual as his or her right, but in a more general interest as well.¹²⁷

It has thus been correctly remarked that it is difficult to assess what margin of appreciation is applied by the Court, but also that the very admission of 'general interests' does not always meet a certain threshold of importance, as is required in cases of negative duties for states.¹²⁸ In the case of positive obligations, in many cases more expertise and exhaustive discussion could be required as to the negative impact on an individual, which is much harder to establish than in typical cases of public interference with a right.¹²⁹

Claiming to act for the sake of coherence of the case law, some voices on the bench and in the doctrine suggested fully merging positive and negative obligations, abandoning any distinction between the two concepts.¹³⁰ This approach could remedy the problem of an abstract, potentially large number of 'general

¹²⁴ Koch, 289.

¹²⁵ *Rees v United Kingdom*, para 37.

¹²⁶ See already early sceptical C.J. Forder, 'Legal Protection Under Article 8 ECHR: Marckx and Beyond' (1990) 37 *Netherlands International Law Review* 162, 179.

¹²⁷ Xenos, 148.

¹²⁸ *Ibid.*, 61-62.

¹²⁹ *Ibid.*, 62.

¹³⁰ See Wildhaber, concurring opinion in *Stjerna v Finland*, 25 November 1994, (1994) 24 EHRR 195; P. van Dijk, 'Positive Obligations' Implied in the European Convention on Human Rights: Are the States Still the 'Masters' of the Convention?' in M. Castermans-Holleman, F. van Hoof and J. Smith (eds.), *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy: Essays in Honour of Peter Baehr* (The Hague: Kluwer Law International, 1998), 25.

interests' which qualify for the 'fair balance' test and which render unpredictable both the margin of appreciation and the proportionality assessment under the 'fair balance' test. An extensive discussion of the importance of such general interests as well as of the applicable margin of appreciation could, however, already arguably do a lot of work.

iv. Conclusion

The early admission of positive obligations by the Court and the discussion in the doctrine led to the adoption of proportionality analysis. However, despite intense debate on the topic, there continues to be no clarity as to the appropriate standard of review. While the Court – correctly in our view – extended its use of proportionality analysis to the sphere of positive obligations, it has paid insufficient attention to justifying its exercise of review. Instead of thus only focusing on the characteristics of interference with a right in the framework of the 'fair balance' test, the Court would be better advised in pure positive obligation cases to attach more importance to the justification for review and the appropriate standard of review. Some have suggested without providing concrete details that for this purpose the Court should assess the 'democratic limit' of the Convention in the respective case in prescribing positive obligations.¹³¹ Apart from the 'qualitative' element of whether a positive obligation arises under the respective right, regard would also have to be paid to the 'quantitative' element, i.e. the measure's costs, their distribution and the number of potentially concerned individuals.¹³² This could be the first useful contribution to judging the result of proportionality analysis in a more lenient way, i.e. with a less intrusive standard of review. A solution as in German constitutional law, where the very use of proportionality analysis has been called into question,¹³³ does not, however, seem warranted, since the model of equal representation does not appear fundamentally changed.

D Judicial Review and Convention Rights in the Private Sphere

Potential horizontal effect of Convention rights was similarly discussed in the doctrine as early on as positive obligations.¹³⁴ The German

¹³¹ Xenos, 147.

¹³² *Ibid.*, 163 ff.

¹³³ See chapter 3 section III.B.ii.

¹³⁴ See for an early suggestion e.g. M.-A. Eissen, 'La Convention Européenne des Droits de l'Homme et les Obligations de l'Individu: une Mise à Jour' in R. Cassin (ed.), *Amicorum Discipulorumque Liber III: Protection des Droits de l'Homme dans les Rapports entre Personnes Privées* (Paris: Pédone, 1971). Others followed, suggesting that in any event more and more countries were adopting the concept of horizontal effect in their national constitutional orders, see A. Drzemczewski, 'The European Human Rights Convention and Relations between Private Parties' (1979) 26 *Netherlands International Law Review* 163.

example of the *Lüth* decision immediately comes to mind.¹³⁵ The European Court of Human Rights could pre-balance the various arguments in a similar way or reach the conclusion that the specific setting of judicial review under the Convention would call for a different approach. Effectively, the Court chose a path not too far from the German Federal Constitutional Court. In our view, this seems appropriate, although the reliance on proportionality analysis seems vague at some points, as the subsequent case law shows. In the German example pre-balancing led the German Federal Constitutional Court to the conclusion that the outcome resembled a model of special interest representation. Horizontal effect of fundamental rights arguably changes the situation of review, because private law is the object of review and the central value of the latter is private autonomy. Since we found the position taken by the German Federal Constitutional Court convincing, there are no grounds for adopting a different stance for the European Court of Human Rights. There should be no full-scale rejection of review as under a strict division thesis between public and private law. Judicial review should arguably be based – as in the German case – on a model of special interest review, giving due deference to private autonomy and relying on proportionality analysis only in cases of a severe imbalance of values. Discussing doctrine and case law, we find that the solution found by the Court convincing to a large extent, as it is in conformity with the broad and radiating perception of Convention rights generally taken by the Court in justifying its judicial review. At the same time, the use of proportionality analysis is accompanied by appropriate deference.

i. The justification of review in light of indirect horizontal effect of Convention rights

Direct horizontal effect seems unthinkable under the Convention as it would effectively require a full-scale institutional overhaul to create a remedy against private parties. Indirect horizontal effect imposing structural limitations on the leeway of private law seems more feasible. Yet, important questions remain. In the German case, indirect horizontal effect was strongly based by the Federal Constitutional Court on the value of developing one's own personality, which is the cornerstone of the Basic Law. Only, it is hard to find such a central value in the enumeration of rights in the Convention to justify similarly structural constraints imposed by the European Court of Human Rights and to serve as a benchmark of constitutional balance.¹³⁶ Still, to some extent, indirect horizontal effect remains a tempting proposal for some because of the judicial institutional mechanism which allows the introduction of rights

¹³⁵ See chapter 3 section III.B.iii.

¹³⁶ See on German constitutional law M. Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law' (2006) 7 *German Law Journal* 341, 348.

claims into a debate in the absence of or before parliamentary debates.¹³⁷ It also facilitates overcoming the persisting, but only poorly arguable public-private distinction present in fundamental rights adjudication.¹³⁸

The Court reacted with pragmatism: it continued to extend the doctrine of positive obligations. Furthermore, it also insisted on a duty of national authorities to interpret private law instruments in a manner compatible with Convention rights, thereby extending the reach of the latter rights to areas of law ‘traditionally thought of as distant from human rights adjudication’.¹³⁹ It held that in private litigation, a violation could only arise where the national courts’ assessment of the facts or interpretation of domestic law was ‘manifestly unreasonable or arbitrary or blatantly inconsistent with the fundamental principles of the Convention’.¹⁴⁰ The Court underlined that in theory it was not asked to settle disputes of a ‘purely private nature’, but that it could not remain passive in exercising its ‘European supervision’ in such cases.¹⁴¹ It had to intervene as soon as a national court’s interpretation of a legal act of private law or an administrative practice appeared ‘unreasonable, arbitrary, discriminatory or, *more broadly*, inconsistent with the principles underlying the Convention’.¹⁴² Some criticized this approach as interfering too much with private autonomy and private law.¹⁴³ Yet, it should be noted that private law must undeniably be limited to some extent by the guidelines of public law, human rights standards being part of the latter.¹⁴⁴ At least to date, the Court seems to have been exercising its review function with due concern for the role played by public authorities and with restraint in order to sanction only severe interferences with human rights caused by private actors, leaving little doubt that there is no far-reaching control of acts of private persons.

¹³⁷ Xenos, 45.

¹³⁸ Again in the German context Kumm, 359-360.

¹³⁹ D. Spielmann, ‘The European Convention on Human Rights – The European Court of Human Rights’ in D. Oliver and J. Fedtke (eds.), *Human Rights and the Private Sphere – A Comparative Study* (London/New York: Routledge-Cavendish, 2007), 464.

¹⁴⁰ *Pla and Puncernau v. Andorra*, para 46.

¹⁴¹ *Ibid.*, para 59.

¹⁴² *Ibid.* (author’s emphasis). See also more recently *Khurshid Mustafa and Tarzibachi v. Sweden*, 16 December 2008, Application No 23883/06, para 33.

¹⁴³ O. Cherednychenko, ‘Towards the Control of Private Acts by the European Court of Human Rights?’ (2006) 13 *Maastricht Journal of European and Comparative Law* 195, 207, noting the potential negative effect on predictability of private law because of ‘ubiquitous’ Convention rights.

¹⁴⁴ Xenos, 38.

ii. The standard of review and proportionality analysis in the case law on conflicts between private parties

Generally, the Court has also adopted the ‘fair balance’ test for the field of private party conflicts. Two constellations provide good examples to discuss the Court’s approach.

The first case is the obligation imposed on domestic courts not to interpret instruments of a private law nature in a manner blatantly contrary to the Convention’s principles. In *Pla and Puncernau v Andorra*, the Court examined the interpretation of a will as to whether it constituted discrimination under Article 14 in combination with Article 8 ECHR. The interpretation of the highest instance in Andorra excluded adopted sons from inheritance based on the text of the will which only mentioned ‘sons’ and based on the historical context of the will in the year 1939. A distinction as established by the Andorran court would be found discriminatory if there was no ‘objective and reasonable justification’, no ‘legitimate aim’ or no ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’.¹⁴⁵ Most likely based on the absence of any legitimate aim, the Court felt competent to intervene despite its purported deferent approach to domestic court interpretations of private law, where the understanding and knowledge of ‘local legal traditions’ played an eminent role.¹⁴⁶ In the present case, although ‘very weighty reasons’ would have been required to justify a difference in treatment because of the birth out of wedlock, no such reason could be discerned.¹⁴⁷

The ‘fair balance’ test developed by the Court in vertical cases was also extended to conflicts between private interests enshrined in rights, effectively ‘horizontalizing’ the Court’s approach.¹⁴⁸ In the *von Hannover v Germany* case, the Court had to weigh the protection of private life against the freedom of expression in a case concerning an injunction granted by a national court which prevented the publication of photos of a celebrity in magazines.

In *von Hannover v Germany*, the Court had to examine the balance struck by domestic courts in interpreting domestic law on the publication of pictures of a prominent individual in magazines. According to the Court, in the situation of conflict between two individuals’ rights, a ‘fair balance’ between individual and community interests had to be struck and a margin of appreciation applied to the state’s authorities decisions.¹⁴⁹ Repeating some general principles of its case law on the conflict between the freedom of expression and the right to private life, the Court then engaged in a rather informal weighing exercise. It emphasized that the applicant was part of a reigning family, but did not hold public

¹⁴⁵ *Pla and Puncernau v. Andorra*, para 61.

¹⁴⁶ *Ibid.*, para 46.

¹⁴⁷ *Ibid.*

¹⁴⁸ S. van Drooghenbroeck, ‘L’horizontalisation des droits de l’homme’ in H Dumont and others (eds), *La responsabilité, face cachée des droits de l’homme* (Brussels: Bruylant, 2005), 376.

¹⁴⁹ *von Hannover v Germany*, 24 June 2004, (2005) 40 EHRR 1, para 57.

office, which meant that the press' role as a 'watchdog' was not given and there was no public right to be informed relating to her private life as could be the case for public officials.¹⁵⁰ The aim of the publication of pictures only being the satisfaction of the 'curiosity of a particular readership', it could not contribute to a general debate.¹⁵¹ Performing thus a proportionality assessment on one side of the balance, the Court concluded that the freedom of expression only deserved narrow interpretation.

By contrast, the context of the pictures, which implied the harassment of figures of public interest, and the manner of the pictures being taken, i.e. without consent or knowledge, pointed towards a severe interference with the right to privacy.¹⁵² As a consequence, the Court disagreed with the German courts' interpretation of domestic law which had allowed the publication of the pictures based on the finding that the applicant was a 'figure of contemporary society "par excellence"' and could not rely on her right to privacy unless in secluded places out of the public.¹⁵³

The case law seems in fact to grant appropriate deference and the Court only intervenes because of severe imbalances between the conflicting rights. However, the justification for review given by the Court relies, in both cases, mainly on the fact that domestic court decisions merit some deference. The topic of review of private law acts receives only insufficient attention. In comparison, the German Federal Constitutional Court in *Lüth* showed awareness of the danger of transforming its regime of review unduly by granting indirect horizontal effect.¹⁵⁴ The European Court of Human Rights here reaches acceptable results which seem to follow a model of special interest review, but the reasoning for the result provides only insufficient evidence on the justification of judicial review. Recent case law emphasized again rather enigmatically that it would require 'strong reasons to substitute its view for that of the domestic courts', but then insisted – at some points with alarmingly little discretion for the domestic court – on the use and acceptance of its own criteria by domestic courts for the pertinent balancing exercise.¹⁵⁵

¹⁵⁰ *Ibid.*, paras 62-64.

¹⁵¹ *Ibid.*, para 65.

¹⁵² *Ibid.*, para 68.

¹⁵³ *Ibid.*, paras 74-75.

¹⁵⁴ See chapter 3 section III.B.iii.b.

¹⁵⁵ *Von Hannover v Germany (no. 2, Grand Chamber decision)*, 7 February 2012, Applications nos 40660/08 and 60641/08, para 107. While in this case the 'fair balance' struck by domestic courts was accepted, in *Axel Springer AG v Germany (Grand Chamber decision)*, 7 February 2012, Application no 39954/08, para 110, the Court reviewed very closely the various elements of the balancing undertaken by domestic courts and consequently found a violation of the Convention as it disagreed with some of them.

iii. Conclusion

In the case law on private party conflicts, the Court again had recourse to its ‘fair balance’ test. It has thus introduced some indirect horizontal effect of Convention rights. While in principle the result conforms to the suggested pre-balancing resulting in a model of special interest review, a closer look at the case law reveals that the reasoning on the justification of review and the required deference is insufficient. While the Court referred only broadly to its ‘European supervision’ even in private law cases, its justification for review seemed to focus more on the need to defer to courts as domestic institutions than to the central interest of private autonomy at stake. Recent case law thus shows very close scrutiny at some occasions, which does not seem appropriate in the special interest setting of review at issue.

E Conclusion

There is some room for praise and some for criticism of the European Court of Human Rights’ discussion of its own justification of review. Over the years, the margin of appreciation doctrine has become a comprehensive system of justificatory strategies to identify the appropriate standard of review. Its use may not always be as systematic as desired. Some commentators therefore deplored that the margin of appreciation could provide the Court with leeway to avoid explaining fully the criteria it applies to particular problems, potentially leading to erroneous or biased balancing exercises.¹⁵⁶ However, it is a commendably comprehensive attempt to explain pre-balancing and the justification of judicial review in the form of reasoning on the standard of review to be used, which cannot be found in such detail in the case law of other courts.

Of course, the Court generally faces a more difficult challenge as an international court. The institutional dimension of the margin of appreciation doctrine can be commended as a useful tool. For some other rights, however, more discussion as to the justification for intense review through the Court could have proven useful.

It thus remains to some extent in the dark why a very broad variety of rights require intense scrutiny in the eyes of the Court, the latter having left matters at the stage of broad references to its concept of democracy as linked with its own review function.

One could also wish for more extensive justification of judicial review in other fields. In the case law on positive obligations, such reasoning remains rather scarce. In the jurisprudence on private law cases, the Court seems to reach convincing results similar to the one found by the German Federal Constitutional Court in its *Lüth* decision, but its reasoning as to why it follows deferent review based on a model of special interest review remains unfortunately terse.

¹⁵⁶ Lester, II2, points to examples of case law on the conflict between the freedom of expression and the right to protect one’s reputation, the latter having been overemphasized in his view.

In any event, the criticism must be qualified to some extent in light of subsequent chapters on the Court of Justice of the European Union or investment tribunals, which show that in comparison, the European Court of Human Rights offers quite extensive reasoning on the justification of its review function.

IV The ‘Fair Balance’ Test in the Case Law under the European Convention on Human Rights and Fundamental Freedoms

Proportionality analysis plays a central role in the interpretation of the Convention rights by the Court. Yet, it operates in a different manner from what has been identified as the somewhat classic four-pronged version in German constitutional law, the ‘principle of proportionality’.¹⁵⁷ Assessing the case law, we find a particular legal test, the ‘fair balance’ test. We start with an examination of different possibilities of interpreting the Convention and find that so far the Court refused a deontological reading. We thus find that exclusion of balancing or proportionality *stricto sensu* is rare in the case law under the Convention. Relying on full-scale proportionality analysis, the Court developed a somewhat peculiar emphasis on the ultimate prong, while it rejected applying the test of necessity strictly. We have already found an explanation for the emphasis on proportionality *stricto sensu* in the form of the paradigm of individual justice pursued by the Court. At the normative level of the justification of judicial review, however, we have found no particular argument supporting the peculiar use of necessity. In so doing, the Court seems to unduly change the structure of proportionality analysis, while in our view a change of the standard of review could have provided a better solution.

A The Interpretation of the Convention: Between Deontological and Balancing Approaches

The Court had the task of deciding what interpretative methods should apply to the broadly worded provisions of the Convention. Effectively, the Court has opted for a flexible approach of various interpretative principles that are applied together and sometimes weighed against each other. Voices in the doctrine suggested a more deontological reading of Convention rights which excludes balancing and adopts excluded reasons approaches; but the case law has so far only given limited weight to these ideas. As the justification of judicial review suggested by the Court appeared convincing to us, this solution of weighing also seems appropriate as a result of pre-balancing.

¹⁵⁷ See chapter 3 section IV.B.

i. Weighing interpretative principles and doctrines

There is no adherence to one single, clearly identifiable canon. The Court elaborated a number of constitutional principles in its case law, proportionality being prominent among them.¹⁵⁸ The controversy between judges favouring ‘individual’ and ‘constitutional’ justice did not produce major divisions among judges,¹⁵⁹ so that the Court interpreted the Convention using a number of interpretative doctrines in a rather discretionary fashion.¹⁶⁰ The omnipresence of balancing, here between the various doctrines of interpretation, was forcefully described as ‘doing justice and fairness through a vision of reasonableness’.¹⁶¹ Specific doctrines which can also be considered hallmarks for the construction of the Convention’s provisions include evolutionary interpretation¹⁶² and an interpretation which renders rights ‘practical and effective’.¹⁶³ The first doctrine has led to continuous and – in the case of human rights – nearly unavoidable adaptation of interpretation of rights over the years; at the same time, practically no weight has been given to historical interpretation of the Convention.¹⁶⁴ The doctrine of evolutionary interpretation also implied the identification by the Court of common standards accepted by a majority of party states as a benchmark of consensus.¹⁶⁵ The tool of consensus combined with evolutive interpretation helped the Court to overcome the limits of consent of state parties.¹⁶⁶ At the same time, the doctrine of ‘practical and effective’ rights was

¹⁵⁸ Lester, 102.

¹⁵⁹ Harmsen, 131.

¹⁶⁰ See for a scheme of interpretative doctrines J. Christoffersen, *Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (Leiden: Martinus Nijhoff Publishers, 2009), 66.

¹⁶¹ Wildhaber, ‘Rethinking the ECtHR’, 213.

¹⁶² See the Court’s famous statement on the Convention as a ‘living instrument’ which had to be interpreted ‘in light of present-day conditions’, *Tyrer v United Kingdom*, 25 April 1978, Series A, No 26, (1979-1980) 2 EHRR 1, para 30. See also on the ‘in the light of current society’ doctrine first accepted in *Marckx v Belgium* Arold, 39.

¹⁶³ Already in the *Belgian Linguistics case*, para 3, the Court referred to the concept of *effet utile*, before embracing the characteristic formula in *Airey v Ireland*, para 24.

¹⁶⁴ See generally R. Bernhardt, ‘Rechtsfortbildung durch den Europäischen Gerichtshof für Menschenrechte’ in S. Breitenmoser and others (eds.), *Human Rights, Democracy and the Rule of Law – Liber Amicorum Luzius Wildhaber* (Zurich: Dike, 2007). For one of the rare historical approaches see the separate opinion by Judge Fitzmaurice in *Golder v United Kingdom*, 21 February 1975, Series A, No 18, (1979-1980) 1 EHRR 524.

¹⁶⁵ See on this point Letsas, *Theory of Interpretation*, 76-77.

¹⁶⁶ See for a good overview of sceptical voices on this topic K. Dzehtsiarou, ‘European Consensus and the Evolutive Interpretation of the European Convention on Human Rights’ (2011) 12 *German Law Journal* 1730.

used to ensure that rights were not granted merely in an ‘illusory’ or ‘theoretical’ fashion.¹⁶⁷

Sceptics denounced the use of such a variety of interpretative maxims in no particularly ordered fashion as deeply problematic.¹⁶⁸ As one solution, Greer seeks to introduce more clarity suggesting that the Court should use three principles of interpretation as predominant: the rights principle requiring the protection of Convention rights by the national Courts and the ECtHR; the democracy principle safeguarding that public interests or collective goods may be pursued by democratically accountable non-judicial public bodies at the national level; and the priority to rights principle, which in his view – based on the text of the Convention – systematically grants priority to the protection of the rights enshrined in the Convention over collective goods.¹⁶⁹ He does not reject balancing as such,¹⁷⁰ but the central task of the Court is to provide a definitive interpretation of rights and public interests. As a consequence, there can be no role for the margin of appreciation at the level of interpretation, but only for the application of Convention rights by national authorities.¹⁷¹ This critique to some extent joins the earlier findings on the controversy between individual and constitutional justice: in finding solutions the Court must thus be careful not to focus too much on the facts of a specific case, but also develop general guidelines of behaviour.¹⁷²

ii. Deontological approaches to rights and excluded reasons

Even more profound challenges to the Court’s approach question the very use of full-scale proportionality analysis. Letsas mounts a sophisticated attack on the ‘piece-meal’ development of ECHR law caused by this approach, suggesting that the moral principles underlying the norms of the Convention must be applied in an equal and consistent fashion. Research

¹⁶⁷ Christoffersen, *Fair Balance*, 56. Some judges have recently advanced the ‘standstill’ or ‘cogwheel’ theory that an extensive rights interpretation should no longer be able to be reversed and restricted by the judiciary unless a manifest mistake has been made, which would correspond to the principle of non-regression to protect acquired rights (Judge Casadevall partly dissenting in *Gorou v Greece*, 20 March 2009, App 12686/03, ECHR 2009-nyr). Such attempts have been observed with scepticism because of the possibility of erroneous interpretations, the need to leave some leeway to democratic decision-making at national level and the restriction to the margin of manoeuvre of the Court itself this could entail, see Wildhaber, ‘Rethinking the ECtHR’, 216.

¹⁶⁸ See generally S. Greer, ‘Constitutionalizing Adjudication under the European Convention on Human Rights’ (2003) 23 *Oxford Journal of Legal Studies* 405.

¹⁶⁹ *Ibid.*, *passim*.

¹⁷⁰ In fact, in his view the terminological battle seems overrated, see S. Greer, ‘“Balancing” and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate’ (2004) 63 *Cambridge Law Journal* 412, 423.

¹⁷¹ *Ibid.*, 423-424.

¹⁷² See already section II.B.

of consensus or the margin of appreciation offends the values of legality and equality in his view.¹⁷³ The values underlying the ECHR being predominantly liberal egalitarian principles, this would effectively lead to a technique of reason-blocking in adjudicating the rights under the ECHR. The Court should not submit rights to balancing exercises, but instead identify and reject impermissible considerations for government interference such as paternalistic reasons – a classic approach based on excluded reasons.¹⁷⁴

As a matter of fact, however, the interpretation of the Convention remains to this date largely based on balancing exercises. As was discussed at an earlier stage,¹⁷⁵ resort to moral values such as Letsas' liberal egalitarian principles would require assessing these principles from an external point of view; such a point of view is, however, not given unless Letsas' particular reading of the Convention is accepted. The Court's reading of the Convention including positive obligations and some horizontal effect, however, goes far beyond the limited reading Letsas suggests, and was arguably convincing.¹⁷⁶ It therefore appears problematic to suggest an exclusion of proportionality *stricto sensu* and the adoption of an excluded reasons approach to interpretation.

The case law also mirrors low enthusiasm for excluded reasons approaches. Proportionality analysis was indeed excluded in the case of absolute rights.¹⁷⁷ A close look reveals, however, that at the same time there was some interpretative work to do to define the very scope of the rights which involved some balancing akin to proportionality analysis.¹⁷⁸ The *Soering v United Kingdom* case provides an example under the right not to be tortured or not to be inhumanly or degradingly treated or punished.¹⁷⁹ The Court found that all circumstances of the case and the inherent balance in the Convention between the general interest of the community and the protection of the individual's rights had to be taken into account to interpret the notion of 'inhuman or degrading treatment or punishment'.¹⁸⁰

The express provision that seems to allow adjudication based on excluded reasons has also seen only little development. Article 18 of the Convention prescribes that restrictions on rights permitted in the Convention 'shall not be

¹⁷³ Letsas, *Theory of Interpretation*, 124.

¹⁷⁴ *Ibid.*, 13.

¹⁷⁵ See chapter 2 section IV.C.

¹⁷⁶ See sections III.C. and III.D.

¹⁷⁷ See e.g. *Ahmed v Austria*, 17 December 1996, (1997) 24 EHRR 278, paras 40-41. More recently *Saadi v Italy*, 28 February 2008, (2009) 49 EHRR 730, para 139, referring to suggestions to use proportionality *stricto sensu* as 'misconceived'.

¹⁷⁸ Greer, *European Convention*, 233.

¹⁷⁹ Article 3 ECHR.

¹⁸⁰ *Soering v United Kingdom*, 7 July 1989, Series A, No 161, (1989) 11 EHRR 439, para 89. As another example, to reach the required level of severity, the Court accepted as an aggravating factor negative remarks on an applicant's lifestyle based on racism, see *Moldovan and others v Romania*, 12 July 2005, (2007) 44 EHRR 302, para 111.

applied for any purpose other than those for which they have been prescribed'. The requirement imposed is thus that no other, illegitimate purposes are pursued behind the guise of a justification falling within the ambit of the express limitations. The clause can thus be seen as a prohibition to act based on excluded reasons. It can only apply together with the alleged violation of another Convention right.¹⁸¹ Since bad faith cannot be presumed, the Court imposed procedurally a substantial burden of proof on an applicant to show that a state is actually pursuing a 'hidden agenda', in which case the presumption of good faith could be rebutted. For this purpose, the applicant must 'convincingly' show that the aim alleged by authorities or 'reasonably inferred' from the context of the measure was not the true aim.¹⁸² Only in rare cases was a violation of Article 18 ECHR found, e.g. in a case where criminal proceedings and detention were misused by the government as a strategy of intimidation during commercial bargaining.¹⁸³

Summing up, the introductory discussion of interpretative methods witnessed the predominance of proportionality reasoning in the Court's reading of the Convention. Relying on a broad canon of interpretative principles, the Court was not open to suggestions of a more deontological reading of the Convention rights. Even in adjudicating absolute rights, the Court seems to admit some balancing in establishing the scope of the prohibition of an absolute right. Excluded reasons thinking as suggested by Article 18 ECHR only played a minor role. The Court thus consistently relied on proportionality analysis, developing the 'fair balance' test for this purpose.

B The 'Fair Balance' Test

Similar to the German Federal Constitutional Court,¹⁸⁴ the European Court of Human Rights has developed one particular legal test and applied it – as has already been indicated in the discussions on positive obligations and horizontal effect of Convention rights – across the Convention's various situations of rights review. Contrary to other human rights instruments such as the Universal Declaration of Human Rights,¹⁸⁵ no general limitation clause was integrated into the Convention.¹⁸⁶ The individual rights and free-

¹⁸¹ *Gusinskiy v Russia*, 19 May 2004, (2005) 41 EHRR 281, para 75.

¹⁸² See for such language the recent example in *Khodorkovskiy v. Russia*, 31 May 2011, Application No 5829/04, para 255.

¹⁸³ *Gusinskiy v Russia*, para 76.

¹⁸⁴ See chapter 3 section IV.B.

¹⁸⁵ See Article 29 (2) of the Universal Declaration of Human Rights of 1948: 'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.'

¹⁸⁶ As J. Christoffersen, 'Straight Human Rights Talk – Why Proportionality does (not) Matter' (2010) 55 *Scandinavian Studies in Law* 11, 14, notes, the exact reasons for the non-inclusion of such a general

doms are thus defined in detail in the Convention, which, to the dismay of some commentators, was not always sufficiently taken into account by the Court.¹⁸⁷ Similar to German constitutional law and as an advantage over the discussed fragmented structure of United States constitutional law,¹⁸⁸ a fairly consistent test has developed across fields.

i. The structure of the rights norms of the Convention

The classic opposition between rights and their limitations can perhaps best be depicted using the rights enshrined in Articles 8 to 11. Article 8 enshrines everyone's right to respect for his private and family life, his home and his correspondences, Article 9 the 'right to freedom of thought, conscience and religion', Article 10 the 'right to freedom of expression' and Article 11 the 'right to freedom of peaceful assembly and to freedom of association'.

The Convention expressly sets out the limitations of each respective right. In earlier doctrine and in some reports by the Commission, 'inherent' limitations of the Convention rights were also discussed.¹⁸⁹ In *Golder v United Kingdom*, the Court, however, rejected the notion explicitly and held that a state had to find a justification within the express derogations of the Convention for any interference with a Convention right.¹⁹⁰ Still, there remains case law and doctrinal views that suggest that sometimes, the Court relies on proportionality analysis at the level of delineating a right, which comes down to inherent, non-written limitations.¹⁹¹

The public interest justifications set out in the Convention can thus be considered exhaustive, despite the fact that the broad formulations are still subject to interpretation. As a starting point in its analysis, the Court will always verify the legal basis of any interference. In the framework of express limitations, the Convention requires a legal basis for any interfering measure; restrictions must be 'in accordance with the law' or 'prescribed by law'.¹⁹² In practise, this does not necessarily entail expression in the form of written codification as

clause cannot be identified in the *travaux préparatoires*. However, the drafting history gives some hints: It was in particular the British experts that insisted on very detailed definitions of the rights in the Convention during the Senior Official's Conference in June 1950, while other experts – notably the French – had argued in favour of a rather broad 'enumeration of rights' style, see Bates, *Evolution of the ECHR*, 88-89.

¹⁸⁷ Greer, *European Convention*, 232.

¹⁸⁸ See chapter 4 section V.

¹⁸⁹ See J.E.S. Fawcett, *The Application of the European Convention on Human Rights* 2 edn (Oxford: Oxford University Press, 1987), 232-233.

¹⁹⁰ *Golder v United Kingdom*, para 44.

¹⁹¹ See with further references Christoffersen, *Fair Balance*, 80.

¹⁹² There is no difference between the two formulas, as the Court clarified in *Sunday Times v United Kingdom*, 26 April 1979, Series A, No 30, (1979-1980) 2 EHRR 245, para 45. Also, in the French version 'prévues[s] par la loi' is used in all cases.

witnessed in the case of common law systems, but requires a certain accessibility and foreseeability of the legal anchorage.¹⁹³

The central requirement for limitations is phrased equally in all provisions: limitations must be ‘necessary in a democratic society’. This was the basis for the development of proportionality analysis under the ‘fair balance’ test in the case law of the Court.

ii. The individual prongs of the ‘fair balance’ test

Generally, the Court developed a rather comprehensive test encompassing practically all the various stages of proportionality analysis, but gave priority to a flexible, horizontal version which does not exclude measures at various stages, but tries to assess in a holistic fashion whether a ‘fair balance’ between competing interests was struck. A variety of problems were identified under the various prongs of this ‘fair balance’ test. Proportionality analysis is commonly accepted as a description of what the Court actually does, but some argue that no ‘clear or coherent rationale’ underpins the Court’s case law on the classic example provisions of Article 8 to 11 of the Convention.¹⁹⁴ At various stages scholars criticized the Court, sometimes refusing proportionality analysis as such, sometimes merely suggesting some fine-tuning at the level of individual subtests. We find the overall use of proportionality analysis convincing, as it corresponds to our perception of review under the Convention as based – after pre-balancing the relevant arguments – on an equal representation model, but also find some of the features of the ‘fair balance’ test doubtful.

a. Identifying legitimate aims

The express limitations list specific permitted legitimate aims. The lists diverge, but to some extent the Court interpreted some notions more broadly to ensure that in fact a similar group of public interests is available as a justification for states.¹⁹⁵ The typical interests enshrined are national security,¹⁹⁶ public safety,¹⁹⁷ the prevention of disorder or crime¹⁹⁸ and public order,¹⁹⁹ the protection of health or morals²⁰⁰ and the protection of the rights and freedoms of others.²⁰¹ There are some rather specific interests listed under various provisions. Under the right to respect for private and family life, the interest of economic well-

¹⁹³ See e.g. *Ibid.*, paras 47 and 49.

¹⁹⁴ Greer, ‘Balancing’ and the European Court of Human Rights’, 424.

¹⁹⁵ See for some examples Jacobs, White and Ovey, 315.

¹⁹⁶ See e.g. Articles 8, 10 and 11 ECHR.

¹⁹⁷ Articles 8-11 ECHR.

¹⁹⁸ Articles 8, 10 and 11 ECHR.

¹⁹⁹ Article 9 ECHR.

²⁰⁰ Articles 8-11 ECHR.

²⁰¹ Articles 8-11 ECHR.

being of the country is specially listed, as is the protection of the reputation of others under the freedom of expression.

Broader circles of legitimate aims were identified under other rights. Under the right to property, the lack of an exhaustive list of legitimate interests prompted the Court to define what interests are eligible in its case law. The Court held that states enjoy a margin of appreciation for the definition of such legitimate interests.²⁰² In a variety of cases, the Court thus accepted interests such as the protection of forests,²⁰³ environmental protection²⁰⁴ and the protection of a country's cultural and artistic heritage.²⁰⁵

The Court was thus rather generous in its interpretation of the states' purported objective of measures, sometimes finding them as falling under a legitimate aim without necessarily clarifying which exact aim.²⁰⁶ In rather rare cases the Court used a 'narrow' interpretation of limitations as exception provisions to reject legitimate aims proposed by governments, such as the protection of 'cultural traditions and historical and cultural symbols' of a country.²⁰⁷

b. Sceptical voices on the delimitation of rights and public interests

As one of the central criticisms of proportionality analysis as used under the Convention, the Court undervalues the separation between the stages of delimitation of rights and public interests and the subsequent stage of limitation of a right.²⁰⁸ A more careful distinction and definition of public interests is suggested, which comes with the suggestion of excluded reasons thinking by other commentators.²⁰⁹

Tsakyrakis criticizes the Court's use of proportionality analysis in several cases as trying to avoid open moral reasoning despite the fact that such reasoning was unavoidable.²¹⁰ In his view, in a number of cases the Court accepts considerations as public interests that should not be admitted, because they simply enshrine paternalistic moral judgments by majorities that do not deserve to compete on an equal basis with rights claims.

In *Otto-Preminger-Institut v Austria*, a movie depicting religious characters in a manner potentially degrading to believers had been seized and confiscated based on Austrian criminal law. When the cinema complained about a viola-

²⁰² *Beyeler v Italy*, 5 January 2000, (2001) 33 EHRR 1224, para 112.

²⁰³ *Z.A.N.T.E. – Marathonisi AE v Greece* 6 December 2007, Application No 14216/03, (2007) ECHR 1398, para 50.

²⁰⁴ *Theodoraki and others v Greece*, 11 December 2008, Application No 9368/06, para 60.

²⁰⁵ *Beyeler v Italy*, para 112.

²⁰⁶ In *Nnyanzi v United Kingdom*, 8 April 2008, (2008) 47 EHRR 461, para 76, the Court held that the 'maintenance and enforcement of immigration control' could constitute a legitimate aim.

²⁰⁷ *Sidiropoulos and others v Greece*, 10 July 1998, (1999) 27 EHRR 633, paras 37-38.

²⁰⁸ Christoffersen, 'Straight Human Rights Talk', 12.

²⁰⁹ S. Tsakyrakis, 'Proportionality: An assault on human rights?' (2009) 7 *International Journal of Constitutional Law* 468, 492-493.

²¹⁰ *Ibid.*, 474.

tion of its freedom of expression, the Court examined only in a very summary manner what should qualify as a public interest on the other side of the balance. The Court accepted that the behaviour of the Austrian authorities pursued the permissible rationale of the ‘protection of rights of others’ enshrined in Article 10 (2) of the Convention, because the predominantly Catholic population of the region Tyrol where the cinema was based had a right ‘not to be insulted in their religious feelings by the public expression of views of other persons’.²¹¹ Emphasizing the importance of freedom of religion, the Court underlined that members of a religion also had to accept criticism and the denial of their beliefs by others, but that the state had a responsibility to ensure the peaceful enjoyment of beliefs. As a consequence, certain methods of opposing or denying beliefs could inhibit others in their freedom of religion, and a state could consider it necessary to take measures to repress such conduct judged incompatible with the freedom of religion of others.²¹² In the present case, the ‘respect for the religious feelings of believers’ could ‘legitimately be thought to have been violated’ by the provocative pictures of the movie, which could amount to a ‘malicious violation of the spirit of tolerance’ as a feature of democratic society.²¹³

For Tsakyrakis, a right to have one’s religious feelings protected is all too easily accepted without the necessary reflection about what ambit such a right could and should have. Instead of asking whether such a right should extend to the public screening of a movie which people can choose to see or not, the contextual elements of the confiscation are examined only at the stage of balancing, what Tsakyrakis calls the ‘principle of definitional generosity’.²¹⁴ Even though the minority in the case did not accept the existence of a right, it held in a similar display of definitional generosity that to have one’s religious feelings qualifies as a legitimate public interest. Again, for Tsakyrakis, this seems inadmissible, as a public interest in this case could only be the views of the Catholic majority²¹⁵ – the sort of majoritarian rule which has made the protection of minority rights a necessity in the first place.

Khosla contends that the Court’s approach in cases like *Otto-Preminger-Institut v Austria* was based on the margin of appreciation doctrine, which led the Court as an international adjudicator to defer to domestic authorities’ judgment in situations where no European consensus could be identified.²¹⁶ Consequently, the margin of appreciation caused the definitional generosity. Whether one accepts Tsakyrakis criticism ultimately depends on whether it is accepted that under a pure proportionality analysis approach, the Court would also be

²¹¹ *Otto-Preminger-Institut v Austria*, 20 September 1994, Series A, No 17, (1994) 19 EHRR 34, para 48.

²¹² *Ibid.*, para 47.

²¹³ *Ibid.*

²¹⁴ Tsakyrakis, 480.

²¹⁵ *Ibid.*, 481.

²¹⁶ M. Khosla, ‘Proportionality: An assault on human rights?: A reply’ (2010) 8 *International Journal of Constitutional Law* 298, 302-303.

willing to exclude certain purposes as illegitimate. Khosla seems to think so, as becomes clear in his confirmation of some of Tsakyrakis' critique.²¹⁷

If this feature is thus accepted by both authors, a common core of criticism becomes clear. The Court does not discuss with sufficient intensity this first important stage of establishing what should enter the balance or not. However, such exaggerated definitional generosity is not an inherent and necessary component of the 'fair balance' test, but simply an erroneous application of a legal test.²¹⁸ No conceptual argument speaking out against the test can be derived from this criticism, but merely a call for caution.

c. Suitability

Generally, the two prongs of suitability and necessity play a rather subordinate role in the case law of the Court.²¹⁹ This is mostly based on the subsidiary nature of intervention by the Court: To a large extent, questions of suitability and necessity have already been considered by domestic courts before a case comes before the Court at all,²²⁰ which again leads the Court to apply its margin of appreciation doctrine to grant deference to the assessments by domestic courts.²²¹

The Court has not provided one clear interpretative test with clearly distinguishable features in its case law to determine this first aspect of the relationship between ends and means.²²² Sometimes, the Court referred to furthering a 'pressing social need'²²³ or providing 'relevant and sufficient reasons'.²²⁴

In a test as weak as suitability, authors correctly pointed out that the true matter is not so much some formulation in the case law. The link between norms and facts – in this case future facts in the form of intended consequences of a measure – being the fundamental feature at dispute, the burden of proof is of much higher interest.²²⁵ However, the Court neglected this feature and no clear approach has arisen from the case law to date.²²⁶ The Court has adopted the standard of proof 'beyond reasonable doubt' in cases of severe interferences

²¹⁷ Ibid., 305. Khosla argues that Tsakyrakis' example of the protection of 'Eskimo haters' would neither qualify as a public interest nor a right, since it would be excluded from the outset from proportionality analysis as no legitimate purpose.

²¹⁸ S. Tsakyrakis, 'Proportionality: An assault on human rights?: A rejoinder to Madhav Khosla' (2010) 8 *International Journal of Constitutional Law* 307, 310, however, insists on the fact that the use of proportionality analysis inevitably obscures the actual moral reasoning on which the Court's decisions are based.

²¹⁹ Tsakyrakis, 474.

²²⁰ Greer, 'Balancing' and the European Court of Human Rights', 433.

²²¹ Khosla, 303.

²²² Christoffersen, *Fair Balance*, 164.

²²³ See e.g. *Dudgeon v United Kingdom*, para 51.

²²⁴ See e.g. *Handyside v United Kingdom*, para 50.

²²⁵ Christoffersen, *Fair Balance*, 165.

²²⁶ Greer, *European Convention*, 259.

with the particularly protected rights to life and the prohibition of torture in Articles 2 and 3 of the Convention.²²⁷ This standard is, however, not generally used throughout the case law, so that in fact one may rather speak of a ‘preponderance of evidence’ standard in practice.²²⁸ It appears that the more important a right is considered, the more solid the factual evidence to support interference has to be.²²⁹ The Court itself criticized the lack of solid evidence brought forward by some governments to show that a contribution towards an alleged legitimate interest is achieved.²³⁰ In the future, more attention paid to this early step of the test and the factor of evidence could lead to more predictability and more coherent adjudication. It could make sense to borrow the formula of an intermediate standard of proof as recognised in United States’ law which asks for ‘clear, convincing and cogent’ evidence.²³¹

d. Necessity

Some point out that proportionality analysis in the classic, three-pronged understanding may be the wrong description for what the Court is doing. Earlier doctrine referred to the Court’s case law as the inquiry into whether the ‘least intrusive’ means had been used.²³² Actual case law, however, shows a different picture. The test applied under the necessity prong is a far cry from a strict assessment of less restrictive alternatives.²³³ This development, in our view, has no parallel in the two domestic constitutional legal regimes examined so far.

In a variety of cases, the Court has explicitly rejected the assertions of applicants that a measure should be held to be a violation on the basis that less intrusive alternatives had existed. In *James and others v United Kingdom*, the Court explained that no test of strict necessity should be read into the relevant article of the Convention, but that the availability of alternatives could only be one factor ‘along with others’ to assess whether reasonable means had been chosen in order to strike a fair balance.²³⁴ For the Court, there were thus ‘boundaries’ within which the legislative choice should be accepted and where the Court was not entitled to say whether the ‘best solution for dealing with the problem’ had been found.²³⁵ Further reviews of case law show that in a number of cases, alternatives have been examined by the Court, but only as part of the holistic

²²⁷ See e.g. *Ireland v United Kingdom*, para 161, where the Court accepts this standard suggested by the Commission.

²²⁸ Christoffersen, *Fair Balance*, 176.

²²⁹ See Christoffersen, ‘Straight Human Rights Talk’, 34.

²³⁰ See e.g. *Hatton and others v United Kingdom*, 2 October 2001, (2002) 34 EHRR 1, paras 100-102.

²³¹ As suggested by Greer, ‘“Balancing” and the European Court of Human Rights’, 432.

²³² Greer, ‘Constitutionalizing Adjudication’, 409.

²³³ Christoffersen, ‘Straight Human Rights Talk’, 36.

²³⁴ *James v. United Kingdom*, para 51.

²³⁵ *Ibid.*

examination of a 'fair balance' and not as a threshold step to be passed to enter the final stage of proportionality *stricto sensu*.²³⁶

In the *Hatton* saga, the Grand Chamber even explicitly disagreed with the previous chamber decision on that matter. The latter had assessed the government's lack of measures to counter noise pollution caused by an extension of night flight hours of Heathrow Airport as an interference with an environmental right. The right to sleep was seen as part of the right to privacy and family life. The chamber held that no right balance could have been struck 'in the absence of a prior specific and complete study with the aim of finding the least onerous solution for human rights'.²³⁷

The Grand Chamber did not take up this suggestion, but instead found that the measure at issue was of a general nature, which should lead to a margin of appreciation leaving to the state 'a choice between different ways and means of meeting' the obligation to give due consideration to the interests at stake.²³⁸ The Court, as in other cases, seemed to base its rather limited test on a mixture between the ECHR obligations and its own institutional position, holding that its 'supervisory function being of a subsidiary nature', the latter was 'limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance'.²³⁹

In other cases, the Court leaned towards less restrictive means as part of the overall assessment as to whether a fair balance had been struck because domestic law pointed towards such alternatives. Under Article 2 of the Convention on the right to life, the Court referred in *Simsek and others v Turkey* to 'less life-threatening methods' for the purpose of quelling a riot and dispersing a crowd than direct shots at demonstrators, such as tear gas, water cannons or rubber bullets. It did so, however, based on Turkish legislation which allowed the use of firearms by the police only in 'limited and special circumstances'.²⁴⁰

The Court has thus refrained from imposing necessity in a strict sense as a central component of its fair balance test. While some suggested that from the 1990s onwards the case law relied increasingly on necessity,²⁴¹ in reality the Court seems to use the test of alternatives only as part of the holistic weighing exercise.

Christoffersen explains this peculiar feature of the 'fair balance' test on normative grounds. In his view the obligations under the Convention provide merely for a minimum standard to be safeguarded for the protection of rights. According to him, there is, however, no simultaneous requirement to find the most efficient solution in the sense of the least onerous means for a right. As a

²³⁶ See extensively Christoffersen, *Fair Balance*, 114 ff.

²³⁷ *Hatton and others v United Kingdom*, para 106.

²³⁸ *Hatton and others v United Kingdom (Grand Chamber decision)*, 8 July 2003, (2003) 37 EHRR 28, para 123.

²³⁹ *Ibid.*

²⁴⁰ *im ek and Others v. Turkey*, 26 October 2005, Application No 35072/97 and 37194/97, para 108.

²⁴¹ Arai-Takahashi, 129.

consequence a narrow circle of violations of Convention rights exists where less restrictive means, if available, must be chosen, while in a wider circle of mere interference with the right various means with different degrees of interference may legitimately be taken by a party state.²⁴²

While in principle this explanation seems acceptable to distinguish between different uses of necessity, its normative justification is less obvious. It remains unclear how the Court under its flexible horizontal use of necessity distinguishes between situations where the least restrictive solution must be found and where more leeway should be granted. To reject a strict necessity test acknowledges some of the difficulties of adjudicating necessity. It is indeed difficult to assess the exact contribution of a measure towards a public interest and to compare this contribution with alternatives. But the Court could simply point out these difficulties in the case law, rather to reject necessity as such. The potentially useful contribution of a necessity test to identifying one measure in comparison with others is lost, which puts even more emphasis on the last prong of proportionality *stricto sensu*. From the point of view of a paradigm of individual justice as discussed previously, this may not cause a problem. In terms of predictability and the systematic operation of proportionality analysis, it certainly does. It remains difficult to understand why necessity could not be combined with recognition of the limited epistemic resources of the Court, but still be applied as far as feasible as a threshold to the ultimate stage of proportionality *stricto sensu*.

e. Proportionality stricto sensu

The ‘fair balance’ test puts most of its weight on this ultimate stage. It thus comes down to a very open-ended weighing exercise, which allows for the representation of all interests and arguments at stake – which seems in line with the general justification of judicial review found after the pre-balancing exercise in our view. However, predictability is also low, and the earlier prongs of the ‘fair balance’ test have suffered in practice from less thorough elaboration because of this special weight on the ultimate balancing exercise. Some more predictability comes from particular features that the Court routinely examines in its balancing exercise under specific rights. This can be demonstrated with the example of compensation as a factor in expropriation cases. The reliance on proportionality *stricto sensu* is, however, remarkable, and is also expressed in a rather limited reading by the Court of the ‘essence’ of rights which would in theory exclude the ‘fair balance’ test.

The Court developed both a substantive and a procedural side of the ‘fair balance’ test. As an example, in *Hatton and others v United Kingdom*, the Grand Chamber first assessed how the domestic authorities gave relative weight to the interests at stake.²⁴³ The Court accepted the authorities’ reliance on statistical data to assess the sleep interference, on the rather vague allegations that

²⁴² Christoffersen, ‘Straight Human Rights Talk’, 24-25.

²⁴³ *Hatton and others v United Kingdom* (Grand Chamber decision), para 125.

economic benefits would ensue from increased night flight frequency and on the fact that house prices had not significantly changed, which meant that residents could actually leave the area without financial loss, as part of the interference with the right.²⁴⁴ It then turned to procedure, finding that the measures had been accompanied by appropriate studies and assessments before their introduction and had continually been sufficiently communicated to the public.²⁴⁵

This very flexible test is complemented by elements that are assessed in situations of violation of specific rights. Under the right to property, compensation has become a central element in assessing whether a deprivation of property can be considered compatible with the requirement of striking a fair balance. In the *Holy Monasteries v Greece* case, the Court summarized its views that compensation was ‘material’ to assessing whether a fair balance had been struck, in particular as to whether no ‘disproportionate burden’ has been imposed on the applicant.²⁴⁶ Taking property without paying an amount ‘reasonably related to its value’ would thus ‘normally’ be considered disproportionate, whereas payment of no compensation at all could only be found justified ‘in exceptional circumstances’.²⁴⁷

The emphasis on balancing under the ‘fair balance’ test also becomes visible in the Court’s conception of the ‘essence’ of rights. Early on, the Court developed the idea that there could be some core element of a right that could not be interfered with. In the *Belgian Linguistics* case, it held that the ‘substance of the right to education’ must never be injured.²⁴⁸ The language in the case law, however, did not always choose its terms carefully, so that in a number of cases the ‘fair balance’ test is applied to the ‘substance’ of a right just in the usual way, while the Court simply seems to imply that a rather serious interference is at stake.²⁴⁹ Overall, despite some references to the core, substance or essence of rights, the Court seems to subject a right in its full scope to the ‘fair balance’ test in its case law, which excludes an absolute conception. As an example, in *F. v Switzerland*, the Court held that a waiting period for remarriage constituted a measure that ‘affected the very essence of the right to marry’ and was ‘disproportionate to the legitimate aim pursued’.²⁵⁰

Only in a limited number of cases was an absolute conception of an essence of rights accepted:²⁵¹ In cases where absolute rights and other Convention rights overlap, the scope of overlap with the absolute right leads to an exclusion of the

²⁴⁴ *Ibid.*, paras 125-127.

²⁴⁵ *Ibid.*, para 128.

²⁴⁶ *Holy Monasteries v Greece*, 9 December 1994, Series A, No 301, (1995) 20 EHRR 1, para 71.

²⁴⁷ *Ibid.*

²⁴⁸ *Belgian Linguistics case*, para 5.

²⁴⁹ See e.g. *Sporrong and Lönnroth v. Sweden*, 23 September 1982, Series A, No 52, (1983) 5 EHRR 35, para 60, where the Court held that the ‘very substance of ownership’ was affected by certain property restrictions.

²⁵⁰ *F. v Switzerland*, 18 December 1987, (1987) 10 EHRR 411, para 40.

²⁵¹ See Christoffersen, *Fair Balance*, 155 ff.

'fair balance' test. In *M.C. v Bulgaria*, the Court thus found an overlap between the right to effective respect for private life under Article 8 and the prohibition of inhuman or degrading treatment in Article 3 of the Convention.²⁵² As a consequence, a positive obligation arose for the state to ensure effective deterrence against grave acts of ill-treatment such as rape even if administered by private individuals. The Court underlined the absoluteness of protection at stake holding that '[w]hile the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State's margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions'.²⁵³ It therefore appears that 'efficient' criminal law provisions are indispensable, even without a proportionality based assessment under the 'fair balance' test.

