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2008

# Proportionality Balancing and Global Constitutionalism

Alec Stone Sweet, *Yale Law School*  
Jud Mathews



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# Proportionality Balancing and Global Constitutionalism

ALEC STONE SWEET\* AND JUD MATHEWS\*\*

*Over the past fifty years, proportionality balancing—an analytical procedure akin to “strict scrutiny” in the United States—has become a dominant technique of rights adjudication in the world. From German origins, proportionality analysis spread across Europe, into Commonwealth systems (Canada, New Zealand, South Africa), and Israel; it has also migrated to treaty-based regimes, including the European Union, the European Convention on Human Rights, and the World Trade Organization. Part II proposes a theory of why judges are attracted to the procedure, an account that blends strategic and normative elements. Parts III and IV provide a genealogy of proportionality, trace its global diffusion, and evaluate its impact on law and politics in a variety of settings, both national and supranational. In the conclusion, we discuss our major finding, namely, that proportionality constitutes a doctrinal underpinning for the expansion of judicial power globally. Although there is significant variation in how it is used, judges who adopt proportionality position themselves to exercise dominance over policymaking and constitutional development.*

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\* Leitner Professor of Law, Politics, and International Studies, Yale Law School.

\*\* J.D. Yale Law School (2005); Ph.D. student, Department of Political Science, Yale University. We thank all those who have provided comments on drafts of this article and other helpful input, including especially Robert Alexy, Aharon Barak, Eshchar Ben Shitrit, Dieter Grimm, and Wade Wright.

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## I. INTRODUCTION

Over the past fifty years, proportionality analysis (PA) has widely diffused. It is today an overarching principle of constitutional adjudication, the preferred procedure for managing disputes involving an alleged conflict between two rights claims, or between a rights provision and a legitimate state or public interest. With the consolidation of the “new constitutionalism,”<sup>1</sup> this type of dispute has come to dominate the dockets of constitutional and supreme courts

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1. See *infra* notes 27–30 and accompanying text. See also ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

around the world. Although other modes of rights adjudication were available and could have been chosen and developed, PA has emerged as a multi-purpose, best-practice, standard.

From German origins, PA has spread across Europe, including to the post-Communist states in Central and Eastern Europe, and into Israel. It has been absorbed into Commonwealth systems—Canada, South Africa, New Zealand, and via European law, the U.K.—and it is presently making inroads into Central and South America. By the end of the 1990s, virtually every effective system of constitutional justice in the world, with the partial exception of the United States, had embraced the main tenets of PA. Strikingly, proportionality has also migrated to the three treaty-based regimes that have serious claims to be considered “constitutional” in some meaningful sense: the European Union (EU),<sup>2</sup> the European Convention on Human Rights (ECHR),<sup>3</sup> and the World Trade Organization (WTO).<sup>4</sup> In our view, proportionality-based rights adjudication now constitutes one of the defining features of global constitutionalism, if global constitutionalism can be said to exist at all.

In this paper, we seek to explain why this has happened, through what processes, and with what consequences for judicial authority. Because some readers might not be familiar with PA, it might be useful to summarize the basics. PA is a doctrinal construction: it emerged and then diffused as an unwritten, general principle of law through judicial recognition and choice. For our purposes, it is a decision-making procedure<sup>5</sup> and an “analytical

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2. Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT’L L. 1 (1981); ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 118–19 (2004); JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION (1999).

3. Evert Albert Alkema, *The European Convention as a Constitution and its Court as a Constitutional Court*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN PERSPECTIVE 41 (Paul Mahoney et al. eds., 2000); Jean-Françoise Flauss, *La Cour Européenne des droits de l’homme est-elle une cour constitutionnelle?*, 36 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 711 (1999). See also STEPHEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2006) (discussing the “constitutionalization” of the European Court of Human Rights and the “constitutional justice” dispensed by the ECHR).

4. DEBORAH CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION (2005); Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT’L ECON. L. 19 (2000); Joel P. Trachtman, *The Constitutions of the WTO*, 17 EURO. J. INT’L L. 623 (2006).

5. As a general principle of law, some form of proportionality is found in most stable legal systems. In criminal law, the severity of punishment is expected to be proportionate to

structure”<sup>6</sup> that judges employ to deal with tensions between two pleaded constitutional “values” or “interests.”