C Conclusion

Based on the various human rights norms enshrined in the Convention, the Court developed a fairly consistent, though searching test for whether a 'fair balance' has been struck between competing rights or interests. The pervasiveness of proportionality analysis is notable, as the interpretative methods of the Court have emphasized flexibility and balancing, while excluded reasons and deontological readings have to date not truly been retained in the case law. This correlates with our suggestion to perceive judicial review under the Convention as substantially similar to domestic fundamental rights adjudication despite the international law setting.

The particular form of the 'fair balance' test is marked by the absence of a true necessity test, with substantive reliance instead on the last prong of proportionality *stricto sensu*. We observed with some concern that the reluctance to engage in necessity seems only partly justified by the subsidiary nature of Convention rights; a concern that could arguably be better tackled openly in the case law by accepting that the comparison of alternatives must necessarily remain a sometimes rough estimation. Heavy reliance on the last prong of proportionality analysis has led, in our view, to a very case-specific method of decision-making, which may correspond to the paradigm of individual justice discussed earlier. At the same time, however, it lacks an appropriate normative justification and caused in practice neglect for the earlier stages of proportionality analysis, a shortcoming whose consequences were demonstrated in cases such as *Otto-Preminger-Institut v Austria*.

²⁵² *M.C. v Bulgaria*, 4 December 2003, (2005) 40 EHRR 20, para 153.

²⁵³ *Ibid.*, para 150.

V Evaluation and Conclusion

As an overall conclusion, the use of proportionality analysis is in principle convincing under the European Convention on Human Rights. Deontological approaches were suggested in the doctrine, but could not offer a convincing reading of the Convention. Rather, pre-balancing seemed to point towards an outcome following an equal representation model, with the exception – as in the case of German constitutional law – of fundamental rights review in the private sphere.

Examining the descriptive elements surrounding judicial review by the European Court of Human Rights, the debate over individual and constitutional justice appears most remarkable. It has also left its mark on the actual case law. Proportionality analysis has become somewhat synonymous with the flexibility of the jurisprudence, with heavy reliance on balancing at the stage of proportionality *stricto sensu*. At least institutionally, the Court has the advantage of being representative to engage intensively in such proportionality analysis.

As to pre-balancing, many parallels between the European Court of Human Rights and the German Federal Constitutional Court can be observed. In particular, a somewhat comparable approach to the broad justification of judicial review was taken for a number of rights both in their dimension as shields, but also in the field of positive obligations and horizontal effect. Like the United States Supreme Court, in some cases the European Court of Human Rights justified more intrusive review for some rights with its role as a safeguard for democracy because of the importance of such rights for the democratic process. Beyond this narrow argument, however, other rights similarly led the Court to intensify its scrutiny under the margin of appreciation doctrine. On this basis, we concluded that the European Court of Human Rights has a similarly broad understanding of human rights as the German Federal Constitutional Court; it perceives them as relevant in various dimensions and based on more than their relationship to democratic process. The development of case law on the horizontal effect of human rights bolsters this point, although we found that the justification of its review power by the Court is not always satisfactorily prudent.

A second feature that again appears comparable to German constitutional law is the use of a fairly consistent legal test, the ‘fair balance’ test, across all Convention law. As a less satisfactory feature, the discussion of the margin of appreciation in the Court’s case law is also not always as extensive and systematic as it seems to some extent in United States constitutional law under the procedural democracy doctrine.

As a striking feature of the ‘fair balance’ test, the European Court of Human Rights has refused to engage in a strict inquiry of necessity as part of the test. No convincing normative justification for this approach could be found. While administering a necessity test under the subsidiary system of protection created by Convention rights is admittedly a difficult task, the horizontal form of the ‘fair balance’ test and the heavy reliance on proportionality *stricto sensu* lead to

very case-by-case based adjudication. More weight on the prong of necessity seems not only more appropriate in the light of the suggested pre-balancing exercise, but could furthermore help to grant more guidance for future cases and to reduce unpredictability. This again would be more in tune with an emerging stronger paradigm of constitutional justice as the predominant task of the European Court of Human Rights. Due deference should rather be administered under the margin of appreciation doctrine than through rejection of necessity, because necessity could arguably serve as a useful threshold in the process of proportionality analysis.

I Introduction

With European Union law, we enter a somewhat hybrid field. As the subsequent overview shows, in principle the strong focus on economic integration places judicial review EU law in the field of a model of special interest review at first glance. Yet matters are more complex than that: looking at the context, we understand that the Court of Justice of the European Union (CJEU) has been described on various occasions as a constitutional court with a broader range of values to be represented by its review. But there remain doubts as to whether it has fully assumed the role of a fundamental rights adjudicator.

The discussion of pre-balancing and the justification of judicial review reinforces this preliminary impression. While fundamental rights review has emerged in EU law and continues to play an ever-increasing role in the case law, there is a notable difference to the much stricter standard of review applied for reviewing Member States' measures under the internal market freedoms enshrined in the Treaty on the Functioning of the European Union (TFEU). Only recently has a somewhat more coherent standard of review for fundamental rights emerged. In comparison to the courts examined so far, we thus observe an outcome of pre-balancing resulting in a much less pronounced role for the model of equal representation review. However, as another development, horizontal effect of fundamental freedoms has emerged and reminds us in its effect of the efforts of the German Federal Constitutional Court to establish fundamental rights review in its horizontal dimension. However, the justification of this extension of judicial review is more difficult to ascertain.

From these perceived imbalances in pre-balancing, there also results a somewhat uneasy use of proportionality analysis. Despite the strong textual basis of a 'principle of proportionality' with which the CJEU can operate, in practice we observe a remarkable gap between the theoretical will to engage even in proportionality *stricto sensu* and a heavy reliance on a strict necessity test in practice. The result is an often undue over-representation of the interest of economic integration to the detriment of regulatory autonomy of the Member States.

Finally, it should be noted that providing an overview on proportionality in EU law is no simple task, not because of a lack of sources, but rather because of the abundance of proportionality language. The 'principle of proportionality' can be found in the Treaty on European Union (TEU), the TFEU, in secondary legislation and, as a consequence, in a huge amount of case law.

It is thus indispensable to pick and choose for this presentation, which has accordingly focused on the common topics of EU competences, internal market freedoms and fundamental rights as the most frequently cited in relation to questions of proportionality analysis. Still, this should not mean that the concept plays no role in other areas of EU law.

II The Broader Context of Judicial Review in European Union Law

Looking at the broader context, we receive a first impression of judicial review by the Court of Justice being rather focused on the specific interest of economic integration. Throughout its history, the Court has used the powers attributed to it by the Treaties to foster its interpretative authority. To some extent, it has established cooperation with the national courts, but generally insisted on its predominant position as one central player in the development of the EU internal market as the key project of economic integration. There has indeed been discussion on the role of the Court as a constitutional court, which would point towards review for the purpose of protecting a more diverse range of values. However, the integrationist bias of the CJEU remains, in our view, remarkable. A look at the institutional features of the Court bolsters this conclusion and also shows that the Court itself is rather poorly equipped to engage in full-scale proportionality analysis.

A The History of Judicial Review in European Union Law

There are a number of steps that have led to the dominant position taken by the CJEU in the EU's legal order. We note that while creating its unique interpretative authority, the Court has at various points also relied on national courts and their cooperation, but always emphasized its ultimate authority as the central pillar of the integration project of the internal market. This authority is central to pursue the project of economic integration underlying the EU.

i. Construing an autonomous legal order – The early days

The Treaty establishing a European Coal and Steel Community already entrusted a Court of Justice with the mission to ensure that the law was observed 'in the interpretation and application of this Treaty'.¹ From these early beginnings onwards, the Court was also granted the responsibility to give 'preliminary rulings' on the validity of Community acts.²

Subsequently, the Court embarked on a journey to construct a highly autonomous legal order located somewhere between the coherence and clear hierarchies of a domestic legal order and international law. It did so by ruling first that, in general, based on 'the spirit, the general scheme and the wording' of the European Economic Community Treaty the latter's provisions could be given direct effect, which enabled individuals to invoke the rights enshrined in EU law in proceedings before national courts.³ Only shortly after this first step,

¹ Article 31 European Coal and Steel Community Treaty.

² Article 41 European Coal and Steel Community Treaty.

³ Case 26/62 *NV Algemene Transport en Expeditie Onderneming Van Gend en Loos v Nederlandse administratie der belastingen* [1963] ECR I, 12. See on the case and the history surrounding it B. De Witte, 'Direct

the Court used another preliminary reference by a national court to establish the primacy of EU law over domestic law. The Court held that EU law enjoyed primacy, which meant in practice that national judges should set aside conflicting national law and apply the norms of EU law, thereby going beyond the role played e.g. by international law in countries with a dualist tradition.⁴

Through these two crucial decisions, EU law became a potential source of rights and obligations in a variety of domestic proceedings, which strengthened the role individuals and national courts were to play in this new legal order. When the legislative development of the European Economic Community suffered from slow progress and inaction by the political institutions in the 1970s and early 1980s, the Court intervened on a variety of occasions, fuelled by cases coming from individuals in Member States, and gave an important impetus to the continuous development of the legal order.⁵ In giving direct effect to some Treaty provisions, for example, the Court managed to overcome the legislative inertia which had failed to produce the secondary legislation necessary to achieve important goals in the field of the internal market.⁶

ii. The Court's relationship with other courts

Not only individuals, but also national courts proved crucial in the process of development of the legal order for the Court. The procedure of preliminary reference gives national courts the opportunity to ask the Court about the interpretation of EU law as well as about the validity of secondary EU law. For the highest national courts, the possibility to ask the Court becomes an obligation in order to secure the uniform application and interpretation of EU law. Through several important cases, the Court has clarified the pertinent treaty provisions on the subject in order to establish some elements of decentralisation and give back some authority to national courts, but at the same time to maintain central prerogatives in its own hands.⁷ It found that in some circumstances, the highest courts would not have to submit questions on the interpretation of EU law if these questions were materially identical to questions already

Effect, Primacy, and the Nature of the Legal Order' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), 326-327.

⁴ Case 6/64 *Costa v ENEL* [1964] ECR 585. See on this 'internal primacy' of EU law before the national judge De Witte, 329. For a sceptical account of EU law as not being fundamentally different from international law, see O. Spiermann, 'The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order' (1999) 10 *European Journal of International Law* 763.

⁵ See famously J.H.H. Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2412 on 'normative supranationalism' against the background of a failure of 'decisional supranationalism'.

⁶ P. Craig, 'Institutions, Power, and Institutional Balance' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), 52-53.

⁷ See on the judicial politics of this 'incomplete jurisdiction' T. Tridimas, 'Constitutional Review of Member State Action: The Virtues and Vices of an Incomplete Jurisdiction' (2011) 9 *International Journal of Constitutional Law* 737.

answered by the Court or if the correct application of EU law was obvious and beyond doubt according to certain criteria.⁸ As to questions on the validity of EU secondary law, however, the Court insisted in a later decision that only the Court itself as a central instance could rule on that point.⁹

These decisions have not remained undisputed. Some have suggested that the *CILFIT* criteria were open to abuse by national supreme courts willing to avoid a preliminary reference.¹⁰ The monopoly established by the Court in *Foto-Frost* has not met universal approval either.¹¹ Yet, this case law and the subsequent ‘codification’ by the Member States during treaty revisions have arguably made the Court the central instance of validity and of interpretation of EU law, although it had to juggle cooperative horizontal efforts as in *CILFIT* along with more hierarchical solutions as in *Foto-Frost* to achieve this position. To secure its position, the CJEU has also used the leeway given to it in the framework of the preliminary reference procedure to only partly answer questions and send cases back to national courts for them to decide upon highly context-specific matters for which the Court feels that the latter are better suited. This act may in some cases lead to an answer for the national court which seems unsatisfactory or incomplete after the time and costs invested in the preliminary reference procedure, but at the same helps time to achieve a balance between the authority of the CJEU and the necessity of accommodating, at this lower level, the views of national courts themselves, thereby easing potential tensions.¹²

The CJEU also defended its monopoly as the ultimate interpreter of EU law at the international level. This interpretative monopoly can be contrasted e.g. with the situation of United States constitutional law, where ‘interpretative pluralism’ appears to be much more accepted at least in doctrinal discussion.¹³

⁸ Case 283/81 *Srl CILFIT e Lanificio di Gavardo SpA v Ministero della Sanità* [1982] ECR 3415, paras 14 ff.

⁹ Case 314/85 *Foto-Frost v HZA Lübeck-Ost* [1987] ECR 4199, paras 15 ff.

¹⁰ D. Sarmiento, ‘*CILFIT* and *Foto-Frost*: Constructing and Deconstructing Judicial Authority in Europe’ in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 196. For A. Stone Sweet, ‘The Juridical Coup d’État and the Problem of Authority: *CILFIT* and *Foto-Frost*’ in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 207, uncooperative national courts would hardly be influenced in any way by the criteria introduced in a preliminary ruling. Indeed, in the *Köbler* case, the CJEU introduced state liability for such abusive avoidance of the preliminary reference procedure by the highest national courts, see Case C-224/01 *Gerhard Köbler v Republik Österreich* [2003] ECR I-10239.

¹¹ On the critics’ arguments see P. Craig, ‘The Classics of EU Law Revisited: *CILFIT* and *Foto-Frost*’ in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 190. See also various Advocates’ General opinions suggesting that in cases where a materially identical decision has been taken earlier by the Court, national courts should not be obliged to refer a question to the Court, Sarmiento, 198.

¹² See on this point also T. Tridimas, *The General Principles of EU Law* 2 edn (Oxford: Oxford University Press, 2006), 240.

¹³ D. Halberstam, ‘Pluralism in *Marbury* and *Van Gend*’ in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*

When the establishment of another court, staffed partly with CJEU judges and called to interpret substantially parallel norms to EU law, was planned for the signing of an association with the European Free Trade Area partner countries, the CJEU intervened and found this undertaking incompatible with its own prerogatives.¹⁴ The CJEU did not hold that there was no possibility to subject the EU to the jurisdiction of international courts or tribunals *per se*, but that the overlap of interpretative authority was the main problem.¹⁵ The possibility of being subject to another court is also exemplified by the planned accession of the EU to the Council of Europe, which brings with it the formal authority of the European Court of Human Rights over the CJEU under the ECHR.¹⁶ Next to the emphasis on its interpretative authority over EU law, in recent case law the CJEU also started to emphasize the problem of accountability of such an international court or tribunal.¹⁷

Summing up, the CJEU has steadily and constantly built its role as the autonomous and ultimate interpretive authority of EU law. The need for cooperation with national courts has played a constant role in the CJEU's development. Yet, the CJEU has retained its authority as the only final interpreter and the only court able to hold that EU secondary law may be invalid. The main justification is the role to defend EU law as an autonomous base for the economic integration project of the EU. There has, however, been discussion as to the nature of the CJEU as a constitutional court, which could influence which values should be seen as the central justification for its review.

(Oxford: Hart Publishing, 2010), 31, thus opposes 'interpretative pluralism' in US constitutional law to the 'systems pluralism' of EU law where international systems such as the ECHR, the EU legal system and the Member States legal systems interact.

¹⁴ Opinion 1/91 *Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area* [1991] ECR I-6079.

¹⁵ *Ibid.*, paras 40-42.

¹⁶ See also on this point A. Stone Sweet, 'The European Court of Justice' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), 153. There are a number of arguments on the advantages and drawbacks of accession, succinctly set out by R.C.A. White, 'The Strasbourg Perspective and its Effect on the Court of Justice: Is Mutual Respect Enough?' in A. Arnall, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008), 149-150. Advocates of accession tend to emphasize philosophical points such as the entailed strengthening of the core values of the EU. Opponents, on the other hand, tend to take a more practical approach and generally claim that the case law of the CJEU already respects the standards set by the ECtHR, while accession would add to the problem of overload the ECtHR is facing currently (as already discussed in chapter 5 section II.A.iii.).

¹⁷ See Opinion 1/09 *Draft Agreement on the European and Community Patents Court* Opinion of 8 March 2011, not yet reported, paras 74-76 and 84-87.

B The Court of Justice of the European Union as a Constitutional Court

The constitutionalism debate in EU law dates back quite long in time.¹⁸ In an often-quoted sentence in the *Les Verts* judgment, the CJEU has referred to the Treaty itself as the ‘basic constitutional charter’, which is the basis of judicial review of the Member States’ and EU institutions’ action in a community ‘based on the rule of law’.¹⁹ It has been correctly warned against using the label of constitutionalisation in an inflationary manner, in particular as the concept of what is ‘constitutional’ seems ‘protean’ and open to a variety of meanings.²⁰ Yet, the CJEU exhibits various characteristics that can explain its designation as a constitutional adjudicator. At the same time, the present section also demonstrates that the rationale of economic integration remains alive as a central motive for the CJEU’s activities.

i. ‘Constitutional’ elements of the Court and its review function

One argument often made in favour of seeing the Court in a constitutional perspective, is that there is a wide variety of legal remedies for addressing the Court, which enables the latter to pronounce itself on the interpretation and validity of EU law in a variety of contexts and to review both the action of Member States and EU institutions.²¹ Next to the previously mentioned procedure of preliminary reference, an action for annulment can be brought by Member States, institutions, but also private individuals if certain requirements are met.²² An action can be brought because of inaction of institutions or in order to engage the non-contractual liability of the EU, to name only some

¹⁸ See for an early analysis F.G. Jacobs, ‘Is the Court of Justice of the European Communities a Constitutional Court?’ in D. Curtin and D. O’Keeffe (eds.), *Constitutional Adjudication in European Community and National Law: Essays for the Hon Mr Justice O’Higgins* (Dublin: Butterworth, 1992). See also Stone Sweet, ‘Court of Justice’, 132, who refers to constitutionalisation as the ‘grand narrative’ in the scholarly literature on European integration. See for further references I. Pernice, ‘Costa v ENEL and Simmenthal: Primacy of European Law’ in M.P. Maduro and L. Azoulay (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 52 footnote 26.

¹⁹ Case 294/83 *Parti écologiste ‘Les Verts’ v European Parliament* [1986] ECR 1339, para 35.

²⁰ N. Walker, ‘Opening or Closure? The Constitutional Intimations of the ECJ’ in M.P. Maduro and L. Azoulay (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 334.

²¹ See also A. Arnall, *The European Union and Its Court of Justice* 2 edn (Oxford: Oxford University Press, 2006), 33.

²² See on the well-known difficulties of granting access to the action for annulment T. Tridimas and S. Poli, ‘*Locus Standi* of Individuals under Article 230(4): The Return of Euridice?’ in A. Arnall, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs*

possibilities.²³ The Court can thus interpret EU law, declare it invalid, pronounce itself on non-contractual liability or state what limits EU law imposes on national law.²⁴ At the same time, there remains much to criticize about the actual access to justice for individuals in EU law and the internal coherence of remedies.²⁵

The rather special methodology of interpretation used by the CJEU is also noted as a feature pointing towards the specificity of the EU's constitutional adjudicative arrangement. Since the Treaties are composed of rather broad provisions and phrased in a highly functional manner focusing on general objectives and policy goals, the CJEU has continuously employed a remarkably teleological and contextual approach to the interpretation of Treaty provisions.²⁶ Yet, the objectives of the Treaties are marked by economic considerations, the internal market being among the central ones.

Perhaps with greater certainty, the constitutional character of the Court's adjudicatory function can be based on the power of delimitation of competences. The Court uses this power to delineate areas of competence between the EU institutions in a horizontal manner and between the EU and its Member States in a vertical manner.²⁷ In its history, the Court vigorously guarded these powers against encroachment²⁸ and made ample use of them to equilibrate powers among the various EU institutions. As an example, this happened in the litigation battle opposing the Council and the European Parliament.²⁹ But the Court also made use of these powers to restrain domestic regulatory autonomy of the Member States in favour of economic integration in the internal market under

(Oxford: Oxford University Press, 2008), 89. The Treaty of Lisbon has amended the law partly, although the effects of this amendment remain yet to be fully appraised.

²³ See e.g. A.H. Türk, *Judicial Review in EU Law* (Cheltenham: Edward Elgar, 2009), 171 ff. and 239 ff.

²⁴ The CJEU has always formally respected the limits of its jurisdiction in preliminary reference procedures and held at a number of occasions that it only interpreted EU law and not national law, which was for the national court to apply. See for the exception of national law making EU law norms applicable in the national legal order Joined Cases C-297/88 and C-197/89 *Dzodzi v Belgian State* [1990] ECR I-3763.

²⁵ See K. Lenaerts, 'The Basic Constitutional Charter of a Community Based on the Rule of Law' in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 309 ff.

²⁶ Arnall, 621, who points towards important cases of 'constitutional' dimension where the Court has relied on elements such as the 'spirit' or 'system' of the Treaty to reach a solution, see e.g. *Les Verts*, para 25.

²⁷ Lenaerts, 298-299.

²⁸ See again *Opinion 1/91*, para 35, where the CJEU argued that a court for the new European Economic Area Agreement could not be created if it was given the task of adjudicating upon the notion of 'Contracting Parties' of the new agreement, because this entailed an impermissible interference with the CJEU's own powers to adjudicate upon the exact delimitations of competences within the EU.

²⁹ See for an overview J.-P. Jacqu , 'The Principle of Institutional Balance' (2004) 41 *Common Market Law Review* 383.

the various provisions on the fundamental freedoms, construing these freedoms broadly for this purpose.³⁰

As another notable argument in favour of a perspective of a constitutional court, the Court also enjoys broad powers to adjudicate upon the limits of its own jurisdiction. The increase of EU law – in particular secondary law – to interpret and review, but also developments such as horizontal effect of certain general principles³¹ have increased the influence of the CJEU and its opportunities to construe EU law and ensure its application.³² Member States codified most developments of the case law during treaty revisions or at least refrained from openly rewriting the Treaties in a manner opposite to the CJEU's findings.³³ The impression of a system of constitutional stability is thus reinforced by the politics of the legislative system, which renders reversals of the CJEU's judicial developments very difficult.³⁴

ii. The adjudication of fundamental rights

The Court also assumed the task of ensuring the respect for fundamental rights in the framework of its review powers. After some initial hesitance to review EU measures based on their compatibility with fundamental rights,³⁵ the Court began in an obiter dictum of 1969³⁶ and a seminal decision of 1970 to subject EU measures to such scrutiny.³⁷ For this purpose, the Court introduced fundamental rights as part of the general principles of EU law, a source of law for which it would draw inspiration from the constitutional traditions of the Member States. Among observers applauding this development, for some the CJEU established itself even as a veritable 'Supreme Court' of the EU, engaged in 'nation-building' through the defence of fundamental rights.³⁸

³⁰ See section III.C.i.

³¹ See section III.D.

³² See for a sceptical view e.g. P.L. Lindseth, *Power and Legitimacy – Reconciling Europe and the Nation-State* (New York: Oxford University Press, 2010), 275. Lindseth prefers to perceive the CJEU predominantly as an administrative adjudicator who ought not to be allowed to define the boundaries of its own jurisdiction.

³³ Stone Sweet, 'Court of Justice', 132.

³⁴ Lindseth, 255.

³⁵ See the early case law discussed in A. Tizzano, 'The Role of the ECJ in the Protection of Fundamental Rights' in A. Arnulf, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008), 126.

³⁶ Case 29/69 *Erich Stauder v Stadt Ulm – Sozialamt* [1969] ECR 419, para 7.

³⁷ Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 4.

³⁸ T. Tridimas, 'Primacy, Fundamental Rights and the Search for Legitimacy' in M.P. Maduro and L. Azoulay (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 103.

As a next step, the CJEU also began to review Member States' measures which were implementing EU law as to their respect of fundamental rights.³⁹ While welcoming this development, observers have, however, become worried when the Court subsequently found that even in the case where they deviated from EU law – e.g. under the derogations from fundamental freedoms enshrined in the Treaty – Member States were bound by fundamental rights. The Court insisted in this case on ensuring the respect of fundamental rights in the framework of its review power.⁴⁰ Jacobs convincingly argued that the review for the respect of fundamental rights in such cases ought not to be exercised by the CJEU, but by national constitutional courts or the ECtHR in order not to unduly overwrite national standards of protection of fundamental rights.⁴¹ It can legitimately be argued that the CJEU is not a specialized human or fundamental rights jurisdiction, but simply a court of general jurisdiction on EU law with an incidental power of review in cases where fundamental rights are at issue.⁴²

The extension of the CJEU's powers of review was answered with contestation by national courts. Under the leadership of the German Federal Constitutional Court, several supreme judiciaries in Member States have held that they would retain the ultimate say on whether the EU had overstepped its powers, either by acting beyond the powers conferred upon it or by giving insufficient protection to fundamental rights.⁴³

³⁹ Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, para 22.

⁴⁰ Case C-260/89 *Elliniki Radiophonia Tileorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* [1991] ECR I-2925, paras 42-44.

⁴¹ F.G. Jacobs, 'Wachauf and the Protection of Fundamental Rights in EC Law' in M.P. Maduro and L. Azoulay (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 137-138, noting that the EU Charter of Fundamental Rights has also not taken up the formula found by the Court in the *ERT* case, while codifying the findings in *Wachauf*. See similarly sceptical M. Kumm, 'Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm' in M.P. Maduro and L. Azoulay (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 117, noting that the CJEU, 'charged with monitoring practically everything', might end up not 'monitoring anything' well.

⁴² As rightly emphasized by B.-O. Bryde, 'The ECJ's Fundamental Rights Jurisprudence – A Milestone in Transnational Constitutionalism' in M.P. Maduro and L. Azoulay (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 125.

⁴³ See closer on the well-known 'Maastricht' decision by the German Federal Constitutional Court and for other references on other constitutional courts Z. Kühn, 'Wachauf and *ERT*: On the Road from the Centralised to the Decentralised System of Judicial Review' in M.P. Maduro and L. Azoulay (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 161 and footnote 104. On the case law of national constitutional courts examining the appropriateness of the level of protection of fundamental rights granted in the EU see with further references Tizzano, 137.

Summing up, one can thus identify a legitimate claim to broadly represent a variety of values, including fundamental rights, under the CJEU's review. However, put in practice there remains the difficulty that the Court's jurisdiction must arguably remain focused on EU law. Some substantially constitutional features can easily be identified for the CJEU and would further that case. However, the integrationist predisposition of the Court is also omnipresent. The CJEU's tasks of adjudicating upon competences and upon its own jurisdiction typically are present in the case of a constitutional court. Fundamental rights review, however, is strongly marked by the rationale of economic integration around which EU law is structured and which shapes the questions put to the Court as well as the answers given by the latter. The extension of review into national law deviating from EU law triggered rejection in the doctrine. National courts also reacted by keeping for themselves the ultimate word on EU law's authority and limits. It therefore remains to be seen how the Court itself justified its review. As one further matter, the institutional features of the CJEU do not necessarily favour the use of full-scale proportionality analysis.

C Institutional Aspects of Judicial Review by the Court of Justice of the European Union

Two elements appear particularly striking. Whereas we have suggested that a number of reasons vest the Court with the aura of a quasi-constitutional court, a closer look at the representativeness of the members of the Court and the formal aspects of judgments casts severe doubt on ideas of representation of a broad variety of claims, and thus of values.

First, in terms of membership, the CJEU is staffed with one judge per Member State. However, the underlying idea is not so much that of representing the Member State in a proceeding through a judge, but to 'infuse' the Court with the various legal cultures present among the Member States and to simultaneously strengthen the acceptance of the Court's authority in the Member States.⁴⁴ As a consequence, in the composition of chambers there is currently no need to have a judge from the Member State whose legislation is under scrutiny. There have been proposals to adopt this model, substantially drawing inspiration from the European Court of Human Rights for this purpose.⁴⁵ The main purpose is therefore to have an autonomous court ruling on EU law, but one not necessarily familiar in detail with the socio-economic and legal context in a Member State. Weight is thus given to the 'representation' of the integrationist and unifying rationale of EU law over the representation of regulatory autonomy of a Member State.

⁴⁴ Arnulf, 8.

⁴⁵ K. Schiemann, 'The Functioning of the Court of Justice in an Enlarged Union and the Future of the Court' in A. Arnulf, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008), 12.

As a second issue, the way in which judgments are drafted similarly emphasizes unity of opinion at the cost of deliberative features. The CJEU issues collegiate judgments. Deliberations are secret and only one judgment, drafted in a collective effort, is issued. To some extent, the form of collegiate judgments ought to ensure uniformity of opinion given by the Court and simultaneously reduce the concerns on independence of judges.⁴⁶

However, as another effect of collegiate judgments, in terms of style the CJEU's judgments tend to be rather short and not always coherently or extensively reasoned expressions of legal opinion. The form of judgments remains ill-suited to encompass the lengthy reasoning and weighing of arguments that is required for complex proportionality assessments.⁴⁷ Often, the role of the Advocate General who provides a more extensive exposition of the legal arguments of the case is thus emphasized as indispensable to fill lacunae of judicial reasoning.⁴⁸ There have been debates as to whether separate and dissenting opinions should be permitted. The synthesizing force of EU law, however, weighed in heavily against more discursive styles and in favour of collegiate judgments.⁴⁹

Consequently, the discussed institutional features of the CJEU seem only partly suited for an engagement in proportionality analysis. These features emphasize in particular the need to ensure unitary representation of the integrationist rationale of EU law and discourage case- and Member State-specific solutions.

D Conclusion

During the assessment of the broader context of judicial review, we have found some features pointing towards the CJEU as a constitutional court asked to represent a wider range of values. In particular, the increasing relevance of review in light of fundamental rights comes to mind. On the other hand a historical overview shows the central tendency of the CJEU to establish itself as the highest interpretative authority of EU law, with the aim of strengthening the unifying, integrationist rationale of EU law. Despite efforts of cooperation with national courts as implementing instances of EU law, the main responsibility e.g. to invalidate secondary EU law remains with the Court. Institutional features also point away from discursive representation of a broad number of values. The composition of chambers as well as the form of collegiate judgments shows that the main concern is the representation of the interest of economic integration, which requires unanimous decisions taken based on a

⁴⁶ Judges as well as advocates general are appointed for a renewable term of six years. Some suggested that a non-renewable appointment for twelve years would be more appropriate, see Arnall, 11.

⁴⁷ See for a similarly sceptical view Kumm, 117.

⁴⁸ Schiemann, 15.

⁴⁹ See Arnall, 11-12, who points, in addition, to the early days of the European Economic Community as a reason for the single judgment rule, because at that time the Court had to establish its authority and did not want to appear divided over every single issue at stake.

strong knowledge of EU law, rather than the provision of case-by-case decisions which strongly take into account the domestic context of individual Member States. This also explains the fact that proportionality *stricto sensu* does not play a predominant role in EU law, as our subsequent assessment of the case law confirms.

However, the assembled descriptive elements also show that there can be no static picture for EU law, as the legal regime arguably is in transition. There is an increasingly complex set of values to be represented. While economic integration remains a central value, non-economic values and horizontal effect of market freedoms and fundamental rights have begun to render the picture more complex. We examine this changing paradigm subsequently with the justification of judicial review. The descriptive section has provided us with a background against which the changing normative elements relevant in the pre-balancing exercise can be pointed out.

III The Justification of Judicial Review in European Union Law

The task of assessing the justification of judicial review and setting out possible arguments of pre-balancing is complicated in EU law, as elements of the procedural democracy doctrine and the standard of review have not received systematic treatment and discussion in the case law. We can compare the situation somewhat to the German Federal Constitutional Court, where effectively different standards of review apply. The Court of Justice, however, expresses far less extensively why it chooses different versions of review. Rather, it seems that the pertinent parts in the case law have grown rather ‘naturally and incrementally’.⁵⁰ This has led scholars to suggest a more systematic treatment of the matter, taking inspiration from the margin of appreciation doctrine as developed by the European Court of Human Rights.⁵¹

In the present section, we aim to systematize the justification for adapting the standard of review and the normative justification offered by the Court for such adjustments. Four cases can be distinguished. First, we observe a lenient approach to scrutiny in the field of the exercise of EU competences. Second, the standard of review in light of fundamental rights is – unduly, as we suggest – deferent, although recent case law has suggested more intrusive review, showing that the Court seems to be becoming increasingly aware of the need to strengthen the equal representation component of its review. Third, in reviewing Member States’ measures against the benchmark of the fundamental freedoms of the internal market, the Court adopts a very intrusive stance, which goes together, to some extent, with the lenient standard of review of EU

⁵⁰ J. Gerards, ‘Pluralism, Deference and the Margin of Appreciation Doctrine’ (2011) 17 *European Law Journal* 80, 90.

⁵¹ *Ibid.*, 101.

measures. Both reinforce the impression that here pre-balancing results in a model close to special interest review. EU law is granted deference because it is presumed to realize the integrationist objectives of the internal market, while the potential deviation by Member States for the sake of regulatory autonomy must satisfy higher requirements to be found permissible. Fourth, the Court has increasingly been extending its review to cases of horizontal effect of both market freedoms and fundamental rights, without, however, setting out satisfactorily the reasons for this important development. In conclusion, pre-balancing in EU law does not provide results as close to a model of special interest review as a cursory look might have suggested. Rather, a paradigmatic shift is on its way which seems to push judicial review increasingly towards a model of equal representation review.

A Judicial Review and the Exercise of EU Competences

EU competences are a complex matter. A variety of underlying values can be discerned. In a first section, we aim to unravel some of the complexity to show the conflict of values at stake. Unfortunately, the second section shows that the case law has hardly addressed the justification of judicial review and the use of proportionality analysis based on the substantive values, as the procedural democracy doctrine would suggest. Instead, deference generally prevails based on the institutional consideration of not interfering with the discretion of the legislator. We conclude that this leads to an undue deference given to EU institutions in comparison to the strict review imposed on Member States, without sufficient justification given as to why the value of economic integration should be given such favourable treatment as a reason for intrusive review.

i. The system of competences

As a starting point, the EU as an international organisation is governed by the principle of conferred powers as regards its competences.⁵² Yet, practice proves more complicated than that.⁵³ The scope of EU competences must be distinguished from the principles regulating its exercise. Article 5 TEU sets out subsidiarity and proportionality as such principles. This express reference has made the use of proportionality analysis less debated, but still leaves some open questions as to the standard of review used.

The discussion of the problems involved at the stage of defining the very competences of the EU already shows that the identification of concrete values which enter into conflict is anything but simple. Generally, at least at this level the interests involved seem of a predominantly public nature. To simplify, one

⁵² Article 5 (1) TEU.

⁵³ See generally sceptical on the proposition of the EU as based on the principle of conferred powers D. Wyatt, 'Is the European Union an Organization of Limited Powers?' in A. Arnulf and others (eds.), *A Constitutional Order of States? – Essays in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 3.

could in most cases oppose the interest of central regulation and the interest of local autonomy to regulate. Yet, in detail every EU legal act requires a precise legal basis and thus there is also a weighing exercise between the various values that one specific piece of regulation tries to attain.

The Lisbon Treaty aimed to provide a comprehensive account of the system of competences: Articles 2 to 6 TFEU provide general rules governing the competences, a categorisation and a list of competences. In a limited number of cases, the EU thus possesses exclusive competence,⁵⁴ while in another number of fields its competence may merely support Member States' action.⁵⁵ Thirdly, there is an area of 'shared' competence.⁵⁶ But to put the question of competences into practice, a balancing exercise is needed to determine the appropriate legal basis.

As a general rule, the exercise of EU legislative competence must always be based on a concrete legal basis. These legal bases are, however, 'scattered' throughout the Treaty⁵⁷ and often broadly phrased. For many legal acts, matters became more complicated because they impinged on various potential legal bases, so that a complex case law has emerged which aims to delimit when a legal basis should be used or when recourse to a double legal basis is called for.⁵⁸ This is also important in order to safeguard that the relevant procedural rules apply, in particular because this ensures appropriate participation of the legislative institutions.⁵⁹

⁵⁴ Article 3 TFEU.

⁵⁵ Article 6 TFEU.

⁵⁶ Article 4 TFEU. Yet, already the fields of 'shared' competence in between pose conceptual problems: Theoretically, in an area of shared competence the Member State can act unless the EU has acted and occupied the field. If the EU decides to cease exercising competence in a field, the Member States may again exercise their competence, see Article 2 (2) TFEU. The doctrine is, however, still divided over whether there is true and definitive pre-emption through EU legislation or whether the Member States maintain competence, while pre-emption only acts at the legislative level. See in favour of the first proposition L. Gormley, 'Free Movement of Goods and Pre-emption of State Power' in A. Arnulf and others (eds.), *A Constitutional Order of States? – Essays in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 373; see in favour of the second R. Schütze, 'Supremacy without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 43 *Common Market Law Review* 1023, 1030.

⁵⁷ S. Weatherill, 'Competence and Legitimacy' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), 19.

⁵⁸ See with further references to case law K. St. Clair Bradley, 'Powers and Procedures in the EU Constitution: Legal Bases and the Court' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), 91 ff.

⁵⁹ The Court has tended to 'merge' procedural rules in cases of a double legal basis, so that maximum participation of all political institutions, in particular the European Parliament, was ensured, see *Ibid.*, 91. One might, however, object to this 'levelling-up' of procedures for legislation that such automatic preference for the involvement of the European Parliament is nowhere written in the Treaty and may jeopardize the balance between the institutions, E. Sharpston and G. De Baere, 'The Court of Justice as

Proportionality analysis, as mentioned above, comes in as a step after the determination that the EU can act, i.e. that there is a valid legal basis. It operates at the stage of determining the necessary extent once a decision in favour of EU action has been reached.⁶⁰ In this regard, it has to be distinguished from the principle of subsidiarity, which operates at an earlier stage than proportionality, i.e. when deciding whether action should be taken at EU level or not.⁶¹

ii. The standard of review in the case law on the competences of the European Union

Generally, the Court refers to the principle of proportionality, which comes as no surprise in light of the express reference to that principle in Article 5 TEU. However, based on the need to give discretion to the EU legislator, the CJEU then gives broad deference in adjusting the standard of review.

The *Working Time Directive* case can be examined as an example of review of the exercise of EU legislative competences as to their compatibility with the principle of proportionality. In this case, the United Kingdom sought for annulment of a directive for the reason, among other grounds, that the principle of proportionality had been infringed by the adoption of the directive. The Court held, however, after having set out generally the principle of proportionality, that in the present context the principle could only be applied to strike down the directive if the Council as the legislator had committed a ‘manifest error or misuse of powers’ or ‘manifestly exceeded the limits of its discretion’.⁶² While in principle the Court referred to the ‘principle of proportionality’, only a weak version of this test was implemented. The Court set out in its case law the four limbs of its standard definition of the principle of proportionality. In fact, however, by reducing the intensity of its scrutiny the Court only applied part of what it preached without providing satisfactory reasons for doing so.⁶³

Also in later case law, only ‘manifestly inappropriate’ legislative action would fall foul of proportionality review.⁶⁴ This rather lenient standard only rarely led to the annulment of EU legislation.

There are some cases of annulment. In *Spain v Council*, the CJEU repeated the formula set out in *Jippes* and similar cases.⁶⁵ Despite the emphasis on the discretion of the legislator, the Court then, however, found that it was not possi-

a Constitutional Adjudicator’ in A. Arnall and others (eds.), *A Constitutional Order of States? – Essays in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 138.

⁶⁰ Tridimas, *General Principles*, 176.

⁶¹ Scholars have noted that EU legislation itself seems hardly to pay more than lip service to the idea of subsidiarity, see e.g. Craig, ‘Institutions’, 60.

⁶² Case C-84/94 *United Kingdom v Council (Working Time Directive)* [1996] ECR I-5755, paras 57-58.

⁶³ See similarly sceptical T.-I. Harbo, ‘The Function of the Proportionality Principle in EU Law’ (2010) 16 *European Law Journal* 158, 185.

⁶⁴ See e.g. Case C-189/01 *Jippes and others* [2001] ECR I-5689, para 82.

⁶⁵ Case C-310/04 *Spain v Council* [2006] ECR I-7285, paras 96-97.

ble to assess how the Council arrived at its conclusions, because the Council as the legislator had enacted the pertinent rules despite an appalling lack of evidence. The CJEU thus struck down the directive because the Council had exceeded the boundaries of its discretion and violated the principle of proportionality.⁶⁶

Despite its seeming deference, the ‘manifestly inappropriate’ standard of review therefore possesses some teeth. The Court examines the concrete reasoning for a decision and aims to protect procedural rights without substantially changing the applicable legal test.⁶⁷

By contrast, review becomes increasingly more complex because of the increasing importance of the concept of precaution in cases of science-based measures.⁶⁸ In *Gowan*, the restrictions on the use of a chemical substance were found to be acceptable in light of a precautionary approach because there remained ‘certain concerns regarding the intrinsic toxic effects’ of the substance.⁶⁹ Subsequently, the assessment of whether the measure was ‘manifestly inappropriate’ became even less rigid than usual, the Court accepting the restrictions simply because of the possibility of later modifications provided for in the directive and because of the wide discretion to be given to the Commission.⁷⁰

iii. Conclusion

In reviewing the exercise of EU competences by EU institutions based on the principle of proportionality, the Court has chosen a very deferent standard of review, in effect finding violations only in cases where it becomes virtually impossible to assess the reasons that led to the conclusion of legislation. It is deplorable that the Court has not set out in more detail its reasons to see only a weak justification for judicial review in these cases. Due deference for the legislator seems to be the only reason, while no substantive issues in the values at stake are discussed. This becomes all the more striking as compared with the strict standard of review adopted to review the Member States’ action

⁶⁶ *Ibid.*, paras 134-135.

⁶⁷ H.C. Hofmann, ‘Which Limits? Control of Powers in an Integrated Legal System’ in C. Barnard and O. Oduro (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), 55; Tridimas, *General Principles*, 147.

⁶⁸ See on this point with references to further case law A. Adinolfi, ‘The Principle of Reasonableness in European Union Law’ in G. Bongiovanni, G. Sartor and C. Valentini (eds.), *Reasonableness and Law* (Dordrecht: Springer, 2009), 391.

⁶⁹ Case C-77/09 *Gowan Comércio Internacional e Serviços* Judgment of 22 December 2010, not yet published, para 77. Such lenient scrutiny was already used by the General Court earlier in a landmark case on the precautionary principle, see Case T-13/99 *Pfizer v Council* [2002] ECR II-3305.

⁷⁰ *Gowan*, paras 84-86. See sceptical of the reasoning in *Gowan* A. Alemanno, ‘Case C-79/09, *Gowan Comércio Internacional e Serviços Lda v. Ministero della Salute*, Judgment of the Court of Justice (Second Chamber) of 22 December 2010’ (2011) 48 *Common Market Law Review* 1329, 1330.

as legislators. The EU institutions thus seem to enjoy a presumption of acting in the interest of economic integration, while this presumption does not apply to Member States' measures.

B Judicial Review of EU Measures and Fundamental Rights in EU Law

There has been increasing influence and codification of fundamental rights as a new sort of value which required appropriate representation and protection in EU law. A short section examines this development, before we assess the actual standard of review adopted by the CJEU. It becomes clear that despite the observable ongoing shift towards a model of review resembling more equal representation than special interest review, in early case law the Court reviewed respect of fundamental rights with insufficient intrusiveness. Generally, the discussion of elements of procedural democracy is deplorably cursory, if present at all. We therefore suggest that more efforts be required in future cases if the Court aims to truly position itself as protective of fundamental rights.

i. Fundamental rights in the EU legal order

While initial drafting initiatives before the Rome Treaties had still provided for a considerable role for fundamental rights protection for the emerging European Economic Community, the failure of both the European Defense Community and the subsequent abandonment of the idea of a European Political Community led to the signing and ratification of rather narrowly targeted treaties on the European Economic Community and the Atomic Energy Community.⁷¹ During the 1960s, in particular German litigants tried to challenge Community measures referring to violation of their fundamental rights, but the CJEU still refused to accept such claims without an explicit basis in the Treaty.⁷² Only a few years later, however, in *Stauder* and *Internationale Handelsgesellschaft* the Court began to accept the idea that EU measures had to be reviewed as to their respect for fundamental rights as general principles of EU law.⁷³ To uncover the nature and substance of fundamental rights, the CJEU not only drew comprehensively from constitutional traditions of the Member States, but also found inspiration in the case law of the European Court of Human Rights, which leads to the effect that there is, broadly speaking, convergence

⁷¹ G. De Búrca, 'The Evolution of EU Human Rights Law' in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), 474-475.

⁷² See e.g. Case 40/64 *Sgarlata and others v Commission* [1965] ECR 215, p. 227, where the CJEU held that even fundamental principles existing in the legal systems of all Member States could not override express Treaty provisions.

⁷³ See for more details on this point section II.B.ii.

in the standards of protection of fundamental rights between both courts.⁷⁴ However, the latter's generous use of proportionality *stricto sensu* is not as widely spread in EU law.⁷⁵ At some points, the Court has also paid tribute to the existence of a European consensus, like the European Court of Human Rights. In the *Omega* case, the Court accepted the high level chosen for the protection of human dignity as a central constitutional value in Germany without intrusive review, because it found different constitutional conceptions of dignity among the Member States perfectly acceptable.⁷⁶

Subsequently, the Treaty was amended to take into account the relevance of fundamental rights for the EU legal order. After a reference in the preamble of the Single European Act 1987, the Maastricht Treaty gave such rights formal status in the Treaty text, whereas the Amsterdam Treaty made the Copenhagen Criteria a treaty-based standard for accession of future Member States and introduced the competence for the EU to combat discrimination based on a wide range of criteria apart from nationality.⁷⁷ The most comprehensive effort of codification resulted in the EU Charter of Fundamental Rights and Freedoms.⁷⁸ Drafted and 'proclaimed' in 2000, it eventually received binding legal value in the Lisbon Treaty,⁷⁹ although several Advocates General and later even the Court itself had begun referring to the Charter in their legal arguments even before this.⁸⁰

The Charter provides a written text assembling the fundamental rights and freedoms which can be opposed as private interests to the public interests pursued by EU legislation and regulatory action. As far as similar rights are enshrined in the ECHR or domestic constitutions, the Charter aims for a harmonized interpretative approach.⁸¹ As an interesting feature, the Charter, however, only applies to Member States 'when they are implementing Union law'.⁸² This seems to correspond to the reluctance uttered by some towards the adoption of a broad power of fundamental rights review over Member States' action in cases such as *Wachauf*.⁸³ The claim to interpret these provisions broadly to close a perceived gap in the scope of fundamental rights review of the CJEU seems ill-conceived in this light,⁸⁴ as review is already undertaken by national constitutional courts and if necessary the European Court of Human Rights outside the context where Member States implement EU law.

⁷⁴ See on this judicial dialogue in more detail Tizzano, 128-129.

⁷⁵ See section IV.B.

⁷⁶ C-36/02 *Omega* [2004] ECR I-9609, paras 37-38.

⁷⁷ See on these various treaty reforms in more detail De Búrca, 480-481.

⁷⁸ For the actual version, see [2007] OJ C303, 1.

⁷⁹ Article 6 (1) TEU.

⁸⁰ Tizzano, 134-135.

⁸¹ See Article 52 (3) and (4) of the Charter.

⁸² Article 52 (5) of the Charter.

⁸³ See section II.B.ii.

⁸⁴ See for such a claim Stone Sweet, 'Court of Justice', 153.

The classic opposition between private interests in the form of fundamental rights and public interests implemented in EU legislation and regulation is complemented again by a very explicit reference to proportionality analysis as a legal test. Article 52 (1) of the Charter states that ‘subject to the principle of proportionality’, limitations on rights must be ‘necessary and genuinely meet objectives of general interest’ or the ‘need to protect the rights and freedoms of others’. It thereby also foreshadows the possibility that more complex than mere ‘public’ interests may find themselves in the second scale of the balance.

ii. The standard of review in the case law reviewing European Union measures against fundamental rights

In principle, the Court takes some inspiration from the European Court of Human Rights. Unfortunately, however, this does not extend to the reasoning of the European Court of Human Rights on the justification of judicial review. There is only little reasoning in the case law on the justification and as a consequence on the appropriate standard of review. Overall, we can observe a rather superficial standard of review that uses elements of proportionality analysis, but with surprising deference mirroring to some extent the case law on the exercise of EU competences by EU institutions. Only later case law shows a shift towards a more intrusive exercise of review powers.

As mentioned, review based on the respect of fundamental rights started with an *obiter dictum* in *Stauder* and more substantial findings in *Internationale Handelsgesellschaft*. In the latter case, a system of deposits connected to export licences was challenged as excessively impinging upon traders’ interests and rights. Having found that there was no system as efficient as the present one,⁸⁵ the CJEU moved to examine whether the burden on trade was excessive, thereby causing a violation of fundamental rights.⁸⁶ While one could have expected a lengthy discussion of proportionality *stricto sensu* after this statement, the Court effectively found rather summarily that the costs caused by the scheme did not reach an amount ‘disproportionate’ to the total value of the goods.⁸⁷

A more explicit reasoning was offered in *Hauer*. The case concerned a regulation prohibiting the cultivation of new vineyards in the framework of the common organisation of the wine market. The Court underlined that restrictions on private property for public purposes such as the common organisation of a market under the agricultural policy were an accepted feature in all constitutional orders of the Member States.⁸⁸ It then examined whether the contested regulation effectively pursued an objective of general interest ‘or’ whether it caused a ‘disproportionate and intolerable interference with the rights

⁸⁵ *Internationale Handelsgesellschaft*, paras 10–12.

⁸⁶ *Ibid.*, para 14.

⁸⁷ *Ibid.*, para 16.

⁸⁸ Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para 20.

of the owner, impinging upon the very substance of the right to property'.⁸⁹ The threshold for finding a violation was thus set very high, and consequently not met.⁹⁰ While the Court referred to fundamental rights and examined the impact on the latter, in fact the test was marked by a deferent standard of review, since only virulent violations going to the very substance of a right constituted a violation.⁹¹

In the *Bosphorus* case, the Court remained extremely terse in its reasoning. It held that the sanctions prescribed by the regulation at issue served a highly important objective, the 'fundamental' interest to end a war and restore peace, and their effects on the property rights of the company targeted by the sanctions could thus not be seen as 'inappropriate or disproportionate'.⁹²

The CJEU applied a similar test in the case of directives as legislative measures aimed at a more general public than regulations. In *Metronome Musik*, the Court merely held that it did not 'appear' as if the relevant objectives of general interest could have been achieved by means less restrictive of the freedom to pursue a trade or profession.⁹³ In *Booker Aquaculture*, the CJEU found a measure acceptable using the common two-tier test, examining first whether the measure – a directive containing measures to prevent the emergence and spread of diseases for aquacultures – contributed to some objective of general policy.⁹⁴ As a second part, it then held that only an impairment of the 'very substance' of the right to property could lead to a finding that proportionality had not been respected in the adoption of the directive.⁹⁵

In a few cases, the Court has thus shown at least some willingness to go beyond a rather formalistic review of regulations and directives, if substantial interference with a fundamental right or an interest valued very highly seemed to be at stake. Still, at the end of the day these few stronger words have not been followed by a more elaborate reasoning and in particular not by a different outcome, since the CJEU has effectively upheld EU measures in the mentioned cases.

In more recent years, however, the Court has taken a more vigorous approach to judicial review in fundamental rights cases, in particular as regards

⁸⁹ *Ibid.*, para 23.

⁹⁰ *Ibid.*, para 29.

⁹¹ The same test was also applied in the first *Bananas* case, where Germany complained that a regulation organizing the common market for bananas changed the import system, disadvantaging German traders with substantial effects on their right to property and free exercise of profession. The Court could not find an interference with the 'very substance' of the rights at issue and rejected the claim, see Case C-280/93 *Germany v Council (Bananas)* [1994] ECR I-4973, para 87.

⁹² Case C-84/95 *Bosphorus v Minister for Transport, Energy and Communications and others* [1996] ECR I-3953, para 26.

⁹³ Case C-200/96 *Metronome Musik v Music Point Hokamp* [1998] ECR I-1953, para 26.

⁹⁴ Here the completion of the internal market for aquacultures, Cases C-20/00 and C-64/00 *Booker Aquaculture and Hydro Seafood* [2003] ECR I-7411, para 78.

⁹⁵ *Ibid.*, paras 79 and 85.

recent cases of measures freezing the assets of individuals suspected of terrorist activities.⁹⁶ In the landmark case *Kadi*, the Court used the familiar formula of a ‘disproportionate and intolerable interference impairing the very substance of the fundamental right to respect for the property’ for review.⁹⁷ The CJEU then, however, intensified its review. While it found the objective of the sanctions highly important, the Court qualified that this meant that the measures should not be considered ‘per se’ inappropriate or disproportionate, thereby slightly qualifying the formula used in *Bosphorus*.⁹⁸ Subsequently, it found the sanctions in breach of fundamental rights because there had been no reasonable procedural opportunity for the individual to put his case before competent authorities for any sort of review.⁹⁹ While using the same formulas as in earlier cases, the CJEU thus seemed willing to sharpen the teeth of the standard of review in these later cases.¹⁰⁰

iii. Conclusion

Summing up, the Court has opted for a use of proportionality analysis that refers to the European Court of Human Rights’ case law and somewhat mirrors the latter’s notions. However, in reality a much weaker standard of review is at play, and there is no comparable discussion of the appropriate standard of review and the justification of judicial review. More recent case law seems to take the protection of fundamental rights more seriously as a justification of stricter review. However, the Court does not explain why this change of mind has occurred. As a conclusion, there is an ongoing shift towards more appropriate, even equal representation of values beyond the integrationist paradigm. At the same time, the CJEU’s terse reasoning does not allow for more comprehensive conclusions on its perception of the justification of its fundamental rights review.

C Judicial Review of Member States’ Measures and the Internal Market Freedoms

The fundamental freedoms of the internal market and among them – because of its early development – the free movement of goods constitute the area where the most debate on the justification of judicial review has taken

⁹⁶ A. Albers-Llorens, ‘Edging Towards Closer Scrutiny? The Court of Justice and Its Review of the Compatibility of General Measures with the Protection of Economic Rights and Freedoms’ in A. Arnall and others (eds.), *A Constitutional Order of States? – Essays in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 264.

⁹⁷ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union* [2008] ECR I-6351, para 357.

⁹⁸ *Ibid.*, para 363.

⁹⁹ *Ibid.*, paras 368-370.

¹⁰⁰ See for a discussion of the follow-up case law to *Kadi* Albers-Llorens, 262-263.

place. The debate on the scope of the pertinent provisions, e.g. Article 34 TFEU on the quantitative restrictions on imports and measures having equivalent effect on the free movement of goods, mirrors conflicting views as to whether fundamental freedoms should be read as rights with the need for intensive judicial review or rather as more limited obligations on Member States. We first set out the discussion on the appropriate scope of Article 34 TFEU and compare it briefly to the other internal market freedoms, showing that to some extent there is a paradigm shift – similar to the increasing role of fundamental rights review – through the increasing importance of Union citizenship as a non-economic Treaty freedom. The conceptual debate is then best phrased in terms similar to the procedural democracy doctrine in United States constitutional law; and as in the United States’ context, the question of ‘virtual representation’ must be asked with vigour to ascertain the appropriate standard of review.

i. The appropriate scope of the internal market freedoms and EU citizenship

The free movement of goods provides a suitable example of the general debate on the appropriate scope of internal market freedoms, as it has developed over decades and seen most academic comment. Despite some formal limits to its reach, there is a remarkably strong rights-based reading of the free movement of goods that seems, at first view, to strengthen our finding of a setting of special interest review with strong emphasis on the value of economic integration. Yet, this is not the full picture. The other economic Treaty freedoms have indeed seen similar development in the case law, but there is also increasingly important case law on the non-economic concept of Union citizenship, which shows that judicial review by the CJEU increasingly follows a hybrid paradigm. Non-economic values other than fundamental rights play an increasingly important role in the Court’s review. In our opinion, judicial review in EU law is therefore to be positioned between the models of special interest review and equal representation review, moving closer to the second.

a. *The example of the free movement of goods*

A variety of provisions govern the free movement of goods. The most central tool to enable free circulation of goods was and continues to be the prohibition of quantitative restrictions on imports and measures having equivalent effect enshrined in Article 34 TFEU. In particular the interpretation of the term ‘measures having equivalent effect’ became a central question in determining how far the internal market ought to reach early on. If the notion is understood as focusing primarily on discriminatory measures, a narrower group is encompassed and Member States retain more of their regulatory autonomy. By contrast, a broad understanding of measures based on their effect as restricting market access would include a large number of regulatory measures, which

would help to further the idea of integration with the purpose of furthering one internal market across the EU.¹⁰¹

The Court held boldly in *Dassonville* that '[a]ll trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions'.¹⁰² With this broad definition, a high amount of Member State regulations could potentially fall under the prohibition of Article 34 TFEU. This meant in practice that justification for such measures was needed. In the absence of EU-wide harmonizing measures Member States were entitled to act to protect the public interest, but only insofar as they could provide a justification and show that the measure in question bore a reasonable – proportionate – relationship to the policy objective brought forward. While initially only the list of express derogations in Article 36 TFEU seemed to be at the disposal of Member States, the CJEU made clear that for non-discriminatory measures, a broader list of public policy objectives – referred to as mandatory requirements – could also qualify as justifying trade-restrictive effects of a measure.¹⁰³

For both express derogations under Article 36 TFEU and mandatory requirements, the Court subsequently introduced the condition that compliance with fundamental rights must be ensured. It thus reviewed the use of such derogations and requirements in light of fundamental rights at issue.¹⁰⁴ In *Schmidberger*, the CJEU went a step further and found that the protection of a fundamental right itself could constitute a public interest eligible to act as a justification for a measure which interfered with the free movement of goods.¹⁰⁵

Yet, in terms of the scope of Article 34 TFEU, the Court continued to strengthen market integration by introducing the concept of mutual recognition, holding that products 'lawfully produced and marketed in one of the Member States' could not be excluded from circulation in other Member States without a valid reason.¹⁰⁶

With the two seminal judgments of *Dassonville* and *Cassis de Dijon*, the Court laid the foundation for pro-integrationist judicial review in the field of free movement of goods. The basic approach was to subject broadly all regulations capable

¹⁰¹ See for an early publication on the topic L. Gormley, *Prohibiting Restrictions on Trade within the EEC: The Theory and Application of Articles 30-36 of the EEC Treaty* (Amsterdam: Elsevier, 1985), 18. The parallel to the considerations applying under the United States Dormant Commerce Clause is striking, see chapter 4 section III.B.

¹⁰² Case 8/74 *Procureur du Roi v Dassonville et al* [1974] ECR 837, para 5.

¹⁰³ See already *Ibid.*, para 6. See for the term of mandatory requirements Case 120/78 *Rewe/Bundesmonopolverwaltung für Branntwein ('Cassis de Dijon')* [1979] ECR 649, para 8.

¹⁰⁴ *ERT*, para 45; Case C-368/95 *Vereinigte Familienpress Zeitungsverlags- und vertriebs GmbH v Bauer Verlag* [1997] ECR I-3689, para 26.

¹⁰⁵ Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republic of Austria* [2003] ECR I-5659, paras 71-73. See also in the field of services *Omega*, para 35.

¹⁰⁶ *Cassis de Dijon*, para 14.

of affecting intra-EU trade to judicial scrutiny as a potential measure having equivalent effect, then examining at a second stage whether the Member State – bearing the burden of proof – could bring forward a credible justification and demonstrate that the measure was proportionate to its aims. Often, the *Dassonville* kind of reasoning has been labelled a ‘rule of reason’ which allows derogations to the *a priori* primacy of the internal market interest.¹⁰⁷ This approach leads to a high burden put on the Court, as it is the Court’s task to frequently engage in proportionality analysis of regulatory measures. Most of the adjudicative work is left to the phase of justification of a measure.¹⁰⁸

Yet, concerned about the potential over-inclusiveness of Article 34 TFEU, some suggested that some measures with less trade-restrictive effect should be excluded.¹⁰⁹ The Court followed these views in *Keck and Mithouard* and held that a category of measures that restricted or prohibited ‘certain selling arrangements’ did not fall within the scope of Article 34 TFEU.¹¹⁰ The judgment has been strongly criticized by those preferring a rule of reason approach,¹¹¹ while others stepped up in its defence as necessary to counter the inflation of claims against simple national regulatory measures without much integrationist merit.¹¹² While the debate continued, the CJEU explored other avenues of broadening and restricting the scope of Article 34 TFEU. There had already been suggestions that instead of the rather categorical exclusion chosen in *Keck*, one might use a *de minimis* rule to exclude from the scope of the broad *Dassonville* definition of measures having equivalent effect those measures that only had a minor effect on trade.¹¹³ In a number of cases before and after *Keck*, the Court held that some Member State measures would not be considered as falling

¹⁰⁷ See e.g. L. Gormley, ‘The Definition of Measures Having Equivalent Effect’ in A. Arnall, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008), 192.

¹⁰⁸ See on this point Tridimas, *General Principles*, 206–207.

¹⁰⁹ Typically, an article by White as well as an opinion written by Advocate General Tesauo are cited as having prepared the ground for the decision in *Keck*, see E. White, ‘In Search of the Limits to Article 30 of the EEC Treaty’ (1989) 26 *Common Market Law Review* 235 and the Opinion of Advocate General Tesauo in Case C-292/92 *Hünernmund and others v Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787.

¹¹⁰ Joined Cases C-267/91 and C-268/91 *Criminal Proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097, paras 14 and 16. These measures had, however, to fulfil the conditions of applying to ‘all relevant traders’ in the territory of the Member State and of affecting ‘in the same manner, in law and in fact’ the marketing of imported and domestic products, *Criminal Proceedings against Bernard Keck and Daniel Mithouard*, para 16.

¹¹¹ See e.g. L. Gormley, ‘Reasoning Renounced? The Remarkable Judgment in *Keck & Mithouard*’ (1994) *European Business Law Review* 63.

¹¹² See for a defence of the decision R. Joliet, ‘The Free Circulation of Goods: The *Keck* and *Mithouard* Decision and The New Directions in The Case Law’ (1995) 1 *Columbia Journal of European Law* 436.

¹¹³ See the well-known opinion of Advocate General Jacobs in Case C-412/93 *Leclerc-Siplec v TF1 and M6* [1995] ECR I-179.

under the prohibition of Article 34 TFEU if they were non-discriminatory, did not have the purpose of regulating trade and had an effect ‘too uncertain and indirect’ on trade.¹¹⁴ The effect on trade remains a crucial criterion in defining the scope of Article 34 TFEU. The later case law applying the *Keck* test seems to have also brought a renewed scrutiny even for selling arrangements as to their discriminatory effects, but also beyond that on their mere effect on trade.¹¹⁵ While different tests thus applied to the two categories of selling arrangements and of regulatory measures with an uncertain and indirect effect on trade, both tests ultimately seem to reunite some sort of inquiry into the effects of a measure.¹¹⁶

In later case law, the Court continued to expand the scope of Article 34 TFEU; it even found the rules of the internal market applicable in cases where the facts seemed to be confined to a single Member State.¹¹⁷ The problem of reverse discrimination, where Member States discriminate against their own products or traders, has, however, not yet led the CJEU to adopt a more far-reaching jurisprudence.¹¹⁸ Most recent case law added that even rules which merely focus on the use that could legally be made of products could fall under the concept of measures having equivalent effect, if they hinder access of foreign products to the market of a Member State.¹¹⁹

There are opposing views in the doctrine which denounce that the scope given to Article 34 TFEU is over-inclusive.¹²⁰ As one solution, inspiration from competition law could arguably be fruitful in the future. Competition law would compare products based on econometric assessments. Consequently, what

¹¹⁴ Case C-69/88 *H Krantz GmbH & Co v Ontvanger der Directe Belastingen* [1990] ECR I-583, para 11; Case C-379/92 *Peralta* [1994] ECR I-3453, para 24. See more recently Case C-291/09 *Francesco Guarnieri & Cie* Judgment of 7 April 2011, not yet published, para 17.

¹¹⁵ See the discussion of case law in E. Spaventa, ‘The Outer Limits of the Treaty Free Movement Provisions: Some Reflections on the Significance of *Keck*, Remoteness and *Deliège*’ in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), 256-257.

¹¹⁶ *Ibid.*, 264.

¹¹⁷ C-321/94 *Pistre and others* [1997] ECR I-2343.

¹¹⁸ See on this problem and on a potential broader interpretation of the internal market rules to deal with it A. Tryfonidou, ‘The Outer Limits of Article 28 EC: Purely Internal Situations and the Development of the Court’s Approach through the Years’ in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), 207 and 217 ff., respectively.

¹¹⁹ Case C-110/05 *Commission v Italy* [2009] ECR I-519, para 37. See closer on the case A. Rosas, ‘Life after *Dassonville* and *Cassis*: Evolution but no Revolution’ in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 438.

¹²⁰ See e.g. N. Bernard, ‘On the Art of Not Mixing One’s Drinks: *Dassonville* and *Cassis de Dijon* Revisited’ in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 462-463, who suggests that a more discrimination-based focus as under Article 35 TFEU, which deals with export restrictions and measures of equivalent effect, would have saved the Court the whole dilemma of *Keck*.

should be prohibited under Article 34 TFEU are neither formally discriminatory nor formally market access restricting measures, but ‘selective burden’ measures which create a burden for new market entrants, thereby favouring established competitors.¹²¹

Summing up, the predominance of rule-of-reason thinking points towards a rights-conception of the free movement of goods. This rights-conception also becomes visible in areas of the other market freedoms, as is subsequently shown.

b. The other internal market freedoms and EU citizenship

The free movement of workers, services and capital and the freedom of establishment have undergone separate paths of development in the case law. As a common feature it nonetheless appears notable that the Court has never repeated the debate on the scope of the relevant provisions as in the case of the free movement of goods. Early on the Court rejected the application of a presumption similar to the *Keck* holding in other fields.¹²² Under most of these economic freedoms, the case law developed a rule of reason approach. Even non-discriminatory measures were thus subject to scrutiny, insofar as they represented an obstacle to the free movement of workers, capital, services or companies. Member State therefore had to show that there existed a public interest as a justification for their regulatory measure and demonstrate the measure’s proportionality.¹²³ There is also case law that takes up the concept of measures having too indirect or remote an effect on the relevant fundamental freedom to fall under the respective prohibition from the case law on the free movement of goods.¹²⁴ Furthermore, the Court started much earlier to use a language of ‘rights’ to defend in particular claims by Union citizens as workers or service providers or recipients based on the Treaty’s respective fundamental freedom against Member State regulation.¹²⁵

Up to this point, the substantial opposition of interests seemed to follow roughly the lines of private economic interests, typically workers or traders,

¹²¹ The latter, of course, being typically domestic producers, see G. Davies, ‘Understanding Market Access: Exploring the Economic Rationality of Different Conceptions of Free Movement Law’ (2010) 11 *German Law Journal* 671, 678 ff.

¹²² Case C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141, paras 34 ff.; Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL et al v Bosman et al* [1995] ECR I-4921, para 103.

¹²³ See already early C. Barnard, ‘Fitting the Remaining Pieces into the Goods and Persons Jigsaw?’ (2001) 26 *European Law Review* 35.

¹²⁴ See references to the case law in D. Edward and N.N. Shuibhne, ‘Continuity and Change in the Law Relating to Services’ in A. Arnull, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008), 256.

¹²⁵ See for early references N.N. Shuibhne, ‘The Outer Limits of EU Citizenship: Displacing Economic Free Movement Rights?’ in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart, 2009), 185.

against public interests, such as regulation for the purpose of public order or environmental protection. But the rise of EU citizenship as a new Treaty freedom for persons moving for non-economic motives has somewhat complicated the picture. EU law has undergone a shift from a purely market-based paradigm of integration towards an ever stronger paradigm of policy integration.¹²⁶ Introduced by the Treaty of Maastricht, the concept of citizenship has been discovered by the Court as the new ‘fundamental status’ of the nationals of Member States.¹²⁷ As a central tool, the CJEU has combined the new citizenship rights with the obligation for Member States not to discriminate based on nationality, thereby creating a broad right to equal treatment.¹²⁸ Union citizenship opened up a large number of fields to the Court to assess potential violations of EU law in various areas, such as the right to a name,¹²⁹ language regimes for ethnic minorities¹³⁰ or even the law on the conferral and loss of Member States’ nationality itself.¹³¹ Some have questioned whether there were potential limits of citizenship.¹³² Such limits are indeed particularly questionable because to date there seems to be no clear recognition in the case law of what could be an opposing value to the value of citizenship. Some suggested that greater importance must be given to the concept of solidarity in future case law. Solidarity would counterbalance problematic cases such as those of Union citizens who have moved to another Member State and claim benefits in the social system of that state which they are not entitled to because they lack an effective link with that Member State.¹³³ The Court has been criticized as relying excessively on proportionality as a remedying principle, instead of a more systematic approach based on the value of solidarity. In many cases the solution found is thus simply that territorial welfare restrictions must take into account the personal circumstances of every individual case. Such a solution is manifestly ill-suited to the idea of legal certainty.¹³⁴

¹²⁶ De Witte, 359.

¹²⁷ Case C-184/99 *Grzelczyk v Centre public d’aide sociale d’Ottignies-Louvain-La-Neuve* [2001] ECR I-6193, para 31.

¹²⁸ See for references to the case law J. Shaw, ‘Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism’ in P. Craig and G. De Búrca (eds.), *The Evolution of EU Law* (Oxford: Oxford University Press, 2011), 586.

¹²⁹ Case C-168/91 *Konstantinidis v Stadt Altensteig and Landratsamt Calw* [1993] ECR I-1191; see also Case C-148/02 *Garcia Avello* [2003] ECR I-11613.

¹³⁰ Case C-274/96 *Bickel and Franz* [1998] ECR I-7637.

¹³¹ Case C-135/08 *Rottmann* [2010] ECR I-1449.

¹³² See with some concern on the expanding case law of the Court Shuibhne, 194-195.

¹³³ M. Ross, ‘The Struggle for EU Citizenship: Why Solidarity Matters’ in A. Arnall and others (eds.), *A Constitutional Order of States? – Essays in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 286.

¹³⁴ M. Dougan, ‘Expanding the Frontiers of European Union Citizenship by Dismantling the Territorial Boundaries of the National Welfare States?’ in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), 162.

Based on this overview of the development of the internal market freedoms and citizenship, it must now be assessed how judicial review has been conceptually justified in the doctrine. We have found strong reliance on rights-thinking and the rule of reason. Reliance on the principle of proportionality is a logical consequence. Subsequently, we discuss the differing standards of review in the case law and the overall conceptualisation of internal market freedoms in the literature.

ii. Varying standards of review in the case law

The CJEU does not engage in lengthy discussion of the standard of review or explicitly considers elements of the procedural democracy doctrine in its case law. As a consequence, some reading between the lines is necessary to assess how concrete values have influenced the Court's approach.

As a starting point, there are some indications that the standard of review is adapted in cases of review of Member State measures based on the underlying value for which the regulating state claims regulatory autonomy.

As the most prominent example, if the Court senses that there is likely to be an economic justification for trade-restrictive measures, i.e. protectionism, often a more intrusive standard of review is taken for measures.¹³⁵ On the opposite side, some public interests lead the Court to take a less intrusive stance on its legal test to review Member State measures. An often-cited example is the case law on measures aiming at environmental protection.¹³⁶ Similarly, under the justification of public or national security, the Court showed reluctance to impose too many constraints on the national courts, leaving to them a great part of the final assessment of proportionality.¹³⁷

Generally, we have also observed considerably stricter review for Member States' measures in comparison to the EU institutions.¹³⁸ The importance of furthering the rationale of the single market leads the Court to adopt a more intrusive standard of review, while for review at EU level a more lenient standard is in use.

Some would argue that the differences in the standard of review follow the dividing line between legislative and administrative measures rather than between measures of EU and of national origin.¹³⁹ One can certainly identify a general tendency to subject administrative measures to stricter scrutiny than legislative measures.¹⁴⁰ Intrusiveness correlates with the values typically interfered with by administrative as opposed to legislative measures. There may be

¹³⁵ Gerards, 92.

¹³⁶ E.g. in Case C-379/98 *PreussenElektra* [2001] ECR I-2099, the Court was willing to accept even a plainly discriminatory measure without paying further attention to this characteristic.

¹³⁷ Tridimas, *General Principles*, 228-229.

¹³⁸ See also *Ibid.*, 193.

¹³⁹ Harbo, 173.

¹⁴⁰ See for a similar view Hofmann, 54.

a correlation in the sense that under predominantly ‘legislative’ instruments, broader public interests are opposed, while individual rights as private interests tend to intervene more often in the case of ‘administrative’ measures.¹⁴¹ Yet, directives may also impinge significantly e.g. on economic operators’ freedom to exercise their profession or their property rights. It is thus suggested that instead of a division between legislative and administrative measures, there is a continuum. The differences in the intrusiveness of review are based predominantly on the nature of interests interfered with. EU measures of a more administrative kind are more likely to cause substantial interference with private positions, thereby triggering a concern on the appropriate protection of fundamental rights. The Court has not always been explicit about this concern,¹⁴² but the tougher scrutiny adopted in such cases can nevertheless be understood in this sense.

Still, there seems to be a qualitative leap in the intrusiveness of review between the review of EU measures and of Member States measures if the burden of proof and the narrow interpretation of derogations from fundamental freedoms are taken into account.¹⁴³ A perhaps more useful division to understand varieties in the standard of review uses the underlying interests that are weighed against each other.

Summing up, there is some variation in the intensity of scrutiny that can be derived from the case law, although the Court’s reasoning remains very brief. The interest of economic integration operates as a factor sharpening review. The subsequent section aims to describe how this conceptual focus can be brought together with the procedural democracy doctrine. Provisions such as the prohibition of quantitative restrictions and measures having equivalent effect can be understood as ensuring virtual representation of out-of-state traders. Parallels to the United States jurisprudence and debate on the Dormant Commerce Clause become visible.¹⁴⁴

iii. The procedural democracy doctrine and the scope of the free movement of goods

We will take the debate on Article 34 TFEU’s scope as the example, as much of the doctrine has also done so. This academic discussion bears witness to a dispute over the nature of Article 34 TFEU itself. The arguments in this debate can be made fruitful for the discussion of the justification of judicial review.

The ‘rule of reason’ approach posits Article 34 TFEU as a traders’ right trumping, at first view, the Member States’ interests in regulating for the public purpose, unless they can fulfil the requirements of the narrowly interpreted

¹⁴¹ See on this point insightful Tridimas, *General Principles*, 138.

¹⁴² Harbo, 178.

¹⁴³ See on this point section IV.A.

¹⁴⁴ See chapter 4 section III.B.

express derogation of the Treaty or the mandatory requirements created in the case law for non-discriminatory measures.¹⁴⁵

By contrast, an opposite view refuses to read Article 34 TFEU broadly as a tool for traders to free themselves from all sorts of potentially trade-hindering regulation. The *Keck* jurisprudence is understood as an indication that no general right to unhindered trade is contained in Article 34 TFEU.¹⁴⁶ A more limited prohibition of protectionism should instead be the content of Article 34 TFEU. At this point, the similarity to the debate surrounding the Dormant Commerce Clause in United States constitutional law becomes visible.¹⁴⁷

The ‘virtual representation’ argument put forward in that context has also emerged in the debate in EU law: Should the trader’s right under Article 34 TFEU be read as a tool to ensure representation of the foreign economic actors? Should judicial review thus ensure representation in domestic political processes from which foreign economic operators are excluded and thus disadvantaged?¹⁴⁸ The Member States would in principle be entitled to take their own decisions when regulating in the public interest. But EU law and judicial review aim to force them to take into account the interests of foreign traders. This view would suggest that the use of proportionality analysis in judicial review is to be understood as an order to ‘think federal’,¹⁴⁹ and an intrusive standard of review is justified.

From the opposite position, Regan argues that, as in the case of the Dormant Commerce Clause, the appropriate representation of domestic interests is sufficient to ensure non-protectionist regulation.¹⁵⁰ In his view, a mere necessity test would be sufficient and could replace full-scale proportionality analysis, since review should only focus on finding market exploitation effects and protectionism as condemned motivations for regulating.¹⁵¹

In principle, it appears reasonable that the Court operates following a model of special interest representation in the area of the internal market freedoms and that thus no predominant weight falls on full-scale proportionality analysis. However, based on similar reasons as in the case of the United States consti-

¹⁴⁵ For a view describing the fundamental economic freedoms as ‘rights conferring’ in their nature, see e.g. O. Odudu, ‘Economic Activity as a Limit to Community Law’ in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), 237.

¹⁴⁶ See with further references Shuibhne, 185-186.

¹⁴⁷ See already chapter 4 section III.B.ii.

¹⁴⁸ See M.P. Maduro, *We the Court: the European Court of Justice and the European Economic Constitution: a Critical Reading of Article 30 of the EC Treaty* (Oxford: Hart Publishing, 1998).

¹⁴⁹ See in this respect on national courts Tridimas, *General Principles*, 241.

¹⁵⁰ See succinctly K. Nicolaidis, ‘Kir Forever? The Journey of a Political Scientist in the Landscape of Mutual Recognition’ in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 454.

¹⁵¹ D.H. Regan, ‘An Outsider’s View of *Dassonville* and *Cassis de Dijon*: On Interpretation and Policy’ in M.P. Maduro and L. Azoulai (eds.), *The Past and Future of EU Law – The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Oxford: Hart Publishing, 2010), 469 and 471.

tutional law, it appears exaggerated to suggest with Regan that proportionality analysis should play no role at all. In many cases, there may be appropriate representation of out-of-state interests through in-state groups. In some situations, however, there remains the possibility of a failure of the democratic process to the detriment of foreign economic operators which is not remedied through representation of corresponding local interests. In such a situation of an imbalance of values, we suggest that even under a model of special interest representation a narrow role should remain for full-scale proportionality analysis.¹⁵²

iv. Conclusion

Summing up, the justification of judicial review is rather poorly discussed by the CJEU. Many elements can effectively be found between the lines of case law and using the doctrinal discussion, but more intense discussion in the case law would certainly increase transparency and clarity. Under the review of Member State measures under the internal market freedoms, the paradigm has shifted from purely economically based integration towards broader values with the emergence of citizenship as a non-economic Treaty freedom. There continues to prevail, however, a broad rights-based reading of all the various fundamental freedoms, which leads the Court to exercise its review with strong preference for the interest of integration to the detriment of Member States' regulatory autonomy. As the section on the use of the 'principle of proportionality' by the Court shows, the seemingly predominant rights-based reading of provisions like Article 34 TFEU in the case law has led to an undue over-emphasis on economic integration in the manner in which proportionality analysis is handled.¹⁵³

D Horizontal effect of fundamental freedoms and fundamental rights

In our opinion, review by the CJEU represents a hybrid model still close to a model of special interest representation, but moving increasingly towards equal representation. Another dimension in which non-economic values have been gaining in importance becomes visible in the Court's increasingly resorting to elements of horizontal effect, which is given both to fundamental freedoms under the Treaty as well as to fundamental rights. We first assess both developments, before discussing the very sparse justification for this extension and intensification of judicial review by the CJEU.

¹⁵² See chapter 4 section III.B.ii.

¹⁵³ See section IV.

i. Horizontal effect and the internal market freedoms

As a starting point, the Court imposed considerably broad obligations on the Member States to secure the market freedoms enshrined in the Treaty. It insisted in particular on the duty of cooperation, part of the principle of sincere cooperation, which requires Member States to act to ensure the respect of Treaty obligations. Member States have thus been required to act to remove obstacles to the fundamental freedoms.¹⁵⁴

Beyond these obligations, the Court began to give horizontal effect to some Treaty provisions. For this purpose, in some cases it found collective rule-making activities by private entities to be comparable to state regulation and imposed obligations of ensuring free movement e.g. on sports federations.¹⁵⁵ Later case law extended the effect of the internal market rules to trade unions¹⁵⁶ and a private bank,¹⁵⁷ without providing a substantial justification for this extension.¹⁵⁸

Concern arises out of the fact that justification of their trade-restrictive action may prove difficult for private parties. The Court has indicated that private parties could also avail themselves of a public interest as a justification to defend their measure.¹⁵⁹ For some commentators, this is sufficient to appease fears of an overextension and the quasi-‘*Verstaatlichung*’ of private relations.¹⁶⁰ Still, there remain imbalances in the model built by the CJEU, in particular as the justification for any breach of a fundamental freedom is subject to narrow interpretation and a restrictive distribution of the burden of proof.¹⁶¹ To successfully assert a justification is thus a highly difficult task for private parties in practice.

As a logical continuation, private parties must also be able to justify infringements of the fundamental freedoms by reliance on the exercise of their own

¹⁵⁴ See for but one example *Schmidberger*, para 64, where the Court found a potential breach because Austrian authorities had not prevented a demonstration taking place on an important motorway, which thereby inhibited the transport of goods.

¹⁵⁵ Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and others* [1974] ECR 1405, paras 18 and 25. See also *Bosman*, para 83.

¹⁵⁶ Case C-438/05 *International Transport Workers’ Federation and Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, paras 35-37, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paras 98-100.

¹⁵⁷ Case C-281/98 *Roman Angonese* [2000] ECR I-4139, paras 35-36.

¹⁵⁸ De Witte, 334. See also e.g. critical of the judgments in *Viking* and *Laval* C. Joerges and F. Rödl, ‘Informal Politics, Formalised Law and the ‘Social Deficit’ of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*’ (2009) 15 *European Law Journal* 1.

¹⁵⁹ *Bosman*, para 86.

¹⁶⁰ W. Sauter and H. Schepel, *State and Market in European Union Law* (Cambridge: Cambridge University Press, 2009), 103.

¹⁶¹ See section IV.A.

fundamental rights.¹⁶² In connection with the ever more lenient scrutiny of the Court as to the link to free movement required to activate review for a potential interference with EU law,¹⁶³ the CJEU's role as a court of review of fundamental rights could thereby considerably increase in the future.

ii. Horizontal effect of fundamental rights in EU law

In the vigorously criticized *Mangold* case,¹⁶⁴ the Court found that the prohibition of discrimination on the grounds of age as a general principle of EU law and simultaneously as a fundamental right¹⁶⁵ could exercise its effect in a national labour law dispute between an employer and an employee.¹⁶⁶ Again, the Court adopted an expansive interpretation of the scope and effects of EU law.

In *Mangold*, the time limit of expiration of the directive containing the specific obligation of non-discrimination had not yet expired, but the Court relied on the fact that the contested national measure was taken formally as an implementing measure of the directive to enforce the general principle underlying the directive.¹⁶⁷ The case also caused some concern as to the appropriate relationship between general principles and express legislation.¹⁶⁸ The subsequent partial confirmation of *Mangold* in *Kücükdeveci* led to fears that the reach of EU law would be dramatically expanded. Instead of merely verifying compliance in cases where Member States implement EU law or derogate from it, Member States are subject to review and have to respect the EU 'public law order' even in cases where there is a mere overlap in the subject matter that is being regulat-

¹⁶² E. Spaventa, 'The Horizontal Application of Fundamental Rights as General Principles of Union Law' in A. Arnall and others (eds.), *A Constitutional Order of States? – Essays in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 212.

¹⁶³ See as mentioned *Pistre*, but also Case C-60/00 *Carpenter* [2002] ECR I-6279.

¹⁶⁴ See with further references M. Dougan, 'In Defence of *Mangold*?' in A. Arnall and others (eds.), *A Constitutional Order of States? – Essays in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 220 footnote 6.

¹⁶⁵ See on the disputed content and legal basis of the prohibition *Ibid.*, 221-222.

¹⁶⁶ Case C-144/04 *Mangold* [2005] ECR I-9981, para 77.

¹⁶⁷ In contrast to the *Mangold* case, in Case C-427/06 *Bartsch* [2008] ECR I-7245, para 17, no link with EU law was found because the relevant national measure did not implement the directive. In Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paras 24-26, the relevant rules fell in a field regulated by the now applicable directive and therefore EU law, including the general principle prohibiting age discrimination, was applicable.

¹⁶⁸ K. Lenaerts and J.A. Gutiérrez-Fons, 'The Role of General Principles in EU Law' in A. Arnall and others (eds.), *A Constitutional Order of States? – Essays in Honour of Alan Dashwood* (Oxford: Hart Publishing, 2011), 189-190, suggest that there are issues of institutional balance both horizontally between the EU judiciary and the EU legislator (the former overwriting legislation by expressing itself on general principles) and vertically between the EU and the Member States (the Court overwriting Treaty requirements such as unanimity decision-making by adjudication).

ed.¹⁶⁹ Put together with the potential horizontal effect of fundamental rights, EU law could become a wide-open door for individuals to invoke fundamental rights against other individuals.¹⁷⁰

Wide-spread horizontal effect of fundamental rights is an important constitutional development that not all constitutional orders of Member States have been willing to accept. In particular, horizontal effect is capable of triggering private liability claims, thereby transferring the risk from Member States to private individuals, while the latter are not necessarily capable of foreseeing their legal obligations.¹⁷¹

iii. Conclusion

The increasing relevance of horizontal effect has extended the scope of judicial review by the Court. Arguably, this feature strengthens the shift towards more values being represented as the basis of judicial review; at the same time the extension of horizontal effect for Treaty freedoms imposes in parallel the consideration of the special interest of economic integration on private parties. Unfortunately, the reasons given for this significant development remain somewhat hazy. In view of the CJEU's general jurisdiction, there are legitimate concerns about a revolutionary extension of its fundamental rights review as implicitly suggested by cases such as *Mangold*. The Court seems to follow the path taken by the German Federal Constitutional Court in *Lüth*.¹⁷² But it should then clarify, as in the German case, how the institutional balance and private autonomy can be safeguarded, i.e. whether review would somehow follow a model akin to special interest review. Less intrusive review could be justified, as in the German case. Perhaps, as one author has put it, at the end of the day the Court may be forced to accept that it is not able to 'correct all evils of society' through its judicial review.¹⁷³

E Conclusion

The present section assessed to what extent the CJEU uses varying degrees of scrutiny and discusses these differences in light of the procedural democracy doctrine. While a variety of different standards were effectively found, the reasoning in the case law remains scarce on the matter. There are some general tendencies which lead to the conclusion that the Court follows a model of special interest review. As a consequence, its review is more lenient in the case of measures by EU institutions than those by Member States, as the former are presumed to act based on the interest of economic integration, while the latter's action is perceived as a deviation from this interest. The increasing

¹⁶⁹ Dougan, 'Mangold', 239.

¹⁷⁰ Spaventa, 'Horizontal Application', 212.

¹⁷¹ *Ibid.*, 217.

¹⁷² See chapter 3 section III.B.iii.b.

¹⁷³ Spaventa, 'Horizontal Application', 218.

review in light of fundamental rights, Union citizenship as a non-economic Treaty freedom and the development of horizontal effect have broadened the scope of values represented and show that there is a paradigmatic shift towards equal representation review. Still, the debate on the justification of review under Article 34 TFEU bears witness to the fact that the predominant conceptualisation of review is based on a reading of the Treaty as a charter of trader's rights. The subsequent section fleshes out the claim that the interest of economic integration continues to be better protected than other interests. Beyond the variety of standards of review observed in this section, the Court also introduced a rule-exception relationship between Treaty freedoms and the exercise of regulatory autonomy by Member States for this purpose. This hierarchical setting of values contradicts even the setting of equal representation review if the Court's arguments for such a model of judicial review should be accepted.

IV The Principle of Proportionality in European Union Law

The present section assesses the 'typical' and most wide-spread use of proportionality analysis in EU law, i.e. in the case of review of Member States' measures against the benchmark of internal market freedoms. As has been set out in the previous sections, there are a number of standards of review that the Court applies to its 'principle of proportionality'. Centrally, this situation of review shows, however, to what extent the Court seems to pre-balance its situation of review, reaching the conclusion of a model of special interest representation. As was examined earlier, the Court adopts a very broad reading of fundamental freedoms, finding violations even in cases of non-discriminatory measures. This frequent finding of interference is coupled with a test that relies on very strict necessity with an important burden of proof on the Member State and with less frequent reliance on proportionality *stricto sensu*. It can be concluded that, despite some more recent developments, review by the Court strongly emphasizes the interest of economic integration, while representing only in a somewhat hierarchically lower manner other interests pursued by Member States exercising their regulatory autonomy, thereby adding an undue element of hierarchy to special interest review.

A The Necessity Approach of the Court Towards Review of Member States' Measures Derogating from the Market Freedoms

The Court applies a 'rule of reason' approach to the various Treaty freedoms, which also extends to the non-economic concept of citizenship.¹⁷⁴ Conceptually, every interference with a freedom granted by the Treaty can be justified by a public interest, be it enshrined in the Treaty in the form of

¹⁷⁴ See on this point Y. Borgmann-Prebil, 'The Rule of Reason in European Citizenship' (2008) 14 *European Law Journal* 328.

an express derogation or rather accepted by the Court in form of the case-law-based mandatory requirements.¹⁷⁵ The Court accepted a variety of more or less clearly defined public interests at the request of the Member State in question.¹⁷⁶ The stage of offering a justificatory reason thus did not prove too problematic for Member States trying to defend domestic regulation. If there is suspicion of protectionism, review will be intensified.¹⁷⁷ However, exclusionary reasons thinking is rather limited to cases where exclusively economic reasons of protecting domestic operators are the only pertinent explanation for a measure.¹⁷⁸

At the second stage, the Court insisted on the respect of the 'principle of proportionality'. The derogations as well as the mandatory requirements have been understood as 'exceptions' by the Court. They must therefore be interpreted narrowly and the burden of proof for the fulfilment of the proportionality requirement lies with the Member State.¹⁷⁹

This restrictive approach combined with the broad scope given to the market freedoms¹⁸⁰ produced a considerable amount of case law, most of which strikes down national regulatory measures for the benefit of further market integration. Generally, the balance seems tilted towards negative integration to the disadvantage of domestic regulatory autonomy.¹⁸¹

While the amount of case law renders any comprehensive statement futile, some trends in the case law can still be identified. The reference to the principle of proportionality in the Court's case law does not always take the same shape. Generally, however, the test employed predominantly emphasises a necessity test comparing the chosen measure with alternatives.¹⁸² In a fairly typical case, the Court was confronted with a national prohibition on packaging margarine in a package shaped similarly to that used for butter so that the consumer could not be misled into buying the wrong product. The CJEU accepted the objective of preventing the deception of consumers in principle, but then held that a mere labelling rule could achieve the objective just as well and struck the prohibition down as contrary to internal market rules.¹⁸³

Seemingly simple, the test sometimes proved problematic to put into practice. As an example, in cases concerning measures for consumer protection the

¹⁷⁵ There is an impressive amount of varying terminology that the Court has used over the years in the various areas of internal market law, but there are no perceivable conceptual differences. See for an enumeration of the varying terms C. Barnard, 'Derogations, Justifications and the Four Freedoms: Is State Interest Really Protected?' in C. Barnard and O. Odudu (eds.), *The Outer Limits of European Union Law* (Oxford: Hart Publishing, 2009), 275.

¹⁷⁶ See for a list *Ibid.*, 276-279.

¹⁷⁷ See section III.C.ii.

¹⁷⁸ See e.g. Case C-224/97 *Ciola* [1999] ECR I-2517, paras 16-17.

¹⁷⁹ Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219, paras 26-27.

¹⁸⁰ See section III.C.i.

¹⁸¹ Tridimas, *General Principles*, 193-194, points in comparison to the much more regulator-friendly approach of the Court in interpreting trade agreements in the external relations of the EU.

¹⁸² Adinolfi, 390.

¹⁸³ Case 261/81 *Rau v De Smedt* [1982] ECR 3961, para 17.

Court did not find it easy to clarify what kind of consumer Member States were allowed to protect. The Court sometimes admitted the protection of a rather easily deceivable consumer, while in other cases it departed from the notion of a fairly reasonable consumer who would attentively read labels on products to avoid deception.¹⁸⁴ Moreover, the CJEU often accepts the solution of labels as a less trade-restrictive alternative than other regulatory measures, without considering that labelling may actually not prove of similar efficiency upon closer inspection.¹⁸⁵

The CJEU tackled a majority of cases using the necessity test in this often rather blunt fashion. One may think that a necessity test leaves an ultimate margin of autonomy to the Member State that proportionality analysis *stricto sensu* would not. However, in the case of EU law, the narrow interpretation and burden of proof requirements combined with the restrictive use of necessity effectively erected a high threshold for Member States' measures. A recent study thus remarked that the increasing intensity of review by the CJEU led to an ever-increasing number of national measures failing the test of proportionality in comparison to 10 or 20 years ago.¹⁸⁶

B The Use of Proportionality *Stricto Sensu*

The internal market case law is far from uniform. The previous statement on the predominance of the necessity test must thus be qualified, since the Court also referred to proportionality *stricto sensu* in a number of cases.

Perhaps the most well known case is *Danish Bottles*. In this case, the CJEU assessed a Danish quantitative restriction on the products which importers could market in non-approved containers. The restriction had been introduced to facilitate the operation of a system for returning containers which had been approved for this purpose. The Court struck down the measure, since it found that even though the Danish system had a high positive impact on environmental protection, the trade-restrictive effect of the quantitative restriction was 'disproportionate to the objective pursued'.¹⁸⁷

¹⁸⁴ See e.g. for protection of rather vulnerable consumers Case 382/87 *Buet and others v Ministère public* [1989] ECR I235, para 13. By contrast, in Case C-470/93 *Verein gegen Unwesen in Handel und Gewerbe Köln v Mars* [1995] ECR I-1923, para 24, the Court established the standard of a 'reasonably circumspect consumer' who was unlikely to be deceived e.g. by misleading advertising on the packaging of a product.

¹⁸⁵ See for a such rather cursory acceptance of labelling despite concerns on similar efficiency Case 76/86 *Commission v Germany* [1989] ECR I021, para 16.

¹⁸⁶ Barnard, 'Derogations', 295. Furthermore, the CJEU's approach changes over time, as the increasing tendency to decide ever more cases itself rather than leaving part of the assessment to national courts shows; see Barnard, 'Derogations', 296.

¹⁸⁷ Case 302/86 *Commission v Denmark (Danish bottles)* [1988] ECR 4607, para 21.

In *Stoke-on-Trent*, the reference to ‘weighing the national interest in attaining [a public interest] against the Community interest in ensuring the free movement of goods’ was used more generally to determine whether the effect on trade of a measure – a prohibition against opening shops on Sundays – was sufficiently direct to entail a violation of Article 34 TFEU in the first place.¹⁸⁸

Typically, in classic internal market cases, proportionality *stricto sensu* thus only plays a subordinate role in a small number of cases, where a necessity assessment does not produce a satisfactory result for the Court. The reasoning in internal market cases was more extensive in cases involving fundamental rights.

In *Schmidberger*, the Court accepted that fundamental rights could act as a justification for obstacles to the free movement of goods. An authorized demonstration on a motorway caused traffic interference in the case. Based on case law of the European Court of Human Rights, the CJEU held that the freedom of expression and the freedom of assembly at stake were not absolute rights, but that a weighing exercise had to ensure that a ‘fair balance’ was struck between these interests and the interest of the economic Treaty freedom.¹⁸⁹ The CJEU went on to weigh the rather limited and predictable blocking of traffic against the legitimate goal pursued by the authorities when authorizing the demonstration and found an appropriate relationship of the factors at issue.¹⁹⁰ Without express wording, this comes close to proportionality *stricto sensu*. Yet, the Court then returned to a less restrictive means language and concluded that no less trade-restrictive alternative was at the disposal of the Austrian authorities.¹⁹¹

In *Omega*, the Court also decided itself on the compatibility of a measure causing a hindrance to the market justified by the concept of human dignity as enshrined in the German Constitution. Yet, it took a step back at the same time by clarifying that the interpretation of public order, under which the justification was brought, could accommodate differing constitutional conceptions among Member States and did not impose one common constitutional benchmark across the EU.¹⁹² In its rather terse analysis of proportionality *stricto sensu*, it held that the ‘level of protection’ adequate in Germany could only be reached by prohibiting the laser game at issue, while the measure targeted only the problematic product and no other games.¹⁹³ It seemed thus to undertake a rather necessity-based review.

In *Familiapress*¹⁹⁴ the CJEU decided to send the case back to the national court, providing only some general guidance. The measure at issue aimed at the

¹⁸⁸ Case C-169/91 *Council of the City of Stoke-on-Trent and Norwich City Council v B & Q Plc* [1992] ECR I-6635, para 15.

¹⁸⁹ *Schmidberger*, paras 79-81.

¹⁹⁰ *Ibid.*, paras 84 ff.

¹⁹¹ *Ibid.*, para 93.

¹⁹² *Omega*, paras 37-38.

¹⁹³ *Ibid.*, para 39.

¹⁹⁴ *Familiapress*, paras 27 and 29.

maintenance of press diversity, but not only caused an obstacle to the free movement of goods, but also had a negative impact on freedom of expression. In its guidance, the Court focused in particular on less restrictive alternatives rather than suggesting open-ended balancing.

In conclusion, proportionality *stricto sensu* has played a rather subordinate role as part of the test before the CJEU. It has seen some use in cases of conflicts with fundamental rights. In the latter cases, the Court has, however, sometimes also avoided undertaking comprehensive balancing by sending matters to the national court if assessments could be carried out better by the latter.

C Increasing Complexity under the ‘Principle of Proportionality’ and the Case of Extraterritorial Measures

Beyond the question of the use of proportionality *stricto sensu*, the test to review Member States’ measures has developed increasing complexity by adopting new features during the last decade. This can be understood in light of the Court’s role, which forces it to adjudicate constantly with an eye on the coherency of its solution in one case for EU law as applied across the EU. Rather than finding case-by-case solutions like the European Court of Human Rights, it must thus strive to provide generally applicable guidelines and indicate what general benchmarks will apply to future legislation of all Member States.

As one such guideline, precaution has played an increasingly important role in EU internal market law. After the General Court had expressly accepted the principle of precaution as a general principle of EU law,¹⁹⁵ it became an important tool for the CJEU to review national measures in the fields of public health and environmental protection. In *Commission v Netherlands*, the Court found that precaution could widen the margin of discretion for Member States to adopt measures for health protection purposes where scientific uncertainty still prevailed.¹⁹⁶ But protective measures had to be based on an assessment of the potential risk at issue, which again led to a proportionality-based review of the measures adopted. The Court found that the denial of marketing authorisation for products enriched with certain vitamins went beyond what was necessary, because the denial was only based on the lack of nutritional need of the population. This justification fell outside the scope of the risk assessment undertaken in that case.¹⁹⁷

Furthermore, the application of proportionality in internal market cases also changed priorities and introduced new topics. With the limits of mutual

¹⁹⁵ *Pfizer v Council*, para 115.

¹⁹⁶ Case C-41/02 *Commission v Netherlands* [2004] ECR I-11375, paras 42-43.

¹⁹⁷ *Ibid.*, paras 68-69. See closer on the case and its predecessor before the EFTA Court C. Baudenbacher, ‘The EFTA Court, the ECJ, and the Latter’s Advocates General – a Tale of Judicial Dialogue’ in A. Arnall, P. Eeckhout and T. Tridimas (eds.), *Continuity and Change in EU Law – Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008), 94-95.

recognition emerging in certain cases,¹⁹⁸ the Court began asking Member States to actively further mutual recognition. For this purpose, the Court requires Member States' authorities to recognize product requirements fulfilled in other Member States in an active manner and asks Member States to include recognition clauses in domestic product legislation.¹⁹⁹ Often, this has been termed the 'proceduralisation' of proportionality, as the regulatory process is the newly discovered focus of review.²⁰⁰ As a similar topic, in recent case law the CJEU also started to emphasize the topics of consistent and coherent operation of Member States' measures in its proportionality review.²⁰¹

These focal points introduced to somewhat streamline the analysis under the 'rule of reason' have not, however, given rise to strict forms of categorisation. Comparing the review of trade restrictions with extraterritorial effects undertaken by the CJEU with that of the Supreme Court under the Dormant Commerce Clause, the difference becomes clear. As discussed in the pertinent section, United States courts generally tend to classify in terms of whether they 'control conduct beyond the boundary of the state', in which case they are placed under strict scrutiny like discriminatory measures and in most cases struck down.²⁰² Contrary to this categorical approach, the CJEU integrates extraterritorial elements into the normal scrutiny under the 'rule of reason'.²⁰³

In a recent controversy, applicants attacked the inclusion of aircraft operators for all their flights arriving or departing from EU airports in the EU greenhouse gas emissions trading scheme. This inclusion resulted in costs for foreign operators, as they had to buy allowances. Discussing the claim of an unduly extraterritorial effect of EU law in the case, the Court upheld the relevant EU directive, as it found that there was a sufficient territorial connection. Only aircraft operators who had deliberately chosen to land or depart from EU airports fell under the allowance trading scheme.²⁰⁴ The EU could take such measures to fulfil the high level of protection sought for in the area of the fight against global warming, even if part of the activities that caused the undesired effects of pollution took place outside of its territory.²⁰⁵ Both the fact that a territorial link was given and that the effects of global warming and air pollution would be felt independently of territorial boundaries thus seem to play a role in the Court's reason-

¹⁹⁸ Gormley, 'Definition of MEEs', 203.

¹⁹⁹ See with examples Barnard, 'Derogations', 286-287.

²⁰⁰ *Ibid.*, 286.

²⁰¹ See on this point G. Mathisen, 'Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement' (2010) 47 *Common Market Law Review* 1021.

²⁰² See chapter 4 section IV.B.iii.

²⁰³ See generally on the rather permissive stance of EU law towards extraterritorial effects even in comparison to WTO law L. Ankersmit, J. Lawrence and G. Davies, 'Diverging EU and WTO Perspectives on Extraterritorial Process Regulation' (2012) *Minnesota Journal of International Law Online* 14.

²⁰⁴ Case C-366/10 *Air Transport Association of America a.o. v. Secretary of State for Energy and Climate Change* Judgment of 21 December 2011, not yet published, para 127.

²⁰⁵ *Ibid.*, paras 128-129.

ing, much more than a clear categorisation of whether a measure qualifies as ‘extraterritorial’ or not.

D Conclusion

Summing up, the test developed for the internal market is predominantly marked by an emphasis on the necessity prong, while a rather subordinate role is played by proportionality *stricto sensu*. The rigorous implementation of necessity with a substantive burden of proof imposed on the Member State trying to justify its measure leads to a strong emphasis on the interest of economic integration. At the same time, contrary to case law under the United States Dormant Commerce Clause, no strong categorisation with different degrees of scrutiny emerged. As the example of extraterritorial measures related to climate change shows, the CJEU seems much more willing to balance considerations as to whether extraterritorial effects can be justified.

The over-emphasis on the value of economic integration seems to become somewhat anachronistic in light of the changes of EU law that have been observed in the previous sections. To some extent, it is suggested that more frequent reliance on proportionality *stricto sensu* as well as a less rigorous test of necessity could help to balance out the scales in light of the increasing shift towards a model of equal representation review and more values being accepted as requiring representation that we observed in the previous section. Sending cases back to national courts could arguably also prove advantageous at this stage, with national courts being better equipped for proportionality *stricto sensu* because of their knowledge of the socio-economic and legal context of a Member State’s measure.

V Evaluation and Conclusion

The discussion of the CJEU’s setting of judicial review and its use of proportionality analysis conveys, at first glance, a setting of review focused on uniform interpretation of the Treaties and representation of economic integration as the central value. Throughout the course of history, the Court established itself as the central authority of interpretation and validity of EU law. Some described the Court as a constitutional court, but its predominant task remains the adjudication of a legal order whose priorities point towards economic integration as a central rationale. Institutional features also show that priority is given to uniformity of judicial decisions over adjudication by judges familiar with a domestic context or the expression of dissenting or separate opinions.

A closer look at the normative justification of judicial review reveals, by contrast, that the CJEU considers itself as actually being in a hybrid situation, manoeuvring between special interest review and equal representation review.