In the paradigmatic situation, PA is triggered once a *prima facie* case has been made to the effect that a right has been infringed by a government measure.<sup>7</sup> In its fully developed form, the analysis involves four steps,<sup>8</sup> each involving a test. First, in the “legitimacy” stage, the judge confirms that the government is constitutionally-authorized to take such a measure. Put differently, if the purpose of the government’s measure is not a constitutionally legitimate one, then it violates a higher norm (the right being pleaded). The second phase—“suitability”—is devoted to judicial verification that, with respect to the act in question, the means adopted by the government are rationally related to stated policy objectives. The third step—“necessity”—has more bite. The core of necessity analysis is the deployment of a “least-restrictive means” (LRM) test: the judge ensures that the measure does not curtail the right any more than is necessary for the government to achieve its stated goals. PA is a balancing framework: if the government’s measure fails on suitability or necessity, the act is *per se disproportionate*; it is outweighed by the pleaded right and therefore unconstitutional. The last stage, “balancing in the strict sense,” is also known as “proportionality in the narrow sense.” If the measure under review passes the first three tests, the judge proceeds to balancing *stricto sensu*. In the balancing phase, the judge weighs the benefits of the act—which has already been determined to have been “narrowly tailored,” in American parlance—against the costs incurred by infringement of the right, in order to determine which “constitutional value” shall prevail, in light

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the seriousness of the crime, in classic international law, proportionality is found in the law of reprisal and the use of force, and so on. Our focus is on PA as an argumentation and balancing framework.

6. Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. L. 574, 579 (2004).

7. In a leading child pornography case, *R. v. Sharpe*, [2001] 1 S.C.R. 45 (Can.), the Canadian Supreme Court held that a provision of the Criminal Code, as applied to Mr. Sharpe, violated his freedom of expression but was justified as a proportional measure designed to protect children from “exploitation.” The approach thus contrasts with categorical, rule-based approaches to rights protection that seek to dispense with balancing once the nature and scope of the right has been defined. In this latter approach, a court might decide that Mr. Sharpe’s rights were not abridged, since child pornography is not a protected form of expression, *per se*. Cf. *United States v. Ferber*, 458 U.S. 747 (1982).

8. Some courts—including those of the EU, the ECHR, and the WTO—normally use only a three-part test, leaving out the “legitimate purpose” stage. The analysis is thus entirely focused on the relationship between means and ends.

of the respective importance of the values in tension, given the facts.<sup>9</sup>

In many polities today, proportionality is treated as a taken-for-granted feature of constitutionalism, or a criterion for the perfection of the “rule of law.” For us, this “taken-for-granted” quality is an outcome of a social process that, like any social process, can and should be examined empirically. Treating PA as a natural, inherent principle of the legal system disguises the open-ended process through which it emerged, and downplays the controversies that PA routinely occasions among judges, elected officials, and scholars. The source of the anxiety is clear: however inherently “judicial” one takes the procedure to be, the LRM and balancing stages of PA fully expose judges as lawmakers. Indeed, the framework is typically debated from two opposed standpoints.<sup>10</sup> Some see it as dangerous: judges may defer too much to legislators and executives; they may even “balance rights away.” Others see PA as being too restrictive of policy discretion, inevitably casting judges as masters of the policy processes under review.<sup>11</sup> Proponents defend proportionality against attacks from both sides.<sup>12</sup> Although we will join this debate, it is important to emphasize that PA is an *analytical procedure*—it does not, in itself, produce substantive outcomes. That point made, judges also use proportionality as a foundation on which to build doctrine, the “argumentation frameworks” that govern rights litigation.

The paper is organized as follows. Part II proposes a theory

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9. In the United States, the government will prevail once a court determines that a government measure under review furthers a “compelling interest” and has been “narrowly-tailored.” An exercise akin to balancing may take place at the compelling interest stage but, in some cases, it remains an open question whether a law that passes a LRM test nonetheless infringes more on the right at play than is tolerable; an obvious example is *United States v. O’Brien*, 391 U.S. 367 (1968), where the right being pleaded by Mr. O’Brien received no analytical attention at all.