This has been shown with the various standards of review used by the Court to adjudicate in the increasingly complex settings of conflicts of values that EU law encompasses. The Court has to date paid deplorably little attention to justifying its review. Still, the case law indicates that review in light of fundamental rights, under the non-economic Treaty freedom of Union citizenship and the increasing horizontal effect given both to internal market freedoms and fundamental rights has led to a larger number of values being represented in EU law and to various adaptations of the standard of review in the use of the ‘principle of proportionality’.

Despite this increasing need to represent more values, the Court’s focus and discussion on the justification of review remains largely limited to the economic internal market freedoms. A rights-based reading of provisions such as Article 34 TFEU prevails, which leads the Court to adopt a ‘rule of reason’ to review Member States’ measures perceived as deviating from a Treaty freedom. This rule of reason plays out in a restrictive necessity test which imposes significant limits on Member States’ regulatory autonomy. By contrast, proportionality *stricto sensu* is mentioned, but not very often used by the Court.

The actual use of proportionality analysis thus reinforces the impression of a model of special interest review with an undue hierarchy in favour of the interest of economic integration. In principle, one could agree with the occasional use of proportionality *stricto sensu*. The use of necessity, however, unduly puts economic integration at a higher hierarchical position than other values pursued by Member States under their regulatory autonomy. Generally, the shifting paradigm towards a model of equal representation review and towards representation of more values should lead to more balancing of values on an equal footing, with reliance on proportionality *stricto sensu*. In particular cooperation with national courts which are familiar with domestic socio-economic and legal contexts could here be fruitful for the Court.

I Introduction

With the discussion of WTO law, we move to a clearer case of a model of special interest review than under judicial review in EU law. Far more intergovernmental in its setting and based on a limited number of legal norms, WTO law focuses strongly on various issues to promote the interest of trade through various means. We thus find no comparable shift of emphasis as in EU law, where fundamental rights, Union citizenship and the horizontal effect of internal market freedoms and fundamental rights has extended proportionality analysis and judicial review to individual interests and the private sphere.

In WTO law, the broader context shows that despite a historical development of ‘judicialisation’, one can hardly speak of a truly constitutional system when discussing dispute settlement. There is a clear focus on the topics of the WTO agreements, a generally unbalanced institutional system and adjudicative instances that reflect expertise in trade law and economics rather than representativeness of the diverse WTO membership.

Although a rights-based reading of the General Agreement on Tariffs and Trade (GATT) as the central WTO covered agreement has at some points been suggested, such a justification for more intrusive judicial review has not been able to establish itself. Examining the justification of judicial review, by contrast, we find a rather narrow, text-based interpretation which has led in practice to a somewhat fragmented case law. To some extent, the categorisation of the legal analysis into strictly separated steps is reminiscent of the categorisation in United States constitutional law, but it is based on different reasons, here the overemphasis of literal interpretation to counter fears of judicial activism from an international adjudicative system. Our findings of a model of special interest review being largely confirmed, in our view full-scale proportionality analysis should only play a role in rare cases.

Practice indeed shows predominant reliance on necessity tests, but also some rather unfortunate features: There is a marked fear of proportionality *stricto sensu* and hardly any systematic discussion of the standard of review in the light of the procedural democracy doctrine, which has led to a very blurry actual legal test, the so-called ‘weighing and balancing’ solution developed under Article XX. Other agreements offer a comparable picture.

II The Broader Context of Judicial Review in WTO Law

Historically, there has been an undeniable development towards ‘judicialization’ of the WTO dispute settlement system. However, the adjudicators are not truly embedded in the national context, and comparisons between the WTO Appellate Body and a domestic constitutional court are not persuasive in the light of the former’s specific characteristics as a specialized trade-court of limited jurisdiction.

A A Historical Overview of the Development of the WTO Dispute Settlement System

The General Agreement on Trade and Tariffs of 1947 was the predecessor of the International Trade Organisation's comprehensive regime, which ultimately never entered into force because of the failure of the negotiation process.¹ The GATT as a torso contained only few provisions on dispute settlement. In this light, it was initially hard to predict how successful trade dispute settlements would be in the long run.² Article XXIII provided that in a case where a party thought that there was nullification or impairment of benefits arising out of the GATT due to measures taken by another party, there should first be an exchange of written proposals for resolution, followed by a possibility to refer the matter to the CONTRACTING PARTIES. This provision formed the basis of dispute settlement, which initially relied only on negotiations before establishing special 'intersessional committees' and later 'working parties'.

However, from the very beginning there was controversy on the overall purpose of the dispute settlement system: Should it provide relief for concrete dispute cases or rather promote long-term stability and predictability of the interpretation of the legal texts?³ In the mid-1950s, panels, consisting of 3 or 5 experts, were used as a step towards a more and more judicial procedure.⁴ This procedure proved to be a success and led to a process of legalisation of dispute settlement with a shift away from power politics towards a more central role for the law.⁵ The sparse wording of the provision thus served as a legal basis for the resolution of more than 140 trade disputes: Panels established *ad hoc* wrote reports that subsequently had to be adopted by the Council of Representatives of the GATT 1947 CONTRACTING PARTIES in order to become binding.⁶

Yet, there were also unsatisfactory aspects which led the parties to the GATT to consider reform. As a starting point, the practice was codified in an understanding during the Tokyo Round negotiations.⁷ Most matters, however, required more substantial reform. In particular, the positive consensus rule, an informal practice, required that all decisions taken by the CONTRACTING

¹ See on the International Trade Organisation's failure J. Odell and B. Eichengreen, 'The United States, the ITO, and the WTO: Exit Options, Agent Slack, and Presidential Leadership' in A. Krueger (ed.) *The WTO as an International Organization* (Chicago: University of Chicago Press, 1996), 184ff.

² J. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (Cambridge: Cambridge University Press, 2006), 137.

³ *Ibid.*, 138.

⁴ See R.E. Hudec, *The GATT Legal System and World Trade Diplomacy* (New York: Praeger, 1975), 66 ff.

⁵ See for a broader picture S. Zleptnig, 'The Standard of Review in WTO Law – An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority' (2002) *European Business Law Review* 427, 440.

⁶ R.E. Hudec, *Enforcing International Trade Law – The Evolution of the Modern GATT Legal System* (Salem N.H.: Butterworth Legal Publishers, 1993), 287.

⁷ Jackson, 140-141.

PARTIES were taken by unanimity. This rule also applied to the decision to establish a panel and the adoption of the reports of panels and led to the problem that the losing party could veto both decisions.

With the success of the Uruguay Round of negotiations, the new Dispute Settlement Understanding (DSU) entered into force and provided more comprehensive rules on a number of aspects. The academic debate also intensified and focused in particular on various features of the dispute settlement system which proved hard to put into traditional categories. Central changes included the introduction of an appellate instance, the Appellate Body, which is in charge of review of legal issues in panel reports,⁸ and a negative consensus rule according to which panel reports would henceforth be adopted unless there was consensus against such adoption.⁹ Also, the establishment of panels could no longer be blocked by one WTO member.¹⁰ The Appellate Body was created as a permanent instance of review of the panel decisions. Unlike panels, the Appellate Body consists of seven permanent members who additionally should possess expertise in law and international trade and who, ideally, are elected in order to broadly represent WTO membership.¹¹ Of course, representativeness remains cursory through this method, and expertise in trade law and economics is the more important qualification of Appellate Body members. As a consequence of these changes, scholars have observed a strengthened paradigmatic change away from rather diplomatically functioning dispute settlement towards a compulsory, more judicial mode of operation.¹²

In the light of historic development, the impression could arise that the WTO dispute settlement system is on its way to becoming somewhat of a constitutional adjudicative system for the global trading regime. Yet, some institutional characteristics make the case of constitutional adjudication doubtful for the WTO and also explain why adjudicators appear to feel poorly legitimized to engage in intrusive review using proportionality *stricto sensu* or balancing.

B The WTO Institutional System and Constitutional Adjudication

The creation of the WTO and its *de facto* compulsory third-party adjudication system has provoked a debate among scholars on the constitutional features of the new legal regime of international trade. Constitutionalist theories of WTO law point in the direction that the WTO panels and the Appellate Body can be understood as similar to a domestic constitutional judicial system.

⁸ Art. 17 DSU.

⁹ Article 16.4 DSU.

¹⁰ Art. 6.1 DSU.

¹¹ Article 17.3 DSU.

¹² See J.H.H. Weiler, 'The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement', 35 (2001) 191 *Journal of World Trade* 202.

Such constitutional perspectives have e.g. been developed by a stream of scholars pursuing a project of ‘institutional managerialism’.¹³ Such accounts focus strongly on the institutions of the WTO and base the constitutional nature of the legal regime on this specific institutional system. Approaches of judicial norm-generation take matters further and suggest that adjudication in regimes such as the WTO can be ‘constitutive as well as reflective’ of constitutional law.¹⁴ The predominant adjudicative power of the WTO should thus be read in the light of insights from constitutional law.¹⁵ Could one, thus, draw a parallel between the quasi-judicial system of the WTO and a constitutional court such as in Germany or the Supreme Court of the United States?

Several arguments render such comparisons doubtful. As a starting point, the argument has often been repeated that there is hardly a robust inter-institutional balance between the institutions of the WTO.¹⁶ The legislative side is underdeveloped, and as a consequence judicial law-making by the dispute settlement system is a virtual *sine qua non* for further development of the WTO rules.¹⁷ Yet the difficulty of ‘correcting’ adjudicative decisions by later legislative activity can also play out as an argument for judicial restraint. To argue in favour of an additional power shift towards the WTO judiciary, as the use of proportionality analysis would entail, requires convincing arguments.

Even beyond considerations of institutional relations in the WTO, the scope and function of judicial review as it is undertaken by the panels and the Appellate Body upon closer examination proves unclear, to say the least. There are aspects that support the argument that judicial review in the WTO should be understood as a limited and functionally oriented exercise not to be easily equated with constitutional review. These elements support the subsequent assessment of pre-balancing, which will show a rather clear picture of a model close to special interest review.

¹³ See e.g. J. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998).

¹⁴ D.Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford: Oxford University Press, 2005), 177.

¹⁵ See also D.Z. Cass, ‘The ‘Constitutionalization’ of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade’ (2001) 12 *European Journal of International Law* 39.

¹⁶ Cass, *Constitutionalization*, 109, shows explicitly that there is no principle of ‘institutional balance’, as the Appellate Body recognized in the case law.

¹⁷ P. Eeckhout, ‘The Scales of Trade – Reflections on the Growth and Functions of the WTO Adjudicative Branch’ (2010) 13 *Journal of International Economic Law* 3, 5. R. Howse, ‘Moving the WTO Forward – One Case at a Time’ (2009) 42 *Cornell International Law Journal* 223, lists instances where political deadlock resulted in progress of WTO law achieved through its adjudicative institutions.

C The Rationale of the WTO Dispute Settlement System

To assess the rationale of WTO dispute settlement, a narrow view would start with the text of the Dispute Settlement Understanding (DSU). However, in order to gain a more comprehensive picture, we should also identify more generally the goals of the DSU discussed in academic doctrine. Furthermore, a look at the consequences of a finding of breach reveals a somewhat particular mechanism in WTO law which enriches our perspective of the descriptive elements of judicial review.

i. The text of the DSU and doctrinal discussion on the policy goals of the DSU

Art. 3.2 DSU states that the system is a ‘central element in providing security and predictability to the multilateral trading system’. The panel in *United States – Section 301* has similarly emphasized this point, stating that the DSU is ‘one of the most important instruments to protect the security and predictability of the multilateral trading system’.¹⁸ The main aim of the system of dispute settlement for panels should thus be to clarify the existing provisions of the WTO agreements.¹⁹ At the same time, Art. 3.2 DSU makes clear that reports by panels and the Appellate Body must not ‘add to or diminish the rights and obligations provided in the covered agreements’. Consequently, despite their powerful institutional position, the dispute settlement organs are required to exercise judicial restraint. As the Appellate Body has stated, the DSU is not ‘meant to encourage either panels or the Appellate Body to “make law” by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute’.²⁰

Despite the fact that with the lack of a strong legislative component, the development of WTO law has largely rested on the shoulders of panels and the Appellate Body, the underlying mandate is actually rather restricted.²¹ This has also proven true in the views on what law should apply in WTO dispute settlement: There seems to be reluctance to include norms of international law other than the WTO covered agreements in the adjudicative process.²²

Even if the doctrine is taken into account beyond the mere text of the DSU, the picture does not change substantially. It has been suggested more broadly

¹⁸ *United States – Sections 301-310 of the Trade Act 1974* WT/DS152/R, 27 January 2000, para 7.75.

¹⁹ Y. Guohua, B. Mercurio and L. Yongjie, *WTO Dispute Settlement Understanding: a Detailed Interpretation* (The Hague: Kluwer Law International, 2005), 17.

²⁰ *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* AB-1997-1, WT/DS33/AB/R, 25 April 1997, p. 19.

²¹ See also P.-T. Stoll, ‘Article 3 DSU’ in R. Wolfrum, P.-T. Stoll and K. Kaiser (eds.), *WTO – Institutions and Dispute Settlement* (Leiden: Martinus Nijhoff, 2006), 287 para 13.

²² See for a comprehensive overview of the problem and the relevant case law P. Delimatsis, ‘The Fragmentation of International Trade Law’ (2011) 45 *Journal of World Trade* 87.

that the dispute settlement pursues a number of policy goals which may also enter into conflict. The DSU should thus achieve various objectives such as to restrict international tensions, provide prompt settlement of disputes,²³ provide precedents for stability and predictability, resolve ambiguities in the treaty text, promote compliance with the treaty, re-establish the balance of benefits among WTO members, give access to a fair court proceeding including a reasoned final decision and allocate powers between various levels of the ‘international landscape’.²⁴ Such broader views on the objectives of the dispute settlement system demonstrate that the focus lies on the character of the WTO covered agreements as a contract of substantially equal sovereign states. Despite the sophistication of the trade regime, it remains based on an old-fashioned inter-State treaty.

ii. The consequences of a breach of WTO law

The consequences of a finding of a breach are peculiar in WTO dispute settlement. A panel does not declare the domestic law or regulation invalid or influences its legal force in any other way, but simply authorizes trade retaliation, the ‘suspension of concessions’. The rather scarce provisions in the DSU have led to intense debate on the setting and goals of trade retaliation: A variety of reasons could potentially underlie the system as it is drafted. For example, one could understand the DSU rules as providing for a mere system of compensation, where the main aim is either to rebalance trade between trading partners or to compensate those economic operators in a state that have suffered under a violation of WTO law for their damages. On the other hand, trade retaliation could also serve a more sanctioning purpose focusing on the breaching party; in this setting, retaliation would predominantly serve either to induce compliance or even to punish the breaching party.²⁵ All these matters influence how the leeway ought to be used in designing concrete retaliation in terms of the benchmarks of calculation, the targeted sectors, the timing and resort to cross-retaliation.²⁶ Article 22.4 DSU sets out that the level of suspension of concessions ‘shall be equivalent to the level of the nullification or impairment’. Based on this, part of the doctrine has suggested that the DSU could actually be based on the idea of ‘efficient breach’: the actual goal is not so much compliance with WTO obligations, but to ensure that those hurt by WTO violations are compensated, while a party could buy itself off even in the case of persistent

²³ As required by Art. 3.3 DSU.

²⁴ Jackson, *Changing Fundamentals*, 147-150.

²⁵ See for a concise overview J. Pauwelyn, ‘The Calculation and Design of Trade Retaliation in Context: What Is the Goal of Suspending WTO Obligations?’ in C.B. Bown and J. Pauwelyn (eds.), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge: Cambridge University Press, 2010), 38.

²⁶ *Ibid.*, 39-40.

violations of WTO law.²⁷ Such an overall rationale of WTO law could be read as changing the role of WTO adjudication in itself: Rather than adjudicating in a quasi-constitutional setting in regulatory disputes, panels and the Appellate Body would then rather act as organs verifying contractual breaches and determining the sum to be paid in terms of compensation.

The actual legal texts, however, seem to contradict the ‘efficient breach’ hypothesis. Article 22.1 DSU emphasizes the temporary character of compensation and the suspension of concessions as tools of retaliation. Article 22.8 DSU states that suspension of concessions is temporary until the violating measure has been removed or a mutually satisfactory solution has been found. Also, the case law and the arguments of parties seem to predominantly depart from a reading of the DSU as having the central purpose of inducing compliance, not allowing for efficient breach.²⁸ The truth may lie somewhere between the extremes, but inducing compliance is arguably one central objective of the WTO dispute settlement system.²⁹

Summing up, the ‘efficient breach’ hypothesis does not prove highly convincing. Still, there remains a remarkably complex set of policy goals pursued by the WTO dispute settlement system as it is set up. It seems inconclusive in this light to simply equate WTO dispute settlement with constitutional adjudication and the corresponding need to represent a broad set of values. Consequently, our overall impression of a specialized system focused on the appropriate representation of trade interests is strengthened.

D Conclusion

What becomes clear from this discussion of descriptive elements is that the WTO dispute settlement system is highly centred on trade and the international trade regime. It may thus have a broad mandate looking at the WTO covered agreements, but at the same time its mandate is a functionally very narrow one. Other topics such as the protection of other public values overlap with trade and have led to substantial debate on how so-called ‘trade

²⁷ See e.g. W.F. Schwartz and A.O. Sykes, ‘The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization’ (2002) 32 *Journal of Legal Studies* 179; A.O. Sykes, ‘Optimal Sanctions in the WTO: The Case for Decoupling (and the Uneasy Case for the *Status Quo*)’ in C.B. Bown and J. Pauwelyn (eds.), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement* (Cambridge: Cambridge University Press, 2010), 346. See for contrary views J. Jackson, ‘International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to ‘Buy Out’?’ (2004) 98 *American Journal of International Law* 109.

²⁸ See with further references J. Pauwelyn, *Optimal protection of international law : navigating between European absolutism and American voluntarism* (Cambridge/New York: Cambridge University Press, 2008), 140-141. See for some controversial statements by WTO arbitrators Pauwelyn, ‘Goal of Suspending WTO Obligations’, 54-55.

²⁹ Pauwelyn, ‘Goal of Suspending WTO Obligations’, 61.

and...’ issues should ideally be resolved.³⁰ But in these issues the WTO panels and Appellate Body come up against their own limits and limitations.

The problem caused by such limited rationale of the dispute settlement system is the incapacity to truly integrate the abovementioned non-trade concerns. This is coupled with the WTO’s legislative incapacity, which so far has proved unable to arrive at ‘positive integration’; i.e. legislative decisions which could reconcile competing values with trade. Consequently, the WTO panels and the Appellate Body operate in an environment where trade standards are predominantly applied.³¹ An implicit structural bias results from this feature, which renders it even more difficult to perceive the WTO dispute settlement system as an equivalent of constitutional review.³² This bias does not necessarily operate to the overall advantage of trade and to the disadvantage of other interests, as the example of the development of lenient review under the ‘new approach’ in the subsequent section will show. However, the need perceived by adjudicators to engage in proportionality *stricto sensu* is arguably weakened if the goal is no full argumentative representation of all interests.

The function of international adjudicators in panels and the Appellate Body is thus rather that of representatives in a specialized judiciary than that of embedded adjudicators in a quasi-constitutional setting where they are called to rebalance competing values at face level. With this impression in mind, the next section examines possible pre-balancing solutions and the justification of review through panels and the Appellate Body in light of the procedural democracy doctrine, as far as it can be applied to the obligations in the WTO covered agreements.

III The Justification of Judicial Review in WTO Law

The debate on the justification of judicial review and the resulting choice of a standard of review are a thorny issue in WTO law. As the present section shows, the debate on the justification of judicial review is thin – certainly

³⁰ For one of the original contributions to the debate, see J. Dunoff, ‘The Death of the Trade Regime’ (1999) 10 *European Journal of International Law* 733.

³¹ T. Kleinlein, ‘Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law’ (2011) 12 *German Law Journal* 1141, 1151. See also A. Paulus, ‘International Adjudication’ in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (New York: Oxford University Press, 2010), 215, who claims that tribunals must go beyond the ‘narrow confines of their own system’ to appropriately address conflicts with other values.

³² See on structural bias M. Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument (Reissue with a new epilogue)* (Cambridge: Cambridge University Press, 2005), 600 ff. See also M. Koskeniemi, ‘The Politics of International Law – 20 Years Later’ (2009) 20 *European Journal of International Law* 7, 9. Sceptical on structural bias in WTO law D.H. Regan, ‘International Adjudication: A Response to Paulus – Courts, Custom, Treaties, Regimes, and the WTO’ in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (New York: Oxford University Press, 2010), 238.

because of the predominance of textual interpretation. We will first assess the relevant facts on the standard of review in the text of the agreements and the case law, before we then engage at a more conceptual level: Under the GATT, the question arises whether review should be perceived as justified as a form of virtual representation based on the procedural democracy doctrine. Examining the case law on national treatment as a useful example for the understanding of GATT by the WTO adjudicative bodies and the doctrine, we find a rather limited understanding of the GATT in practice. This understanding appears convincing in our eyes and provides a model of special interest review as a result of pre-balancing; but as is subsequently shown the WTO judiciary's take on pre-balancing has led to exaggerated fear of proportionality *stricto sensu* and blurred case law in the attempt to avoid the latter at all costs. Under the TRIPS Agreement, due to its different rationale, the question must be phrased differently, i.e. whether intellectual property rights should justify intense judicial review because of their character as human rights.

A Introductory Remarks on The Standard of Review in WTO Dispute Settlement

The debate on the standard of review is another example of the incomplete contract setting in which judicial review is embedded in WTO law. Historically, the problem of the appropriate measure between intrusive review and deference for panels only started to raise attention with the increasing judicial character of the dispute settlement system. Before the creation of the WTO only few panel reports therefore referred to the concept; and those that did did so without developing a clear content. During the Uruguay Round of negotiations, the topic was discussed intensely for the first time, but different views prevented a clear codification. Some states favoured a highly deferent standard, while others feared for the overall consistency of WTO law if an excessively wide margin of appreciation were granted to WTO members by panels and the Appellate Body.³³ As a consequence, there is no explicit provision on the matter.³⁴

The case law has struggled with the issue of the standard of review for facts and decisions based upon facts.³⁵ Article 11 DSU has been used as a fall-back provision, because this provision on the function of panels states that panels should make an 'objective assessment of the matter'. In particular in its *EC – Hormones* report the Appellate Body stated that neither *de novo* review nor total deference to national authorities' determinations were required, but something

³³ Zleptnig, 429-430.

³⁴ With the exception of Art. 17.6 of the Antidumping Agreement which provides for a highly deferent standard of review.

³⁵ Matters proved easier for the standard of review of the law. As a 2003 study has remarked, panels and the Appellate Body consistently engaged in full *de novo* review, i.e. following the principle of *iura novit curia*, see M. Oesch, *Standards of Review in WTO Dispute Resolution* (Oxford: Oxford University Press, 2003), 237.

in between.³⁶ In assessing factual determinations by national authorities, panels are thus called according to the case law to verify whether all relevant evidence has been examined and where there is an adequate explanation of how the evidence supports the determinations made.³⁷

The Appellate Body continued in the *Hormones* case that the standard of review must reflect the balance between those jurisdictional competences that WTO members conceded and those they decided to retain for themselves.³⁸ The language reveals a very contractual vision of the WTO as an intergovernmental organisation, which also impacts on the judicial system established in its framework. Case law on the institutional balance within the WTO has also refrained from truly addressing the issue.³⁹

In conclusion, there is no thorough deference by panels and the Appellate Body. Yet the background of the chosen standard of review is hardly openly discussed, despite the vagueness of the underlying legal provisions of the DSU. Panels and the Appellate Body have not engaged in a more in-depth discussion of the institutional balance and competences and their distribution between the WTO's judicial branch and the members. Neither does there seem to be much discussion, on the whole, on elements of procedural democracy as the underlying justification for judicial review. This silence is most likely to be explained by the incomplete institutional system of the WTO, which cannot easily be explained in the same terms as the classic triangle of legislative, executive and judicial powers. Rather, it continues to correspond, to a substantial extent, to a contractual and intergovernmental setting.⁴⁰

B A Rights-Based Conception of the GATT as the Justification for Judicial Review

As discussed, the case law also does not engage in detail in discussing the strength of its justification of judicial review based on 'rights' that it should protect. Subsequently, we show that there are two competing perceptions of how the GATT – which is at the centre of the debate as the 'oldest' agreement – can be read: either as enshrining traders' rights or rather as a more limited set of obligations for WTO members. While we do not find the first perspective wholly convincing, there is another level at which the justification of judicial review also seems to play a role: In the case law under Article XX, which is examined in much more detail in the following section.

³⁶ *EC Measures Concerning Meat and Meat Products (Hormones)* AB-1997-4, WT/DS26/AB/R and WT/DS48/AB/R, 16 January 1998, para 117.

³⁷ Guohua, Mercurio and Yongjie, 126-127.

³⁸ *EC – Hormones (Appellate Body report)*, para 115.

³⁹ See on such case law P. Mavroidis, 'Article 11 DSU' in R. Wolfrum, P.-T. Stoll and K. Kaiser (eds.), *WTO – Institutions and Dispute Settlement* (Leiden: Martinus Nijhoff, 2006), 398 paras 27 ff.

⁴⁰ Oesch, 241.

i. The controversy on a right to trade under the GATT

Most prominently, Petersmann has suggested reading trade law in the light of a right to trade given to individuals.⁴¹ In his later writings, he combined this right to trade with human rights⁴² without necessarily clarifying the consequences or compatibility of this reading with the intergovernmental structure of the WTO and its dispute settlement system. The vision is strongly influenced by economic views on the welfare gains from trade liberalisation⁴³ and links up well with the market-access-based view of the GATT as an instrument of strong liberalisation.

As in the case of the Dormant Commerce Clause in United States constitutional law⁴⁴ as well as in European Union internal market law,⁴⁵ Regan opposes such rights-based views as far as they lead to intrusive judicial review with the use of balancing or proportionality analysis. In his view, a reading of the GATT as defending a right to trade or even an abstract value of trade is misleading, because it suggests as a consequence an act of balancing trade against other public interests, while the overall project according to Regan is never about competing interests in the first place. Instead, the aim in economic terms is to reach efficient outcomes, which are best achieved through local adjustments of the market mechanism by public regulation. These adjustments must be checked as to whether they improve the overall efficiency of exchanges.⁴⁶ Instead of ‘virtual representation’ through judicial review and proportionality analysis, a more limited reading of the GATT should thus be adopted.

Again, Regan’s criticism is convincing on the whole, although the full exclusion of proportionality *stricto sensu* seems unwarranted for limited cases where a misrepresentation of values based on a true failure of the democratic process can indeed be shown before a panel.

As the subsequent discussion of national treatment as the cardinal obligation under the GATT demonstrates, the case law also tends to support a more limited reading of the agreement. Recent case law does not take up a rights-based reading of GATT either, even though good opportunities have presented themselves. In the recent *China – Publications* case, the Chinese Protocol of Accession

⁴¹ See generally E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law: International and Domestic Foreign Trade Law and Foreign Trade Policy in the United States, the European Community and Switzerland* (Fribourg: Fribourg University Press, 1991).

⁴² E.-U. Petersmann, ‘Human Rights and International Economic Law in the Twenty First Century’ (2001) 4 *Journal of International Economic Law* 3.

⁴³ Cass, *Constitutionalization*, 167 ff.

⁴⁴ See chapter 4 section III.B.ii.

⁴⁵ See chapter 6 section III.C.iii.

⁴⁶ D.H. Regan, ‘Judicial Review of Member-State Regulation of Trade within a Federal or Quasi-Federal System: Protectionism and Balancing, “Da Capo”’ (2001) 99 *Michigan Law Review* 1853, 1862-1863. See for the WTO context D.H. Regan, ‘The meaning of ‘necessary’ in GATT Article XX and GATS Article XIV: the myth of cost-benefit balancing’ (2007) 6 *World Trade Review* 347.

contains the phrase ‘China’s right to regulate trade’. The Appellate Body held that it saw ‘the “right to regulate”, in the abstract, as an inherent power enjoyed by a Member’s government’.⁴⁷ Discussing the limits of this right to regulate, the Appellate Body then opposed, however, not a right to trade, but stated that the WTO Agreements ‘operate to [...] discipline the exercise of each Member’s inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder’.⁴⁸ Therefore, no balancing of competing rights seemed to emerge in the Appellate Body’s view. In interpreting the preamble of the TBT Agreement, the Appellate Body identified a ‘balance’ between a ‘recognition of Members’ right to regulate’ and a ‘desire to avoid creating unnecessary obstacles to international trade’ similar to the balance established between the national treatment obligation and the general exceptions of Article XX under GATT 1994.⁴⁹ Again, a ‘right’ is balanced against a ‘desire’, and not another right.

ii. Adapting the standard of review based on the values at stake

It is in the light of this refusal to grant a rights-structure to GATT that we can understand the silence on the standard of review. However, we can observe some adaptation of the standard of review based on the values at issue, as the procedural democracy doctrine would suggest. Unfortunately, this ‘new approach’ is not a very transparent and predictable judicial creation.

This ‘new approach’ comes down to a particular reading of case law on Article XX’s ‘necessary’ condition noted by scholars. The ‘weighing and balancing’ test which is discussed subsequently in more detail uses the relative importance of values as one factor; but it does so here not so much to weigh competing values, but rather to adapt the standard of scrutiny.⁵⁰ The more important the value pursued by a WTO member’s regulation, the more deferent the scrutiny of the WTO judiciary would thus be, both concerning the first stage of weighing and balancing and the second stage of comparing a measure to alternatives. This helps to explain the light-handed approach in particular in cases of measures pursuing goals of environmental protection. As the classic example, the decision in *Brazil – Tyres* has thus been welcomed as a more comprehensive, regulator-friendly assessment of measures of environmental policy which aims

⁴⁷ *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audio-visual Entertainment Products* AB-2009-3, WT/DS363/AB/R, 21 December 2009, para 222.

⁴⁸ *Ibid.*, para 222.

⁴⁹ *United States – Measures Affecting the Production and Sale of Clove Cigarettes* AB-2012-1, WT/DS406/AB/R, 24 April 2012, para 96.

⁵⁰ See in particular E. Vranes, *Trade and the Environment – Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford: Oxford University Press, 2009), 274-275. See also D.A. Osiro, ‘GATT/WTO Necessity Analysis: Evolutionary Interpretation and Its Impact on the Autonomy of Domestic Regulation’ (2002) 29 *Legal Issues of Economic Integration* 123, 135.

to identify problematic protectionist features, but maintains a fairly deferent standard of review.⁵¹

iii Conclusion

Summing up, panels and the Appellate Body have not given a rights reading to GATT. They have remained deplorably silent on the issue of justification of judicial review. Under the ‘new approach’, panels and the Appellate Body adapt the intensity of scrutiny to the values at issue – comparable to some extent to the margin of appreciation doctrine under the European Convention on Human Rights and Fundamental Freedoms. However, judicial reasoning on this tendency remains scarce. Subsequently, we explore in more detail what alternative reading to the right-to-trade approach has effectively been taken by panels and the Appellate Body. A disconcerting tendency to put literal interpretation over conceptual sequencing of legal test becomes visible. Literalism can somewhat be explained by the contractual setting of WTO dispute settlement we have observed, but is nonetheless incapable of justifying the resulting fragmented approach.

C National Treatment under the GATT

The national treatment obligation is the central pillar of the GATT. Its concrete interpretation determines how the GATT operates, and the scope of its obligations imposed on WTO members. Article III GATT has been subject to a very literal interpretation, which does not adopt a rights-based reading, but also does not accord sufficient attention to a logical sequence of legal tests for trade-restrictive measures which would appropriately accommodate all competing interests. This point is illustrated by the relationship with Article XX, which is examined in detail in the subsequent sections. The rigidity of the case law simultaneously seems to exclude any closer reflection on an appropriate justification of judicial review and on an appropriate use of proportionality analysis.

Read in its context, Article III GATT is in a rule-exception relationship with Article XX GATT, which sets out the general exceptions. The more rigid a reading of Article III GATT is adopted, the more regulatory policies of WTO members with an impact on trade and competitive conditions must be justified under Article XX GATT. By contrast, adopting a broader test under Article III GATT taking into account cases of regulatory reasons for apparent discrimination reduces the pressure on Article XX. This relationship has received most of the attention of panels and the Appellate Body, while the literal approach to

⁵¹ See e.g. G. Van Calster, ‘Faites Vos Jeux – Regulatory Autonomy and the World Trade Organization after Brazil – Tyres’ (2008) 20 *Journal of Environmental Law* 121, 130. As a positive development, the less intrusive scrutiny proposed by the ‘new approach’ under the ‘necessary’ requirement of Article XX has also considerably reduced the problem of hierarchy between review under Article XX’s sub-paragraphs featuring ‘necessary’ and Article XX (g) featuring ‘relating to’, see Vranes, 282.

interpretation has prevented much thinking as to whether legal tests such as those under Article III GATT should be applied with a view to appropriately representing competing values based on the justification of judicial review.

i. The rationale of GATT

GATT was concluded as a trade agreement. To explain the different interpretations of GATT, one must begin with the fundamental question: Why do states conclude trade agreements in the first place? The two main opposing views of GATT are best understood by considering the different economic theories underlying the discussion on this topic.

Some suggest thus that trade agreements are concluded by states to avoid a prisoner's dilemma if several large states begin manipulating the terms of trade, e.g. by adopting a revenue-gaining strategy of imposing optimal tariffs.⁵² Others reject the terms of trade story and argue that the avoidance of protectionism and 'irrational' regulation is the purpose of trade agreements.⁵³ Some scholars argue that the main interest for governments may be to gain support from domestic interest groups by trade agreements which are advantageous for the these groups.⁵⁴ By contrast, other evidence seems to support the views that trade agreements are concluded to strengthen governments' resistance against domestic pressure groups.⁵⁵ A last stream of scholars argues that trade reduces conflict and that it is therefore foreign policy considerations that motivate the conclusion of trade agreements.⁵⁶ The most convincing explanation may in fact be a combination of several or all of the theories mentioned above rather than one predominant one.⁵⁷

Against this background of competing policy considerations that gave rise to the GATT, it is understandable that there has been some difficulty in defin-

⁵² See e.g. K. Bagwell and R.W. Staiger, *The Economics of the World Trading System* (Cambridge: The MIT Press, 2002), 13.

⁵³ D.H. Regan, 'What Are Trade Agreements For? – Two Conflicting Stories Told by Economists, With a Lesson for Lawyers' (2006) 9 *Journal of International Economic Law* 951, 963 and 968.

⁵⁴ G.M. Grossman and E. Helpman, 'Protection for Sale' (1994) 84 *The American Economic Review* 833, 834-835.

⁵⁵ G. Maggi and A. Rodríguez-Clare, 'A Political-Economy Theory of Trade Agreements' (2007) 97 *The American Economic Review* 1374, 1377.

⁵⁶ S.W. Polachek, 'Conflict and Trade' (1980) 24 *Journal of Conflict Resolution* 55, 56. Newer research, however, casts doubt on this explanation, as there seems to be no obvious connection between trade and conflict, see R. Glick and A.M. Taylor, 'Collateral Damage: Trade Disruption and the Economic Impact of War' (2010) 92 *Review of Economics and Statistics* 102, 112. Other authors suggest that the conflict-reducing effect of trade is limited to bilateral, not multilateral trade, see P. Martin, T. Mayer and M. Thoenig, 'Make Trade Not War?' (2008) 75 *Review of Economic Studies* 865, 894.

⁵⁷ D. Irwin, P. Mavroidis and AO Sykes, *The Genesis of the GATT* (Cambridge: Cambridge University Press, 2008), 200.

ing what exactly the GATT should tackle as a concern, and consequently how its obligations should be interpreted.⁵⁸ Two main readings can be distinguished.

Some read GATT as a promise of reciprocal market access. This view would correspond largely to the rights-based reading we have encountered in the previous section. WTO members have thus granted each other certain conditions of competition which products face at importation and which should not be disturbed. In other words, products have a 'right of access' to another member's market.⁵⁹ For all measures concerned by the GATT, be they tariffs, taxes or regulatory treatment, the emphasis lies on the competitive relationship between products and an effects-based view of protectionism. Article III GATT on national treatment would thus examine only whether different treatment exists in the presence of a competitive relationship between products and would cast its net of prohibition widely.⁶⁰ The regulatory intention behind trade restrictive measures should be reviewed only later at the stage of the general exceptions enshrined in Article XX.⁶¹

Competing voices, however, cast doubt on the market access reading of the GATT. A more reduced reading of the GATT suggests that it merely constitutes an incomplete contract which contains a pledge of non-discriminatory treatment of imported products.⁶² Instead of granting a right to trade or to market access, WTO members have agreed to a binding of tariffs and a prohibition of discrimination in the field of taxes and regulation, but left domestic policies unbound to the widest extent.⁶³ In the assessment of what is prohibited, econometric assessments of the competitive relationship between products play a role, but so does the regulatory intent of WTO members which can be a reason for its own for measures with an effect on trade. As a consequence, the general exceptions of Article XX become less important in such a reading of the GATT because the trade-off between a public purpose pursued by regulation and its trade-restrictive effect can take place as part of the earlier analysis of whether a GATT violation has occurred in the first place.

These competing views become more visible with the example of how national treatment has been interpreted by the WTO judiciary and discussed in

⁵⁸ See on this point K.N. Schefer, 'Dancing with the Devil: A Heretic's View of Protectionism in the WTO Legal System' (2009) 4 *Asian Journal of WTO and International Health Law and Policy* 423.

⁵⁹ This term is used by R. Howse and D. Regan, 'The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy' (2000) 11 *European Journal of International Law* 249, 257.

⁶⁰ See e.g. Vranes, 191-193.

⁶¹ The latter then ought to be interpreted more broadly, see *Ibid.*, 214-215 footnote 146.

⁶² For an exploration of the idea of GATT as an incomplete contract see H. Horn and P.C. Mavroidis, 'Still Hazy after All These Years: The Interpretation of National Treatment in the GATT/WTO Case-law on Tax Discrimination' (2004) 15 *European Journal of International Law* 39, 53-54.

⁶³ This also means that a number of 'beggar-thy-neighbour' policies remain possible, as P. Mavroidis, *Trade in Goods – The GATT and the Other Agreements Regulating Trade in Goods* (Oxford: Oxford University Press, 2007), 215 footnote 56, demonstrates.

the doctrine. Only the second interpretation allows national treatment to operate as a legal test also representing non-trade interests.

ii. The debate on the national treatment standard in the case law under Article III GATT

Article III GATT lays down an obligation of national treatment for internal taxes and charges as well as for regulation in its paragraphs 2 and 4. In its first paragraph, the general purpose of avoiding the use of such measures ‘so as to afford protection to domestic production’ is set out. Panels and the Appellate Body have subsequently embarked on a very literal reading of the provision and developed a test of discrimination based on the effects of a measure on the competitive relationship between products, while in the doctrine several voices have argued that the anti-protectionist rationale of Article III requires that regulatory aims be taken into account as well.⁶⁴

The debate has first centred on the identification of what constitutes ‘like products’. Based on a GATT 1947 document, the *Border Tax Adjustment Report*,⁶⁵ the Appellate Body introduced an effects-based reading of Article III in the early days of the WTO, rejecting all consideration of regulatory purpose.⁶⁶

While economists have already questioned the criteria for the assessment of competitive relationship between products,⁶⁷ the case law has in some instances permitted regulatory purpose as playing a role in the assessment of whether two products are like.⁶⁸ This has led some scholars to advocate an ‘aim and effects’ test⁶⁹ which was already used by panels in the GATT 1947 days.⁷⁰ Some even

⁶⁴ See for a more extensive discussion of the complex structure of Article III and suggestions for an alternative interpretation to the current one D.H. Regan, ‘Regulatory Purpose and “Like Products” in Article III:4 of the GATT (With Additional Remarks on Article III:2)’ (2002) 36 *Journal of World Trade* 443, 476.

⁶⁵ *Report by the Working Party on Border Tax Adjustments* L/3464, BISD 18S/99, 20 November 1970.

⁶⁶ *Japan – Taxes on Alcoholic Beverages* AB-1996-2, WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, 4 October 1996, p. 22-23. See also *European Communities – Regime for the Importation, Sale and Distribution of Bananas* AB-1997-3, WT/DS27/AB/R, 9 September 1997, paras 215-216.

⁶⁷ See e.g. D.J. Neven, ‘How should “protection” be evaluated in Art. III GATT disputes?’ (2000) 15 *HEC Lausanne cahiers de recherches économiques* 1, 18, or Horn and Mavroidis, 62-63.

⁶⁸ See *Chile – Taxes on Alcoholic Beverages* AB-1999-6, WT/DS110/AB/R and WT/DS87/AB/R, 13 December 1999, paras 71-72.

⁶⁹ See the well-known essay R.E. Hudec, ‘GATT/WTO Constraints on National Regulation: Requiem for an Aim and Effects Test’ (1998) 32 *International Lawyer* 619; see also F. Roessler, ‘Beyond the Ostensible – A Tribute to Professor Robert Hudec’s Insights on the Determination of the Likeness of Products Under the National Treatment Provisions of the General Agreement on Tariffs and Trade’ (2003) 37 *Journal of World Trade* 771, 778, and A. Porges and J.P. Trachtman, ‘Robert Hudec and Domestic Regulation: The Resurrection of Aim and Effects’ (2003) 37 *Journal of World Trade* 783, 785.

⁷⁰ *United States – Measures Affecting Alcoholic and Malt Beverages* DS23/R, BISD 39S/206 (panel report adopted on 19 June 1992), para 5.25; *United States – Taxes on Automobiles* DS31/R (panel report from 11 October 1994, not adopted), para 5.8.

suggested installing a legal test at the level of the inquiry into the likeness of products: a state should show under a necessity test whether the identification of two products as like was the least trade-restrictive measure.⁷¹

While the more flexible likeness analysis in the later case of *EC – Asbestos*⁷² was welcomed by some,⁷³ the fundamentally economic approach to likeness also continued to prevail in this case. Attention shifted to the second stage of the national treatment analysis. If likeness was the ‘fishing net’, the criterion of ‘so as to afford protection’ should be the means of assessing the catch.⁷⁴ A finding of likeness does not yet mean that a measure falls under the prohibition of Article III, because there still has to be a finding of less favourable treatment.⁷⁵ Such treatment can be identified either by comparing whether any imports receive less favourable treatment than any like domestic products or by comparing aggregated groups of imported and domestic products.⁷⁶ Recent scholarship has suggested that the choice of the concrete test should depend on the degree of the competitive relationship between the products at issue.⁷⁷

Next to the substantive test under less favourable treatment, however, some have suggested that regulatory intent could be more usefully integrated at this second stage than at the first stage of likeness. The case law has hinted at this possibility.⁷⁸ Less favourable treatment could thus be justified by bringing forward a public policy objective and demonstrating a link between the two.

⁷¹ See G. Verhoosel, *National Treatment and WTO Dispute Settlement – Adjudicating the Boundaries of Regulatory Autonomy* (Oxford: Hart Publishing, 2002).

⁷² *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* AB-2000-11, WT/DS135/AB/R, 12 March 2001, paras 117-118.

⁷³ R. Howse and E. Tuerk, ‘The WTO Impact on Internal Regulations – A Case Study of the Canada-EC Asbestos Dispute’ in G. De Búrca and J. Scott (eds.), *The EU and the WTO – Legal and Constitutional Issues* (Oxford: Hart Publishing, 2001), 304, have tried to explain the Appellate Body’s decision as an attempt to address two constituencies, free traders as well as advocates of other interests.

⁷⁴ Horn and Mavroidis, 60.

⁷⁵ As the Appellate Body also famously underlined in *EC – Asbestos* (*Appellate Body report*), para 100.

⁷⁶ L. Ehring, ‘*De Facto* Discrimination in World Trade Law – National and Most Favoured Nation Treatment – or Equal Treatment?’ (2002) 36 *Journal of World Trade* 921, 924-925, refers to ‘diagonal’ and ‘asymmetric impact’ tests. See also O.K. Fauchald, ‘Flexibility and Predictability under the World Trade Organization’s Non-Discrimination Clauses’ (2003) 37 *Journal of World Trade* 443, 467.

⁷⁷ N. Diebold, ‘Non-Discrimination and the Pillars of International Economic Law – Comparative Analysis and Building Coherency’ (2010) 24 *Society of International Economic Law Online Proceedings Working Paper* 1, 18-19.

⁷⁸ In *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* AB-2005-3, WT/DS302/AB/R, 25 April 2005, para 96, the Appellate Body held that less favourable treatment was not established if a modification of competitive conditions could be explained by factors ‘unrelated to the foreign origin of the product’.

Parallels to the test under Article XX have been drawn, as the latter provision would practically become redundant in such a case.⁷⁹

On the whole, however, the case law remains inconclusive. No broad rights-based reading has been adopted, but the test of likeness continues to emphasize competition, and regulatory intent has not been accommodated in a solid manner at any level. Despite the intense debate on how to ensure appropriate representation of competing values, the appropriate standard of review or the use of proportionality analysis have not received sufficient attention in the case law.

iii. Conclusion

The discussion of national treatment has shown that there are inherent tensions underlying the interpretation of the GATT. The dispute between a market-access-based view and a less far-reaching anti-protectionism reading has led to an incoherent, over-textual interpretation based on a barely coherent insistence on certain product criteria for the assessment of likeness. The new focus on less favourable treatment has yet to show whether it can produce a more convincing rationale for the national treatment test. In sum, thus far the opportunity to develop a comprehensive test with a logical sequence allowing for an appropriate representation of the competing values has not been made use of. Textualism and ad-hoc decision-making have prevailed. It is in the light of the competition-based reading of Article III GATT that the burden of analysis is placed on Article XX GATT. As has been shown, some adaptation of the standard of review has taken place in the case law under the latter provision. Still, the very blurry ‘weighing and balancing’ test developed under Article XX GATT is to no small extent caused by the unsatisfactory solution found under Article III GATT, which again goes back to an unwillingness to engage in conceptual debates on the justification of judicial review in the case law.

Most of the WTO covered agreements could be described by and large as following the logic of GATT, setting out in more detail specific aspects of trade obligations. A different case is presented by the TRIPS Agreement. Consequently, it merits treatment apart as to the justification of judicial review under its provisions.

D The TRIPS Agreement and the Problem of Intellectual Property Rights as Human Rights

The TRIPS Agreement generally operates in a different manner from GATT and GATS. It substantially pursues three objectives: to expand a minimum standard of intellectual property protection throughout the WTO

⁷⁹ J. Pauwelyn, ‘Comment: The unbearable lightness of likeness’ in M. Panizzon, N. Pohl and P. Sauvé (eds.), *GATS and the Regulation of International Trade in Services* (Cambridge: Cambridge University Press, 2008), 368.

membership, to strengthen the domestic enforcement of intellectual property rights and to facilitate international dispute settlement by subjecting the TRIPS obligations to WTO dispute settlement.⁸⁰ The Agreement thus incorporates substantive standards for the protection of a number of intellectual property rights, including copyrights, trademarks and patents.

Against the background of the above analysis of the GATT, one could argue at this point that TRIPS is, to a far greater degree than GATT, concerned with the rights of individuals, as it protects intellectual property rights, which can be compared to property rights. The case law has not discussed the matter to date. Yet, the equation of intellectual property rights with human rights is not as straightforward as a first look may suggest.

Article 15 (1) of the United Nations International Covenant on Economic, Social and Cultural Rights, for example, enshrines the right of everyone ‘to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author’, but in parallel ‘to take part in cultural life’ and ‘to enjoy the benefits of scientific progress and its applications’. Intellectual property rights regimes are thus not to be understood as an end in themselves, but as incorporating a balance between the rights of inventors and creators and the interests of the wider society.⁸¹

The equation is even more strongly qualified in the General Comments on the Covenant, where human rights are seen as fundamental, inalienable and universal entitlements inherent in the human person as such. In contrast, intellectual property rights as enshrined in legal regimes are considered first and foremost as means of temporary protection by which States aim to provide incentives for invention, strengthen the distribution of creative productions and further the development of cultural identities for the benefit of society at large. They can be allocated, traded, limited and forfeited and generally serve to protect business and corporate interests and investments.⁸² Yet, to understand them as equal to human rights neglects their substantially instrumental character.⁸³

In the light of such arguments, to our mind there is no specifically strong justification for intrusive review. Based on the procedural democracy doctrine, one would have to argue first why the protection of a specific codification of property rights merits special protection through intrusive judicial review.

⁸⁰ J. Pauwelyn, ‘The Dog That Barked But Didn’t Bite: 15 Years of Intellectual Property Disputes at the WTO’ (2010) 1 *Journal of International Dispute Settlement* 389, 391.

⁸¹ See in more detail D. Matthews, ‘Intellectual Property Rights, Human Rights and the Right to Health’ in W. Groscheide (ed.) *Intellectual Property and Human Rights: A Paradox* (Cheltenham: Edward Elgar, 2011), 122.

⁸² *Ibid.*, 124.

⁸³ See also for the case of the ‘right’ to patents claimed by some academics J. Brinkhof, ‘On Patents and Human Rights’ in W. Groscheide (ed.) *Intellectual Property and Human Rights: A Paradox* (Cheltenham: Edward Elgar, 2011), 153.

E Conclusion

Summing up, the procedural democracy justification of judicial review is poorly discussed in WTO law, as is the standard of review in general. The rather weak institutional balance in the WTO is perhaps the most central reason. But at the same time, there continues to be debate on the extent to which the GATT should be read as a rights-instrument in the first place. The case law has not embraced such a reading, but understands the GATT more literally as an ensemble of obligations. Under the TRIPS Agreement, what is protected are aspects of property rights. Still, the human rights similarity arguably does not lead to a strong claim for intrusive judicial review, because intellectual property rights as in the TRIPS Agreement themselves only enshrine a special codification of a previous balancing exercise between public and private interests.

In our view, pre-balancing would yield a result somewhere close to a model of special interest review. To some extent, comparisons to EU law on the internal market are useful: Panels and the Appellate Body have never accepted the rights-based reading that has become common-place for internal market freedoms in EU law. Instead, the GATT has been understood as an incomplete contract based on a variety of policy goals it is designed to achieve. While in principle this solution is convincing, the result of such inconclusiveness combined with the fear of being accused of judicial activism as an international adjudicative body in a contractual setting has led the WTO adjudicative instances to adhere to a very literal interpretation of the provisions of GATT. The example of national treatment as enshrined in Article III GATT shows that the result is a number of legal tests whose conceptual justification and logic of sequence is not sufficiently taken into account. Examining the case law under Article XX GATT and similar provisions, we thus discover a remarkable fear of engaging openly in proportionality analysis, which leads to the adoption of the blurred ‘weighing and balancing’ test whose true content is virtually impossible to discern. Some inspiration from the CJEU has been found in the case of the ‘new approach’, which adapts the standard of review based on the values at issue like the CJEU has done in cases on environmental protection. However, judicial reasoning lacks transparency to a similar extent in both cases.

IV ‘Weighing and Balancing’ and Similar Necessity-Based Tests in WTO Law

A number of tests close to proportionality analysis can be observed under various WTO covered agreements. While the exceptions under the TRIPS Agreement function according to their own logic and are discussed separately, there are some common threads that link the tests in GATT, the TBT and the SPS Agreement. Starting with the ‘weighing and balancing’ test developed under Article XX GATT, we observe that the literal reading given to

the GATT provisions by panels and the Appellate Body has led to rather isolated single steps of analysis. In the case of Article XX, a logical sequence with Article III GATT on national treatment is missing, as is a truly logical distinction for the separate tests adopted under sub-paragraphs of Article XX and the chapeau of Article XX. The ‘weighing and balancing’ test itself is a remarkable combination of references to balancing and a prevailing abhorrence of proportionality *stricto sensu*, which overshadows the actual necessity test that seems to do most of the work. A similar, though slightly different picture emerges under Article 2.2 TBT, which in its phrasing leaves some doubt as to whether it enshrines full-scale proportionality analysis. By contrast, Article 5.6 SPS Agreement prescribes a necessity test in its wording and has been interpreted according to this feature. Under the TRIPS Agreement, the case law has focused on a literal reading of the exceptions provisions, while the doctrine has suggested legal tests closer to balancing, in particular to take into account the objectives of the TRIPS Agreement. Having identified the WTO legal regime as following the model of special interest review, we suggest that there is a good case to generally avoid proportionality *stricto sensu* except in some very specific cases. However, the avoidance of this test in the case law has actually led to the emergence of a virtually incomprehensible legal test, which causes great costs in terms of predictability and legal certainty.

A Article XX GATT and Article XIV GATS

While assessing Article XX GATT, we also consider Article XIV GATS as a similarly structured provision on general exceptions. After an initial assessment of Article XX GATT, the conceptual similarity of both provisions is thus briefly shown in order to justify why they can be examined together. Turning to the concrete examination of the various tests operating under Article XX, the structure of the provision combined with literal interpretation has led to the emergence of several legal tests. Most prominently, under the condition of measures that must be ‘necessary’ to achieve a public interest, the ‘weighing and balancing’ test has emerged. Under a different sub-paragraph, however, the term of measures ‘relating to’ a public interest objective has been subject to a different reading. To complicate matters further, the introductory phrase to Article XX GATT, the chapeau, has also received an interpretation that at some points seems to carry some of the burden of the situation of value conflict. While this categorisation has led to solutions that are not always convincing, it should also be noted that it has not led to similarly fragmented results as compared e.g. to United States constitutional law. While in the latter, the categorisation leads to different results, as has been shown with the example of extraterritorial measures and the difficulty of their justification under strict review, in WTO law the Appellate Body has loosened older categorical distinctions. Process and production methods as well as measures with extraterritorial effect are no longer found

to be in violation of WTO law as such, but only subject to the usual judicial scrutiny.

i. Article XX GATT

Article XX found its way into the GATT based on some precursor provisions in earlier international treaty law. In the 1920s, the short-lived Convention on the Abolition of Import and Export Prohibitions and Restrictions already contained a clause of general exceptions to the prohibition of trade restrictions.⁸⁴ The clause allowed certain measures for the pursuit of a number of listed public policy objectives and included an introductory clause prohibiting such measures' being applied in a manner which could constitute 'arbitrary discrimination' or a 'disguised restriction on international trade'. More permissively, a similar clause in two trade agreements concluded by the United States with Mexico and Uruguay, stated that '[n]othing' in the agreement should be construed to prevent the adoption of such measures.⁸⁵

The lengthy negotiation process of the GATT 1947 eventually produced a text mixing elements from both precursors⁸⁶ which reads in its most relevant parts:

Article XX: General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

necessary to protect public morals;

necessary to protect human, animal or plant life or health;

[...]

necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, [...] the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

[...]

[...]

⁸⁴ See article 4 of the Convention, 'Convention for the Abolition of Import and Export Prohibitions and Restrictions' (1931) 25 *The American Journal of International Law* 121. On the Convention's failure see Irwin, Mavroidis and Sykes, 162 footnote 309.

⁸⁵ See J.H. Jackson, 'The General Agreement on Tariffs and Trade in United States Domestic Law' (1967) 66 *Michigan Law Review* 249, 314, and S. Charnovitz, 'Exploring the Environmental Exceptions in GATT Article XX' (1991) 25 *Journal of World Trade* 37, 43.

⁸⁶ The chapeau was inserted on particular insistence by the British delegation. See generally for a concise overview of the drafting process and the emergence of Article XX GATT Irwin, Mavroidis and Sykes, 99 ff. and 163.

relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

[...]

The GATT 1947 panels and the WTO adjudicative bodies thus found themselves faced with the challenge of interpreting the conflict between the values enshrined in the provision and the trade disciplines imposed by the GATT itself. The terms ‘necessary’ enshrined in particular in paragraphs a, b and d and the term ‘relating to’ enshrined in paragraph g became the stage for the development of legal tests.

Two problems have continuously troubled the application of Article XX GATT. Conceptually, the creation of such a limited number of grounds to depart from the WTO trade obligations proves problematic in pursuing the manifold objectives of the modern regulatory state which may in many cases have an effect on trade.⁸⁷ The refusal to consider regulatory purpose in any way under the national treatment analysis has put even more weight on the interpretation Article XX GATT.

As a second aspect, the WTO adjudicative bodies have opted for a highly text-based method of interpretation which entails conceptual problems in terms of sequencing the analysis.⁸⁸

A broad interpretation of the various public policy headings of Article XX GATT has managed to maintain a margin of manoeuvre for WTO members to date. Under Article XX (a), measures to pursue public morals could be justified in principle based on a fairly broad, country-by-country definition of the concept of public morals.⁸⁹ Some more contentious suggestions have, however, not yet been approved in the case law, such as the potential to justify measures

⁸⁷ See concisely Mavroidis, *Trade in Goods*, 254.

⁸⁸ For a critique and some examples of this overemphasis on textual interpretation see P. Mavroidis, ‘No Outsourcing of Law? WTO Law as Practiced by WTO Courts’ (2008) 102 *American Journal of International Law* 421, 470 ff.

⁸⁹ See *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/R, 10 November 2004, paras 6.461 ff. and *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* WT/DS363/R, 12 August 2009, para 7.759. See also M. Krajewski, ‘Playing by the Rules of the Game? – Specific Commitments after US – Gambling and Betting and the Current GATS Negotiations WTO Appellate Body report, 20 April 2005, WT/DS258/AB/R, ‘United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services’ (2005) 32 *Legal Issues of Economic Integration* 417, 440, and more sceptical of an overly interpretation of public morals N. Diebold, ‘The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole’ (2007) 11 *Journal of International Economic Law* 43, 51.

to protect human rights⁹⁰ or animal welfare⁹¹ in an extraterritorial manner, e.g. via the introduction of import bans. Article XX (b) has served to accommodate a broad range of public health and environmental policies.⁹² Under Article XX (d), regulatory objectives such as the collection of taxes, consumer protection or the combat of smuggling and money-laundering have been accepted.⁹³ Article XX (g) has been broadly interpreted both as to its wording⁹⁴ and using other international law as evidence⁹⁵ to suggest that a number of measures of environmental conservation policy could be justified.

But the example of the case law on the chapeau demonstrates that other conceptual difficulties result from a strict adherence to the text of a less than perfectly drafted provision. In addition, the overlap between the two environmental exceptions has led to ‘policy heading shopping’ because of the more lenient test developed under Article XX (g), as is subsequently shown.

ii. Article XIV GATS

Article XIV GATS follows the model of Article XX GATT as a provision for general exceptions. It assembles substantially the same grounds of exception, although in a different order and leaving aside measures for the conservation of exhaustible natural resources, unlike Article XX (g) GATT. Furthermore, Article XIV (a) GATS provides justification for measures necessary to protect public morals or to maintain public order, thereby drawing a wider circle than the mere protection of public morals set out in Article XX (a) GATT. However, a footnote is included to avoid an overextension of Article XIV (a) GATS which refers to a formula developed initially by the Court of Justice of the European Union for restrictions on the free movement of workers:⁹⁶ measures to

⁹⁰ S. Charnovitz, ‘The Moral Exception in Trade Policy’ (1998) 38 *Virginia Journal of International Law* 689, 742.

⁹¹ E.M. Thomas, ‘Playing Chicken at the WTO: Defending an Animal-Welfare Based Trade Restriction under GATT’s Moral Exception’ (2007) 34 *Boston College Environmental Affairs Law Review* 605, 625. See also more recently P.L. Fitzgerald, ‘“Morality” May Not Be Enough to Justify the EU Seal Products Ban: Animal Welfare Meets International Trade Law’ (2011) 14 *Journal of International Wildlife Law & Policy* 85, 123.

⁹² See the various cases discussed subsequently in section IV.A.iii.

⁹³ See, respectively, *United States – Malt Beverages*, para 5.42; *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* WT/DS161/R and WT/DS169/R, 31 July 2000, para 6.58; and *Colombia – Indicative Prices and Restrictions on Ports of Entry* Report of the Panel, WT/DS366/R, 27 April 2009, para 7.498.

⁹⁴ *United States – Automobile Taxes*, para 5.57; *United States – Standards for Reformulated and Conventional Gasoline* WT/DS2/R, 29 January 1996, paras 6.36-6.37.

⁹⁵ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* AB-1998-4, WT/DS58/AB/R, 12 October 1998, paras 129-132.

⁹⁶ Case 30/77 *Bouchereau* [1977] ECR 1999, para 35.

maintain public order are acceptable only if a ‘genuine and sufficiently serious threat is posed to one of the fundamental interests of society’.⁹⁷

Generally, panels and the Appellate Body have accepted a conceptually similar interpretation of Article XIV GATS and Article XX GATT.⁹⁸ This appears reasonable, as structurally they are also similar and pose the same interpretative challenges, taking into account the differences noted above.

iii. The ‘weighing and balancing’ test for measures ‘necessary’ to achieve a public interest

The legal test under the various sub-paragraphs requiring measures to be ‘necessary’ to achieve a public interest substantially developed in various phases: In an early period, an informal way of assessing the facts was transformed into a more formalized legal test. Later, in the WTO case law the landmark ruling in the *Korea – Beef* case reformulated the test and led to controversial understandings. The subsequent case law has taken up and applied the *Korea – Beef* test. To this date, however, the test remains somewhat blurry and unpredictable as to its operation.

a. *The restrictive necessity test of the GATT 1947 era*

Generally, the law under Article XX during the GATT 1947 era has been described as the construction of a virtually ‘impossible’ threshold for domestic regulatory measures.⁹⁹ After some cases of rather vague application of a test resembling necessity,¹⁰⁰ the test of the GATT 1947 was clearly spelled out in *United States – Section 337*. Noting the disagreement of the parties on whether there was a requirement to use ‘the least trade restrictive measure available’,¹⁰¹ the panel held that justification of a measure as necessary was not open to a party if another GATT-consistent alternative was open to the party. If no GATT-consistent measure was reasonably available, the measure entailing the least degree of inconsistency had to be chosen, but a change of the desired level of

⁹⁷ Footnote 5 to Article XIV GATS. P. Delimatsis, ‘Protecting Public Morals in a Digital Age: Revisiting the New WTO Rulings on *United States – Gambling* and *China – Publications and Audiovisual Products*’ (2011) 14 *Journal of International Economic Law* 257, 277, warns of the catch-all potential the phrase could otherwise have achieved.

⁹⁸ See in particular *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services* AB-2005-1, WT/DS285/AB/R, 7 April 2005, para 291.

⁹⁹ I. Venzke, ‘Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy’ (2011) 12 *German Law Journal* 1111, 1116.

¹⁰⁰ See *United States – Imports of Certain Automotive Spring Assemblies* L/5333, BISD 30S/107 (panel report adopted on 26 May 1983), para 58; *Canada – Administration of the Foreign Investment Review Act* L/5504, BISD 30S/140 (panel report adopted on 7 February 1984), para 5.20.

¹⁰¹ *United States – Section 337 of the Tariff Act of 1930* L/6439, BISD 36S/345 (panel report adopted on 7 November 1989), para 5.25.

protection was not required.¹⁰² In practice the degree of inconsistency proved to be a difficult benchmark which effectively boiled down to an assessment of trade effect, although the panel did not state so nor gave indications as to how the assessment of inconsistency should take place. Despite the terminology which resembles a test of necessity, the panel did not in fact pay much attention to the level of enforcement and to the implementation of alternatives.¹⁰³ Concerns were aggravated by the subsequent ruling in the first case opposing trade and health under Article XX(b), when the panel in *Thailand – Cigarettes* used the test from *United States – Section 337* to strike down rather crude trade restrictions to impose less trade-restrictive but more costly alternatives without truly examining whether a developing country such as Thailand could afford such policies, i.e. whether they were reasonably available.¹⁰⁴ Later case law has not added much to these findings.¹⁰⁵ The test has, however, consistently been applied in the same manner without regard to the concrete public interest opposed to trade at stake.¹⁰⁶ It has rightly been criticized as showing a strong bias in favour of trade.¹⁰⁷

b. The new ‘weighing and balancing’ test introduced in Korea – Beef

The second phase of case law after the emergence of the WTO law brought forth a new test. Aiming for a more literal reading, in the landmark case *Korea – Beef* the Appellate Body put the term ‘necessary’ on a continuum between ‘indispensable’ and ‘making a contribution to’, located ‘significantly closer’ to the first pole ‘indispensable’.¹⁰⁸ In its view, an assessment of a variety of factors was required to determine whether a measure was ‘necessary’ to pursue an objective. For this purpose, the assessment ‘involv[es] in every case a process of weighing and balancing a series of factors’ which ‘include’¹⁰⁹ the ‘relative importance of the common interests or values that the law or regulation to be enforced’ aims to

¹⁰² *Ibid.*, para 5.26.

¹⁰³ Osiro, 127 and footnote 14.

¹⁰⁴ *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* DS10/R, BISD 37S/200 (panel report adopted on 7 November 1990), paras 74-79.

¹⁰⁵ In *United States – Malt Beverages*, para 5.43, the panel applied the test as in *United States – Section 337*. In *United States – Restrictions on Imports of Tuna* DS21/R, BISD 39S/155 (report from 3 September 1991, not adopted), para 5.28, the panel adopted a highly restrictive reading of the test, requiring that all other available options had to be exhausted before an import ban could be used. In *United States – Restrictions on the Imports of Tuna* DS29/R (panel report from 16 June 1994, not adopted), para 5.38, the panel excluded justification under Article XX *tout court* by pointing at the coercive character of the trade embargo in question.

¹⁰⁶ Delimatsis, ‘Protecting Public Morals’, 262.

¹⁰⁷ M. Ming Du, ‘Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?’ (2010) 13 *Journal of International Economic Law* 1077, 1091.

¹⁰⁸ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* AB-2000-8, WT/DS161/AB/R and WT/DS169/AB/R, 11 December 2000, para 161.

¹⁰⁹ *Ibid.*, para 164.

protect,¹¹⁰ the ‘extent to which the measure contributes to the realisation of the end pursued’ and the ‘extent to which [it] produces restrictive effects on international commerce’.¹¹¹ Notably, the term ‘include’ allows the conclusion that other elements could also be taken into consideration, as the Appellate Body confirms in later cases, without, however, ever revealing which elements this could be. Conscious of the earlier case law, the Appellate Body also recalls the jurisprudence of *United States – Section 337* which already contained this analysis.¹¹²

The passage has been read by many as introducing balancing or proportionality *stricto sensu* in the interpretation of the term ‘necessary’.¹¹³ The impression of balancing is reinforced by the subsequent discussion of Korea’s level of protection by the Appellate Body. The latter concept can be understood as partly borrowed from the SPS Agreement¹¹⁴ and prescribes that WTO members cannot be required to change the desired level of enforcement.¹¹⁵ Yet in *Korea – Beef*, the Appellate Body subsequently overthrew the high level of protection indicated by Korea because of the implausible connection between the stated high level of protection sought for and the measures undertaken in the past to ensure the prevention of consumer deception as regards the origin of beef.¹¹⁶

For other commentators opposing a balancing reading of the report, the strong emphasis on the prerogative of a WTO member to choose its level of protection and a closer reading of the words of the Appellate Body support the conclusion that while the words may have opened the door a crack to balancing, effectively the Appellate Body did not balance in *Korea – Beef*. Regan in particular emphasized that there could be no balancing or cost-benefit analysis if a level of protection had to be respected.¹¹⁷ Instead, Korea had not convincingly substantiated its level of protection.¹¹⁸ The reference of the Appellate Body that the test

¹¹⁰ *Ibid.*, para 162.

¹¹¹ *Ibid.*, para 163. It is at this point that the criterion of ‘less inconsistency’ is transformed into an inquiry into the trade restrictiveness of a measure.

¹¹² *Ibid.*, para 166.

¹¹³ See e.g. S. Charnovitz, ‘The Law of Environmental “PPMs” in the WTO: Debunking the Myth of Illegality’ (2002) 27 *Yale Journal of International Law* 59, 100, A. Stone Sweet and J. Mathews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 73, 164, or Osiro, 129, who qualifies this finding, however, stating that the case law indicates that the Appellate Body is not likely to implement the test in practice.

¹¹⁴ Ming Du, 1089.

¹¹⁵ *Korea – Beef (Appellate Body report)*, paras 176-177.

¹¹⁶ *Korea – Beef (Appellate Body report)*, para 178.

¹¹⁷ Regan, ‘The myth of cost-benefit balancing’, 354-355.

¹¹⁸ In support of this view e.g. A. Desmedt, ‘Proportionality in WTO Law’ (2001) 4 *Journal of International Economic Law* 441, 469-470, J. Neumann and E. Türk, ‘Necessity Revisited: Proportionality in World Trade Organization Law After *Korea – Beef*, *EC – Asbestos* and *EC – Sardines*’ (2003) 37 *Journal of World Trade* 199, 209, P. Van den Bossche, ‘Looking for Proportionality in WTO Law’ (2008) 35 *Legal Issues of Economic Integration* 283, 292, and C.B. Bown and J.P. Trachtman, ‘Brazil – Measures Affecting the Import of Retreaded Tyres: A Balancing Act’ (2009) 8 *World Trade Review* 85, 121. Reading the report

in *United States – Section 337* already encompassed the same inquiry further supports this view.¹¹⁹ In light of the later case law, this view appears more convincing. The main work seems to be done through the part of the ‘weighing and balancing’ test that resembles necessity.

As this second stage of the test, a comparison with reasonably available alternative measures has to be executed.¹²⁰ At this point, the alternative of selective inspections of beef shops was accepted by the Appellate Body and meant that the Korean measure failed the test under Article XX.¹²¹ The relationship between these two stages of the ‘weighing and balancing’ test has not been clarified, and it does not become fully clear whether the test is not fulfilled as a consequence of the erroneous level of protection or because of the availability of alternatives. Conceptually, it appears difficult to understand how a measure could pass the first stage, which seems to resemble proportionality *stricto sensu*, and subsequently fail a comparison to alternatives. Only the later inquiry, which resembles necessity, ensures that the least trade-restrictive measure is identified in the first place. Therefore, in the present setting it seems quite impossible to find alternatives which would provide a better ratio between trade effects and the contribution towards the purported regulatory objective. Yet in reality the first stage is undertaken with such light scrutiny that in most cases the comparison with alternatives in fact constitutes the decisive part of the analysis of measures. In our view, the Appellate Body and subsequent panels seem to simply have settled for the high flexibility provided by the ‘weighing and balancing’ test without confronting its conceptual problems. The necessity test which actually seems to do most of the work can simply be adjusted in its strictness by means of the standard of review determined under the ‘new approach’ which has been described previously.¹²²

c. Subsequent refinement of the ‘weighing and balancing’ test

EC – Asbestos offered the opportunity for the Appellate Body to restate its view on the test under ‘necessary’ in Article XX.¹²³ It repeated the ‘weighing and balancing’ formula, but strongly emphasized the right of WTO members to choose their level of protection.¹²⁴ After *EC – Asbestos*, commentators also noted

together with the later *United States – Gambling* report, Regan, ‘The myth of cost-benefit balancing’, 364, argues that the test should be understood as a burden of proof issue, more precisely as the requirement of a WTO member to demonstrate ‘a high enough level of goal-achievement from the measure, and a low enough level of trade-restriction’ to make a *prima facie* case in a necessity test.

¹¹⁹ Van Calster, 133, as well as Bown and Trachtman, 89-90, correctly note that this reference caused a lot of confusion about the relationship between the *Korea – Beef* ‘weighing and balancing’ test and the necessity analysis in *United States – Section 337*.

¹²⁰ Ming Du, 1093.

¹²¹ *Korea – Beef* (Appellate Body report), para 180.

¹²² See section III.B.ii.

¹²³ Neumann and Türk, 213.

¹²⁴ *EC – Asbestos* (Appellate Body report), para 168.

for the first time the rather cursory assessment by the Appellate Body of the factor of whether a measure contributes to the end pursued.¹²⁵

Yet the next major steps were arguably undertaken in *United States – Gambling*. The Appellate Body applied the *Korea – Beef* test, focusing strongly on its relationship with the comparison with reasonably available alternatives.¹²⁶ The Appellate Body held that a measure could not be considered a reasonably available alternative if it was ‘merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.’¹²⁷ It also insisted on the capacity of alternatives to achieve the level of protection sought for by the defending WTO member.¹²⁸

In *United States – Gambling* the Appellate Body also reformed the approach to the burden of proof. Generally, the Appellate Body has attributed the burden of proof to the party that asserts a particular claim of violation as a complainant, or to the party acting as a defendant in the case of an exception or defence.¹²⁹ Article XX has consistently been treated as an exception as regards the burden of proof. In *United States – Gambling*, the Appellate Body qualified this position and held that under the ‘necessary’ test, a defendant was not required to identify all potential alternatives and to exclude them. Rather, the defendant had to make a *prima facie* case under the ‘weighing and balancing’ condition, while it was for the complainant to identify reasonably available alternatives. Only then did the defendant have to establish why these were not ‘reasonably available’.¹³⁰

In the next crucial case, *Brazil – Tyres*, the Appellate Body applied the ‘weighing and balancing’ test with a particularly light hand. It confirmed the panel’s superficial characterisation of the regulatory goal of Brazil as the reduction of exposure to risks for human, animal and plant life or health caused by the accumulation of waste tyres and of the intended level of protection as the risk reduction ‘to the maximum extent possible.’¹³¹ In assessing the contribution of the measure, the Appellate Body accepted a qualitative assessment and

¹²⁵ Desmedt, 466, deplors that the Appellate Body only assessed the existence of a health risk without examining whether the actual policy, a ban of a product, truly contributed to the desired objective.

¹²⁶ In *United States – Gambling (Appellate Body report)*, paras 306-307, the Appellate Body seems to suggest that first the weighing and balancing is undertaken and ‘then’ a comparison with reasonably alternatives follows.

¹²⁷ *Ibid.*, para 308.

¹²⁸ Ming Du, 1093.

¹²⁹ *United States – Wool Shirts and Blouses (Appellate Body report)*, para 14. See more comprehensively on the burden of proof in WTO dispute settlement D. Unterhalter, ‘Allocating the Burden of Proof in WTO Dispute Settlement Proceedings’ (2009) 42 *Cornell International Law Journal* 209.

¹³⁰ *United States – Gambling (Appellate Body report)*, paras 309-311. See approvingly from the point of view of economic cost-of-proof theory M.T. Grando, ‘Allocating the Burden of Proof in WTO Disputes: A Critical Analysis’ (2006) 9 *Journal of International Economic Law* 615, 651-653.

¹³¹ *Brazil – Measures Affecting Imports of Retreaded Tyres AB-2007-4, WT/DS332/AB/R*, 3 December 2007, para 144.

a nearly theoretical appraisal that the measure was ‘apt’ to make a material contribution.¹³² This light hand on the contribution was explained by the fact that a measure could be assessed as part and parcel of a ‘comprehensive strategy’ of interacting measures to tackle a complex environmental problem.¹³³

At the second stage of the test, the Appellate Body underlined that elements of a comprehensive strategy such as the one already in place in Brazil could not qualify as alternative measures, as they would weaken the policy as a whole.¹³⁴ Some alternatives were qualified as overly costly and thus excluded as not reasonably available. It is remarkable, however, that some alternatives are hardly ever truly considered by panels and the Appellate Body.¹³⁵

While the main part of scrutiny takes place under the second part of the ‘weighing and balancing’ test, the Appellate Body seemed to keep the door open to balancing at one point in the report.¹³⁶ Yet it can be argued that the evaluation of alternatives and their reasonable availability took centre stage in *Brazil – Tyres*, while the first part of the ‘weighing and balancing’ test was merely paid lip service.

There remain some points of criticism. The lenient approach also visible in the interpretation of what exactly is the regulatory objective and the level of protection simultaneously leads to more discretion for the panel to decide upon what qualifies as an alternative.¹³⁷ In addition, the two issues were not sufficiently kept apart, since the regulatory objective constitutes the ‘value’ to be protected, while the level of protection indicates the ‘degree’ to which it ought to be pursued.¹³⁸ To allow a merely theoretical contribution risks drawing the circle of alternatives too widely, as all measures with a theoretical impact could then qualify. The statement that measures forming part of a more comprehensive regulatory package should not be considered as alternatives does justice to the complexity of regulation in technical fields such as environmental protection, but raises the question of how to delineate these complementary measures from

¹³² *Brazil – Tyres (Appellate Body report)*, paras 146-147 and 150.

¹³³ *Ibid.*, para 151.

¹³⁴ *Ibid.*, para 172. In the light of the level of protection, non-generation measures were to be preferred over waste management measures, see *Brazil – Tyres (Appellate Body report)*, para 174.

¹³⁵ *Brazil – Tyres (Appellate Body report)*, para 175. Bown and Trachtman, 120, critically remark that for some reason, the Appellate Body never seems to seriously consider tariffs, subsidies or taxes as reasonably available alternatives under Article XX.

¹³⁶ Paragraph 150 reads: ‘[W]hen a measure produces restrictive effects on international trade as severe as those resulting from an import ban, it appears to us that it would be difficult for a panel to find that measure necessary unless it is satisfied that the measure is apt to make a material contribution to the achievement of its objective.’ For a possible reading as proportionality analysis see Venzke, 1135; see sceptical Van den Bossche, 294.

¹³⁷ B. McGrady, ‘Necessity Exceptions in WTO Law: Retreaded Tyres, Regulatory Purpose and Cumulative Regulatory Measures’ (2008) 12 *Journal of International Economic Law* 153, 158.

¹³⁸ Bown and Trachtman, 124.

other alternatives that a WTO member must consider as an alternative.¹³⁹ In subsequent case law, the two-stage test developed in *Korea – Beef* has continuously been applied, with only some light meandering.

d. Conclusion

Summing up, there is a general confusion in the two-pronged ‘weighing and balancing’ test developed by the Appellate Body. After *Korea – Beef*, despite some language pointing towards some sort of full-scale proportionality analysis, the later case law confirmed an understanding that the second stage of the ‘weighing and balancing’ test, i.e. the comparison with reasonably available alternatives, is the central test. A sceptical observer of the case law could even suggest that the Appellate Body is simply weighing and balancing the individual steps of its weighing and balancing test to reach the appropriate results. The consequence of the still unsolved mystery of how the emphasis on the level of protection and the weighing and balancing formula in the light of the relative importance of the value at issue interact has led to a highly casuistic approach. On the positive side, the adaptation of the burden of proof has somewhat reduced the problem of truly construing Article XX as an exceptions provision. In this respect, a comparison to EU law on internal market freedoms can be drawn. As has been observed in the pertinent section,¹⁴⁰ the CJEU uses its necessity test in a much more – and in our view even exaggeratedly – restrictive way. Regulatory autonomy is thus taken more seriously in WTO law under the ‘necessary’ condition than in EU law. Even following a model of special interest review, an adjudicator must thus not necessarily over-emphasize the interest that it is focused on, as the case law by the Appellate Body demonstrates. On a less satisfactory note, however, this generally reasonable approach of the ‘weighing and balancing’ test is belied by the blurredness of the actual legal analysis. It remains largely in the dark whether and on what basis the standard of review is adapted under the ‘new approach’, and it is still a mystery whether in some extreme case proportionality *stricto sensu* could be used.

iv. The test for measures ‘relating to’ a public interest

The case law under Article XX (g) regarding the requirement that measures must relate to conservation policy is a text-book example for literal interpretation. Panels and the WTO Appellate Body have developed a separate legal test which is more lenient than the requirement found for the term ‘necessary’ based on the weakness of the term ‘relating’. At the same time, it is under this sub-paragraph that we again find some more regulator-friendly reforms in

¹³⁹ Bown and Trachtman, 127, suggest that the only distinction should be whether measures are already implemented or not yet implemented. It may, however, be more fruitful to adopt a more complex distinction. McGrady, 167-168, proposes using the concept of ‘complementary measures’, which uses the different effect upon the same regulatory goal as distinguishing criterion.

¹⁴⁰ See chapter 6 section IV.A.

the case law. Despite earlier categorisation as inadmissible measures, newer case law has no longer subjected process and production measures and measures with extraterritorial effects to an automatic prohibition, but subjected them to ‘normal’ scrutiny.

a. The development of a lenient test under Article XX (g) GATT

In case law before the advent of the WTO some efforts were made to reach a test beyond pure textual interpretation. Panels construed ‘relating to’ as a requirement that a measure must be ‘primarily aimed at’ conservation purposes. This interpretation created a wider category than under the ‘necessary’ requirement,¹⁴¹ although in practice some testing against alternatives occurred in panels’ reasoning.¹⁴² Later GATT 1947 case law used the test as a rather strict examination of suitability, i.e. of whether a measure ‘contribute[s] directly to’ the objective.¹⁴³

In the first case under the WTO regime, however, the Appellate Body vigorously rejected the ‘primarily aimed at’ approach suggested by the panel¹⁴⁴ because it had no basis in the treaty text and did not take into account sufficiently the different degree of connection between measure and objective which the treaty drafters had wanted when phrasing Article XX (g) and other subparagraphs. Instead, the Appellate Body suggested a more deferent interpretation, according to which a measure merely had to be not ‘merely incidentally or inadvertently aimed at’ conservation policies, a weak suitability requirement easily fulfilled by the measure at issue.¹⁴⁵ Furthermore, based on a reading of the chapeau the Appellate Body underlined that the ‘measure’ should be understood more comprehensively as the whole regulation instead of only its discriminatory

¹⁴¹ *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* L/6268, BISD 35S/98 (panel report adopted on 22 March 1988), para 4.6. In *United States – Tuna I*, para 5.33, and *United States – Tuna II*, para 5.22, the panels applied the same analysis, but came out with flawed results because of the erroneous assessment of the extraterritorial aspects of the measure at issue, see on extraterritoriality section IV.A.iv.c.

¹⁴² In *Canada – Exports of Unprocessed Salmon*, para 4.7, the panel found export restrictions as not ‘primarily aimed at’ conservation because for other fish species no similar restrictions were needed for the same purpose. To suggest with C. Wofford, ‘A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT’ (2001) 24 *Harvard Environmental Law Review* 563, 578, that the test amounted to an ‘odd cost-benefit analysis’ appears, however, to overstretch the panel’s reasoning.

¹⁴³ *United States – Automobile Taxes*, para 5.60.

¹⁴⁴ The panel’s interpretation of ‘primarily aimed at’ came close to a necessity inquiry as under the other sub-paragraphs of Article XX in this case, see Venzke, 1125.

¹⁴⁵ *United States – Standards for Reformulated and Conventional Gasoline* AB-1996-1, WT/DS2/AB/R, 29 April 1996, pp. 17-18.

aspects, which rendered justification under the new interpretation of ‘relating to’ even more easily available.¹⁴⁶

In the later *United States – Shrimp* case, the Appellate Body explained further that ‘relating to’ should mean that there has to be a ‘close and genuine relationship of ends and means’.¹⁴⁷ Focusing on the structure of the import ban at issue rather than the effects, the Appellate Body found that the measure as well as its limited exceptions were related ‘clearly and directly’ to the objective of the conservation policy.¹⁴⁸ The test under the ‘relating to’ criterion was, as a consequence, transformed from a variant of the necessity test into a light-handed analysis of suitability without the need to demonstrate concrete effects, but instead a rational link between a measure and the policy objective claimed.

One could argue that this less intense scrutiny is to a certain extent balanced out by the additional requirement set out in Article XX(g) that measures must be ‘made effective in conjunction with restrictions on domestic production or consumption’. In the GATT 1947 case law, panels struck down measures if no domestic consumption restriction could be found¹⁴⁹ or examined restrictions with the same rather strict interpretative approach taken under the ‘relating to’ criterion.¹⁵⁰ However, in parallel to the development under ‘relating to’, the Appellate Body weakened the interpretation of the required equivalent restrictions on domestic production or consumption in *United States – Gasoline*. It held that the clause should be read as a ‘requirement of even-handedness in the imposition of domestic restrictions’, which does not require identical treatment.¹⁵¹ In analysing even-handedness, again no pure effects test should be adopted, as conservation measures only show effects after a considerable period of time.¹⁵²

As the subsequent section shows, to some extent the weakening of the test has effectively led panels and the Appellate Body to strengthen their review under a different label, i.e. the chapeau.¹⁵³ At the same time, by choosing this deferent test as the interpretation for Article XX (g) the Appellate Body has made it easier to pursue conservation policies than other public interests, implicitly establishing a hierarchy.¹⁵⁴ Arguably, this seems to go beyond what the treaty drafters had in mind when setting up Article XX, based on older precursor

¹⁴⁶ *Ibid.*, p. 15. The panel had used its legal findings of less favourable treatment under Article III:4 to test the discriminatory aspects of the measure under Article XX(g). Desmedt, 472, supports a more consistent application of the same reasoning under all sub-paragraphs of Article XX.

¹⁴⁷ *United States – Shrimp (Appellate Body report)*, para 136.

¹⁴⁸ *Ibid.*, para 138.

¹⁴⁹ *United States – Prohibition of Tuna and Tuna Products Imports from Canada* L/5198, BISD 29S/91 (panel report adopted on 22 February 1982), paras 4.10-4.11.

¹⁵⁰ *Canada – Exports of Unprocessed Salmon*, para 4.6.

¹⁵¹ *United States – Gasoline (Appellate Body report)*, p. 19.

¹⁵² *United States – Shrimp (Appellate Body report)*, para 144.

¹⁵³ See section IV.A.v.

¹⁵⁴ Desmedt, 472.

provisions. A more coherent test could simply set up a test closer to that under the other sub-paragraphs of Article XX and combine the analysis with an appropriate light standard of review.

Despite the somewhat over-textual interpretation of Article XX which has been observed in this case, more interpretive flexibility has been introduced for another topic under Article XX (g) GATT. On issues such as extraterritorial measures, we had shown in the case of United States constitutional law the rigidity of the system of tiers of scrutiny. Article XX (g), by contrast, has been the stage for remarkable change in the case law over the years, which has led from the early exclusion of process and production methods and measures with extraterritorial effect to their examination with normal scrutiny.

b. The case of process and production methods

In loosening the test under Article XX (g), in the landmark *United States – Shrimp* case the Appellate Body simultaneously abandoned an old categorical approach to trade restrictions of a certain character.

In earlier case law, so-called process and production methods (PPM) had been observed with a high degree of scepticism by the international trading system. Such regulations focus on the characteristics of a product's manufacturing process, and on whether the process influences the composition of the product or not. In particular processes that do not affect the final composition of the product, but also methods which aim at purposes that are not related to the functionality, safety or similar qualities of the product¹⁵⁵ have generally been considered as problematic because they could easily be abused for protectionist motives. From an economic point of view, however, regulators may sometimes be compelled to intervene in the form of PPMs for externalities that cannot be tackled differently.¹⁵⁶ In this light, it is also suggested that the very existence of an externality must necessarily be determined by the concerned state.¹⁵⁷ Opponents of PPMs argue that PPMs come down to the unilateral imposition of a country's standards in an extraterritorial manner, which may even amount to coercion if developing countries have to bear important adaptation costs to enjoy continuous access to the markets of industrialized countries.¹⁵⁸ But such claims are focused on particular factual situations and appear difficult as support for a general prohibition of PPMs. Discussion in the doctrine thus focused on the

¹⁵⁵ So-called non-product-related PPMs.

¹⁵⁶ Howse and Regan, 'The Product/Process Distinction', 273, cite the example of externalities of a product which are imposed by a minority on a majority which does not consume the product in question, which can render a ban of the product indispensable to tackle the majority's concern.

¹⁵⁷ D.H. Regan, 'How to think about PPMs (and climate change)' in T. Cottier, O. Nartova and S.Z. Bigdeli (eds.), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge University Press, 2009), 112.

¹⁵⁸ D.C. Crosby, 'Tilting at Conventional WTO Wisdom' in T. Cottier, O. Nartova and S.Z. Bigdeli (eds.), *International Trade Regulation and the Mitigation of Climate Change* (Cambridge: Cambridge University Press, 2009), 126.

question which forms of PPMs were more likely to be acceptable under WTO law and which were likely to very often violate the rules.¹⁵⁹

The case law started with a similarly categorical view of the inadmissibility of PPMs.¹⁶⁰ As landmark cases in this regard, the *Tuna* reports excluded PPMs from possible justification under Article XX because of their extraterritorial and coercive effect¹⁶¹ and because they could impair the ‘balance of rights and obligations among contracting parties, in particular the right of access to markets’.¹⁶² However, even some of the earlier GATT 1947 case law began admitting producer-based PPMs as potentially compatible with Article XX.¹⁶³ The full turnaround came with *United States – Shrimp*, where the Appellate Body rejected that a category of measures which conditioned access to a WTO member’s market should be considered *per se* as prohibited, because such an interpretation would render Article XX itself mostly useless: Most measures allowed by it would possess such characteristics.¹⁶⁴ Instead of an outright prohibition, PPMs are thus simply subject to scrutiny as to the need for and consistency of a PPM.

c. The case of measures with extraterritorial effects

Linked to the issue of PPMs, there is the treatment of measures with extraterritorial effects in WTO law. PPMs are typical, but not the only example of regulation which exerts extraterritorial effects.¹⁶⁵ General international law allows the exercise of jurisdiction based on three different links: nationality, territoriality and effects which materialize within a state’s jurisdiction. The effects criterion has proven most contentious in practice, as benchmarks or criteria to assess the quality and quantity of effects required to grant jurisdiction are difficult to determine in an objective manner.¹⁶⁶ With the particularly trade-restraining effect of measures which impose conditions on the entry of prod-

¹⁵⁹ See e.g. Charnovitz, ‘The Law of Environmental “PPMs”’, 67 ff.; Howse and Regan, ‘The Product/Process Distinction’, 270 ff.; country-based PPMs are therefore too broad in most situations and will often fall foul of GATT disciplines, while PPMs based merely on the manner of production could often be in compliance as origin-neutral measures pursuing a public purpose. Producer-based PPMs require close scrutiny, as they may easily be tilted against foreign producers.

¹⁶⁰ See e.g. *Belgian Family Allowances (Allocations familiales)* G/32, BISD 1S/59 (panel report adopted on 7 November 1952), para 3; *Spain – Tariff Treatment of Unroasted Coffee* L/5135, BISD 28S/102 (panel report adopted on 11 June 1981), paras 4.6-4.9.

¹⁶¹ *United States – Tuna I*, para 5.32.

¹⁶² *United States – Tuna II*, para 5.26.

¹⁶³ *United States – Automobile Taxes*, paras 5.61 and 5.66.

¹⁶⁴ *United States – Shrimp (Appellate Body report)*, para 121.

¹⁶⁵ As one example, tariff preferences are granted by industrialized countries to developing countries based on their human rights record, which does not attach directly to the products at issue, see e.g. in *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* AB-2004-1, WT/DS246/AB/R, 7 April 2004.

¹⁶⁶ H. Horn and P. Mavroidis, ‘The Permissible Reach of National Environmental Policies’ (2008) 42 *Journal of World Trade* 1107, 1126

ucts into a territory some have argued in WTO law that a contractual approach should be taken: WTO members have promised access to their market, so if they close it down by such measures they must compensate foreign producers.¹⁶⁷ Yet, this view departs from a strongly market-access based perception of the GATT. More convincing solutions admit such compensation only in cases where large countries effectively abuse their market power by means of extraterritorial measures.¹⁶⁸

In WTO jurisprudence, a struggle between categorical exclusion and normal scrutiny can be observed. Initially, the panel in *United States – Tuna I* simply held that Article XX could not apply to measures in an ‘extrajurisdictional’ manner.¹⁶⁹ The *United States – Tuna II* phrased more carefully that it would not have to answer the question of a jurisdictional limit of Article XX, as the measure already failed to comply with Article XX as a coercive PPM.¹⁷⁰ In a similar vein, the Appellate Body in *United States – Shrimp* stated that it would not have to answer expressly the question of jurisdictional limits in Article XX to decide the case. At the same time, however, it accepted that Article XX (g) could cover a measure aiming at the protection of migratory species occurring in waters outside the jurisdiction of the regulating WTO member, as long as there was a ‘sufficient nexus’ with the territory of the relevant WTO member.¹⁷¹ The Appellate Body’s explicit refusal to clarify the jurisdictional limits of Article XX has led to a variety of readings of this paragraph, which range from the establishment of territorial jurisdiction of the United States to the justification of the exercise of extraterritorial jurisdiction by the United States.¹⁷² In any event, it can safely be assumed that there is no longer a categorical refusal in WTO law to permit measures exclusively because of their extraterritorial character. Instead, they are subject to the test under the relevant sub-paragraph and the scrutiny under the chapeau.

Recent case law under the TBT Agreement seems to point in a similar direction. In *United States – Tuna III*, the panel and the Appellate Body refused to accept an argument by Mexico which claimed that requirements for a dolphin-protecting label could constitute *per se* illegitimate ‘extraterritorial’ regulation because of the pressure to adapt products this could entail for foreign traders.¹⁷³

¹⁶⁷ K. Bagwell, P. Mavroidis and R.W. Staiger, ‘It’s a Question of Market Access’ (2002) 96 *American Journal of International Law* 56, 67, suggest that a non-violation complaint could be the solution to such a case. See also the hint in *EC – Asbestos (Appellate Body report)*, para 188.

¹⁶⁸ Regan, ‘How to think about PPMs’, 115.

¹⁶⁹ *United States – Tuna I*, paras 5.27-5.28.

¹⁷⁰ *United States – Tuna II*, paras 5.15-5.16.

¹⁷¹ *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WT/DS58/R, 15 May 1998, para 133.

¹⁷² See for a concise overview Vranes, 161 footnote 406.

¹⁷³ The panel in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* WT/DS381/R, 15 September 2011, para 7.371, refers here to the findings of the Appellate Body in *United States – Shrimp*.

Instead, a normal analysis under Article 2.1 TBT as to whether the products in question were ‘like’ and whether imported products received ‘less favourable treatment’ should ensue.¹⁷⁴

d. Conclusion

Summing up, the literal approach with which Article XX (g) – and with it conceptually all of Article XX’s sub-paragraphs – has been interpreted thus astonishingly led to categorisations as to which test is to be applied under the various sub-paragraphs, but simultaneously broke up older categorisations. As a consequence, PPMs and extraterritoriality are subject to judicial scrutiny – but are no longer *per se* prohibited characteristics of measures. While this development is commendable, the fragmented review under the various sub-paragraphs is hardly convincing if Article XX is observed from a conceptual rather than purely text-based perspective. A more coherent test combined with varying standards of review appears to offer a more convincing solution.

v. The chapeau of Articles XX GATT and XIV GATS

Under the chapeau clause of the general exceptions clauses, measures which involve an ‘arbitrary or unjustifiable discrimination’ or ‘disguised restriction’ on trade should be excluded. The textual approach to the interpretation of this provision has resulted in a somewhat blurry case law. Generally, the case law has attempted to separate, under the chapeau, the level of application and enforcement of a measure from its general existence. This became the third part of a three-pronged analysis after the assessment of the public policy objective and the test of whether the relevant test under a sub-paragraph is fulfilled. By this token, a balance between the right of a WTO member to invoke an exception and the substantive rights of other WTO members under the GATT should be respected.¹⁷⁵ In *United States – Shrimp* as the most extensive interpretation of the chapeau clause, the Appellate Body thus developed a reading in which the chapeau prohibits ‘unjustifiable discrimination’ focused on over-restrictive substantive requirements and ‘arbitrary discrimination’ as concerned with the procedural aspects of trade measures.¹⁷⁶

Yet the case law highlights the conceptual difficulty of keeping a separate test under the chapeau. As a starting point, the scope of the measure to be examined is not truly clarified to date. The case law has tried to separate the interpretation of the chapeau from the interpretation of substantive national treatment enshrined in Article III GATT.¹⁷⁷

¹⁷⁴ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* AB-2012-2, WT/DS381/AB/R, 16 May 2012, para 226.

¹⁷⁵ *United States – Shrimp (Appellate Body report)*, para 156.

¹⁷⁶ See *Ibid.*, paras 162 ff. and para 177.

¹⁷⁷ *United States – Gasoline (Appellate Body report)*, p. 21.

For the purpose of keeping Article XX autonomous, the notion of measure has thus been defined differently. The measure examined under Article XX must be broader than the mere violation found under Article III as a violation of national treatment.¹⁷⁸ More recent case law, however, seems to suggest a return to examining the aspects of a measure which are in violation under Article XX.¹⁷⁹ The more narrow view appears more in line with a systematic reading of the GATT that sees no fundamental difference between the concept of discrimination set out in the chapeau and national treatment in Article III. In favour of the other view, however, it has been suggested that a separate test could allow the substantially different discrimination tests under both provisions to be maintained.¹⁸⁰ It also means, however, substantial weight on the test under the chapeau.

The interpretation of the latter, however, has hardly proven capable of fulfilling expectations of coherence. At some points, parts of other tests under Article XX seem to have been outsourced to be resolved at the level of the chapeau without a closer explanation or relationship to the main tests under the relevant subparagraphs.¹⁸¹ Another concern is the only apparently neat separation between a measure and its ‘application’ which is examined under the chapeau. In *Brazil – Tyres*, parts of the measure at issue have rather randomly been assigned to the chapeau and examined in that framework rather than as part of the measure as a whole.¹⁸²

To conclude, the chapeau is thus potentially far from stable and its interpretation seems to be used by panels and the Appellate Body as a potential fall-back test which can accommodate reasoning on national treatment as well as under other tests that does not properly fit in at an earlier stage. Literal interpretation

¹⁷⁸ The earlier more restrictive view which only aimed to examine the aspects of a measure in violation with national treatment under Article XX had been developed in *United States – Section 337*, para 5.27.

¹⁷⁹ *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines* AB-2011-1, WT/DS371/AB/R, 17 June 2011, paras 177 ff.

¹⁸⁰ See for a comprehensive overview of the case law A. Davies, ‘Interpreting the Chapeau of GATT Article XX in Light of the ‘New’ Approach in Brazil-Tyres’ (2009) 43 *Journal of World Trade* 507, 537.

¹⁸¹ In *United States – Gasoline (Appellate Body report)*, p. 26, the Appellate Body compared the contested measures with reasonably available alternatives similar to the test under sub-paragraphs of Article XX. In *Brazil – Tyres*, the Appellate Body examined whether a ‘rational connection’ to the overall objective of the trade measure existed for the aspects of its application which were under scrutiny, *Brazil – Tyres (Appellate Body report)*, para 228.

¹⁸² *Brazil – Tyres (Appellate Body report)*, paras 225 ff. Brazil had introduced an import ban on waste tyres for environmental reasons, but excluded MERCOSUR countries from the ban because of a ruling of a MERCOSUR tribunal. Instead of examining this exception under the chapeau as part of the ‘application’ of the measure, it was convincingly suggested that it should have been scrutinized as part of the overall measure, which would mean that e.g. the level of protection sought for by Brazil would have to be lowered since some imports of environmentally harmful goods were permitted, see Bown and Trachtman, 124.

has once again led to an overemphasis on treaty terms to the detriment of predictability and of a coherent sequence of legal tests.

vi. Conclusion

Article XX GATT and its corollary Article XIV GATS contain an exhaustive list of public interests for the pursuit of which WTO members may deviate from their substantive obligations under GATT and GATS. Some room for tests adjudicating the value conflict of trade against domestic regulatory autonomy has been created by the WTO judiciary by means of an interpretation of the individual headings, which accommodate a rather comprehensive number of public policy objectives. Yet, on the whole a very literal reading combined with the high weight put on Article XX GATT through the restrictive understanding developed for national treatment has led to an unsystematic functioning of the provisions; tests have been developed under the individual headings without due regard for the overall functioning of the provision including its chapeau clause.

The central ‘weighing and balancing’ test developed under the term ‘necessary’ in several sub-paragraphs of Article XX GATT seems to posit a somewhat awkward sequence. It starts with a ‘weighing and balancing’ exercise which includes the importance of the value protected by the regulation. The contribution – the regulatory benefit – of the measure is then apparently taken into account together with the trade-restrictive effect. Despite appearances, however, this does not turn out as balancing or proportionality *stricto sensu*, since the subsequent step of a comparison with reasonably available alternatives – a not all-too strict version of necessity – does most of the work of excluding some measures. Lack of transparency and predictability is a central characteristic of the ‘weighing and balancing’ test. In the light of our finding that pre-balancing for judicial review in the WTO yields a result close to a model of special interest review, the reliance on necessity is in principle a useful choice. However, the rejection of proportionality *stricto sensu* in the case law arguably seems exaggerated. Other elements are, however, commendable. In comparison to the very strict assessment of necessity in EU internal market law, the more equally distributed burden of proof, the more careful examination of measures as alternatives and the adaptation of the standard of review through the ‘new approach’ render the test somewhat more respectful of domestic regulatory autonomy.

Literal interpretation has also led to only partly convincing solutions under the chapeau clause and under Article XX (g), which posits the condition of measures ‘relating to’ a public interest. However, similarly respectful of domestic regulatory autonomy as under the ‘weighing and balancing’ test, the Appellate Body has in its case law refused to continue older categorical prohibitions of certain trade-restrictive measures, i.e. PPMs and measures with extraterritorial effects.

In examining other WTO covered agreements, we find inspiration from ‘weighing and balancing’ both in the case of Articles 2.2 TBT and 5.6 SPS Agreement. The exceptions under the TRIPS Agreement have in a way led a life of their own, as the agreement is structured somewhat differently from the other ‘typical’ covered agreements.

B Article 2.2 TBT Agreement

Article 2.2 of the TBT Agreement sets up several requirements for technical regulations of WTO members. These must not be ‘prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade’ and must not be more ‘trade restrictive than necessary to fulfil a legitimate objective’ such as the ones provided in a demonstrative list,¹⁸³ ‘taking into account the risks non-fulfilment would create’. There is some scholarly debate on the appropriate interpretation of the provision, in particular as to whether its wording could encourage full-scale proportionality analysis. Recent case law seems to move the test under Article 2.2 TBT close to the one under Article XX GATT, but with some regulator-friendly aspects. We conclude that, based on the model of special interest representation, the solution found is in principle convincing, though the fear of proportionality *stricto sensu* again seems somewhat exaggerated.

i. The debate in the doctrine

Generally, most scholars refer to the test under Article XX GATT as the test to apply in order to assess what is understood as a regulation that is no more trade-restrictive than necessary.¹⁸⁴ However, with that test being understood in various ways by scholars,¹⁸⁵ the discussion on whether proportionality *stricto sensu* is endorsed by Article 2.2 TBT has led to differing conclusions.

In particular the express reference to the ‘risks of non-fulfilment’ that must be taken into account has led some to suggest that proportionality analysis including proportionality *stricto sensu* has expressly been laid down by the drafters of the TBT Agreement.¹⁸⁶ At first view, ‘taking into account the risks non-fulfilment would create’ seems to open the door for an understanding that some measures may be unnecessarily trade-restrictive to an extent where the risks of non-fulfilment should be considered – which comes down to proportionality *stricto sensu*. On the other hand, one could also read the provision differently, focusing on the terms ‘taking into account’: Using proportionality *stricto sensu*

¹⁸³ This list includes national security, the prevention of deceptive practices, as well as protection of human health or safety, animal or plant life or health, or the environment.

¹⁸⁴ L. Tamiotti, ‘Article 2 TBT Agreement’ in R. Wolfrum, P.-T. Stoll and A. Seibert-Fohr (eds.), *WTO – Technical Barriers and SPS Measures* (Leiden: Martinus Nijhoff, 2007), 218 para 17.

¹⁸⁵ See section IV.A.iii.b on the various understandings of the test developed in *Korea – Beef*.

¹⁸⁶ See e.g. Desmedt, 459-460.

could be read as going beyond a mere *taking into account* of risks and suggest implicitly *accepting* in some cases the risk of non-fulfilment.