10. The standard European reference is the debate between JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 256–59 (William Rehg trans., The MIT Press 1996) and Robert Alexy, *Constitutional Rights, Balancing and Rationality*, 16 *RATIO JURIS* 131, 131–40 (2003). Daniel Halberstam surveys differing American and Continental approaches to balancing, and examines American ambivalence toward PA, in *Desperately Seeking Europe: On Comparative Methodology and the Conception of Rights*, 5 *INT’L J. CONST. L.* 166 (2007).

11. In the American context, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L.J.* 943 (1987). U.S. and European perspectives on constitutional rights and balancing are debated in *EUROPEAN AND U.S. CONSTITUTIONALISM* (Georg Nolte ed., Council of Europe Publishing 2005).

12. See, e.g., DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159–76 (2004).

of proportionality that blends strategic and formal legal elements. It is argued that adopting an explicit balancing posture gives distinct advantages to the rights adjudicator, and that PA provides a principled doctrinal foundation for balancing. We give empirical content to these ideas in two ways. First, we emphasize the neat “fit” between proportionality and the structure of contemporary rights provisions. Second, we provide a brief summary and analysis of Robert Alexy’s influential theory of constitutional rights.<sup>13</sup> Parts III and IV of the paper provide a genealogy of PA, trace its global diffusion, and assess its impact on law and politics in a variety of settings, both national and supranational. In Part V, we assess the relationship between PA and judicial power. Although PA can be portrayed as a “neutral” procedure, its adoption has—inexorably—led to a steady accretion of judicial authority over how constitutions evolve and how policy is made.

We do not want to be misunderstood on this last point. PA helps judges manage disputes that take a particular form; it does not dictate correct answers to legal problems. As argued in Part II, the key to the political success of PA—its social logic—is that it provides a set of relatively stable, off-the-shelf, solutions to a set of generic dilemmas faced by the constitutional judge. If PA mitigates certain legitimacy problems, it also creates, or at least spotlights, an intractable, second-order, problem. PA does not camouflage judicial lawmaking. Properly employed, it requires courts to acknowledge and defend—honestly and openly—the policy choices that they make when they make constitutional choices. Proportionality is not a magic wand that judges wave to make all of the political dilemmas of rights review disappear. Indeed, waving it will expose rights adjudication for what it is: constitutionally-based lawmaking. Nonetheless, one of our claims (elaborated on in Part II) is that PA offers the best position currently available for judges seeking to rationalize and defend rights review, given certain strategic considerations, the structure of modern rights provisions, and the precepts of contemporary constitutionalism. To be clear: we do not argue that PA necessarily makes any politico-legal system more just, or otherwise better off, relative to alternatives. Indeed, we do not explicitly theorize a normative position, although one is implied. Rather, our goal is to

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13. ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (Julian Rivers trans., Oxford Univ. Press 2002) (1986).

explain why judges would be attracted to PA, and then to trace the process through which PA has, in fact, been adopted.

In the conclusion, we discuss, in more general and comparative terms, the relationship between proportionality and judicial power. When a court moves to adopt PA as an operating system to manage rights adjudication, it alters the relationship between judicial authority and all other public authority, enhancing the former. Consider alternatives. Courts could, as in Commonwealth systems of yore, choose to operate under the “*Wednesbury* reasonableness”<sup>14</sup> standard developed by British courts, wherein judicial review of government measures is only granted if the claimant can demonstrate that officials have acted irrationally. The judge must find that officials have made a decision that *no* rational decision-maker could have made. *Wednesbury* reasonableness is a deference doctrine, a cousin of “rational basis” inquiry in the United States. In most Continental systems, like France and Italy, courts used, pre-proportionality, various standards, including “manifest error of appreciation” (granting very wide deference), to “reasonableness” (a kind of inchoate intermediate standard in American parlance), and various modes of *ultra vires* (or abuse of discretion) review.<sup>15</sup> Adopting proportionality replaces all of these standards with something akin to strict scrutiny, positioning courts to exercise dominance over both policy and constitutional development. However, to reiterate: the choice to deploy PA, in and of itself, does not determine how PA will, in fact, be deployed.