A number of scholars have read Article 2.2 TBT as containing a necessity test. As an example, Vranes compares the provision with the other paragraphs of Article 2 TBT which require that international standards be used unless they are not suitable (Article 2.4 TBT), that other members' standards should be given positive consideration if they are deemed equally suitable (Article 2.7 TBT) and that performance standards are to be preferred over other standards (Article 2.8 TBT).¹⁸⁷ A necessity reading is thus convincing based on economic insights in this light, since performance standards have indeed been qualified as the least trade-restrictive means by economists in such circumstances.¹⁸⁸

As another argument, an express footnote using the term of 'proportionality' was deleted during the drafting process of Article 2.2 TBT.¹⁸⁹ In addition, the note 'taking into account the risk of non-fulfilment' can also be read differently: Article 2.2 TBT lists factors for the assessment of risks, which should then simply inform the necessity analysis suggested by the provision.¹⁹⁰

There is thus room for both readings in the wording and context of Article 2.2 TBT. From a conceptual point of view, our model of special interest review suggests predominant reliance on tests other than proportionality *stricto sensu*. However, in situations where there is severe under-representation of one interest – trade in this case – there could be reliance on full-scale proportionality analysis.

ii. The case law

Recent case law has led to some innovations and confirmed a necessity-based reading of Article 2.2 TBT. Even at the level of the test of national treatment more regulator-friendly approaches become apparent.

National treatment under the TBT Agreement has been read by one panel with more openness towards considering regulatory purpose.¹⁹¹ In *United States – Clove Cigarettes*, the panel extensively interpreted Article 2.1 TBT which prescribes 'treatment no less favourable' to imported products than that granted to domestic 'like products'. Faced with similar interpretative choices as in the case of Article III GATT, the panel opted, however, for a rather aims-and-effects based reading of likeness. It thus assigned considerable weight to the regulatory

¹⁸⁷ Vranes, 308-309.

¹⁸⁸ On the economic rationale of the least trade-restrictive means requirement of various measures see A.O. Sykes, 'Regulatory Protectionism and the Law of International Trade' (1999) 66 *University of Chicago Law Review* 1, 21-22.

¹⁸⁹ Vranes, 310.

¹⁹⁰ Tamiotti, 220 para 24.

¹⁹¹ Compare the case law discussed under Article III GATT in section III.C.ii.

purpose of the measure to find that the products at issue were indeed like.¹⁹² The Appellate Body, however, rejected this reading and held that the likeness of products had to be assessed on ground of competitive relationship only, ‘in isolation from the measure at issue’.¹⁹³ Taking into account regulatory objectives pursued by a measure would not only be difficult because of the choice among a variety of objectives this could often require,¹⁹⁴ but mainly prevent the assessment of the appropriate ‘marketplace’ on which then the assessment of ‘less favourable treatment’ as the second step had to take place.¹⁹⁵ This assessment would be distorted by taking into account regulatory objectives at the level of likeness.

Following doctrinal suggestions that had already been raised for Article III GATT as discussed previously, the Appellate Body in *United States – Clove Cigarettes* proposed assessing the role of regulatory distinctions at the level of ‘less favourable treatment’, which was also confirmed in the subsequent Appellate Body report in *United States – Tuna III*.¹⁹⁶ At this level, the panel had already clarified with reference to the similar analysis under Article III GATT that the examination of ‘less favourable treatment’ required a comparison of groups of products as to their treatment, which the Appellate Body confirmed.¹⁹⁷ The panel had also hinted here at the fact that a resulting modification of the conditions of competition to the detriment of the group of imported products could still be explained by some factors unrelated to the foreign origin of products.¹⁹⁸ The Appellate Body made the point clearer: at the level of less favourable treatment; the assessment should inquire whether prohibited *de jure* or *de facto* discrimination was at stake or whether the effects on a group of imported products could be explained by a ‘legitimate regulatory distinction’.¹⁹⁹ To draw the line between *de facto* discrimination and legitimate regulatory distinctions, the Appellate Body suggested looking at the ‘circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is evenhanded’.²⁰⁰ Some first insights as to how legal tests to assess the relationship between the impact of a measure and the objective pursued by a legitimate regulatory distinction emerged in *United States – Tuna III*. The Appellate Body clarified that initially, the complainant had to make a *prima facie* case that a measure was inconsistent with Article 2.1 TBT. Then, however, the respondent had to bring forward evidence to show that his measure was ‘calibrated’ to

¹⁹² *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R, 2 September 2011, paras 7.246-7247.

¹⁹³ *United States – Clove Cigarettes (Appellate Body report)*, para 111.

¹⁹⁴ *Ibid.*, paras 113 and 115.

¹⁹⁵ *Ibid.*, para 116.

¹⁹⁶ *Ibid.*, para 111; *United States – Tuna III (Appellate Body report)*, para 215.

¹⁹⁷ *United States – Clove Cigarettes (Appellate Body report)*, para 180.

¹⁹⁸ *Ibid.*, para 7.269.

¹⁹⁹ *Ibid.*, para 181.

²⁰⁰ *Ibid.*, para 182.

the risks identified which should be tackled by the label at issue.²⁰¹ Examining whether detrimental impact stemmed ‘exclusively’ from a legitimate regulatory distinction, the Appellate Body found that in the present case the United States could not show that the measure was sufficiently closely tailored to a specific problem; ‘calibration’ seemed to perform a similar function as a necessity test, although with particular focus on whether satisfying evidence for a particular risk tackled by the measure was brought forward.²⁰² Future case law must show whether this test will develop in a similar direction as the test under Article XX GATT and whether it will also be used under Article III:4 GATT. The Appellate Body criticized the use of judicial economy by the panel in the case, noting that contrary to the view of the panel, the obligations under both provisions were not ‘substantially the same’ and differed in scope and content.²⁰³ Still, the Appellate Body did not spell out how this would work out in detail, and did not suggest an alternative legal test.

These developments also raise the question of whether some convergence will ensue with the assessment under Article 2.2 TBT. Because of the different structure of the TBT Agreement, Article 2.2 is structured as a positive obligation rather than an exception.²⁰⁴ Panels have used the pertinent GATT case law as an inspiration.²⁰⁵ Despite some differences in their approach, all three panels in *United States – Clove Cigarettes*, *United States – COOL* and *United States – Tuna III* seemed to arrive at a similar conclusion, i.e. that a necessity test akin to the pertinent part of the ‘weighing and balancing’ test under Article XX GATT’s ‘necessary’ condition constitutes the core of the analysis.²⁰⁶

In *United States – Tuna III*, the panel found no anchorage for e.g. proportionality *stricto sensu* while construing the phrase ‘taking into account the risks non-fulfilment would create’. Instead, it simply understood the phrase as requiring the consideration of non-fulfilment in the form that alternative measures were excluded if they presented a higher risk of non-fulfilment of the level of protec-

²⁰¹ *United States – Tuna III (Appellate Body report)*, para 283.

²⁰² *Ibid.*, paras 284 and 297.

²⁰³ *United States – Tuna III (Appellate Body report)*, para 405.

²⁰⁴ *United States – Tuna III (panel report)*, para 7.458.

²⁰⁵ *United States – Clove Cigarettes (panel report)*, para 7.368; *United States – Certain Country of Origin Labeling (COOL) WT/DS384/R and WT/DS386/R*, 18 November 2011, para 7.667; *United States – Tuna III (panel report)*, para 7.457.

²⁰⁶ See *United States – Clove Cigarettes (panel report)*, para 7.352, *United States – Tuna III (panel report)*, para 7.465, and *United States – COOL*, para 7.557. The panel in *United States – Tuna III (panel report)*, para 7.460, goes to great lengths to distinguish that contrary to Article XX GATT, it is not the necessity of a measure fulfilling the objective but rather the trade restrictiveness of a measure that must be justified. The practical relevance of the distinction remains somewhat unclear, however, since the level of protection as the central concept of the panel’s reasoning is accepted under Article 2.2 TBT just as well as under Article XX GATT.

tion sought for by the regulating state, i.e. as an emphasis on the right of WTO members to choose their level of protection when regulating public concerns.²⁰⁷

The Appellate Body read the phrase somewhat more as an element of its own: It suggested that this enlarged the ‘weighing and balancing’ to be undertaken and should lead to an examination of alternatives ‘in the light of the nature of the risks at issue and the gravity of the consequences that would arise from non-fulfilment of the legitimate objective’.²⁰⁸ Such ‘consequences’ of ‘non-fulfilment’ could be read as a crack in the wall for a future appearance of proportionality *stricto sensu*. But in summarizing its approach, the Appellate Body was quick to muddy the waters again. The Appellate Body concluded that three elements are to be examined under the necessity condition of Article 2.2 TBT, the contribution of a measure towards a regulatory objective, its trade-restrictiveness and ‘the nature of the risks at issue and the gravity of consequences that would arise from non-fulfilment’.²⁰⁹ Deviating from a possible proportionality *stricto sensu* reading of this passage, the Appellate Body was, however, quick to subsequently describe the test as coming down in ‘most cases’ to a typical necessity test of comparing a measure with alternatives, which presents the classic features of alternatives as ‘less trade restrictive’, making an ‘equivalent contribution’ and ‘reasonable available’ as in other case law.²¹⁰ A footnote notes that there could be ‘at least’ two instances where no necessity assessment is required: These are situations where a measure is not trade-restrictive and where a measure makes no contribution to the regulatory objective.²¹¹ These seem to be rather obvious cases of hardly any practical relevance which can already be sorted out by previous steps of the analysis.

The solution suggested by the Appellate Body in *United States – Tuna III* emphasizes the pure necessity character of the inquiry less than the findings of the panel seem to suggest; still, despite many words it falls short – in a manner reminiscent of the ‘weighing and balancing’ discussion under Article XX GATT – of embracing in any clear way situations where true full-scale proportionality analysis may be used.

As to the burden of proof, in construing its test of necessity the panel in *United States – Tuna III* imported the attribution of the burden of proof from the setting of Article XX GATT, imposing only the identification of reasonably available alternatives on the complaining party.²¹² It could, however, be argued that Article XX GATT as an exceptions provision should be treated differently from Article 2.2 TBT as a positive obligation, in which case the complainant

²⁰⁷ *United States – Tuna III (panel report)*, para 7.467.

²⁰⁸ *United States – Tuna III (Appellate Body report)*, para 321. See also the later confirmation of this approach in *United States – Certain Country of Origin Labelling (COOL) AB-2012-3, WT/DS384/AB/R and WT/DS386/AB/R*, 29 June 2012, para 461.

²⁰⁹ *Ibid.*, para 322.

²¹⁰ *Ibid.*

²¹¹ *Ibid.*, para 322 footnote 647.

²¹² *United States – Tuna III (panel report)*, para 7.468.

would bear the burden of proof for all elements of Article 2.2 TBT.²¹³ The result in *United States – Clove Cigarettes* demonstrates the advantage for the defending regulating state that such a shift of the burden entails.²¹⁴

A somewhat curious rule for the burden of proof was subsequently set up by the Appellate Body in *United States – Tuna III*. It suggested a middle way, holding that the complainant had to make a *prima facie* case that a measure was ‘more trade restrictive than necessary to achieve the contribution it makes to the legitimate objectives, taking account of the risks non-fulfilment would create’; for this purpose, the complainant ‘may also seek to identify a possible alternative measure that is less trade restrictive’. Then the burden would shift to the respondent.²¹⁵ What remains unclear, however, is how a complainant should show that a measure is more restrictive than necessary without identifying an alternative.

It remains for future case law to show whether the test close to ‘weighing and balancing’ used for Article 2.2 TBT will also make its way to Article 2.1 TBT’s less favourable treatment assessment. If a reasonable distribution of the burden of proof is found, this could serve as a useful solution. The fear of proportionality *stricto sensu* discussed in the case of Article XX GATT seems, however, already to have been transposed to Article 2.2 of the TBT Agreement.

iii. Conclusion

Summing up, future case law will show whether more elements of the interpretation of Article XX GATT will be transposed to Article 2.2 TBT. It seems, however, that the test may be similar in some respects, but is more regulator-friendly in the case of Article 2.2 TBT. There is no closed list of regulatory objectives, and the attribution of the burden of proof – if confirmed as in *United States – Clove Cigarettes* – favours the defending WTO member in dispute settlement proceedings. These features keep the balance in the favour of the regulating state, although another feature from Article XX GATT has not yet appeared in the case law: Up to this point, there appears to be no adaptation of the standard of review based on the interest at issue. Based on the Appellate Body’s finding in *United States – Clove Cigarettes*, there also seems to be increasing leeway under the condition of ‘less favourable treatment’ in Article 2.1 TBT to assess the effects of regulation on groups of imported products and put them in relation with a purported regulatory objective. It seems likely and reasonable that the solutions embraced under Article 2.2 TBT will serve as an inspiration for this purpose.

²¹³ See for this approach the panel in *United States – Clove Cigarettes (panel report)*, para 7.331, based on agreement among the parties.

²¹⁴ See *Ibid.*, para 7.431.

²¹⁵ *United States – Tuna III (Appellate Body report)*, para 323.

C Article 5.6 SPS Agreement

Article 5 SPS Agreement regulates the assessment of risk and the determination of the appropriate level of protection for so-called sanitary and phytosanitary measures (SPS). Article 5.6 SPS stipulates that WTO members are to ensure that SPS measures are ‘not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility’. The notion of ‘more trade-restrictive than necessary’ is explained in footnote 3 to Article 5.6, which underlines that for a measure to fail this condition, there must be ‘another measure, reasonably available taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade’.

The wording clearly suggests a necessity test, while the notion of alternative measures is qualified by the fact that technical and economic feasibility must be given. In addition, alternative measures must also fulfil the requirement not of being ‘significantly’ less trade-restrictive. The SPS Agreement thus prescribes by its explicit wording a necessity test with significant discretion to choose a specific measure for WTO members. Because of this explicit wording, it is rather difficult to suggest the introduction of proportionality *stricto sensu* at this occasion.²¹⁶

The case law has also strongly supported the idea of a necessity test and in particular elaborated the concept of a WTO member’s level of protection. The Appellate Body thus used the footnote to Article 5.6 SPS to distinguish three different elements to be fulfilled: the reasonable availability in the light of economic and technological feasibility, the achievement of a WTO member’s chosen level of protection and a significantly lower negative effect on trade.²¹⁷ It defended the concept of the level of protection, rejecting alternatives if their potential to achieve the level of protection had not been demonstrated with scientific evidence.²¹⁸ One of the panels has admitted that it may prove difficult to determine whether an alternative measure is able to achieve the WTO member’s chosen level of protection.²¹⁹ This, however, could not relieve the panel of its burden; when it found alternative measures which could reduce

²¹⁶ See, however, L. Strack and P.-T. Stoll, ‘Article 5 SPS Agreement’ in R. Wolfrum, P.-T. Stoll and A. Seibert-Fohr (eds.), *WTO – Technical Barriers and SPS Measures* (Leiden: Martinus Nijhoff, 2007), 456 para 65, who suggest that a test ‘similar’ to the principle of proportionality in EU law should apply. The predominant reliance on necessity in EU law (see chapter 6 section IV.A) is perhaps the reason for their suggestion.

²¹⁷ *Australia – Measures Affecting Importation of Salmon* AB-1998-5, WT/DS18/AB/R, 6 November 1998, para 194.

²¹⁸ *Ibid.*, paras 210 ff. See also *Japan – Measures Affecting Agricultural Products* AB-1998-8, WT/DS76/AB/R, 22 February 1999, paras 8.83-8.84.

²¹⁹ *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 by Canada* WT/DS18/RW, 18 February 2000, paras 7.128-7.131.

the risk significantly and achieve the relevant member's level of protection, the panel refrained from imposing one particular course of action on the member, but held that the relevant member could decide autonomously on the concrete set-up of the measure.²²⁰

The test chosen under Article 5.6 SPS is thus respectful of the explicit wording of the provision and links substantial respect for the level of protection chosen by a WTO member with a certain margin of manoeuvre given to the WTO member in the means it chooses to achieve that end.²²¹

D The Exceptions to the TRIPS Agreement

A different setting is presented by the TRIPS because of its different structure.²²² Yet, at the same time there are also exceptions in the TRIPS Agreement which serve to strike a balance between the protection of intellectual property rights and public interests.²²³ As an example, Article 13 on copyrights provides:

Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

Article 30 on exceptions to patents provides in addition that account should be taken of the 'legitimate interests of third parties'.

As is discussed below, the case law has opted for a highly literal interpretation and created a three-step test, while voices in the doctrine have called for a more flexible test to account for the collision between intellectual property rights as values and other societal values.

i. The test under the exceptions to the TRIPS Agreement

The TRIPS exceptions have given room to the development of a test based on a highly literal interpretation. Panels²²⁴ have created a three-step test: limitations or exceptions introduced by WTO members must be confined to certain special cases; these cases must not conflict with a normal exploitation of the work; and as a third prong, they must not unreasonably prejudice the legitimate interests of the right holder.²²⁵

²²⁰ Ibid., para 7.144. See also *Australia – Measures Affecting the Importation of Apples from New Zealand* AB-2010-2, WT367/DS/AB/R, 29 November 2010, para 363.

²²¹ Ming Du, 1089.

²²² See already section III.D.

²²³ C.M. Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford: Oxford University Press, 2007), 135. Article 13 on copyrights, Article 17 on trademarks and Article 30 on patents can be named in that regard.

²²⁴ There is no Appellate Body report on this topic to date.

²²⁵ See for a detailed discussion Ibid., 146 ff.

In the application of this step-by-step test, panels have required the conditions to be fulfilled cumulatively. The first step mostly requires a clearly defined exception whose scope of applicability is narrowly drawn.²²⁶ During the second step, the determination of what constitutes ‘normal exploitation’ of works is examined in the light of economic considerations.²²⁷ Under the third prong of the test, panels struggled both with the determination of what constitutes ‘unreasonable’ prejudice²²⁸ and with the identification of the legitimate interests of the rights holder as well as the identification of interests that may justify a limitation in the first place.²²⁹

In *Canada – Pharmaceutical Patents*, the panel defined legitimate interests as ‘a normative claim calling for protection of interests that are “justifiable” in the sense that they are supported by relevant public policies or other social norms’.²³⁰ However, it gave a more restrictive reading to the ‘legitimate interests’ of the rights-holder: the relevant claim had to rest on a ‘widely recognized policy norm’²³¹ and had to be sufficiently ‘compelling’.²³² As has been noted, the panel thereby introduced additional thresholds for the recognition of interests of rights holders, as such a ‘widely recognized policy norm’ must be grounded in the views of substantial number of countries worldwide and must also convey a certain importance.²³³ This feature immediately reminds us of the approach of the European Court of Human Rights when the existence of a ‘consensus’ is looked for.²³⁴ However, while in that case the Court simply narrows its standard of review if a consensus is found, in dispute settlement under the TRIPS Agreement the existence of views of a substantial number of countries is the precondition for the recognition of a legitimate interest.

In *United States – Copyrights*, the panel held that the term ‘legitimate’ not only meant lawful from a positivist perspective, but also carried the meaning of legitimacy in a normative perspective, which required the ‘protection of interests that are justifiable in the light of the objectives that underlie the protection of exclusive rights’.²³⁵ While in the relevant case these interests were of an economic nature, the panel underlined that legitimate interests were not

²²⁶ *United States – Section 110(5) of United States Copyright Act* WT/DS160/R, 15 June 2000, paras 6.108-6.109.

²²⁷ *Ibid.*, para 6.183. J.T. Füller, ‘Article 13 TRIPS’ in P.-T. Stoll, J. Busche and K. Arend (eds.), *WTO – Trade Related Aspects of Intellectual Property Rights* (Leiden: Martinus Nijhoff, 2009), 283 para 14, criticizes that the panel refrained from suggesting general criteria to determine ‘normal use’.

²²⁸ Füller suggests that in any case limits to the full maximisation of profits for beneficiaries can be introduced, Füller, 284 para 16.

²²⁹ Article 30 TRIPS expressly prescribes taking into account the ‘legitimate interests of third parties’.

²³⁰ *Canada – Patent Protection of Pharmaceutical Products* WT/DS114/R, 17 March 2000, para 7.69.

²³¹ *Ibid.*, para 7.77.

²³² *Ibid.*, para 7.82.

²³³ Pauwelyn, ‘Intellectual Property Disputes’, 405-406.

²³⁴ See chapter 5 section III.B.i.

²³⁵ *United States – Copyright*, para 6.224.

necessarily limited to this category.²³⁶ In a later case, a panel then recognised the interest of consumer protection as legitimate for the justification of a limited exception to the rights of trademark holders which were based on the legitimate interest to protect the distinctiveness of their trademarks.²³⁷

ii. Debate on a less rigid test under the exceptions provisions

Some authors have voiced concerns on the mechanistic application of the three-step test which would cause a very narrow reading of the clauses on limitations and exceptions in particular in the field of copyrights.²³⁸ A number of scholars have thus drafted a declaration requiring a change in the interpretation of the three-step test.²³⁹ Their claim is that an unduly narrow interpretation of the three-step test leads to an under-representation of the interests of the public at large to the benefit of right holders' interests, which contradicts the balance of interests underlying intellectual property rights, the latter also being enshrined in Article 7 TRIPS.²⁴⁰ In particular interests enshrining fundamental rights and undue restrictions of competition that can arise out of the use of intellectual property rights must be appropriately accounted for in the framework of a test under the TRIPS exceptions.²⁴¹ Consequently, the three-step test should in future be applied as a comprehensive overall assessment; legislatures and courts should not be prevented from introducing open-ended limitations and exceptions, and there should not be a conflict with the normal exploitation of works by such behaviour if the exceptions and limitations introduced are 'based on important competing considerations' or counter anti-competitive effects of intellectual property rights use on secondary markets.²⁴² Next to human rights and competition, other values such as scientific progress and cultural, social or economic development should be accepted as public interests.²⁴³ This manner of applying the three-step test arguably suggests a holistic

²³⁶ *Ibid.*, para 6.227.

²³⁷ *European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs* WT/DS290/R, 15 March 2005, paras 7.668 and 7.676-7.677.

²³⁸ See e.g. Correa, 155.

²³⁹ See for the document www.ip.mpg.de/ww/en/pub/news/declaration_on_the_three_step_.cfm (access on 6 March 2012).

²⁴⁰ Declaration – A Balanced Interpretation of the „Three-Step Test“ in Copyright Law, 2. Article 7 provides as an objective that the protection and enforcement of intellectual property rights should operate 'in a manner conducive to social and economic welfare' and lead to a 'balance of rights and obligations'. The Doha Declaration on Public Health has also emphasized the need to read each TRIPS provision in the light of the objectives and principles of the Agreement, among which one can count Article 7, see S. Reyes-Knoche, 'Article 30 TRIPS' in P.-T. Stoll, J. Busche and K. Arend (eds.), *WTO – Trade Related Aspects of Intellectual Property Rights* (Leiden: Martinus Nijhoff, 2009), 541 para 17.

²⁴¹ *Ibid.*, 2.

²⁴² *Ibid.*, 4-5.

²⁴³ *Ibid.*, 5.

weighing exercise.²⁴⁴ Concerns have also been voiced about the overreliance on the interpretative methods of ‘ordinary meaning’ and ‘context’ in the case law to the detriment of more integrative interpretation using Article 7 TRIPS under a more teleological construction based on the agreement’s ‘object and purpose’.²⁴⁵

Others, however, read the case law as striking an appropriate balance. For Pauwelyn, there is a difference in the drafting of the TRIPS limitations and exceptions as opposed to Article XX GATT, but still panels have usefully managed to bring into play public interests through the back door of legitimate interests of third persons.²⁴⁶ The functioning of the weighing exercise may be more limited through the step-by-step sequence of the three-step test than under Article XX GATT. In particular, if a measure is broad, it will not pass the first step, although a justification by a legitimate purpose may have existed. Furthermore, the weighing exercise itself was also narrowed down by the requirements imposed on legitimate interests of right holders by the panel in *Canada – Pharmaceutical Patents*.²⁴⁷ But the exceptions do not serve as the only possibility to deviate from TRIPS obligations in order to pursue other public interests in Pauwelyn’s view. Unlike Article XX GATT, in TRIPS Article 27 (2), TRIPS also provides for exclusions to patentability if such an exclusion is required to protect ‘*ordre public* or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment’. Article 6 TRIPS leaves the question of exhaustion of intellectual property rights untouched and thus gives scope for parallel imports. Article 7 and 8²⁴⁸ were not intended to ‘overrule’ other TRIPS provisions as the latter already constitute the result of a weighing exercise between competing public interests.²⁴⁹

Still, it can be argued that the exceptions and limitations provisions in TRIPS potentially cover a substantial range of domestic regulatory measures.²⁵⁰

In the light of these arguments, an ideal test under the TRIPS exceptions and limitations provisions has yet to see the light of day in the case law. At the theoretical level, however, it appears appropriate to note that the strict step-by-step sequence of the analysis is, as the drafters of the declaration have found,

²⁴⁴ Füller, 281 para 10, argues furthermore that a balancing formula such as a ‘rule of reason’ could also be acceptable, as long as it transparently sets out the interests to be balanced and is thus sufficiently certain as required by the first prong of the three-step test.

²⁴⁵ See, based on an empirical study of TRIPS case law, H.G. Ruse-Khan, ‘The (Non)Use of Treaty Object and Purpose in Intellectual Property Disputes in the WTO’ (2011) 11 *Max Planck Institute for Intellectual Property and Competition Law Research Paper* 1, 33.

²⁴⁶ Pauwelyn, ‘Intellectual Property Disputes’, 410.

²⁴⁷ *Ibid.*, 411.

²⁴⁸ Article 8 TRIPS allows WTO members to adopt measures ‘necessary to protect public health and nutrition’ and measures to ‘prevent the abuse of intellectual property rights’, but prescribes that all such measures must be ‘consistent with the provisions’ of the TRIPS Agreement.

²⁴⁹ Pauwelyn, ‘Intellectual Property Disputes’ 412.

²⁵⁰ During the drafting process of TRIPS, there have even been attempts to codify a non-exhaustive list of permitted exceptions which can arguably be used as an inspiration, see Reyes-Knoche, 547 paras 28 ff.

exaggerated textualism. Since the justification of judicial review under TRIPS does not seem conducive to highly intrusive review,²⁵¹ intrusive proportionality analysis arguably should not constitute the solution to all problems. There remains, however, some leeway to be used to loosen the three-step test. As an example, it appears conceptually difficult that a panel is called to assess whether an exception is sufficiently narrow in the absence of any benchmark. The provisions of domestic law may be a starting point, but without a look at the purpose – the legitimate interest – pursued by a measure, a finding of narrowness can probably only be based on intuition in borderline cases. Suitability and necessity may help to identify ‘narrowness’ in such cases. The identification of ‘legitimate interests’ also seems somewhat over-restrictive. The need to identify a majority of countries with similar views risks locking in current views on the exploitation of intellectual property rights and excluding legitimate interests based on majority views. Instead of a threshold approach to recognition, panels could take inspiration from the European Court of Human Rights at this point. Instead of excluding legitimate interests, they could adapt the standard of review based on whether a broad consensus exists. Legitimate interests which are not based on widely used policy norms would thus be subject to more intrusive scrutiny, but not excluded from the outset. Such renovations arguably do not overthrow the carefully negotiated balance of the TRIPS Agreement, but still give some more flexibility to the TRIPS Agreement.

E Conclusion

Generally, panels and the Appellate Body have so far abstained from a clear engagement in proportionality *stricto sensu* in the interpretation of the WTO covered agreements. In the case of the SPS and TBT agreements, this seems based on clear textual exclusion of such a test (Article 5.6 SPS Agreement) or at least textual elements that render such an interpretation less suitable (Article 2.2 TBT). The case of the TRIPS Agreement has presented adjudicators with the difficulty of a number of exceptions, which has led them to rather narrowly construe the provisions in front of them. Article XX GATT as the central provision is a narrowly drafted provision for exceptions for certain public policy objectives. Its unsystematic and highly literal interpretation has not helped in allowing a coherent picture to emerge. Its wording, however, arguably does not exclude an interpretation along the lines of proportionality *stricto sensu*. The WTO judiciary has, however, embraced the rather blurry ‘weighing and balancing’ test, which in a rather obscure way puts in relation the value protected by regulation, the contribution of a measure towards the regulatory objective and the trade-restrictive effect, only to subsequently compare the measure to reasonably available alternatives.

Still, it should be noted that the prevailing necessity test on which the ‘weighing and balancing’ test rests presents some positive features. Through

²⁵¹ See section III.D.

the appropriate attribution of the burden of proof and the implicit adaptation of the standard of review under the ‘new approach’, the test effectively represents values at stake in a less hierarchical manner than e.g. under EU law. Earlier categorical exclusion of PPMs and extraterritorial measures has given way to more measured scrutiny in more recent case law. Still, the evident fear of proportionality *stricto sensu* seems exaggerated in our view and not normatively justified, and the ‘weighing and balancing’ process remains to a large extent opaque and under-theorized.

V Evaluation and Conclusion

In our contextual assessment, a historical overview shows that today’s dispute settlement system of the WTO is the result of a process of increasing ‘judicialisation’. However, as closer insights on the institutional balance and in particular the rationale and objectives of the dispute settlement system show, adjudication under WTO law generally remains a technical, trade-focused process where specialized adjudicators can hardly feel legitimized in aiming for a quasi-constitutional approach of representing all interests equally in a balancing act. In our view, this explains to quite a great extent the reluctance to engage in balancing or proportionality *stricto sensu*, without, however, justifying such reluctance normatively.

Pre-balancing for judicial review in WTO law has, in our view, yielded a result close to a model of special interest review. In the discussion in the case law, unfortunately, fairly few elements of procedural democracy can be found. The debate on national treatment under the GATT can be related to an overall debate on whether GATT should be read as an instrument containing rights. The actual case law and discussion of the standard of review, however, do not take up the idea of reading GATT as a rights instrument, and generally remain somewhat vague on the subject. In the case of the TRIPS Agreement, justifying judicial review because of the nature of intellectual property rights as aspects of property rights is not a highly convincing argument. The provisions of the TRIPS Agreement already express a previous balance found between property rights as individual interests and public interests. The case for intrusive review using proportionality analysis thus seems weak, which has further bolstered our overall conclusion of pre-balancing for judicial review under WTO law resulting in a model of special interest review.

The overall reliance on necessity tests can generally be welcomed in this light. Under the ‘necessary’ condition of Article XX GATT, the Appellate Body’s ‘weighing and balancing’ test is the central legal test. We have noted with approval that the operation of necessity has been adjusted to better represent both the interest of trade and of regulatory autonomy as compared to the restrictive version of necessity operating in EU internal market law. At the same time, older categorisations for PPMs and extraterritorial measures have been aban-

done in the case law, leading to a more flexible scrutiny as compared e.g. to the scrutiny under the Dormant Commerce Clause in United States constitutional law.

However, shortcomings remain. Panels and the Appellate Body seem to be using the flexibility of the ‘weighing and balancing’ test to obscure an unwillingness to seriously consider proportionality *stricto sensu*, which in our view cannot be excluded absolutely, but should still play a role in a very limited set of cases under the model of special interest representation. Furthermore, many conceptual issues and the sequence of the ‘weighing and balancing’ test remain blurred by the constant repetition of the same formulas without clearly setting out e.g. how the standard of review changes according to the interests at stake.

International Investment Law

I Introduction

International investment law is a somewhat peculiar regime of international economic law.¹ In principle, international investment law is based on the idea of providing standards of treatment and protection of foreign investment. The setting of judicial review in investment arbitration, however, features a remarkably prominent position given to investors as individuals who are able to bring host states before an arbitral tribunal to claim compensation for breaches of an investment protection obligation. At first glance, the analogy with human rights protection comes to mind, and one is tempted to draw comparisons with the protection of the right to property. Consequently, international investment law would probably feature as a model of equal representation review similar to the European Court of Human Rights. However, a closer look leads to the conclusion that the human rights review parallel is rather crude. When one looks more closely at the details, pre-balancing results rather in a model of special interest review.

Starting with the context, history as well as institutional characteristics and the political economy of investment arbitration point less towards a process of increasing judicialisation towards a quasi-constitutional regime of adjudication, but rather to a limited, technical task of finding treaty breaches and adjudicating the appropriate details of compensation – which in our view can be presented as the insurance contract perspective.

With this in mind, pre-balancing the justification of judicial review cannot easily be put on equal footing with the case of fundamental rights or human rights adjudication. The procedural democracy doctrine would justify intrusive review based on the violation of specific interests which are central to the democratic process. In the case of investment law, confusion and disagreement surrounds the very notion of investment, which is not clearly recognized as a public interest. The justification of judicial review could follow the lines of procedural democracy if international investment law is set up as regime that protects property rights as human rights. However, the functioning of investment arbitration casts severe doubt on this point.

In examining the case law, we find some references to proportionality analysis. However, there is no systematic test that has emerged. The case law is predominantly fact-specific and has only just begun to construct tests that are being taken up and repeated by other tribunals. As an early evaluation, we thus conclude that following a model of special interest representation, tribunals should refrain from frequent use of full-scale proportionality analysis, although it may be justified in situations where the interest of investment seems to be severely underrepresented in the domestic political process.

¹ Many of the arguments presented in this chapter were already published in a shorter version in B Pirker, 'Seeing the Forest without the Trees – The Doubtful Case of Proportionality Analysis in International Investment Arbitration', in: A Herwig, C Joerges and G Pavlakos (eds), *Proportionality in a Post-National Context*, forthcoming 2013.

II The Broader Context of Judicial Review in International Investment Law

In the present section, insights into the historical development reveal that a narrative of continuous ‘judicialisation’ and constitutionalisation seem exaggerated. Furthermore, the institutional design of investment arbitration leaves some doubt as to whether arbitrators are well placed for full-scale proportionality analysis. Eventually, the political economy of investment arbitration positions it closer to a bilateral, contractual mechanism for limited technical purposes than to quasi-constitutional adjudication. Some voices in investment arbitration would categorically exclude the use of full-scale proportionality by tribunals, because the latter would otherwise question a pre-established balance of interests laid down by the legislator or treaty-drafters.² Without going that far, the broader context offers an explanation for a more cautious approach to pre-balancing to establish the appropriate use of proportionality analysis by arbitral tribunals.

A The History of Judicial Review in International Investment Arbitration – Two Conflicting Narratives

Two narratives can be opposed here. On the one hand, one view describes the history of international investment law as a ‘progressive’³ development towards judicialisation, institutionalisation and constitutionalisation. Such a progressive perspective would logically suggest the continuous development of interpretations along the lines of other, older constitutional regimes such as domestic constitutional legal systems. On the other hand, there are elements that suggest a less straightforward path calling into question the progressive narrative and with it the constitutionalisation objective of investment arbitration.

i. The progressive narrative

The starting point of the international law on investment protection was concern about the protection of property and appropriate treatment of a state’s nationals in another state. The use of international treaties for this purpose began in the late eighteenth century, when the United States in particular started to conclude treaties of ‘Friendship, Commerce and Navigation’ with trading partner countries. These treaties focused on trade relations, but also included provisions granting ‘special protection’ to the property of inves-

² See recently *Abaclat and others (formerly Beccara and others) v. The Argentine Republic* ICSID Case No ARB/07/5, Decision on Jurisdiction and Admissibility (4 August 2011), Dissent of Professor Abi-Saab (28 October 2011), para 251, where balancing is found to be ‘clearly *ultra vires* the powers of the Tribunal’.

³ Term borrowed from A. Mills, ‘Antinomies of Public and Private at the Foundations of International Investment Law and Arbitration’ (2011) 14 *Journal of International Economic Law* 469, 471.

tors from the partner state, requiring the payment of compensation in cases of expropriation.⁴ Next to these treaties, there existed a general consensus as to the existence of a minimum standard of treatment for foreign investors anchored in customary international law.⁵

Yet, when these norms ought to have been put into practice in the case of a perceived violation, only diplomatic protection was available: the home state of an investor had to espouse the latter's claim and address it by diplomatic means or with military force.⁶ The predominant view taken by capital-exporting states in the early 20th century was best described by the well-known Hull-formula: in case of expropriation, a state was required by customary international law to pay 'prompt, adequate and effective' compensation to the foreign investor.⁷

After the Second World War and during the subsequent process of decolonisation, newly independent countries and communist countries started a series of expropriations which were not accompanied by 'prompt, adequate and effective' compensation; this prompted capital-exporting states to look for a better way to protect their investors.⁸ As force was no longer permitted after the entry into force of the United Nations Charter and as customary international law provided only incomplete protection, developed countries opted for treaties.⁹ The first bilateral investment treaty (BIT) was signed in 1959 between Germany and Pakistan. However, these first attempts to protect investors by international treaties were not yet coupled with the aim of enforcing them by dispute settlement, including interpretation of the treaty and judicial review of the host state's regulatory actions. Instead, they served as political documents to support efforts of diplomatic protection.¹⁰ Since then, there has been a constant growth in the conclusion of BITs which led to some 2676 BITs in existence by the end of 2008.¹¹ The 1990s have also seen the conclusion of regional agreements including provisions on investment protection, and a new tendency to conclude agreements mixing provisions on trade and on investment.¹²

⁴ K.J. Vandeveld, 'A Brief History of International Investment Agreements' (2005-2006) 12 *UCDavis Journal of International Law and Policy* 157, 158-159.

⁵ *Ibid.*, 159.

⁶ A. Lehari and A.N. Licht, 'BITs and Pieces of Property' (2011) 36 *Yale Journal of International Law* 115, 121.

⁷ See on the emergence of this formula during the dispute over Mexican expropriation measures in the inter-war period A. Guzman, 'Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties' (1998) 38 *Virginia Journal of International Law* 639, 644-645.

⁸ See for an overview of these waves of expropriation Lehari and Licht, 120.

⁹ Vandeveld, 169.

¹⁰ T. Waelde, 'Interpreting Investment Treaties: Experiences and Examples' in C Binder and others (eds), *International Investment Law for the 21st Century – Essays in Honour of Christoph Schreuer* (Oxford: Oxford University Press, 2009), 748.

¹¹ United Nations Conference on Trade and Development, 'Recent Developments in International Investment Agreements (2008-June 2009)' (2009) UN Doc UNCTAD/WEB/DIAE/IA/2009/8, 2.

¹² See closer on NAFTA and other agreements of the 'global' age Vandeveld, 180 ff.

In terms of judicial review, the paradigmatic change was introduced in the form of dispute settlement provisions in these BITs. BITs started to typically include the general and prospective consent to arbitration by a host state. As a consequence, investors could bring a claim directly to arbitration simply by offering their own consent, without the need to have their claim espoused by their home state. Arbitration clauses thus created a ‘whole new review mechanism’ against actions of the host state.¹³ Typically, such clauses also designate framework rules according to which arbitration should proceed, the most commonly used being the rules and institutional mechanisms of the International Center for the Settlement of Investment Disputes (ICSID).¹⁴ Also, as a common provision the need to exhaust local remedies is often excluded, giving the investor direct access to arbitration and the possibility to avoid allegedly biased domestic courts.¹⁵

The strengthened dispute settlement provisions and the increasing number of BITs led to an explosion of cases brought to arbitration from the late 1990s onwards. ICSID alone registered 351 cases by mid-2011, the majority of which were initiated after 1997.¹⁶

The growing amount of case law prompted tribunals to increasingly rely on a mild form of precedent in their decisions, referring to other tribunals’ decisions in their reasoning. Adopting a progressive perspective, a commentator suggested that investment arbitration was moving towards a process of ‘judicialisation’ which would result in system-building.¹⁷ Based on the fact that investment arbitration subjects the regulatory power of host states to the rules and constraints of investment treaties, a quasi-constitutional character was ascribed to such arbitration.¹⁸ According to this first narrative, investment law as a discipline is on a continuous path towards coherent, universal standards of investment protection and the strengthening of the rule of law, and is supported in this process by the increasingly self-stabilizing mechanism of investment arbitration.¹⁹

¹³ J. Wouters and N. Hachez, ‘The Institutionalization of Investment Arbitration and Sustainable Development’ in M-C Cordonier Segger, MW Gehring and A Newcombe (eds), *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011), 718.

¹⁴ See concisely *Ibid.*, 619.

¹⁵ S.W. Schill, ‘System Building in Investment Treaty Arbitration and Lawmaking’ (2011) 12 *German Law Journal* 1083, 1089.

¹⁶ *The ICSID Caseload – Statistics*, Issue 2011-2, available at www.icsid.org, 7.

¹⁷ Schill, 1088.

¹⁸ A. Newcombe, ‘Sustainable Development and Investment Treaty Law’ (2007) 8 *Journal of World Investment & Trade* 357, 366. See for a strong claim on the constitutionalisation of investment law P. Behrens, ‘Towards the Constitutionalization of International Investment Protection’ (2007) 45 *Archiv des Völkerrechts* 153.

¹⁹ See also for an account based on the concept of global administrative law B. Kingsbury and S.W. Schill, ‘Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerg-

A progressive perspective on the development of international investment arbitration thus suggests that despite the fragmentary, bilateral origins a new, coherent system of international law is emerging, including an increasingly coherent system of judicial review. The more such a perspective is adopted, the more appropriate it might also seem to suggest that proportionality analysis is a key concept to be used in such an arbitration setting. Several authors argue thus in favour of proportionality analysis as a ‘rational’ process²⁰ for weighing competing arguments²¹ in the interpretation of substantive standards of investor protection in BITs. Commentators welcomed proportionality analysis as a tool to improve the reasoning of tribunals, without necessarily clarifying why the use of proportionality analysis would automatically entail such an effect or whether alternative legal tests could play a more fruitful role in individual contexts.²² Some doubts arise, however, on the straightforward development of judicial review that seems to stand behind such accounts. There is room for a second competing narrative, departing from which one can assess with more scepticism the institutional setting of investment arbitration and its political economy.

ing Global Administrative Law’ (2009) *New York University School of Law Public Law & Legal Theory Research Paper Series Working Paper* No 9-46 1.

- ²⁰ B. Kingsbury and S.W. Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality’ in S.W. Schill (ed.) *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010), 88. See also in the context of investment arbitration intersecting with the law on State immunity S.W. Schill, ‘International Investment Law and the Law of State Immunity: Antagonists or Two Sides of the Same Coin?’ in R. Hofmann and C.J. Tams (eds.), *International Investment Law and General International Law – From Clinical Isolation to Systemic Integration?* (Baden-Baden: Nomos, 2011), 258.
- ²¹ See also A. Stone Sweet, ‘Investor-State Arbitration: Proportionality’s New Frontier’ (2010) 4 *Law & Ethics of Human Rights* 46, 50.
- ²² A. Stone Sweet and F. Grisel, ‘Transnational Investment Arbitration: From Delegation to Constitutionalization?’ in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (New York: Oxford University Press, 2009), 131. See also H. Xiuli, ‘The Application of the Principle of Proportionality in *Tecmed v. Mexico*’ (2007) 6 *Chinese Journal of International Law* 635, 642; J. Krommendijk and J. Morijn, ‘Proportional’ by What Measure(s)? Balancing Investor Interests and Human Rights by Way of Applying the Proportionality Principle in Investor-State Arbitration’ in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds.), *Human rights in international investment law and arbitration* (New York: Oxford University Press, 2009), 442; C. Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’ (2012) 15 *Journal of International Economic Law* 223, 228-229. See also in the context of the fair and equitable treatment standard R. Kläger, ‘Fair and Equitable Treatment’ in *International Investment Law* (Cambridge: Cambridge University Press, 2011), 153, who admits at the same time that arbitrators’ personal views may play a role in the process of the weighing of competing claims.

ii. A less linear account

A progressive perspective on the development of international investment law and arbitration is only possible if some elements are left out of the picture. In bringing them back in, more concern arises on the fragmented nature of the international investment legal regime and its form of dispute settlement, i.e. arbitration. The emergence of BITs can alternatively be understood as a reaction to the constant contestation of the claim that customary international law provided for some particular level of protection of foreign investors. In light of this, it becomes necessary to re-examine the claims of a continuous judicialisation of investment arbitration, at least as far as the nature of judicial review in investment law is concerned.

In the early 20th century, Latin-American states in particular contested the prevalent view of capital-exporting states according to which there was a certain international minimum standard of treatment for aliens, in particular as regards fair treatment²³ and the need to pay compensation at market value for expropriated property. The obligation to compensate was particularly contested based on the doctrinal basis established by Calvo;²⁴ only national treatment – i.e. treatment comparable to that for nationals – should be granted to foreign investors.²⁵

Renewed support for similar views became apparent in the above mentioned wave of expropriations, but also in efforts to create new rules. The capital-exporting states' efforts to create multilateral norms of investment protection were not crowned by success and led to the emergence of a strategy of bilateral law-making.²⁶ By contrast, the newly independent developing and socialist countries tried to further establish their views in the framework of the United Nations, in particular by using their new majority in the General Assembly to adopt the Declaration of the New International Economic Order in 1974.²⁷ According to this resolution, full permanent sovereignty over a state's resources included the right to nationalisation, while a duty to compensate or the details of compensation were not mentioned at all.²⁸

²³ See on this point the important case *Neer v. Mexico* Opinion, US-Mexico General Claims Commission, 15 October 1926, 21 *American Journal of International Law* (1927) 555.

²⁴ C. Calvo, *Derecho Internacional Teórico y Práctico de Europa y América* (Paris: D'Amyot e.a., 1868), paras 170-171.

²⁵ See closer on the discussion in particular between Mexico and the United States Guzman, 646. See on the two conflicting opinions concisely M. Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010), 18. See also on the Calvo doctrine Sornarajah, 21.

²⁶ See e.g. the unfinished International Law Commission project to codify a minimum standard of treatment for foreign nationals in the 1950s, the failure of the 1967 OECD Draft Convention on the Protection of Foreign Property or the collapse of the negotiations of a Multilateral Agreement on Investment in the 1990s, see Mills, 474.

²⁷ Declaration on the Establishment of a New Economic Order, General Assembly Resolution, U.N.Doc. A/RES/3201(S-VI), 1 May 1974, reprinted in 13 *International Legal Materials* 1974, 715.

²⁸ Vandevelde, 167. The earlier 1962 UN resolution on permanent sovereignty over natural resources had still required 'appropriate' compensation, while the 1973 resolution clarified that the amount and

This opposite view subsequently lost strength. Outright nationalisations became rare in the late 1970s, and the emergence of the Washington Consensus and the collapse of the Soviet Union led to a more wide-spread acceptance of foreign direct investment as a positive source for economic development, which also led to increasing signing of BITs.²⁹ Still, contestation of the specific protection of investors by international law has not lost critics. On the contrary, the earlier division along North-South lines is becoming increasingly blurred as a result of increasing capital-export from former developing countries; simultaneously, criticism has also been voiced in academic and political circles of the 'North' against the special system of investment protection. The process of signing new BITs has, overall, also lost some of its speed in recent years.³⁰ The potential restrictive effect of awards imposing high compensation payments on domestic regulatory autonomy was criticized.³¹ Linked to these public law effects of arbitration is the claim that the commercial arbitration setting of investment arbitration is unsuitable for the chosen task.³² The argument in favour of proportionality analysis is, therefore, sometimes claimed to be grounded in an effort to lend additional output legitimacy to an adjudication system in crisis.³³

Summing up, the fragmented way in which the investment regime evolved – i.e. mostly in bilateral treaties, interpreted and enforced by arbitration – arguably mirrors the described tensions between more investor-friendly positions and opponents who are worried about the loss of regulatory autonomy of host states. The development of judicial review in the international investment regime thus proves more complex than at first glance. The subsequent sections must accordingly examine the institutional design and political economy of investment arbitration more closely.

B The Institutional Design of Judicial Review in Investment Arbitration

The central point of concern for many scholars in the current regime of investment arbitration is the mixture of a setting of commercial arbitration with the substantially public-law-based issues that come before such adjudication. Elements that can be brought forward include, for instance, the

manner of payment of compensation were for the national state to regulate, see Guzman, 649–650.

²⁹ Lehari and Licht, 124.

³⁰ Z. Elkins, A. Guzman and B. Simmons, 'Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000' (2008) *University of Illinois Law Review* 265, 299.

³¹ Mills, 489.

³² Perhaps the strongest claim in this regard has been issued by G. Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford: Oxford University Press, 2007), 180 ff., who suggests that the present system of investment arbitration should be abandoned and that public courts staffed with permanent judges should replace it.

³³ E. Leonhardsen, 'Looking for Legitimacy: Exploring Proportionality Analysis in Investment Treaty Arbitration' (2012) 3 *Journal of International Dispute Settlement* 95

confidential setting of proceedings. Claims for more transparency have arisen as a consequence.³⁴ Two main concerns, furthermore, relate more directly to the possibility of having recourse to proportionality analysis. First, representativeness of arbitrators is low. Second, the arbitration setting is likely to contribute to very low predictability if proportionality analysis is embraced.

On the first point, because a tribunal is created *ad hoc* for each dispute, arbitrators do not enjoy a security of tenure comparable to judges. They are chosen by the parties. This choice may take into account to what extent arbitrators are familiar with the socio-economic and legal background of a particular dispute. In practice, however, choice is predominantly based upon expertise in international investment law and the political view that a particular potential arbitrator has expressed in the past in scholarly writings or legal practice, i.e. whether he or she has sided with host states or investors.³⁵ This causes severe issues of independence of arbitrators, in particular since they themselves have an interest in being employed in future investment arbitration litigation, be it as counsel or arbitrator, and may be influenced in their decision-making.³⁶

It also comes as no surprise that the representation of interests is not necessarily balanced as far as the methods of interpretation of BITs are concerned. General studies of the interpretative methods used by tribunals demonstrated a tendency of tribunals to rely on teleological approaches, which leads to a rather investor-friendly reading of BITs because of the wording of preambles and objectives of BITs, which tend to describe foreign investment as a welcome and beneficial factor for economic development.³⁷

For proportionality analysis, the main point of concern which follows out of these *ad hoc* appointments of experts in investment law is a high likelihood that arbitrators are not overly familiar with the social, economic and legal circumstances surrounding a particular dispute case. If proportionality analysis should be used, this lack of 'embeddedness' can render difficult the weighing between competing values in context. Context-sensitivity would be central to reach an informed result.³⁸

³⁴ See e.g. Mills, 485, or Wouters and Hachez, 630.

³⁵ Wouters and Hachez, 628.

³⁶ See concisely on this point G. Van Harten, 'Five Justifications for Investment Treaties: A Critical Discussion' (2010) 2 *Trade, Law and Development* 14, 36-37.

³⁷ See e.g. Van Harten, *Investment Treaty Arbitration*, 138; Waelde, 732; see also on the narrow interpretation of exceptions to BIT obligations A. Newcombe, 'General Exceptions in International Investment Agreements' in M.-C. Cordonier Segger, M.W. Gehring and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011), 361 ff.

³⁸ See on this point W.W. Burke-White and A. von Staden, 'Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations' (2010) 35 *Yale Journal of International Law* 283, 336. Burke-White and von Staden suggest the margin of appreciation doctrine as a more useful test than proportionality analysis. It remains doubtful, however, why the problem of context sensitivity should not play out similarly under the margin of appreciation, because the latter requires a similar weighing of competing values. The only difference seems to be that the margin of appreciation adapts the standard

On the second point, the *ad hoc* setting of investment arbitration is likely to give rise to highly fragmented casuistic case law. The setting where only a solution to one dispute has to be found does not necessarily encourage the consideration of earlier case law and the search for some sort of coherence.³⁹ The fragmented setting of arbitral tribunals adjudicating a multitude of only partly similar BITs is contrasted with the broad standards contained in these BITs, which gives the tribunals a large margin of discretion in interpretation. The tribunals' adjudicative activity has correctly been qualified as 'law-making'.⁴⁰

For proportionality analysis, such a fragmented case law could increase the unpredictability of awards. If non-embedded tribunals were to decide every case from scratch, the task for non-embedded arbitrators becomes even more difficult because of their broad discretion.

Yet, at least this last point can be nuanced to a certain extent. Recent contributions demonstrate that a mild form of precedent used by tribunals reduces to some extent the potential for fragmentation in the case law. First, the high amount of case law produces in itself a stabilizing effect for international investment law as a system.⁴¹ 'Normative expectations' are formed out of the existence of earlier case law for later cases.⁴² Second, based on this preceding case law, tribunals cite are citing other tribunals' awards in their reasoning more and more to either support their own conclusions or to explain different solutions. They do not ignore each other's case law with the reference to the essentially bilateral and separate nature of each dispute, as one might have feared.⁴³ Instead, some have described the phenomenon as a 'burden of argumentation' which shifts towards a tribunal that needs to justify an interpretation different from the one taken by previous tribunals, thereby necessarily engaging with the other tribunal's view.⁴⁴

Still, despite these developments it appears overrated to read judicial review in investment arbitration as necessarily aimed at the development of universal standards of investor protection. In comparison, the European Court of Human Rights⁴⁵ has a role in aiming for common minimum standards of human rights protection, which strengthens its mandate for judicial review.⁴⁶ The stabilizing

of review before proportionality analysis is undertaken. The same problem thus arises at an earlier level.

See similarly sceptical on the institutional capacities of investment arbitration Henckels, 244.

³⁹ See on this point Schill, 'System-Building and Lawmaking', 1104.

⁴⁰ See *Ibid.*, 1092, and Burke-White and von Staden, 336.

⁴¹ Wouters and Hachez, 634.

⁴² Schill, 'System-Building and Lawmaking', 1106.

⁴³ *Ibid.*, 1104.

⁴⁴ T. Kleinlein, 'Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law' (2011) 12 *German Law Journal* 1141, 1143.

⁴⁵ See chapter 5 section III.A.

⁴⁶ A similar argument has already been made in the doctrine when rejecting inspiration from the case law of the ECtHR for investment tribunals, compare J.E. Alvarez and K. Khamisi, 'The Argentine Crisis and Foreign Investors: A Glimpse into the Heart of the Investment Regime' in K.P. Sauvant (ed.) *Yearbook on*

effect of the use of precedent in investment arbitration should not, however, be easily conflated with this treaty-based mandate. The fragmented nature of the investment regime has already been explained as based on the disagreement over fundamental issues of investor protection, including the nature of investment arbitration. As one scholar puts it, there is room to perceive investment law and arbitration as a process of ‘global harmonisation and systematisation’, but also to conceive it as ‘essentially bilateral’ and ‘quasi-contractual’.⁴⁷

As a consequence, institutional elements rather explain how over-reliance on proportionality analysis could prove more damaging than beneficial in terms of results. The subsequent section adds some more insights into the political economy of investment protection by arbitration, which reinforces the impression that arbitration serves a rather specific, technical purpose of providing compensation, which again seems rather to suggest judicial self-restraint in the interpretation of BITs by arbitral tribunals.

C The Political Economy of International Investment Law and Judicial Review

In order to fully understand international investment law and arbitration as mechanisms for the protection of investments, some elements of political economy prove insightful. Substantially, two perspectives on the investment regime can be taken: both suggest that investment law is aimed at providing improved property protection and thereby promoting investment. One line of thought furthermore perceives investment law and arbitration as a promoter of good governance and the rule of law in particular in developing countries. A different line of thought suggests that investment treaties and arbitration function more as an insurance policy for the investor and are less linked to domestic institutional reform than to the determination of a breach and the consequent determination of compensation. Both claims are examined below in light of empirical observations on the effect of BITs and arbitration and on the remedies typically provided in BITs.

As a starting point, however, the basis of the view of BITs as providing a form of insurance against detrimental host state behaviour should be set out in more detail. The obsolescing bargaining theory has been advanced as one central economic rationale for BITs.⁴⁸ According to this theory, a multinational company planning to invest in a country and the country itself have divergent

International Investment Law & Policy (Oxford: Oxford University Press, 2008-2009), 444-445, or S.R. Ratner, ‘Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law’ (2008) 102 *American Journal of International Law* 475, 500.

⁴⁷ Mills, 480.

⁴⁸ There are two scholars predominantly cited as the first to bring up the theory, see R. Vernon, *Sovereignty at Bay: The Multinational Spread of U.S. Enterprises* (New York: Basic Books Inc., 1971); and T. Moran, *Multinational Corporations and the Politics of Dependence: Copper in Chile* (Princeton: Princeton University Press, 1974).

interests. Initially the host state has a strong incentive to attract investment and the resources such as capital, technology or expertise connected to it. The investor is thus in a situation of power for an initial bargaining of investment conditions. After the investment is made, however, the balance shifts in favour of the host state, who can now subject the investment to regulation and seek rent or expropriate if desired. In order to reduce this risk of deteriorating investment conditions for the investor and to improve the initial package of conditions for the investor, host states may add protection through a BIT. The latter can then be understood as a sort of insurance which should render credible the host state's commitment refraining from unfair or detrimental treatment of the investor in the future.⁴⁹

Based on this insight, it is generally claimed that BITs and investment arbitration operate to improve the conditions for investment. As a consequence, investment influx into a country should be favourably influenced by the signing of a BIT.

However, studies on this effect show conflicting results.⁵⁰ The possibility to grant better property rights protection to potential direct investors is often advanced as one of the main explanations for BITs.⁵¹ Countries thus sign BITs in a competitive effort to reach agreements with the most promising partners. Both the earlier spread of BITs and the more recent decrease can be explained in terms of increasing saturation of the market for investment capital protection.⁵²

Looking more closely at the empirical effects on domestic institutions, one central justification for the investment law regime is the improvement of domestic institutions which can result from the review exercised by arbitral tribunals. Faced with the threat of being punished for unfair treatment of investors by domestic institutions such as courts or administrative authorities, host states would have an incentive to improve governance, the rule of law and the quality of their institutions.⁵³

⁴⁹ Lehavi and Licht, 125.

⁵⁰ See a study finding positive effects e.g. T. Büthe and H.V. Milner, 'Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis' in K.P. Sauvant and L.E. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (New York: Oxford University Press, 2009), 214. See for a far more sceptical appraisal J. Yackee, 'Do BITs Really Work? Revisiting the Empirical Link between Investment Treaties and Foreign Direct Investment' in K.P. Sauvant and L.E. Sachs (eds.), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (New York: Oxford University Press, 2009), 391, who suggests the correlation is substantially weaker and mostly holds true for countries with low investment risk.

⁵¹ Elkins, Guzman and Simmons, 297.

⁵² *Ibid.*, 298.

⁵³ See e.g. S.D. Franck, 'Foreign Direct Investment, Investment Treaty Arbitration, and the Rule of Law' (2006) 19 *Pacific McGeorge Global Business & Development Law Journal* 337, 365. See also Schill, 'System-Building and Lawmaking', 1085.

Yet, some concerns remain about this suggestion. Because they typically contain a clause excluding the need to exhaust local remedies, BITs often function as an alternative form of dispute resolution that allows an investor to avoid the domestic judiciary.⁵⁴ The possibility for circumvention of domestic justice, however, strongly suggests that there is even less of an incentive for host states who have problems with governance and the rule of law to invest in improvement. Investors as potentially powerful economic and political players could act as a catalyst for reform, but with the alternative of BIT arbitration available to them they have no incentive to act in the domestic setting, and local political forces are also less likely to see the need for judicial reform.⁵⁵ Some have countered that there may be a possibility for a ‘symbiotic relationship’ between domestic courts and international arbitration, the former emulating the quality of decision-making of the latter and thereby improving its own quality.⁵⁶ Given the highly specialized and confidential nature of investment arbitration, one may, however, wonder whether such a relationship is a truly realistic assumption. Consequently, the exclusion of local remedies does not support the rule-of-law narrative for investment arbitration.

A second element to be taken into account is the system of remedies provided for and commonly used in investment law. General international law typically foresees restitution as one central remedy for breaches of international law.⁵⁷ In international investment law, compensation is predominant. As studies show, there are occasionally remarks by tribunals on other possible remedies.⁵⁸ The vast majority of awards, however, goes straight to compensation and does not even bother to discuss other remedies, which are also hardly ever addressed by the parties to the dispute.⁵⁹ Strictly legally speaking, a good argument can be made for other remedies; there is no convincing reason why the rules of general law should not apply in the context of investment arbitration in the absence of

⁵⁴ Some scholars already develop ideas of abandoning such clauses, see Wouters and Hachez, 636.

⁵⁵ T. Ginsburg, ‘International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance’ (2005) 25 *International Review of Law and Economics* 107, 119.

⁵⁶ Franck, 372.

⁵⁷ See the fundamental findings of the Permanent Court of Justice in *Factory at Chorzow* Judgment of 13.9.1928, PCIJ Series A, No 17, p. 47. The 2001 Draft Articles on State Responsibility drafted by the International Law Commission also foresee a primary duty of restitution for a State breaching an international obligation, unless it is materially impossible or implies efforts out of all proportion, see Article 35 of the Draft Articles.

⁵⁸ See for examples S. Hindelang, ‘Restitution and Compensation – Reconstructing the Relationship in Investment Treaty Law’ in R. Hofmann and C.J. Tams (eds.), *International Investment Law and General International Law – From Clinical Isolation to Systemic Integration?* (Baden-Baden: Nomos, 2011), 176 ff.

⁵⁹ *Ibid.*, 175.

explicit provisions regulating the issue.⁶⁰ As a consequence, there are indeed claims to bring restitution back into the picture as a possible remedy.⁶¹

However, there are some practical reasons of political economy which explain the focus on compensation and also strengthen the insurance policy narrative of investment arbitration. In practice, it should be noted that BIT violations are normally very grave for an investment and often lead to its termination. In the situation of investment arbitration, the investor has typically already left the country and is simply looking for compensation to limit the economic damage suffered by the failed investment. Host states similarly are likely to be reluctant to consider restitution as a remedy, since their unwillingness to comply with investment protection rules is the very starting point of creation of the whole system of BITs and arbitration.⁶²

Consequently, while there may be a legal leeway for the introduction of restitution, in practice investment arbitration seems to be perceived and used by the participants much more with the insurance policy mindset described before. The above mentioned removal of the duty to exhaust local remedies speaks out even more strongly in favour of this suggestion: The clause which removes this duty was qualified as 'over-inclusive', because it typically acts for both concluding states, despite the fact that often one developed country as a treaty party will possess a quite well-developed domestic judicial and administrative system.⁶³ Reading BITs and arbitration through the 'insurance' lens, however, the clause makes more sense: It simply alleviates the burden on the investor to cash in the insurance premium by removing an otherwise cumbersome obligation imposed on the investor. Even the one-way setting of investment arbitration, which only allows the investor to bring the host state before a tribunal, supports this view.⁶⁴

As a result, arbitrators' main task seems to consist mostly in determining a violation and finding appropriate compensation than in re-assessing the balancing of interests undertaken by a legislator or administrator in order to suggest a 'better' balance. Both the rule of law claim and claim of restitution as a central remedy having failed, the political economy of investment arbitration seems to rest primarily on the idea of an insurance contract. Judicial review thus functions predominantly with the idea of providing appropriate compensation *ex post* to investors in particular cases.

⁶⁰ A. van Aaken, 'Primary and Secondary Remedies in International Investment Law and National State Liability – A Functional and Comparative View' in S.W. Schill (ed.) *International Investment Law and Comparative Public Law* (Oxford: Oxford University Press, 2010), 733.

⁶¹ Hindelang, 198; see also van Aaken, 749.

⁶² A. Kulick, 'Book review, Stephan W. Schill (ed.). *International Investment Law and Comparative Public Law*. Oxford: Oxford University Press, 2010.' (2011) 22 *European Journal of International Law* 917, 923.

⁶³ Van Harten, 'Five Justifications for Investment Treaties', 34.

⁶⁴ *Ibid.*, 37.

D Conclusion

The context of judicial review in investment arbitration thus showed that such arbitration tends to follow a rather narrow mandate with a technical focus on investment protection. Some claim, based on a progressive perception of the development of judicial review in international investment law, that investment arbitration is on a continuous path from the early beginnings towards the creation of a fully judicialized system protecting universal standards of treatment for investors in host states. A closer look at the history and its inconsistencies reveals that there is a second narrative which accounts partly for the fragmented nature of the investment regime; a history that is marked by bilateral treaty-making and only partial judicialisation in the form of arbitral tribunals. Consequently, upon closer examination some further concern on such claims arise. First, the institutional setting is not necessarily suited to the comprehensive use of proportionality analysis, in particular because of the use of non-tenured arbitrators who are not necessarily sufficiently embedded in the social, economic and legal background of a case to undertake an informed balancing exercise of competing claims. Second, the political economy of investment arbitration does not point towards review for the purpose of improvement of domestic institutions in a host state or the promotion of a global rule of law and investment protection minimum standards. Instead, it seems to pursue the logic of an insurance policy for investors which offers the determination of a breach and calculation of compensation *ex post*, exemplified by the predominant use of compensation as a remedy by tribunals. This limited mandate resulting from the factual context of investment arbitration should, in our view, be taken into account in our subsequent discussion of pre-balancing and the justification of judicial review.

III The Justification of Judicial Review in International Investment Law

To date investment tribunals have not expressly addressed the question as to what extent they perceive their exercise of judicial review as justified based on grounds of the procedural democracy doctrine. However, some of the doctrinal debate and a few implicit statements in the case law provide some guidance on this point. There is considerable definitional vagueness on whether investment should be perceived as a public interest itself, or whether the whole investment law regime should operate as a sort of property rights protection regime. In light of some doubts, we conclude that again, a model of special interest review appears to offer the more appropriate solution as the result of pre-balancing.

A Investment as a Public Interest

The clear identification of public interests is crucial in the application of proportionality analysis. Investment law is, however, a field that suffers from under-definition of the public interests underlying it. Part of the problem is the hybrid nature of a field of international law that gives prominent place to private individuals as opposed to states.

On the side of investors, much seems to remain unsaid on the exact nature of the interest behind the regime of investment protection. Despite the fact that there seems to be increasing adherence to the statement that investment law is indeed a public law regime and opposes – to a certain extent – ‘public’ interests, what stands behind investment law remains somewhat mysterious.⁶⁵

To what extent should investment be understood as a public interest? The debate on the notion of investment itself demonstrates that there is still no consensus. While this debate focuses on the potential reach of the ICSID Convention itself, implicitly it shows that some would rather see any form of commercial interest protected as an investment. Others would require that an investment contribute and participate to the development of the economy of the host state in some way – thereby arguably introducing a public interest dimension through the criterion of a contribution to the economy. In the case law, the *Salini* decision has added to the definition of what qualifies as an investment a criterion of contribution to the economic development of the host state.⁶⁶ A number of tribunals subsequently took up this approach in order to restrict the scope of what should qualify as an investment.⁶⁷ However, other tribunals rejected the *Salini* test or gave it less weight,⁶⁸ and the criterion of a contribution to economic development is also contested in the doctrine.⁶⁹

The above mentioned debate focuses, however, on the jurisdictional reach of ICSID and investment arbitration at large. In the substance of international investment law, there seems to be, by contrast, a tendency to easily assume between the lines a property protection rationale for investment protection. This assumption begs the question of whether the rather crude and general standards of protection for investors can truly be equated with the right to property as enshrined in various domestic constitutions and international human rights treaties.⁷⁰

⁶⁵ Kulick, 920.

⁶⁶ *Salini Costruttori SpA and Italstrade SpA v. Kingdom of Morocco* ICSID Case No ARB/00/4, Decision on Jurisdiction (23 July 2001), para 52.

⁶⁷ See with references to case law D.A. Desierto, ‘Development as an International Right: Investment in the New Trade-Based IIAs’ (2011) 3 *Trade, Law and Development* 296, 302 ff.

⁶⁸ *Ibid.*, 307 ff.

⁶⁹ See, based on the *travaux préparatoires* of the ICSID Convention, J.D. Mortenson, ‘The Meaning of ‘Investment’: ICSID’s Travaux and the Domain of International Investment Law’ (2010) 51 *Harvard International Law Journal* 257.

⁷⁰ Sceptical on this point M. Perkams, ‘The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark’ in S.W. Schill (ed.) *International Investment Law and Comparative*

One of the consequences of this non-conceptualisation is unsatisfactory case law. The tendency by tribunals to rely on investment-friendly preambles and objectives of BITs to arrive at pro-investor interpretations of BIT provisions can be mentioned in this regard.⁷¹ Also, debate continues on the question to whom rights contained in BITs pertain. Some argue that investors possess ‘direct’ rights,⁷² while others suggest that investors only bring claims based on rights still owned by their home state.⁷³ Again, this controversy shows that the hasty equation of BIT rights with property rights is difficult to sustain.

The fuzziness of what interest ‘investment’ should constitute also becomes problematic for proportionality analysis, as balancing requires clearly defined rights and public interests. A conceptualisation along the lines of property rights may be appealing at first glance, but is not convincing upon closer examination.

B Investment Law as a Regime Protecting Property Rights

Perhaps the most straightforward explanation for a value underlying international investment law is the protection of property as a right. The standard on expropriation immediately comes to mind and is subsequently discussed as to the possible parallels with rights protection and the justification of judicial review under the procedural democracy doctrine.

The reach and contours of the obligations contained in the expropriation standard are far from settled. Still, it can be argued that expropriation comes closest among all the other standards of protection to the content of a fundamental right in the form of the right to property. In the case law, scholars have found that tribunals engaged in a veritable ‘property discourse’ in the adjudication of expropriation cases.⁷⁴

The protection of property is not necessarily a central right in the procedural democracy justification of judicial review, as its relation to the political process is not as direct as e.g. in the case of the right to free assembly. Still, in principle as a fundamental rights violation it could qualify, depending on the prevailing view of what rights merit special protection and intrusive review in a specific legal regime. By way of example, the European Court of Human Rights perceived the protection of property rights as so important that it extended its review to require positive measures from states to protect private property.⁷⁵ By contrast,

Public Law (Oxford: Oxford University Press, 2010), 148.

⁷¹ See for an insight into economic theory underlying the favourable view on foreign direct investment Sornarajah, 48 ff.

⁷² See e.g. Hindelang, 195.

⁷³ Typically, the view of the tribunal in *The Loewen Group, Inc. and Raymond L. Loewen v. United States of America* ICSID Case No ARB(AF)/98/3, Award (26 June 2003), para 233, is cited as support for this hypothesis.

⁷⁴ Lehavi and Licht, 131.

⁷⁵ See chapter 5 section III.C.ii.

under its categorical approach, the United States Supreme Court grants only low protection through deferent review to economic rights.⁷⁶

There could thus be a need for virtual representation by judicial review in light of the failure of the democratic process in a host state. Investors could typically develop the argument that they do not have nationality in the host state and therefore cannot participate sufficiently in domestic decision-making processes – assuming the latter’s democratic character. This argument has been used e.g. by the tribunal in the *Tecmed* case.⁷⁷ One may already have doubts at the practical level whether political participation by means of voting as a national is the only form of representation of interests for foreign investors. Typically, influence is also gained e.g. by setting up a subsidiary in the host state,⁷⁸ or by means of lobbying power as a company and sometimes as an important employer.⁷⁹

While the use of the concept of property may thus point in the direction of something equivalent to fundamental rights protection, in practice a look towards the broader context of investment arbitration casts doubt upon this assumption. First, the way in which investment arbitration offers access to justice differs fundamentally from the situation of fundamental or human rights protection. The basis of claims brought before an arbitral tribunal is the possession of an investment, which draws a rather narrow circle of economic actors that are actually eligible to be protected in the form of virtual representation of their interests under investment arbitration.⁸⁰ Investors may represent a minority whose interests may have been overlooked by a majority in a legislative or administrative process. But the similarity with virtual representation of fundamental or human rights interests stops there. Looking at the content of investors’ rights, the latter do not possess a right to property based on the BIT, but rather may simply insist on the respect of the general obligations – here the conditions for lawful expropriation – laid down in said treaty. The systems of protection thus differ from one another, as can also be seen by the conditions of a breach and the remedies.⁸¹

⁷⁶ See chapter 4 section III.A.ii.

⁷⁷ See the detailed discussion of the case in section IV.A.ii.c. See also the tribunal in *Joseph Charles Lemire v. Ukraine* ICSID Case No ARB/06/18, Award (28 March 2011), para 57: ‘Foreigners, who lack political rights, are more exposed than domestic investors to arbitrary actions of the host State and may thus, as a matter of legitimate policy, be granted a wider scope of protection.’

⁷⁸ See also Perkams, 111 footnote 16.

⁷⁹ The tribunal in *Lemire v. Ukraine* strikingly seems to admit this point between the lines in its discussion as to whether a foreign investor is less privileged in a national public procurement administrative procedure, as the investor does not have the ‘political clout’ and contacts that local economic operators may have. As a consequence, in its view investment arbitration and its additional protection should simply help to achieve a ‘level playing field’, *Lemire v. Ukraine*, paras 64-65.

⁸⁰ J.D. Taillant and J. Bonnitcha, ‘International Investment Law and Human Rights’ in M.-C. Cordonier Segger, M.W. Gehring and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011), 76-77.

⁸¹ J. Pauwelyn, *Optimal protection of international law : navigating between European absolutism and American voluntarism* (Cambridge: Cambridge University Press, 2008), 145, points out that generally inter-

Second, investment arbitration does not seem to offer virtual representation because of the lack of subsidiarity of the protection it grants. Typically, BITs exclude the need to exhaust domestic legal remedies.⁸² Consequently, they offer a way to avoid the domestic judiciary rather than an additional access to justice once all domestic remedies have been used.⁸³ The protection of investment arbitration therefore seems to operate following the idea of an insurance policy,⁸⁴ while in most contexts of human or fundamental rights the system of protection operates in a subsidiary manner; only when mechanisms of protection at the domestic or lower level fail does protection by judicial review intervene in a subsidiary manner based on the idea of virtual representation.⁸⁵

Summing up, even though BIT provisions on expropriation may resemble human or fundamental rights provisions on property protection, some conceptual differences remain. The justification for judicial review is thus not similarly compelling. In our view, this failed equation further supports a limited justification for review in investment arbitration and as a result use of proportionality analysis close to a model of special interest representation.

C Conclusion

The main difficulty in assessing the justification of judicial review in investment arbitration lies in the vagueness of the values underlying the investment legal regime. It is unclear whether investment is a public interest. The debate on the *Salini* test shows that there is no unanimous view on a possible public interest dimension of investment. Another possibility would be to read a right of property into the investment legal regime. The rules on expropriation seem to partly point in that direction. Yet, a closer look reveals that their rationale seems more limited and in particular virtual representation is difficult to transpose conceptually to the context of investment arbitration. Other standards provide context to the level of protection that investors should enjoy, but fail to convince as rights of their own comparable to fundamental or human rights. Consequently, we conclude that pre-balancing yields a result close to a model of special interest representation for investment arbitration.⁸⁶ The subsequent assessment shows that indeed, tribunals have not widely engaged in proportionality analysis. However, there are various references to ‘proportional-

national investment law rules constitute liability rules rather than property rules, which means that they encourage ‘efficient breach’ as long as appropriate compensation is paid. The case of expropriation provisions is particularly compelling: If compensation is paid, such expropriation is typically not even considered a breach of treaty.

⁸² See discussion in section II.C.

⁸³ See also Wouters and Hachez, 635.

⁸⁴ See section II.C.

⁸⁵ See e.g. on subsidiarity of the European Court of Human Rights chapter 5 section II.B.

⁸⁶ A similar recommendation to use a deferent standard of review and rely on proportionality *stricto sensu* only in a ‘residual’ manner is embraced by Henckels, 240 and 253-254.

ity', which can be criticized in our view because it is difficult to see what exact test they refer to.

IV 'Proportionality' and Similar Tests in International Investment Law

The present section assesses the norms used and the interpretation of the latter by arbitral tribunals to examine to what extent tribunals used proportionality analysis and similar tests. For this purpose, we discuss norms and case law under the standards of expropriation, fair and equitable treatment, national treatment, non-precluded measures clauses and – as a rather recent development – general exceptions clauses which are modelled after similar provisions in the GATT and the GATS. We discover that there are some references to 'proportionality' and 'reasonableness' in the case law. However, the legal tests used are often not expressly set out, while mostly fact-based reasoning decides the question. We conclude that there emerges a need to spell out more clearly to what extent proportionality analysis is used.

A Expropriation

As a consequence of the idea of territorial sovereignty, states are generally considered to have the right to expropriate private property, be it that of foreigners or of their citizens. International investment law did not fundamentally change this view, but instead added additional rules to delimit 'lawful' from 'unlawful' expropriation and to ensure that compensation is paid to an investor in all cases of expropriation.

i. Norms on expropriation and the concepts of direct and indirect expropriation

The typical norm for this purpose is a provision on expropriation which puts up certain conditions for expropriation to be 'lawful'. Conditions for such lawful expropriation are 'usually'⁸⁷ accepted as the following:

- A measure expropriating an investor must pursue a legitimate public purpose.⁸⁸
- A measure must not cause discrimination or be applied in an arbitrary way.
- A certain minimum standard of treatment and due process is some-

⁸⁷ A. Salazar, 'NAFTA Chapter 11, Regulatory Expropriation, and Domestic Counter-Advertising Law' (2010) 27 *Arizona Journal of International and Comparative Law* 31, 50.

⁸⁸ Tribunals generally tend to accept a purpose claimed by a regulating state. In *ADC v. Hungary*, the tribunal stated rather generously that 'some genuine interest of the public' would be sufficient, *ADC v. Hungary* ICSID Case No ARB/03/16, Award of the Tribunal (2 October 2006), para 432.

times set out as a separate requirement, although it can also be understood as part of the condition of non-discriminatory and non-arbitrary treatment.⁸⁹

- In order to be lawful, expropriation must be accompanied by prompt, adequate and effective compensation.

BITs, but also regional investment agreements such as the North American Free Trade Agreement (NAFTA) enshrine these requirements in one form or another.⁹⁰ Expropriation which fulfils the above requirements is 'lawful' and does not constitute a breach of the relevant treaty. While in earlier days the distinction between lawful and unlawful was discussed as relevant for the applicable standard of compensation, more recently standards of compensation tend to be set out explicitly in BITs. The relevance of this differentiation and the related discussion in the doctrine and the case law therefore lost momentum.⁹¹

The debate therefore concerns the boundaries of the definition for so-called indirect expropriation. In earlier days expropriation typically took the form of direct expropriation by means of administrative decrees or similar formal acts.⁹² In the majority of cases nowadays, the entitlement of an investor to his property remains intact, but action by the host state largely deprives the investor of the possibility to use the investment or interferes in another way with its substance.⁹³ The term of indirect expropriation was coined for such expropriatory measures. As a problem, host states are likely not to recognize the expropriatory character of their action and deny the payment of compensation.

As a reaction to claims for compensation, host states bring forward the concept of 'police powers'. This label comprehends regulatory measures taken by states to protect and further public welfare.⁹⁴ The present situation in the case law is perhaps best summed up by using two issues on which tribunals disagree in various combinations. First, there is disagreement on whether 'police

⁸⁹ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (Oxford: Oxford University Press, 2008), 91.

⁹⁰ Article 6(1) of the United States' model bilateral investment treaty of 2004 provides a good example: 'Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation; and in accordance with due process of law and Article 5 [Minimum Standard of Treatment] (1) through (3).'

⁹¹ C. McLachlan, L. Shore and M. Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford: Oxford University Press, 2008), 331.

⁹² Ratner, 476-477.

⁹³ Dolzer and Schreuer, 92.

⁹⁴ The term was used and recognized as a principle in customary international law for example by the tribunal in *Saluka Investments BV v. Czech Republic* Partial Award (UNCITRAL Rules, 17 March 2006) 18(3) World Trade and Arbitration Materials 166, paras 258 resp. 262. As Krommendijk and Morijn, 434, show, this basic idea found entry in a number of revised texts of model bilateral investment treaties and newly concluded treaties.

powers', also referred to as 'bona fide' regulation, should ever give rise to a duty to compensate⁹⁵ or whether this could be the case if a strong negative effect on the property at issue is exerted. Second, tribunals are divided over the question whether only the effect of regulation should matter or whether other factors – in particular the public interest pursued by a host state's measure – should be considered as well.⁹⁶

ii. Legal tests developed under expropriation provisions

Indirect expropriation cases have become the main arena for the development of legal tests close to proportionality. In situations of indirect expropriation a central role is played by the regulatory purpose of the measure.

Substantially, tribunals developed three different ways to decide cases. In a first line of cases, tribunals focus on the effect of regulatory measures, attributing expropriatory character to them by degree. In a second line, tribunals exclude a whole category of measures from the reach of expropriation and the connected duty to compensation, using a definitional approach to 'police powers' measures or 'bona fide' regulation. In a third line of cases, tribunals take into account regulatory purpose, but also inquire into the relationship between the negative effect on investment and the beneficial effects of regulation. Proportionality-based tests have emerged in this third category.

Subsequently, a first section briefly presents the case law of the so-called 'sole effects' doctrine and the definitional approaches to 'police powers' measures. Then, the case law resorting to more elaborate proportionality reasoning is examined.

a. The 'sole effects' doctrine

A variety of cases can be found which see indirect expropriation as a threshold issue for which a certain degree of effect on the investment must be reached. The perhaps most striking ruling can be found in *Santa Elena*, where a tribunal sharply excluded the consideration of the regulatory purpose of measures. It held that expropriation measures for environmental purposes such as the one at issue might be 'laudable and beneficial to society as a whole'; however, the exist-

⁹⁵ Early on, there were attempts to codify this concept. See for such an attempt the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens: According to its Article 10(5), an uncompensated taking of property should not be considered wrongful in certain situations, among which we find the 'action of the competent authorities of the State in the maintenance of public order, health or morality' or other effects which are 'incidental to the normal operation of the laws of the State'. The powers specified must not, however, be used in an abusive manner to deprive a foreigner of his property. For a commented version of the Harvard Convention see L.B. Sohn and R.R. Baxter, 'Responsibility of States for Injuries to the Economic Interests of Aliens' (1961) 55 *American Journal of International Law* 545, 554.

⁹⁶ These two cleavages are succinctly pointed out by Perkams, 111.

ence of a public purpose for the taking could not change the ‘legal character’ of the measure as expropriation for which compensation had to be paid.⁹⁷

Similarly, in *Metalclad*, the tribunal stated that it ‘need not decide or consider the motivation or intent of the adoption’ of the environmental decree at issue.⁹⁸ In *Siemens*, the tribunal did not accept Argentina’s argument referring to the consideration of regulatory purpose because the treaty clause only spoke of indirect expropriation as to its effects without mentioning the intent of the government.⁹⁹

Instead of taking into account regulatory purpose, tribunals focused on the threshold for expropriation to exclude regulatory measures from the reach of the duty to compensate linked to expropriation. The tribunal in *Metalclad* took a broad approach to expropriation and held that serious restrictions of the use of an investment could amount to expropriation.¹⁰⁰ Later tribunals, however, refused to adopt such a broad concept of indirect expropriation. In *SD Myers*, the tribunal found that, usually, the case law did not treat regulation as amounting to expropriation. This was due to the fact that in most cases, regulation would not involve a sufficient degree of interference.¹⁰¹ The tribunal in *Pope & Talbot* admitted that regulation might interfere with an investor’s operations, but that a mere loss of profits would not be sufficient to reach the threshold of expropriation. Instead, the arbitrators suggested that interference must be sufficiently restrictive as regards the overall control of the investment and affect day-to-day operations.¹⁰²

In *Spyridon Roussalis*, the tribunal found the regulatory purpose of a state ‘relevant but [...] not decisive’, only to subsequently quote an earlier tribunal’s decision that found no need to determine the intent of a government at all.¹⁰³

Tribunals thus used the threshold of the required intensity of effects on an investor to avoid over-inclusiveness of the standard of indirect expropriation.

⁹⁷ *Compania de Desarrollo de Santa Elena S.A. v. Republic of Costa Rica* ICSID Case No ARB/96/1, Award (17 February 2000), paras 71-72.

⁹⁸ *Metalclad Corp. v. Mexico* ICSID Case No ARB(AF)/97/1, Award (30 August 2000), para 111.

⁹⁹ *Siemens Corp. v. Republic of Argentina* ICSID Case No ARB/02/8, Award (6 February 2007), para 270.

¹⁰⁰ *Metalclad v. Mexico*, para 103. The tribunal held in this respect that expropriation could also take the shape of ‘covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State’.

¹⁰¹ *SD Myers Inc. v. Government of Canada* Partial Award on Merits (13 November 2000), 8 ICSID Report 4, paras 281-282. A similar view is taken by the tribunal in *Marvin Feldman v. Mexico* ICSID Case No ARB(AF)/99/1, Award (16 December 2002), para 103.

¹⁰² *Pope & Talbot Inc. v. Government of Canada* Merits, Phase 1, Award (26 June 2000) 7 ICSID Report 69, paras 100-102.

¹⁰³ *Spyridon Roussalis v. Romania* ICSID Case No ARB/06/1, Award (7 December 2011), para 330.

b. The 'police powers' exception

A completely different road has been chosen by a second group of tribunals that opted for a categorisation instead of a threshold of effects. They aimed for a more holistic examination of each case taking into account regulatory purpose as a distinctive feature.¹⁰⁴

The tribunal in *Methanex* examined whether the regulatory measure at issue was taken for a public purpose, was non-discriminatory and was enacted in accordance with the principles of due process. In such a case, the measure should not be deemed to be expropriatory and no compensation would be due, unless specific commitments had been given to the investor by the regulating state beforehand.¹⁰⁵ The *Methanex* test makes it possible to take regulatory purpose into account, but already raises concerns on the feasibility of a clear-cut categorisation of measures along the lines it proposes.¹⁰⁶

In *Saluka*, the tribunal similarly adopted a rather categorical approach. It held that the host state's measure fell within the range of *bona fide* regulation which, as was recognised by customary international law, would not amount to unlawful expropriation.¹⁰⁷ The tribunal hinted at more extensive reasoning on proportionality, however, stating that international law had yet to define a 'bright and easily distinguishable line' between legitimate, non-compensable regulatory measures and measures which could amount to unlawful expropriation if no compensation was paid. The 'context' within which a measure was adopted and applied would be crucial in this determination.¹⁰⁸

The tribunal in *ADC* seemed willing to discuss regulatory purpose and its role in the assessment of potential expropriatory measures, but the host state could not produce such a purpose.¹⁰⁹

A somewhat mixed approach was taken by the tribunal in *Continental*. In its view, a distinction had to be drawn between two types of encroachment by

¹⁰⁴ Already in the 1980s, Higgins famously questioned the feasibility of a clear conceptual division between indirect expropriation and the legitimate exercise of 'police powers' by a host state: 'What I hope nonetheless to have shown in these lectures is that questions relating to property in international law need to be looked at as a coherent whole. Questions of permanent sovereignty over natural resources, compensation, public interest, concessions, regulatory controls, human rights, are all intertwined. If we isolate them we exclude relevant factors from our consideration.' R. Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982-III) 176 *Recueil des Cours* 259, 331.

¹⁰⁵ *Methanex Corp. v. United States* Award (3 August 2005) 44 ILM 1345, Part IV Chapter D para 7.

¹⁰⁶ A similarly sceptical view is taken by S.A. Spears, 'The Quest for Policy Space in a New Generation of International Investment Agreements' (2010) 13 *Journal of International Economic Law* 1037, 1051. Others find the decision highly convincing, see H. Mann, 'The Final Decision in *Methanex v. United States*: Some New Wine in Some New Bottles' (2005) *IISD Research Paper*, available at www.iisd.org, 7, for whom the award successfully draws a 'sharp line' between expropriatory measures subject to compensation and other regulatory measures.

¹⁰⁷ *Saluka v. Czech Republic*, paras 255 ff.

¹⁰⁸ *Ibid.*, paras 263-265.

¹⁰⁹ *ADC v. Hungary*, paras 429 ff. The tribunal held with a hint of irony that its 'curiosity' on this point would have to remain 'unsatisfied', para 433.

public powers on private property.¹¹⁰ On the one hand, there were measures which constituted either ‘outright suppression or deprivation of the right of ownership, usually by its forced transfer to public entities’ or ‘limitations and hampering with property, short of outright suppression or deprivation, interfering with one or more key features, such as management, enjoyment, transferability, which are considered as tantamount to expropriation, because of their substantial impact on the effective right of property’. In this category of cases, the usual terminology of lawful and unlawful expropriation therefore applied even if the measure pursued a public purpose, and compensation had to be paid in all cases. These findings seem in line with the sole effects doctrine, although the public purpose of a measure is mentioned. For the second category, however, the tribunal held that these were ‘limitations to the use of property in the public interest that fall within typical government regulations of property entailing mostly inevitable limitations imposed in order to ensure the rights of others or of the general public’. These limitations often proved to be beneficial overall even for the property affected, did not affect the ‘basic, typical use’ of an investment and did not impose an unreasonable burden on one owner compared with similarly situated owners, which meant that no one single investor should be forced to bear the burden for an advantage given to a wider group.¹¹¹ Such limitations did not amount to expropriation and no compensation was due.¹¹² Here, the regulatory purpose seemed clearly relevant, although the tribunal did not state explicitly whether more extensive reasoning on proportionality would be required or whether it suggested a category of its own. At least the insistence on a reasonable burden on the individual investor seems to point towards more extensive analysis close to proportionality analysis.

Similar findings were made by the tribunal in *Impregilo*. It held that ‘less far-reaching’ measures which merely ‘regulate or restrict the right to use property’ should be treated apart.¹¹³ Despite their sometimes serious economic effects, these measures were not expropriations. However, there might be ‘borderline cases’ which leave the investor with only a nominal property right; cases which again should be treated as an expropriation.¹¹⁴ The rigidity of this approach was denounced by a dissenting arbitrator who pointed out that the rational link between the host state’s action and the purported purpose had all-too easily been accepted by the tribunal without looking closely enough at the evidence and considering all arguments.¹¹⁵

¹¹⁰ *Continental Casualty v. Argentine Republic* ICSID Case no ARB/03/9, Award (5 September 2008), para 276.

¹¹¹ *Ibid.*, para 276 and corresponding footnote 405.

¹¹² It should be noted that the subsequent analysis of the case was rather cursory, as the tribunal saw most of the allegations taken outside its scrutiny because of the non-precluded measures clause of Article XI of the pertinent United States – Argentina bilateral investment treaty, as discussed in more detail in section IV.D.iii., see *Continental Casualty*, para 283.

¹¹³ *Impregilo S.p.A. v. Argentine Republic* ICSID Case No ARB/07/17, Award (21 June 2011), para 270.

¹¹⁴ *Ibid.*, para 270.

¹¹⁵ See dissent by Brower, *Ibid.*, para 29.

These last cases highlight the difficulty of categorisation along the lines of a regulatory purpose. The *Continental* tribunal tries in a more elaborate way to rectify some of the neglect for the effects of a measure which approaches such as the one taken by the tribunal in *Methanex* cause. While categorisations in themselves may be rigid, the *Continental* tribunal offers a rather flexible legal test emphasizing examples for the features of measures it would like to treat differently.

c. The Tecmed decision and the emergence of proportionality analysis

The *Tecmed* decision can almost be understood as the opposite of the approach taken in the *Santa Elena* decision. The tribunal found that regulatory measures were not as such excluded from the scope of measures which could amount to indirect expropriation. It then explicitly embraced proportionality analysis, stating that consequently it would have to examine whether such measures were ‘proportional to the public interest presumably protected thereby and to the protection legally granted to investments’.¹¹⁶ The tribunal then referred to case law of the European Court of Human Rights¹¹⁷ to borrow from the latter’s advanced experience with proportionality analysis.¹¹⁸ The arbitrators emphasized that some deference was due to the state when it defined the issues of public policy to be addressed, but that at the same time the reasonableness of the measures had to be assessed as to the deprivation of economic rights and reasonable expectations of investors in relation to the aim pursued. The extent of the deprivation of the investor would also be influenced by the fact whether there had been compensation. The tribunal referred to the ECtHR’s judgment in *James v. United Kingdom*.¹¹⁹ Like the ECtHR, the tribunal underlined that the fact must be taken into account that foreign investors have a reduced or even no participation in the taking of decisions which affect them, since they do not have political rights as nationals of a host state. Furthermore, there might be ‘legitimate reason’ for requiring a national to carry a more extensive burden than a non-national.¹²⁰ Proportionality would in any case not be found if a person had to bear an ‘individual and excessive burden’.

Tecmed represents the most explicit and comprehensive recourse to proportionality analysis in an expropriation case. The judicial borrowing in the case

¹¹⁶ *Tecnicas Medioambientales TECMED, SA v. United Mexican States* ICSID Case No ARB/AF/00/2, Award (29 May 2003), para 122.

¹¹⁷ Henckels, 233, correctly notes that the tribunal does not sufficiently justify why it borrowed from the European Court of Human Rights at this point.

¹¹⁸ The tribunal refers here to various older decisions of the European Court of Human Rights which analyse measures under the angle of proportionality regarding their impact on the access to justice and length of judicial proceedings (*Matos e Silva, Lda. and others v. Portugal* (16 September 1996) ECHR 1996-IV, no 14) and on private property (*Pressos Compania Naviera S.A. and others v. Belgium* (20 November 1995) Series A No 332; *Mellacher and others v. Austria* (19 December 1989) Series A No 169).

¹¹⁹ *James and others v. United Kingdom*, 21 February 1986, Series A, No 98, (1986) 8 EHRR 123, para 63.

¹²⁰ *TECMED v. Mexico*, para 122.

went as far as to even transpose the margin of appreciation doctrine of the ECtHR to investment arbitration in the form of deference, which the tribunal suggested applied to a host state's regulatory measures.¹²¹ However, there is no discussion as to the adaptation of the standard of review based on substantive values at issue, as the substantive side of the margin of appreciation doctrine would suggest.¹²²

The subsequent analysis of the case's features in *Tecmed* is fairly persuasive in its comprehensiveness and weighing of the arguments. At the same time, there seems to be no excessive reliance on proportionality *stricto sensu*, so that one wonders whether a more elaborate spelling out of the test actually applied would point more towards necessity.¹²³ Therefore, unfortunately both the standard of review and the actual sub-tests of proportionality analysis remain in the dark, while the tribunal focuses on the facts of the case.

The subsequent case law referred to the *Tecmed* decision, but without truly applying it to a similarly broad extent. The later decision in *LG&E* agreed with *Tecmed* that a 'balance' had to be found in the analysis of both the causes and the effects of a measure. By means of such a balancing analysis, one should distinguish the right of a state to adopt policies from its power to take an expropriatory measure.¹²⁴ Proportionality analysis as in *Tecmed* should be the tool to assess when state action was 'obviously disproportionate to the need being addressed'.¹²⁵ Only in such cases would compensation be required from a state when the latter was exercising its right to adopt public policies.¹²⁶

In *Azurix*, the tribunal compared the approaches chosen in *SD Myers* and in *Tecmed* and found the latter more convincing.¹²⁷ The tribunal in *Total* also confirmed that it would follow the 'dominant approach', i.e. taking into account the legitimate purpose pursued by any measure including the latter's 'features and object so as to assess [its] proportionality and reasonableness'. A measure thus classified as 'regulatory' would not give rise to compensation.¹²⁸

¹²¹ Krommendijk and Morijn, 444.

¹²² See chapter 5 section III.B.i. See sceptical on the intrusive standard of review effectively chosen by the tribunal Henckels, 233.

¹²³ See e.g. *TECMED v. Mexico*, para 149, where the tribunal discusses concretely why the resolution depriving the investor of the future exploitation of his business was not required in light of the ecological circumstances of the matter.

¹²⁴ *LG&E Energy Corp. v. Argentine Republic* ICSID Case No ARB/02/1, Decision on Liability (3 October 2006), para 194.

¹²⁵ *Ibid.*, para 195.

¹²⁶ Subsequently, however, the tribunal found that the effects did not amount to expropriation in the first place and did not really apply its earlier findings.

¹²⁷ *Azurix Corp. v. Republic of Argentina* ICSID Case No ARB/01/12, Award (14 July 2006), para 312.

¹²⁸ *Total S.A. v. Argentine Republic* ICSID Case No ARB/04/1, Decision on Liability (27 December 2010), para 197 footnote 232.

iii. Conclusion

The import of proportionality analysis into investment arbitration under the case law on indirect expropriation can be welcomed in the sense that it answered the need for a more extensive reflection on the relationship between measures taken for a public purpose and their effects on investors' rights.¹²⁹ However, the uniform reference to 'proportionality' causes concern since tribunals do not seem to truly develop clearly defined legal tests, but simply weigh arguments in a rather raw fashion. While the results are often plausible, there is a deplorable lack of predictability. Since we suggested a model of special interest representation for investment arbitration, in our view proportionality *stricto sensu* should only be used in rare cases, while other avenues – e.g. a necessity test – should preferably be explored. To avoid over-restrictive scrutiny with a bias in favour of investment protection, tribunals could e.g. find inspiration in the process of 'weighing and balancing' embraced by the WTO Appellate Body under Article XX GATT.¹³⁰ The 'weighing and balancing' test offers a balanced approach to the burden of proof and a refined comparison with alternative measures.¹³¹ As another shortcoming of the case law, the standard of review is not clarified, although the tribunal in *Tecmed* made some hesitant first suggestions.

B Fair and Equitable Treatment

The fair and equitable treatment standard is a provision in most bilateral investment treaties which aims to provide a certain minimum level of protection to investors. It acts mainly as a gap-filler next to the more specific substantive standards of protection in investment treaties. Treaty makers have created many different versions of the clause, some referring to the minimum standard of treatment for foreigners foreseen in customary international law¹³² or to general rules of international law.¹³³

¹²⁹ See for a similar view M. Paparinskis, 'Regulatory Expropriation and Sustainable Development' in M.-C. Gondonier Segger, M.W. Gehring and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011), 318, who also favours an approach examining the regulatory 'method' over a mere acceptance of any regulatory 'intent' without further scrutiny to exclude expropriatory character of a host state's measure. See also Leonhardsen, 125, who applauds the clearer distinction developed in *Tecmed* between non-compensable general regulatory measures and cases of indirect expropriation.

¹³⁰ See chapter 7 section IV.A.iii.d. Note also the differences to the use of necessity in EU law, which has been found too restrictive of domestic regulatory autonomy in comparison, see chapter 6 section IV.A.

¹³¹ Ideally, a tribunal should simultaneously avoid transposing the discussed blurriness of the analysis under Article XX GATT.

¹³² See e.g. the interpretive statement to the United States model BIT 2004, Article 5 (2). See for other examples R. Kläger, 'Fair and Equitable Treatment' and Sustainable Development' in M.-C. Gondonier Segger, M.W. Gehring and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011), 242-243.

¹³³ See e.g. the French model BIT 2006, Article 4.

i. General tendencies in the case law

The case law on fair and equitable treatment has a tendency to be highly fact-specific in each individual case. A judgment ‘in the abstract’ of the content of fair and equitable treatment appears difficult to achieve.¹³⁴ Still, since the coming of age of the standard in investment treaty arbitration in the early 2000s, tribunals have produced a substantial amount of case law. Controversy emerged as to whether the standard to measure state action should be rather deferent as in customary international law equivalent to the *Neer* case¹³⁵ or more demanding.¹³⁶ However, as the threshold for finding a violation of the fair and equitable treatment standard is quite high, generally speaking, only few tribunals perceived a need to proceed to extensive reasoning, limiting their argumentation after a lengthy assessment of the facts to often nothing more but a few paragraphs.¹³⁷

Instead, tribunals referred to a multitude of factors which had not been sufficiently taken into account by the host state. Scrutinizing the case law, scholars identified several elements that led to a finding of violation of the fair and equitable treatment standard: breach of requirements of stability and predictability,¹³⁸ legality,¹³⁹ legitimate expectations of investors,¹⁴⁰ due process,¹⁴¹ arbitrariness

¹³⁴ *Mondev International Ltd. v. United States of America* ICSID Case No ARB(AF)/99/2, Award (11 October 2002), para 118.

¹³⁵ In *Neer v. Mexico*, para 4, it was held that an act by a state’s authorities would have to amount to ‘an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency’ to amount to a violation.

¹³⁶ As an example, the tribunal in *Pope & Talbot Inc. v. Government of Canada* Merits, Phase 2, Award (10 April 2001) UNCITRAL (NAFTA), para 110, interpreted the fair and equitable treatment standard broader than the *Neer* formula. Subsequently, the NAFTA Free Trade Commission issued a Note of Interpretation which rejected this view and retained that the reference to the fair and equitable treatment standard in NAFTA was equivalent to the minimum standard of treatment of aliens in customary international law (NAFTA Free Trade Commission, Note of Interpretation, 31 July 2001).

¹³⁷ Kläger, ‘Fair and Equitable Treatment’, 116.

¹³⁸ For example, in *Metalclad v. Mexico*, para 99, the tribunal found that Mexico had ‘failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment’.

¹³⁹ In *Metalclad v. Mexico*, para 93, one factor of the violation of the fair and equitable treatment standard was the misapplication of domestic law by the local administrative authority.

¹⁴⁰ Such expectations can be induced by a host state’s action which are directed towards the investor, but also derive from the general legislative framework in place, see e.g. *GAMI Investments Inc. v. The United Mexican States* UNCITRAL, Final Award (15 November 2004), para 100. However, other tribunals later held that the legitimate expectations of investors must also be examined as to their reasonableness, see *Parkerings-Compagniet v. Lithuania* ICSID Case No ARB/05/8, Award (11 September 2007), para 333, and *Continental v. Argentina*, para 258.

¹⁴¹ See e.g. *Waste Management Inc. v. The United Mexican States* ICSID Case No ARB(AF)/00/3, Award (30 April 2004), para 98.

and discrimination,¹⁴² transparency¹⁴³ and – in a few cases – of proportionality¹⁴⁴. Reasoning following the lines of proportionality analysis does not seem central to fair and equitable treatment. Rather, the standard appears to be a threshold issue for which a variety of elements can be assessed and weighed. The boundary towards national treatment is not easy to draw, as sometimes fair and equitable treatment serves as a gap filler, taking up elements of discrimination that are not brought under a national treatment claim by a tribunal.¹⁴⁵

ii. Legal tests under the fair and equitable treatment standard

Under the ‘fair and equitable treatment’ standard, tribunals, at various occasions, used terms like reasonableness or proportionality. These, however, remain at the level of references and it is difficult to distil elements of proportionality analysis or similar legal tests from the highly fact-based reasoning.

In *Pope & Talbot*, the tribunal referred at various points to the concept of reasonableness in its decision. It held that the host state’s authorities’ actions constituted a ‘reasonable response’ to the problems encountered, which also respected the principles of fairness and equal treatment.¹⁴⁶ In *MTD*, the tribunal simply held that the standard of fair and equitable treatment ‘encompassed’ proportionality among other concepts.¹⁴⁷

The arbitrators in *Saluka* discussed the concept of reasonable expectations for the investor and how host states were supposed to regulate ‘bona fide’. The latter should thus ensure that their conduct was ‘reasonably justifiable by public policies’ and that in particular differential treatment was motivated by ‘rational policies’ and not by a hidden preference for local economic operators.¹⁴⁸

In *Continental*, the tribunal held that as part of the assessment under the fair and equitable treatment standard ‘the relevance of the public interest pursued by the State, accompanying measures aimed at reducing the negative impact

¹⁴² Schill, 19, here points as an example to the early case before the International Court of Justice *Elettronica Sicula S. p. A. (ELSI, United States of America v. Italy)* Judgment of July 20 1989, ICJ Reports 1989, p 15, para 128.

¹⁴³ One can again cite as an example the statement by the tribunal in *Metalclad*, para 99, where a ‘transparent’ legal framework had not been granted.

¹⁴⁴ See for an overview Kläger, ‘Fair and Equitable Treatment’, 118–119.

¹⁴⁵ See on this interaction with the example of the *SD Myers* case K. Miles, ‘Sustainable Development, National Treatment and Like Circumstances in Investment Law’ in M.-C. Cordonier Segger, M.W. Gehring and A. Newcombe (eds), *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011), 272.

¹⁴⁶ *Pope & Talbot v. Canada (Merits, Phase 2)*, paras 125, 128 and 155.