This paper is the first of two on this topic; the second will examine the evolution of American rights doctrine through the lenses of proportionality and global constitutionalism. Reversing the relationship, considering PA through American lenses, reveals a puzzle that is at the heart of our concerns. The “necessity” phase of PA—with its “least-restrictive means” test—is also a constituent element of American “strict scrutiny.”<sup>16</sup> In the United States, it

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14. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 K.B. 223 (U.K.).

15. Conference at European Univ. Inst. Florence, Italy, Nov. 16–17, 2007, *Reasonableness and Law*.

16. See PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISION MAKING: CASES AND MATERIALS* 966 (5th ed. 2006) (“Today the Court describes the strict scrutiny test as whether the law in question is ‘narrowly tailored to achieve a compelling governmental interest.’”).



seems fair to state, judicial review of government acts has been the most controversial activity engaged in by the Supreme Court. It also seems fair to state that rights review, under a strict scrutiny standard, is the most contested form of judicial review, in part, because it leads to judicial supremacy over outcomes. From this American perspective, it appears quite remarkable that so many new courts, operating in environments traditionally hostile to judicial review, have so quickly and successfully embraced what is, inarguably, the most intrusive form of review found anywhere. It bears emphasis that judges *chose* to adopt and develop the proportionality framework; it was not imposed on them. In the next section, we develop an explanation of why they have done so.

## II. THEORY

The phenomenon we seek to explain—the emergence of PA as a global constitutional standard<sup>17</sup>—is enormously complex,

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17. Despite proportionality's striking diffusion globally, there is only a small body of work that seeks to explain or compare how PA has emerged and with what consequences. A recent edited volume on "the migration of constitutional ideas" has no chapter devoted to the spread of proportionality. *THE MIGRATION OF CONSTITUTIONAL IDEAS* (Sujit Choudhry ed., Cambridge Univ. Press 2006). There are a few comparative treatments of proportionality, but these tend to be focused more narrowly on the doctrinal particulars of the various jurisdictions. *See, e.g., THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* (Evelyn Ellis ed., Hart Publishing 1999). Indeed, a number of works restrict their scope to European jurisdictions and/or proportionality as a principle of administrative law. *See, e.g., GEORGE GERAPETRITIS, PROPORTIONALITY IN ADMINISTRATIVE LAW: JUDICIAL REVIEW IN FRANCE, GREECE, ENGLAND AND IN THE EUROPEAN COMMUNITY* (1997); ROBERT THOMAS, *LEGITIMATE EXPECTATIONS AND PROPORTIONALITY IN ADMINISTRATIVE LAW* (2000). Although it is not his main focus, Nicholas Emiliou argues that the turn to PA follows from the growth of the modern interventionist state: proportionality is "a most appropriate tool to control interventionist activity for the creation of a welfare state." NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY* 21 (1996). David Beatty takes a broader view of proportionality in his book, *THE ULTIMATE RULE OF LAW*. Beatty presents proportionality as a principle of constitutional justice that deserves universal acceptance, and he briefly charts its adoption in a number of jurisdictions. Beatty is less concerned with the mechanics of proportionality's diffusion, or PA's political effects; its diffusion provides evidence of its universalist potential as a "neutral principle." DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159 (2004). Vicki Jackson wrote a penetrating review of Beatty's book in which she offered some of her own thoughts about the pros and cons of proportionality analysis. *See* Vicki C. Jackson, *Being Proportional About Proportionality*, 21 *CONST. COMMENT.* 803 (2004) (reviewing DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* (2004)). Jackson's review is among the more perceptive writings on proportionality analysis in English, but it does not engage with the question of proportionality's diffusion. Finally, Matthias Kumm brings considerations of normative

involving hundreds of discrete decisions taken by actors, public and private, operating in very different political contexts and legal settings. The first part of the explanation therefore rests on a set of simplifying assumptions, and a series of generic arguments related to classic dilemmas of adjudication. How can judges bolster the perception, among losing parties (or legal interests), that their decisions are not the product of bias in favor of winning parties (or legal interests)? If the law evolves primarily through judicial interpretation and application, how can judges depict this “lawmaking” as “judicial,” rather than “legislative”? If rights provisions are relatively open-ended norms, how can a rights-protecting court escape the charge that it is both master of the constitution and of the decision-making of the “political” branches of government? In adopting the proportionality framework, constitutional judges acquire a coherent, practical means of responding to these basic legitimacy questions. As important, once adopted, PA tends to develop a normative status of its own, comprising a new element of a “presupposed Grundnorm,”<sup>18</sup> or a meta-constitutional principle governing the development of constitutional doctrine. We interpret Alexy’s account of rights—as “optimization requirements”—in light of this tendency. The question of how PA in fact diffused, with what consequences for judicial power, demands a separate treatment, which is provided in Parts III–V.