¹⁴⁷ *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* ICSID Case No ARB/01/7, Award (25 May 2004), para 109.

¹⁴⁸ *Saluka v. Czech Republic*, see in particular para 307.

are also to be considered in order to ascertain fairness'.¹⁴⁹ The arbitrators thus decided to scrutinize both the genuineness of the value pursued by the host state and the negative effect on the investor to determine whether the requirement of 'fairness' had been respected.

In *EDF v. Romania*, the tribunal borrowed from the statements on proportionality issued by the tribunal in *Azurix*, holding that a 'reasonable relationship of proportionality between the means employed and the aim sought' should be established.¹⁵⁰

Similarly, in *Total* the tribunal held that in examining whether the investor's legitimate expectations had been respected under the standard of fair and equitable treatment, the host state's right to regulate domestic matters in the public interest had to be taken into account. As a consequence, a 'standard of reasonableness and proportionality' had to be used to assess the circumstances of regulatory change with an impact on the investor.¹⁵¹

iii. Conclusion

The resorts to proportionality under the fair and equitable treatment standard are less explicit and the analysis less advanced¹⁵² than in the case law on expropriation. Tribunals strongly emphasized the facts, sometimes at the cost of a more developed reasoning and without explaining sufficiently the legal standard they applied.¹⁵³ As an overall aim, the case law seems to establish a set of elements that must be present to reach a certain threshold of unfair treatment. At this stage, only more extensive legal reasoning can lead to a clarification on what tribunals actually mean when they refer to reasonableness or proportionality.

C National Treatment

National treatment standards call for a comparison between the treatment received by local investors and the foreign investor, as far as like circumstances allow a comparison.¹⁵⁴ In earlier days, these standards played a less important role than for example in the law of international trade, as the standard

¹⁴⁹ *Continental v. Argentina*, para 261.

¹⁵⁰ *EDF (Services) Ltd v. Romania* ICSID Case No ARB/05/13, Award (8 October 2009), para 293.

¹⁵¹ *Total v. Argentina (decision on liability)*, para 123. Leonhardsen, 134-135, suggests that *Total* represents one of the most sound uses of proportionality analysis to date, though the textual basis for this finding seems weak in our view.

¹⁵² See also Kläger, 'Fair and Equitable Treatment', 249.

¹⁵³ S.W. Schill, 'Fair and Equitable Treatment under Investment Treaties as an Embodiment of the Rule of Law' (2006) 6 *International Law and Justice Working Papers* 1, 6.

¹⁵⁴ Dolzer and Schreuer, 178-179, show that typically, contrary to 'European' national treatment clauses, 'American' clauses tend to include the explicit qualifier of investors 'in like situations' or 'in like circumstances'.

of treatment of domestic investors was not particularly high. Only later, with an improvement in the standard of treatment of domestic economic actors, did the standard gain importance in investment treaty arbitration.¹⁵⁵

i. Regulatory purpose and national treatment in international investment law

The leeway for the choice of criteria for comparison and for the evaluation of differential treatment is in most cases large, which renders the concrete test adopted somewhat of a ‘value judgment’.¹⁵⁶ Fundamentally, there is a division of views. Some suggest that, similar to the context of international trade law, the main concern for national treatment in investment law is the use of regulatory means by the host state to favour local economic operators over foreign investors. In these accounts, the main test for assessing national treatment is based on an inquiry into the competitive relationship between the investor and the domestic operators.¹⁵⁷ By contrast, other scholars suggest that contrary to the context of international trade law, national treatment should focus more generally on fairness for individual investors, which means that a national treatment test should examine whether there is a discriminatory act against an investor based only on the latter’s foreign nationality and on no other legitimate public policy objective.¹⁵⁸ Any inquiry would in the latter case have to be based on a broader examination of the regulatory context rather than on a narrow assessment of the competitive relationship between economic operators. As we have already found an assessment of national treatment using regulatory context more convincing in the context of WTO law,¹⁵⁹ such a solution is even more appropriate in international investment law. The overall rationale of national treatment in investment law is not structured along a rule-exception construction, as is Article III and Article XX GATT. There is thus conceptually no other way to examine regulatory purpose than at the stage of the national treatment analysis, as, at least in most cases, no exceptions provision exists.¹⁶⁰

Despite these disagreements, scholars substantially agree that ‘the adjudicator should ultimately focus on the rationality of the state’s purpose in assessing a claim for breach’.¹⁶¹ This explicit consideration of public purpose in investment law brings into play a potential leeway for proportionality analysis, as the effect

¹⁵⁵ N. DiMascio and J. Pauwelyn, ‘Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?’ (2008) 102 *The American Journal of International Law* 48, 67.

¹⁵⁶ Miles, 269.

¹⁵⁷ See e.g. J. Kurtz, *The Obligation of National Treatment in International Investment Law* (Ann Arbor: JSD Thesis University of Michigan, 2011), 83. See already for the discussion on national treatment in WTO law under Article III GATT chapter 7 section III.C.ii.

¹⁵⁸ See e.g. DiMascio and Pauwelyn, 75-76.

¹⁵⁹ See chapter 7 section III.C.iii.

¹⁶⁰ See on the more recent introduction of general exceptions clauses section IV.E.

¹⁶¹ Kurtz, 96.

of discrimination of means can be weighed against the contribution of these means to the purported public interest objective.

ii. Legal tests under the national treatment obligation

In adjudicating national treatment in investment arbitration, tribunals addressed issues at several stages which should be distinguished for the sake of clarity. First, it must be determined with which domestic investors the investor should be compared. Some tribunals limited comparisons to investors in the same sector of the economy,¹⁶² while others opted for a wide interpretation of the likeness of circumstances across sectors.¹⁶³ Second, less favourable treatment must be found to establish a violation of national treatment. Tribunals took into account the regulatory objective of regulations which create distinctions sometimes at the first level, sometimes at the second level. This also led them in the direction of proportionality analysis.

Contradictory decisions have emerged as to whether discriminatory intent must be shown.¹⁶⁴ It was also questioned whether only discriminatory treatment on the basis of nationality or on different grounds should fall foul of national treatment in investment treaties. Regulatory intent could provide a useful criterion in cases where the distinction and differential treatment are based on public policy reasons which the host state pursues. Proportionality analysis made its entry to examine the link between the measure which is allegedly discriminatory and its public policy justification.

In treaty codification, some states reacted to this trend by codifying in more detail the national treatment standard. In a Norwegian model BIT¹⁶⁵ a footnote was added to the national treatment provision which stated that the pursuit of legitimate public policy objectives might cause discrimination, but that this discrimination should not necessarily constitute a breach of the treaty.

The case law too took up the challenge to provide appropriate space for the consideration of the regulatory purpose of a measure which causes discrimination. This becomes all the more relevant in cases of *de facto* discrimination, where disadvantageous treatment results not from a formal distinction in law, but from the factual impact of a measure. In such cases, tribunals imposed a certain burden of persuasion on the claiming party to show that *de facto* discrimination was established.¹⁶⁶

¹⁶² *SD Myers v. Canada*, para 250.

¹⁶³ *Occidental v. Ecuador* LCIA Case No UN 3467, Award (1 July 2004), para 173.

¹⁶⁴ The tribunal in *Siemens v. Argentina*, para 321, excluded such intent explicitly, whereas in *Alex Genin, Eastern Credit Ltd. v. Republic of Estonia* ICSID Case No ARB/99/2, Award (25 June 2001), para 369, intent to discriminate was seen as a prerequisite.

¹⁶⁵ According to Spears, 1059 footnote 121, the draft was initially released for comment, but subsequently withdrawn again because it was not approved by parliament.

¹⁶⁶ See e.g. *GAMI v. Mexico*, para 114.

Some legal tests resembling proportionality analysis appeared in the examination of the rational link between differentiations and differential treatment on the one hand and the purported regulatory objective on the other.

As a starting point, the tribunal in *SD Myers* suggested that comparisons between the investor and domestic companies should be limited to the same economic sector.¹⁶⁷ As NAFTA did not contain an express provision to derogate from national treatment for public policy reasons, such as those contained in the GATT, the tribunal held that any comparison between foreign and domestic investors would have to 'take into account circumstances that would justify governmental regulation that treat them differently in order to protect the public interest'.¹⁶⁸ The tribunal's analysis remained somewhat blurred, but eventually found that the measures at issue could not validly claim to fulfil the suggested environmental objective, in particular because alternative measures promised the same result.¹⁶⁹

In *Pope & Talbot*, the tribunal refined the analysis. After differential treatment had been found within one sector, a presumption of violation arose, alleging that the measure at issue caused prohibited discrimination based on the nationality of the investor. A host state would have to show that the measure had a 'reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA'.¹⁷⁰ If a difference in treatment could be shown to bear a 'rational relationship' to legitimate government policies, the foreign investor and the domestic companies would not be considered to be 'like', and no violation of national treatment arose.¹⁷¹

The tribunal in *Feldman* followed the *Pope & Talbot* approach and decided that the national treatment standard should prohibit 'unreasonable' distinctions. As a consequence, differential treatment for cigarette resellers as exporters in comparison to cigarette producers as exporters could be reasonably explained by the need to fight smuggling with such a policy.¹⁷²

In *Methanex*, the tribunal took a very narrow approach, excluding broader competition concerns¹⁷³ and taking only identical foreign and domestic producers of the same substance into account as in like circumstances.¹⁷⁴ Producers of similar substances were excluded from the scope of companies in like circum-

¹⁶⁷ *SD Myers v. Canada*, para 248.

¹⁶⁸ *Ibid.*, para 250.

¹⁶⁹ *Ibid.*, para 255.

¹⁷⁰ *Pope & Talbot v. Canada (Merits, Phase 2)*, para 78.

¹⁷¹ *Ibid.*, para 79.

¹⁷² *Feldman v. Mexico*, paras 170 ff.

¹⁷³ See for a criticism of this aspect Kurtz, 181-182.

¹⁷⁴ *Methanex v. US*, part IV, chapter B, para 6.

stances because of the legitimate regulatory differentiation on environmental grounds.¹⁷⁵

In *GAMI*, the tribunal was content ‘that a reason exists for the measure which was not in itself discriminatory’.¹⁷⁶ The arbitrators thus found it sufficient that a purpose for the measure was given without questioning in greater detail how the individual elements of the measure were linked to that purpose.

Similar deference can be found in *UPS v. Canada*. The majority accepted here that Canada’s international treaty commitments on postal mail created no like circumstances to compare the foreign investor to Canada Post.¹⁷⁷ A dissenting arbitrator, however, argued that the host state should be required to meet a higher burden to show that there were no ‘like’ circumstances, if a competitive relationship had already been demonstrated by the claimant.¹⁷⁸ Closer scrutiny of the distinction and the related differential treatment had to be linked with the purported purpose of the regulation to avoid absurd results as in the present case, where the lack of like circumstances excluded a violation of national treatment despite the fact that the differential treatment had no rational link to the distinction drawn between the various economic operators.¹⁷⁹

In *Paushok*, the tribunal accepted the heavier taxation of a specific sector as ‘unwise’ but not discriminatory, and even found no problem in the severe restrictions imposed for the employment of truck drivers, despite the fact that they seemed not to be based on a real need and their discriminatory effect for the employment of foreign workers was acknowledged.¹⁸⁰

Contrary to such leniency, in *Corn Products* closer scrutiny was held to be indispensable by the tribunal, since discrimination did not cease to be discrimination merely because of the existence of a ‘laudable goal’ or a goal whose achievement ‘can be described as necessary’.¹⁸¹ Also, in *Cargill* the discriminatory effect of a tax used as a countermeasure could not be justified by the assertion that it necessarily had to discriminate against certain investors in order to be effective.¹⁸²

How such close scrutiny could be undertaken was demonstrated by the tribunal in *ADM*. After a lengthy examination of the questionable purpose brought forward by Mexico and of the measures chosen to implement it, the

¹⁷⁵ *Ibid.*, part IV, chapter B, para 28.

¹⁷⁶ *GAMI v. Mexico*, para 114.

¹⁷⁷ *United Parcel Service of America v. Government of Canada* ICSID NAFTA Chapter 11 Arbitration, Final Award (11 June 2007), para 118.

¹⁷⁸ See dissenting opinion in *Ibid.*, para 17.

¹⁷⁹ See dissenting opinion in *Ibid.*, para 51.

¹⁸⁰ *Sergei Paushok, CJSC Golden East Company, CJSC Vostokneftegaz Company v. Government of Mongolia* Arbitration under UNCITRAL Rules, Award on Jurisdiction and Liability (28 April 2011), para 366.

¹⁸¹ *Corn Products International v. The United Mexican States* ICSID Case No ARB(AF)/04/01, Decision on Responsibility (15 January 2008), para 142.

¹⁸² *Cargill, Inc. v. United Mexican States* ICSID Case No ARB(AF)/04/2, NAFTA Chapter 11 Arbitration, Award (18 September 2009), para 220.

tribunal came to the conclusion that the tax adopted was not ‘proportionate’ as a countermeasure as brought forward by the defending host state, and furthermore neither ‘necessary’ nor ‘reasonably connected to the aim said to be pursued’.¹⁸³

Eventually, a rather explicit endorsement of proportionality can be found in *Parkerings*. The tribunal held that in order to violate the national treatment standard, ‘discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State.’¹⁸⁴ In such a manner, ‘differentiated treatments of similar cases’ could be justified.

iii. Conclusion

Summing up, the development of proportionality analysis is still at an early stage under national treatment. While the debate on the appropriate criteria for likeness is ongoing, the acceptance of regulatory purpose as an important factor in assessing the reasons and way of differential treatment prompted some first statements in the case law. Some tribunals refrain from closer scrutiny and are content with the existence of a regulatory purpose for measures. Others take a closer look. Again others even explicitly refer to concepts such as ‘proportionality’ or ‘reasonableness’. Yet, most awards remain based on a close assessment of the specific facts and tend not to engage in detail in setting out a legal test. In the future, it is suggested that necessity could play a useful role under a model of special interest representation. The comparison with reasonably available alternatives used by the tribunal in *SD Myers* can be considered a useful example.

D Non-Precluded Measures Clauses and the Defence of Necessity

In situations of crisis, host states can refer to specific treaty clauses which foresee that a ‘[t]reaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interest.’¹⁸⁵ Clauses such as Article XI of the US-Argentina BIT just quoted are often referred to as ‘non-precluded measures clauses’.¹⁸⁶ A second avenue of argument

¹⁸³ *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States* ICSID Case No ARB(AF)/04/05, Award (21 November 2007), para 158.

¹⁸⁴ *Parkerings v. Lithuania*, para 368.

¹⁸⁵ Article XI, BIT between the United States and Argentina (1991).

¹⁸⁶ Typically, such clauses are enshrined in United States BITs, but other states have also started to include such clauses in their BITs, Dolzer and Schreuer, 489. There has also been intense debate as to whether these clauses can be considered self-judging, see A.K. Bjorklund, ‘Economic Security Defenses in

is opened by customary international law. Article 25 of the International Law Commission's Draft Articles on State Responsibility¹⁸⁷ as the pertinent codification provides that states may plead a state of necessity in order to preclude wrongfulness of action they have taken in emergency situations.

i. The norms allowing the invocation of a state of necessity

Both provisions have been invoked in the context of the Argentinean economic crisis in the early 2000s. Investors brought claims for compensation before investment tribunals, as they suffered severe losses caused by emergency measures undertaken by the government.¹⁸⁸

Arbitral tribunals saw themselves faced with the challenge of balancing the need for emergency government action in the crisis against the legitimate interest of investors to be protected. The case law thus provides two lines of reasoning. In an earlier line of case law and in several cases where no express treaty clause on necessity had been included in the relevant BIT, tribunals tended to adhere to the rather restrictive conditions of customary law to adjudicate investors' claims. A virtually paradigmatic turn towards a more comprehensive weighing exercise took place in the ruling of the *Continental* tribunal.

In the first line of case law, the basis represents the codification of customary international law on the responsibility of states for wrongful acts by the International Law Commission (ILC). The ILC Draft Articles on State Responsibility provide for a specific rule for a state of necessity as a ground of precluding the wrongfulness of a state's action. The following conditions apply:

Article 25. Necessity

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) the international obligation in question excludes the possibility of invoking necessity; or
 - (b) the State has contributed to the situation of necessity.

International Investment Law' in K.P. Sauvant (ed.) *Yearbook on International Investment Law & Policy* (Oxford: Oxford University Press, 2008-2009), 498, or Dolzer and Schreuer, 493.

¹⁸⁷ Article 25, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, International Law Commission' (2001) II Part Two Yearbook of the International Law Commission .

¹⁸⁸ Stone Sweet, 'Proportionality's New Frontier', 69, provides a very succinct summary of the crisis.

If these conditions are fulfilled, the wrongfulness of the action of a host state is excluded. However, such an exclusion of wrongfulness is ‘without prejudice’ to the question of compensation for damages caused.¹⁸⁹

Four conditions are set out in the provision. While the second two preclude the very access to the defence of Article 25, the first two suggest elements of proportionality analysis. There must be an essential interest to be safeguarded (paragraph 1a), while on the other hand no essential interest of other states or the international community must be impaired (paragraph 1b). This balancing exercise has, however, not played an important role in the case law. More emphasis has been put by tribunals on the requirement that emergency measures must constitute ‘the only way’, which has been read as a strict test of necessity. The defence of Article 25 remains, however, inaccessible to states that have contributed with their previous action to the emergence of an economic crisis or in situations where a norm expressly excludes the possibility of invoking necessity.

Because of the very explicit wording of the provision, there seems to be only little room for a less text-based test such as balancing or proportionality *stricto sensu* without overturning the structure and wording of the provision. It therefore comes as no surprise that more flexible tests have only been developed in cases where the adherence to Article 25 were loosened in favour of an interpretation focused more on the very broad wording of non-precluded measures clauses, also taking inspiration from legal tests from other legal regimes.

ii. Legal tests under the conditions of Article 25 of the International Law Commission’s Draft Articles

Even in presence of Article XI of the US-Argentina BIT as a non-precluded measures clause, some tribunals have found it difficult to give independent meaning to that provision. They have therefore conflated the standard with the conditions established in Article 25 of the ILC Draft Articles.¹⁹⁰ Typically, tribunals accepted that the severe economic situation of Argentina qualifies as a sufficiently serious threat against national security interests which could in theory excuse emergency measures detrimental to investors’ interests. However, they subsequently rejected the defence of a state of necessity by Argentina based on two grounds. First, they found that Argentina had contributed

¹⁸⁹ Article 27 of the ILC Draft Articles.

¹⁹⁰ *CMS Gas Transmission Co. v. Republic of Argentina* ICSID Case No ARB/01/8, 12 May 2005, 44 ILM 1205 (2005), para 91, without clear guidance regarding the use of Article 25 of the ILC Articles; in *LG&E v. Argentina*, para 245, the tribunal held that Article 25 of the ILC Articles ‘supported’ its analysis of Article XI; see also *Enron Corp., Ponderosa Assets, L.P. v. Argentine Republic* ICSID Case No ARB/01/3, Award (22 May 2007), para 334, where the treaty clause was found to be ‘inseparable’ from Article 25; see also *Sempra Energy International v. Argentine Republic* ICSID Case No ARB/02/16, Award of the Tribunal (28 September 2007), para 378.

to the emergence of a situation of necessity by its previous policies.¹⁹¹ Second, they adopted a very narrow reading of the requirement that the measure to be defended must constitute ‘the only way’ for a State to safeguard an essential interest.¹⁹² Only in one case did the tribunal find that necessity excused Argentina’s actions.¹⁹³

In other cases, the relevant BIT between Argentina and the other state did not contain a specific clause on necessity situations, which meant that Article 25 of the ILC Draft Articles was applied. In *National Grid* the tribunal found that Argentina had not been able to show that it had not contributed to the emergence of the crisis.¹⁹⁴ In *Suez*, the tribunal found again that Argentina had partly contributed to the emergence of the crisis and that its measures had not been the only means available.¹⁹⁵

As Article 25’s requirements were never found to be fulfilled, tribunals also refrained from interpreting whether compensation would be due under Article 27 of the ILC’s Articles even if the measure was excused under Article 25.

The case law based effectively on Article 25 of the ILC’s Articles thus adopts a very strict necessity test. As soon as some alternatives appeared open to a government, tribunals consistently found that a state of necessity could not excuse a host state’s emergency measures. Furthermore, as a consequence of the attribution of the burden of proof to the host state, the latter was virtually compelled to prove a negative.¹⁹⁶ Contrary to this line of case law, the tribunal in *LG&E* took the opposite solution to impose the burden on the investor. Article 25’s requirements were thus fulfilled in this exceptional case.¹⁹⁷

¹⁹¹ See e.g. *Enron v. Argentina*, paras 311-312. On the difficulty of establishing and evaluating the various endogenous and exogenous causes of an economic crisis see A. Alvarez-Jiménez, ‘Foreign Investment Protection and Regulatory Failures as States’ Contribution to the State of Necessity under Customary International Law – A New Approach Based on the Complexity of Argentina’s 2001 Crisis’ (2010) 27 *Journal of International Arbitration* 141. See also more recently *Impregilo v. Argentine*, para 358.

¹⁹² See e.g. *Enron v. Argentina*, paras 308-309. The restrictiveness of the test goes back to a similarly narrow reading adopted by the International Court of Justice when interpreting a precursor provision to Article 25 of the ILC Articles, see *Case concerning the Gab ikovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997, p 7, 40 para 55.

¹⁹³ In *LG&E*, the tribunal primarily applied Article XI of the BIT and only applied Article 25 of the ILC’s Articles in support. It imposed the burden of proof on the investor and found no sufficient rebuttal of the case for a state of necessity made by Argentina; see for a detailed commentary S.W. Schill, ‘International Investment Law and the Host State’s Power to Handle Economic Crises – Comment on the ICSID Decision in *LG&E v. Argentina*’ (2007) 24 *Journal of International Arbitration* 265, 278.

¹⁹⁴ *National Grid P.L.C. v. Argentine Republic* UNCITRAL Arbitral Tribunal Award, 3 November 2008, at <http://ita.law.uvic.ca/documents/NGvArgentina.pdf>, para 260.

¹⁹⁵ *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic/AWG v. Argentine Republic* ICSID Case No ARB/03/19 and UNCITRAL (AWG), Decision on Liability (30 July 2010), paras 260 and 264.

¹⁹⁶ *Enron v. Argentina*, para 309.

¹⁹⁷ Favourable towards this solution Schill, ‘International Investment Law and the Host State’s Power’, 280. It should, however, be noted that some see the *LG&E* decision as highly politically motivated and there-

iii. Legal tests in the interpretation of treaty provisions

A second line of case law does not depart from Article 25's strict conditions. Later decisions have questioned the automatic interpretative link established between non-precluded measures clauses and the standard in Article 25 of the ILC's Articles. The Annulment Committee in *CMS* disagreed with the tribunal's view and suggested that the treaty provision should apply as *lex specialis* and be interpreted independently. In its view, the clause constituted a primary norm which excluded a treaty violation in the first place. Article 25 could only exclude wrongfulness of a violation of a treaty.¹⁹⁸ As a consequence, if Article XI of the BIT applied, no breach arose and no compensation was due.¹⁹⁹ The tribunal had incorrectly interpreted Article XI. However, because of its limited jurisdiction in the annulment procedure, the Committee did not provide a more extensive independent interpretation of Article XI.²⁰⁰

In *Continental*, the tribunal abandoned for the first time the link between Article XI of the US-Argentina BIT and Article 25 of the ILC's Draft Articles and provided an independent interpretation of the treaty provision. It held that the severe economic conditions and their societal consequences in Argentina could qualify as 'affecting an essential security interest' in the sense of Article XI of the BIT.²⁰¹ Then, to determine whether the measures taken by Argentina qualified as 'necessary' according to the provision, the arbitrators decided to borrow extensively from the jurisprudence of the WTO Appellate Body. They based this finding on the fact that Article XI was derived from Article XX GATT, a provision establishing general, permanent exceptions for measures which pursue public health, public morals and other public policy objectives.²⁰² The tribunal consequently applied the interpretation given to Article XX GATT in the two landmark WTO cases *Korea – Beef* and *Brazil – Tyres*.²⁰³ The test applied was a

fore not very telling in legal terms, see S.F. Hill, 'The "Necessity Defense" and the Emerging Arbitral Conflict in its Application to the U.S.-Argentina Bilateral Investment Treaty' (2007) 13 *Law and Business Review of the Americas* 547, 562 with further references.

¹⁹⁸ *CMS Gas Transmission Co. v. Argentine Republic* ICSID Case No ARB/01/8 (Annulment Proceeding), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (25 September 2007), para 129.

¹⁹⁹ *Ibid.*, para 146.

²⁰⁰ *Ibid.*, para 136.

²⁰¹ *Continental v. Argentina*, para 178.

²⁰² *Ibid.*, para 192, reads as follows: 'Since the text of Art. XI derives from the parallel model clause of the U.S. FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concept and requirements of necessity in the context of economic measures derogating to the obligations contained in GATT, rather than to refer to the requirement of necessity under customary international law.' (footnotes omitted).

²⁰³ *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef* AB-2000-8, WT/DS161/AB/R and WT/DS169/AB/R, 11 December 2000 and *Brazil – Measures Affecting Imports of Retreaded Tyres*

comparison of the measures undertaken by Argentina with a range of alternatives in light of their ‘reasonable’ availability to the host state. With one exception, the tribunal found Argentina’s measures to be ‘necessary’ and rejected the claim for compensation for these measures, as no treaty breach had emerged.

After *Continental*, the doctrine intensely discussed the conflicting decisions of tribunals and annulment committees in cases in the context of the Argentinean economic crisis. A number of scholars rejected an autonomous reading of non-precluded measures clauses independent of Article 25 of the ILC’s Draft Articles.²⁰⁴ Others disagreed and argued in addition in favour of borrowing from WTO case law as in *Continental*. Moreover, some suggested other sources such as case law of the European Court of Human Rights on proportionality.²⁰⁵ A third group subscribed in principle to the idea of borrowing to fill the broad wording of non-precluded measure clauses with meaning. For this purpose, however, they seemed ready to accept as a source of law both customary international law as well as security exception clauses in international trade agreements.²⁰⁶

Some argue that proportionality analysis may offer an appropriate safeguard against abusive use of the provision as well as an appropriate leeway for states in economic emergency situations.²⁰⁷ Others would prefer restraint to a less value-laden, less restrictive measures test in order not to overburden investment tribunals which are hardly familiar with enough of the context of a case to take a truly informed decision.²⁰⁸ A sort of mixture between the last two

AB-2007-4, WT/DS332/AB/R, 3 December 2007, see chapter 7 section IV.A.iii.b.

²⁰⁴ See e.g. Alvarez and Khamisi, part III(C), who argue that in light of the wording and the objective pursued by Article XI of the US-Argentina BIT, the provision cannot be usefully separated from the standard in customary international law. Bjorklund, 497-498, rejects the argument often advanced that an interpretation in light of customary international law would not give *effet utile* to the clause and underlines that the two provisions of Article XI and Article 25 must not necessarily be seen as operating at a different level as the CMS Annulment Committee had suggested. For an extensive critique of the rules of interpretation used by the *Continental* tribunal, see D.A. Desierto, ‘Necessity and “Supplementary Means of Interpretation” for Non-Precluded Measures in Bilateral Investment Treaties’ (2009-2010) 31 *University of Pennsylvania Journal of International Law* 827.

²⁰⁵ See e.g. Stone Sweet, ‘Proportionality’s New Frontier’, 75, who perceives the proportionality analysis in WTO law as a more ‘mature’ version which should be adopted by arbitral tribunals. W.W. Burke-White and A. Von Staden, ‘Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties’ (2008) 48 *Virginia Journal of International Law* 307, 368-370, approve of the use of ECHR case law including the concept of a margin of appreciation.

²⁰⁶ See e.g. Dolzer and Schreuer, 499.

²⁰⁷ A.K. Bjorklund, ‘The Necessity of Sustainable Development?’ in M.-C. Cordonier Segger, M.W. Gehring and A. Newcombe (eds.), *Sustainable Development in World Investment Law* (Alphen aan den Rijn: Wolters Kluwer Law & Business, 2011), 389.

²⁰⁸ J. Kurtz, ‘Adjudicating the Exceptional at International Law: Security, Public Order and Financial Crisis’ (2010) 59 *International & Comparative Law Quarterly* 325, 366 ff.

approaches may promise the best results. As generally suggested by our model of special interest representation, necessity should operate as the predominant test. An intrusive standard of review could be arguably justified by the nature of the provision, i.e. the exceptional character of the necessity defence. At the same time, it appears unavoidable to keep a minimal leeway under which proportionality analysis could apply in order to sort out the few cases where an actual abuse of the defence becomes visible based on elements of the case. The adoption of the ‘weighing and balancing’ test in *Continental*, however, seems all too permissive,²⁰⁹ as the test focuses on general regulatory policy and not the exceptional situation of emergency measures.

Later case law partly endorsed, partly rejected the findings in *Continental*. The Annulment Committee in *Sempra* struck down the award given by the tribunal.²¹⁰ The Committee held that to apply Article 25 of the ILC’s Draft Articles before Article XI of the BIT amounted to an ‘illogical’ sequence and would unduly establish Article 25 as a peremptory definition of the necessity.²¹¹ In its view, the two provisions envisaged different situations, as the Annulment Committee in *CMS* had already underlined.

The Annulment Committee in *Enron* chose a more deferent approach. It contented itself with the reasons suggested by the arbitral tribunal in *Enron* for the common interpretation given to Article XI and Article 25 and rejected the *CMS* Annulment Committee’s award as going beyond the powers of annulment committees.²¹² It found no annulable error in the tribunal’s findings.²¹³

Also, the later annulment decision in *Continental* did not overthrow the findings of the tribunal, but upheld the interpretation of the non-precluded measures clause including the borrowing from WTO law. Partly, this confirmation is also based on the limited powers of an annulment committee which could not strike down an award because of a mere ‘error of law’.²¹⁴

²⁰⁹ See also Leonhardsen, 132, who agrees with the outcome reached in the case, but finds the basis for the use of balancing in the case unsound.

²¹⁰ *Sempra Energy International v. Argentine Republic* ICSID Case No ARB/02/16 (Annulment Proceeding), Decision on Annulment (29 June, 2010), para 159. In its eyes, the tribunal had failed to apply the law and thereby committed a manifest excess of powers which could lead to the annulment of the award.

²¹¹ *Ibid.*, paras 176 and 197.

²¹² See on the limits of annulment decisions under the ICSID Convention A. Von Staden, ‘Towards Greater Doctrinal Clarity in Investor-State Arbitration: The *CMS*, *Enron*, and *Sempra* Annulment Decisions’ in A.J. Bělohávek and N. Rozehnalová (eds.), *Czech Yearbook of International Law – Rights of the Host States within the System of International Investment Protection* (2011), 215 ff.

²¹³ *Enron Creditors Recovery Corp., Ponderosa Assets, L.P. v. Argentine Republic* ICSID Case No ARB/01/3 (Annulment Proceeding), Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic (30 July 2010), para 403 and 405. However, it found errors in the way in which the tribunal had reached its substantive conclusions during the analysis under Article 25 of the ILC’s Draft Articles, see paras 377-378.

²¹⁴ *Continental Casualty Company v. The Argentine Republic* Annulment Proceeding, ICSID Case No ARB/03/9, Decision on the Application for Partial Annulment of Continental Casualty Company and

Despite its mixed reception, the award in *Continental* is thus still valid as far as the mechanisms of investment law provide for it. There remains, therefore, a fundamental division in the case law over the defence of necessity as to whether adherence to the precise conditions of Article 25 of the ILC Draft Articles or a more flexible ‘weighing and balancing’ approach borrowed from the WTO or even a different legal test from the European Court of Human Rights is the road to follow in the presence of interpretative discretion.

i. Conclusion

The fundamental division of the arbitrators on their view of the defence of necessity in investment treaty arbitration, be it based on a treaty clause or customary international law, caused most of the debate on whether and how to use proportionality analysis in this context. On the one hand, several awards supported a very narrow test based on the host country having to establish that the measures it had taken were truly the only possible means – a virtually impossible task. On the other hand, in *LG&E*, the shift of the burden of proof instead put the investor in the difficult position of having to establish the requirements of Article 25 of the ILC’s Draft Articles. Apart from the distribution of the burden of proof, tribunals also disagree on the degree of strictness of the substantive test. The very flexible ‘weighing and balancing’ in *Continental* was correctly denounced as inappropriate, as it dismisses a host state’s obligations all too easily despite the fact that a BIT has been concluded for the very reason of protecting investors in economically rough times. Article 25’s requirements, however, appear virtually insurmountable as interpreted by earlier awards. While the doctrine remains strictly divided, some hope for at least a partial convergence of the analysis in future case law.²¹⁵ We suggested a middle-of-the-road approach; under the model of special interest review a necessity test is indeed useful to carry most of the burden. The emergency situation justifies an intrusive standard of review. Yet, the door must remain open for full-scale proportionality analysis in cases where elements of an abuse of the provision are apparent.

E General Exceptions Clauses

As a rather new development, states have started to include general exception clauses in BITs.²¹⁶ Such clauses ought to exempt host states from the obligations arising under a BIT if certain key public policy interests identified in the relevant clause cannot be pursued without a violation of such obligations.

the Application for Partial Annulment of the Argentine Republic (16 September 2011), para 133.

²¹⁵ Bjorklund, ‘Economic Security Defenses’, 498.

²¹⁶ See for a number of examples Newcombe, ‘General Exceptions’, 351 ff.

Two generations of these clauses were identified in the doctrine.²¹⁷ A first group of clauses is modelled on Article XX of the GATT or Article XIV GATS respectively.²¹⁸ The second group regulates procedural aspects for measures for public policy purposes, typically prescribing the notification of such measures.²¹⁹

Clauses of the first generation usually provide that a party shall not be prevented from adopting measures ‘necessary’ to or ‘designed and applied’ to protect a public interest such as public health or public morals.²²⁰ To date, no tribunal has ever construed such clauses. The similarity of the provision to WTO legal provisions prompted authors to suggest that a comparable interpretation is very likely.²²¹ Contrary to this suggestion, tribunals could also use a test similar to the one developed under the substantive obligations of BITs such as expropriation. General exceptions clauses could then merely be read as guidance as to how to interpret the substantive standards of a BIT.²²²

The similarity of general exception clauses to the equivalent in the GATT also bears a potential to restrict regulatory freedom for the host state; general exceptions clauses create a closed list of public policy objectives, while for example the concept of police powers under the expropriation standard or the examination of regulatory purpose in national treatment allow virtually every public policy objective a host state claims to be taken into account.²²³

As a final difficulty, the interaction between general exceptions clauses and expropriation provisions could prove difficult. For lawful expropriation, compensation is due as discussed previously. It is difficult to see whether the applicability of an exceptions clause could permit the derogation from this duty to compensate.²²⁴

Future case law is likely to bring general exceptions clauses to life. In light of their uneasy relationship with other treaty obligations and the tests applied under the latter, the most challenging task for tribunals is likely to be the development of a legal test which offers coherence with other BIT obligations and simultaneously offers a convincing middle ground between granting full leeway to host states and restricting their regulatory freedom unduly. In our view,

²¹⁷ Spears, 1060-1061.

²¹⁸ See e.g. Canada Model BIT 2004, Article 10.

²¹⁹ See e.g. BIT between Japan and Korea (2002), Article 16.1c.

²²⁰ For the latter clause see Common Investment Area Agreement of the Common Market for East and Southern Africa, Article 22.

²²¹ Spears, 1062. See also Newcombe, ‘General Exceptions’, 363.

²²² Dolzer and Schreuer, 503.

²²³ DiMascio and Pauwelyn, 82-83.

²²⁴ H. Mann, ‘Investment Agreements and the Regulatory State: Can Exceptions Clauses Create a Safe Haven for Governments?’ (2007) *IISD Background Paper for the Development Country Investment Negotiators’ Forum*, available at www.iisd.org 1 (access on 6 March 2012), 12. See in favour of a continuing duty to compensate Newcombe, ‘General Exceptions’, 369.

many of the lessons found under the expropriation case law and doctrine can be usefully applied here.²²⁵

F Conclusion

The overview over the case law shows that the engagement with proportionality analysis by tribunals in investment arbitration to date remains rather cursory. The certainly most explicit use of the concept was undertaken in the *Tecmed* case, but even here the assessment is highly fact-based and does not put much weight on developing the individual sub-tests of proportionality analysis. Under fair and equitable treatment, the reasoning of tribunals remains even more closely tied to the facts of cases, while the test effectively applied may refer to terms such as reasonableness or proportionality, but seems to operate in practice more like an inquiry into whether a certain threshold of unfair treatment has been crossed. Examining whether the obligation of national treatment has been violated, tribunals did not closely scrutinize the link between an allegedly discriminatory measure and its purported regulatory purpose. Some initial case law indicates, however, that proportionality analysis could play a role in the future, although the tests of suitability and necessity seem to be given preference – correctly so, in our view. In the specific context of non-precluded measures clauses and a state of necessity being pleaded by host states, tribunals are split over whether strict requirements of customary international law or a milder form of weighing – resembling the ‘weighing and balancing’ test used under the WTO/GATT’s general exceptions provisions – should be used. It seems difficult, however, to extend the latter analogy too far or to proceed to full-scale proportionality analysis without somehow paying respect to the very limited number of situations where a necessity plea should be used to excuse the violation of treaty obligations by a host state. Summing up, future development should, in our view, follow the reasoning appropriate under a model of special interest review. This would suggest the use of a necessity test which does not unduly over-represent one interest by means of its burden of proof or notion of alternative measures, and which leaves the door open to proportionality *stricto sensu* in exceptional cases.

V Evaluation and Conclusion

The present chapter examined in detail the development of legal tests close to proportionality analysis in international investment law, finding that only scarce references can be found to date. Generally, the reasoning of arbitral tribunals is strongly linked to the facts of cases and does not necessarily set out legal tests in great detail.

²²⁵ See section IV.A.iii.

Examining the context of judicial review, historic insights show that the narrative of continuous judicialisation of investment arbitration is not convincing. Still, it is used as a basis by scholars to argue in favour of an increased use of proportionality analysis by arbitral tribunals. Similarly, the institutional characteristics – in particular the weak standing of arbitrators – do not support such straightforward claims. A closer look at the political economy of investment arbitration reveals that investment arbitration can be better compared with a technical mechanism in the framework of an insurance contract than with constitutional adjudication. The context thus characterises investment arbitration more as a narrowly focused, technical mechanism of review.

With this in mind, unfortunately to date there is no intense discussion on the topic or on the appropriate intrusiveness of the standard of review and pre-balancing. This seems mostly based on confusion as to whether investment itself should constitute a public interest. A different explanation could posit international investment law as the protection of property rights and justify judicial review through a fundamental rights analogy. However, the specifics of the system, in particular its non-subsidiary character and the limited protection of property render such an analogy rather tenuous. In our view, this debate would have to be led much more openly by tribunals, also to explain the reasons for their choice of more or less intrusive review. In any event, the stretched fundamental rights parallel has led us to conclude that pre-balancing for investment arbitration leads to a result close to a model of special interest review.

In assessing the norms to be interpreted, we found rather broadly worded provisions that allow some interpretative leeway. Typically, they restrict the regulatory freedom of host states towards their investors by imposing on them the obligation to compensate in cases of expropriation or to grant national treatment in comparison to domestic economic operators in ‘like’ circumstances. The strongest reference to proportionality analysis can be found in the *Tecmed* case, where the tribunal examined whether an excessive burden had been imposed on the investor. In our view, in the variety of situations examined, necessity could arguably play a predominant role, if in the future the reasoning of tribunals would set out in more detail the actual test used beyond mere brief references to ‘proportionality’ or ‘reasonableness’. For this purpose, we suggested drawing inspiration from WTO law and the ‘weighing and balancing’ test, since in our view the latter grants appropriate deference in a model of special interest review. At the same time, it must be noted that the latter test also proved to possess shortcomings, in particular in terms of its transparency of reasoning.²²⁶ More open discussion of the justification of judicial review could take inspiration from the more expressive approaches in this respect suggested by the United States Supreme Court²²⁷ or by the European Court of Human Rights under the latter’s margin of appreciation doctrine.²²⁸ Much of our criticism remains, however, necessarily abstract in the absence of extensive engagement with proportionality analysis in the case law.

²²⁶ See chapter 7 section IV.A.iii.d.

²²⁷ See chapter 4 section III.A.ii.

²²⁸ See chapter 5 section III.B.i.

Let us recapitulate. The starting point of this inquiry was the realization that not only is proportionality analysis now widely applied across domestic constitutional, European or international economic law, but also that it is applied in different manners. Our central aim has been to provide a rationale to explain and justify these differences.

For this purpose, we first explored the theoretical foundations of proportionality analysis. To understand why proportionality analysis is worthy of discussion at all, we took a closer look and uncovered both its advantage of equal representation of all claims and arguments and its disadvantage, i.e. the requirement of moral argumentation. The reproach of judicial activism and of judicial law-making can be levered against adjudicators because of this disadvantage. Consequently, a justification is required for adjudicators to use proportionality analysis.

To find this justification we explored the Principles Theory, developed by Robert Alexy based to some extent on the work of Ronald Dworkin. The central norm-theoretic tenet of the theory is the distinction between rules and principles, the latter applying exclusively by proportionality analysis as opposed to subsumption. Having found this distinction difficult to sustain, we turned to a different level of the theory for support.

At the level of argumentation theory, the Principles Theory explains proportionality analysis as the replica of balancing of reasons for action in practical reasoning. Some doubt that such balancing of reasons is omnipresent; Raz would suggest the concept of exclusionary reasons: reasons which exclude the balancing of some other reasons. However, conceptual difficulties cast doubt on this concept. The very exclusion of reasons appears conceptually inexplicable unless there is some balancing of the exclusionary force of reasons, which would require an external point of view for balancing that cannot simply be assumed by the balancing instance. There is thus a pre-balancing of exclusionary force by the balancing instance – i.e. on the use of proportionality analysis or its rejection and instead reliance on subsumption and positive law. This pre-balancing exercise turns out to be the anchor point for the varying uses of proportionality analysis, as these uses can then, in our view, be explained by a pre-balancing of reasons – which emerge from judicial review.

Subsequently, we fleshed out the details of this pre-balancing exercise. In our view, the context of judicial review is central to this pre-balancing for an adjudicator, because judicial review is an allocation of power to the judiciary which must be justified. The procedural democracy doctrine is a milestone in setting out such a justification: this doctrine suggests that the very reason why a judiciary should be entitled to review of legislative action in the first place is to ensure representation of values which may have been inappropriately taken into account in the deliberative legislative process. It is about these values and their representation that pre-balancing, the weighing of arguments, must take place. To develop such arguments, however, we must also take into account the context of judicial review, as it is only based on this context that we can fully understand

what values should be protected by judicial review in what manner. The historical development, political economy and institutional setting of judicial review are important indicators in this regard. Nonetheless, these are empirical rather than normative elements and must therefore be kept apart from the pre-balancing exercise itself as a balancing of normative reasons. This results in a two-tiered examination, which we also transposed to the subsequent comparative studies. First, we examined the non-normative elements to gain a deeper insight into judicial review from a rather descriptive perspective. Second, we turned to pre-balancing and fleshed out what values judicial review is about in a specific legal regime.

To be able to produce more vivid results, we also introduced the concept of models of judicial review. While pre-balancing is an exercise with a particular and unique set of arguments of varying strength in each legal regime, some commonalities as to the results can be identified in our view. To clarify such typical results, we consolidate them into two models. One typical result of pre-balancing is what we designated an equal representation model. In this case, the aim of judicial review is to ensure full representation and a balance between a wide variety of values. Pre-balancing thus justifies extensive use of proportionality analysis by an adjudicator. A contrasting typical result is a model of special interest representation. Judicial review is directed at the representation of one particular interest in this case, and the use of proportionality analysis – though not excluded – is appropriate in fewer circumstances. Other tests – including truncated tests of proportionality analysis – are often more appropriate, although an undue hierarchy in favour of the interest to be represented is not necessarily justified.

Having developed the concepts of pre-balancing, descriptive and normative elements of judicial review and models of judicial review, several comparative studies served to put them to the test of practice. We chose six legal regimes with varying focuses on fundamental or human rights, on the distribution of competences or on economic interests such as trade or the protection of foreign investors for this purpose. With the help of our concepts and a comparable chapter structure, comparisons and adequate criticism were pointed out in each legal regime and will now be briefly recalled in detail.

In German constitutional law as our first comparative study, proportionality analysis is applied quite routinely as the well-known ‘principle of proportionality’ for fundamental rights in their dimension as shields protecting individuals from public interference with their rights. In the field of positive obligations and socioeconomic rights, however, proportionality analysis has been rejected without convincing arguments. Some of this focus on rights as shields can be explained by the historical development of proportionality analysis. However, taking a look at the values to be protected in the Basic Law, the justification of judicial review rather points towards an equal representation model of judicial review. Instead of a rejection of proportionality analysis, we suggested a more extensive discussion and justification of the appropriate standard of review in

each case; this can be emphasized with a glance towards United States constitutional law, where the discussion of the standard of review and the justification of judicial review is much more satisfactory. As a commendable feature, however, the Federal Constitutional Court set out quite comprehensively its reasoning when deciding on the horizontal effect of fundamental rights, applying proportionality analysis with due deference, which comes down – appropriately in our view – to a model of special interest representation which focuses on the balance of values found in private law, but maintains due deference for the interest of private autonomy.

Examining United States constitutional law, two fields of study are particularly worthy of interest. First, in the fundamental rights case law, we note a fragmentation into a variety of different tests, which cannot necessarily be justified through the procedural democracy doctrine. While the Supreme Court bases itself on the latter doctrine to set out in more detail the intensiveness of its scrutiny, there is a remarkable reluctance to engage in proportionality analysis with a similar vigour as the German Federal Constitutional Court. Descriptive elements such as the history of contestation of the Court's authority can help to explain, but not justify the fragmentation which results in very diverging levels of protection for different categories of rights. The particular perception of rights predominant in United States constitutional law, however, provides a plausible argument in pre-balancing to justify the reluctant approach to engaging in proportionality analysis in the field of positive obligations or horizontal effect of fundamental rights. It is thus a more limited equal representation model than in the German context.

Second, under the Dormant Commerce Clause, exaggerated scepticism of proportionality analysis led the Supreme Court to rely on a categorization between discriminatory and non-discriminatory measures, the former being subject to very strict scrutiny, the latter being subject to only a very superficial form of 'balancing'. The rigidity of the distinction could arguably be overcome by the justifiably restricted use of proportionality analysis under a model of special interest representation combined with appropriate deference.

Under the European Convention on Human Rights, the descriptive features of judicial review by the European Court of Human Rights explain the very flexible approach to proportionality analysis exhibited by the Court, because there is ongoing tension between the role of individual and constitutional justice of the Court. However, this 'fair balance' test also seems justified under the procedural democracy doctrine, as over the years the Court has developed a particularly broad understanding of the rights enshrined in the Convention, which also includes positive obligations. A model of equal representation is thus the appropriate result of pre-balancing in most situations of review faced by the Court. Not only does the Court protect rights linked directly to the democratic process with vigour, but it also protects other rights that guarantee the respect of a person's private life. Generally the discussion of the appropriate intrusiveness of scrutiny by the Court is more vivid than in the case of the German Federal

Constitutional; however, in the field of horizontal effect of human rights the justification of review has remained unfortunately shallow. The least convincing feature of the case law is the reluctance displayed in the application of the necessity prong of the 'fair balance' test, for which no appropriate justification resorts from pre-balancing.

A similarly dynamic, yet differently structured image emerges for judicial review in European Union law. The descriptive features of review sketch the Court of Justice of the European Union as predominantly focused on the uniform interpretation of a legal order focused on the value of economic integration. Yet pre-balancing nuances the picture, as a look at the values to be protected shows. The Court has, unfortunately, not always set out with sufficient clarity the variety of standards of review used in different situations. Still, review is called to represent ever more values with fundamental rights, the emergence of citizenship as a non-economic Treaty freedom and the increasing importance of horizontal effect given to fundamental rights and Treaty freedoms. A legitimate argument can therefore be made that there is an ongoing shift from a model of special interest representation towards equal representation. Yet, in the use of the 'principle of proportionality', the Court overemphasizes the interest of economic integration with a heavy-handed use of the necessity prong, and thereby somewhat unjustifiably puts this interest in a hierarchically higher position.

WTO law, by contrast, represents a somewhat clearer case of a model of special interest representation. Looking at the mere technical set-up of judicial review, the focus on trade becomes apparent with the dispute settlement system and its specialized adjudicators. It comes as no great surprise that proportionality analysis has been received with reluctance. The result of our pre-balancing is indeed a model of special interest representation. This has become clear with a discussion of obligations under the GATT such as national treatment and the general exceptions provisions. But also for the TRIPS Agreement, the case of protection of intellectual property rights as property rights is not as straightforward and convincing as a first look might suggest. Most of this discussion is regrettably absent in the case law. Still, having conducted our own pre-balancing, we consequently found the reliance on necessity generally convincing. Concern arises, however, on the exaggerated fear of proportionality *stricto sensu* which results in somewhat obscure case law and the rigidity of the legal tests under the TRIPS Agreement.

International investment arbitration presents a quite unique setting of judicial review. Still, the theoretical framework of pre-balancing and models of judicial review proves itself capable of overcoming the differences. The context of investment arbitration reveals that claims of using proportionality analysis because of the quasi-constitutional setting of such arbitration are exaggerated; in fact, the political economy of investment arbitration points more in the direction of technical adjudication under an insurance contract perspective. While the case law has not debated in much detail a possible justification of judicial

review under the procedural democracy doctrine, our own pre-balancing accentuates the fuzziness of the interest protected in international investment law. A human rights analogy proves hardly convincing, with the consequence that a model of special interest focused on the public interest of investment protection is the outcome. The case law has to date only paid some lip service to proportionality analysis, so that our assessment and criticism remain to some extent inevitably abstract.

Throughout this extensive comparative analysis, the concepts of pre-balancing and models of judicial review have prevented us from simply accepting non-normative features of judicial review as explanations for particular uses of proportionality analysis and have forced us to search for a normative justification. If none could be found, appropriate criticism and our own pre-balancing could be brought forward as suggestions for future jurisprudential development. Furthermore, said concepts have helped to structure the comparative studies similarly in order to render them comparable despite the differences of the various legal regimes examined.

We can thus sum up the findings of the various comparative studies in the following overview, distinguishing the pertinent model of review which resulted from pre-balancing. In the case of a model of special interest review, we can also note what interest is the focus of review.

Situation of review	Model of equal representation review	Model of special interest review	Special interest at issue (if applicable)
German constitutional law – fundamental rights	X		
German constitutional law – fundamental rights in their horizontal dimension		X	Private autonomy
United States constitutional law – fundamental rights	X		
United States constitutional law – Dormant Commerce Clause		X	Inter-state trade
ECHR law – human rights	X		
ECHR law – human rights in their horizontal dimension		X	Private autonomy
EU law – internal market freedoms		X	Economic integration
EU law – fundamental rights and citizenship	X		

EU law – fundamental rights in their horizontal dimension		X	Private autonomy
WTO law – GATT, GATS, TRIPS, TBT and SPS agreements		X	International trade
International investment law		X	Investment protection

One final question arises after the long journey: where to go from here? Our hope is that readers will take from our study an inspiration to take the institutional context of judicial review into account appropriately when thinking about the use of proportionality analysis. The suggested distinction lies between descriptive elements which may explain, but not necessarily justify a particular use of proportionality analysis, and normative elements relevant under the procedural democracy doctrine, which can indeed justify a particular use of proportionality analysis. With this insight, it should become possible to lead a more thorough discussion about proportionality analysis, its promises and pitfalls, uses and misuses, without being reduced to answering a simple yes/no question as to whether it ought to be used or not. The debate should thus evolve more around how it ought to be used.

Proportionality analysis is here to stay. The more comprehensive the discussion becomes about it, the better.

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