#### A. *Two-Against-One*

We proceed from a simple, reductive theory of third-party dispute resolution (TDR).<sup>19</sup> At its core is an insight first made by

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jurisprudence to bear on the practice of PA in a recent paper that deserves wide consideration. Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in *LAW, RIGHTS, DISCOURSE: THEMES OF THE WORK OF ROBERT ALEXY* 131 (Stanley Paulson & George Pavlakos eds., Hart 2007).

18. See HANS Kelsen, *PURE THEORY OF LAW* 208–09 (Bonnie Litschewski Paulson & Stanley L. Paulson trans., Oxford Univ. Press 1992) (1934) (arguing that successful changes of the Grundnorm are ratified once they are “presupposed” by those who interpret and enforce the law).

19. See Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 *COMP. POL. STUD.* 147 (1999). See also MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1986); MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* (2002) (especially Chapter 4: Testing and Comparison).

anthropologists, namely, that the social demand for TDR is so intensive and universal that one finds no society that fails to supply it in some form. When two parties in dispute ask a third party for assistance, they build, through a consensual act of delegation, a node of social authority, or mode of governance.<sup>20</sup> By “mode of governance,” we mean a process through which the rule systems (norms, law) in place in any society are applied and adapted, on an ongoing basis, to the needs and purposes of those who live under them. The theory focuses on the dynamics and political consequences of moving from the dyad (cooperation, conflict, dispute settlement between two parties) to the triadic context, and moving from consensual TDR to compulsory TDR.

Triadic governance contains a fundamental tension that threatens to destroy it. In consensual TDR, the triadic figure knows that her social legitimacy rests in part on the consent of the parties, and thus on the perception that she is neutral *vis à vis* the dispute. Yet in declaring a winner, she creates a 2-against-1 situation that is likely to erode that perception. Given a fundamental interest in *not* declaring a loser, she will seek to mediate settlements, or to “split the difference” between the parties. If one party must win, the typical solution is to base the outcome on pre-existing norms. By definition, a society’s norms, whether informal or formalized as law, comprise ready-made standards of appropriate behavior, and thus facilitate dispute settlement. In invoking norms, the triadic figure is, in effect, saying to the loser, “you have not lost because I prefer your opponent to you; you have lost because it is my responsibility to uphold what is right in our community, given the harm that has occurred.” Her legitimacy now rests, in part, on the perceived legitimacy of a third interest being brought to bear on the parties—the social interest embodied in the norms being applied. In any community, of course, the “perceived legitimacy” of applicable norms, and therefore of TDR, will vary across time and contexts.

Old-fashioned legal anthropology<sup>21</sup> and “new” economic approaches to norms<sup>22</sup> have shown that consensual TDR in close-knit societies typically operates to reassert pre-existing norms, or to

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20. SHAPIRO & STONE SWEET, *supra* note 19; *see also* STONE SWEET, *supra* note 2, at 6.

21. *See* JANE FISHBURNE COLLIER, *LAW AND SOCIAL CHANGE IN ZINACANTAN* (1973).

22. *See* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

evolve new ones only gradually. In social settings characterized by rising levels of interdependence (increased social differentiation, division of labor, impersonal contracting across larger distances) and rising transaction costs, the functional demand for TDR overlaps with a growing need for rule adaptation (lawmaking). In such situations, consensual TDR, with its emphasis on settling conflict through (re)enactment of existing norms, is often insufficient to sustain increasing levels of social exchange. Governance and commitment devices—law and adjudication—are all but required.

*B. Courts and Judicial Lawmaking*

The move to adjudication aggravates the 2-against-1 dilemma, in at least two ways. First, the judge's authority is fixed by office and compulsory jurisdiction, backed by the state's enforcement capacities. Courts are still ritually portrayed in terms of an "orthodox prototype," which highlights their TDR functions and properties. And judges still seek to avoid or mitigate the effects of declaring a loser, through the development of settlement regimes, splitting the costs of a decision among the parties, processing appeals, and so on. But, from the point of view of defendants and losers, at least, judges are part and parcel of the coercive apparatus of the state. Second, given a steady caseload, adjudicators will make law. One can assume, as we do for the purposes of this paper, that this lawmaking behavior is primarily defensive. The judge develops rhetorics of justification, in part, to counter the perception of bias. Even so, a record of deliberation—the giving of reasons—will have prospective, regulatory effects, so long as some minimal notion of precedent exists in the system.

From the perspective of 2-against-1, judicial lawmaking raises a second-order legitimacy dilemma, given that the "content of the law governing the dispute could not have been ascertained by the parties at the time [it] erupted."<sup>23</sup> The applicable law is revealed through the judge's ruling. How one should properly understand judicial lawmaking, and how the legitimacy of courts ought to be evaluated in the face of ongoing lawmaking, are questions that have

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23. Stone Sweet, *supra* note 19, at 157.

haunted democratic and legal theory over centuries.<sup>24</sup> Here we note only two responses to them.

One major stream of positivist theory emphasizes how the law itself constrains judges. Hart implies that the extent of defensible lawmaking discretion in place at any point is proportional to the extent of indeterminacy of the pertinent law.<sup>25</sup> Judicial lawmaking can be defended in so far as it proceeds in light of existing law and precedent, and to the extent that it “renders” that law more determinate. The argument is functional: if judges did not possess lawmaking discretion, they would not be able to perform their adjudication role properly, given indeterminacy and other uncertainties. For MacCormick, a close student of Hart’s, the primary objective of legal theory is the development of standards for evaluating a court’s jurisprudence as “good or bad,” and “rational or arbitrary.” Good decisions are arrived at through deliberation and analogical reasoning; and the good judge packages his lawmaking as a relatively redundant, self-evident, incremental extension of available legal materials.<sup>26</sup> A set of (not incompatible) arguments proceeds from standard delegation theory. In modern constitutional systems, judicial power is delegated power. Rulers (the principals) confer lawmaking discretion on courts (their agents) for sound functional reasons, and good agents are those that use this authority to perform the tasks given to them. When the system operates properly, courts help rulers govern more efficiently. When the principals are not unified but multiple actors (political parties, states, and so on) are competing for power amongst themselves, they may turn to courts as commitment devices. Consider a federalism court, a rights court, the European Court of Justice, or the WTO Appellate Body. In these cases, the agent—what we will call a *trustee* court in the next section—enforces constitutional bargains struck by the principals (political parties, Member States) even against the principals. Further, as with any complex contract, constitutions are fundamentally incomplete. The contracting parties need judges not only to resolve disputes among them, but to clarify their obligations,

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24. The crisis engendered by judicial lawmaking also generates mountains of legal materials—judicial decisions, commentaries and treatises—whose purpose is to reassert the coherence and underlying stability of the law, and therefore the legitimacy of courts, with reference to precedent and settled canons of interpretation and reasoning.

25. H.L.A. HART, *THE CONCEPT OF LAW* 124–47 (2d ed. 1994).

26. NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978).

over time, as disputes arise and circumstances change. It follows that judicial lawmaking counts as a positive to the extent that it operates to help principals deal with their governance problems, including imperfect commitment and legal indeterminacy.

In this view, judicial lawmaking is a normal by-product of delegating to constitutional judges, at worst, a reasonable, predictable price to pay for obtaining some greater social benefit: protecting rights, securing federalism, making trading blocs work. For their part, judges build constitutional doctrine, those constraints on the exercise of lawmaking discretion presumed to be stable.

Yet debates about the legitimacy of “judicial activism” rage on, and for an obvious reason. As we move from (1) consensual TDR, to (2) a judge interpreting a statute in order to apply it, to (3) a constitutional court enforcing rights against a legislative majority, the triadic figure is increasingly implicated in systemic governance, and, in situation (3) the court governs the political rulers. In rights adjudication, wherein litigating parties always represent some wider social interest, lawmaking and 2-against-1 necessarily overlap. A court that chooses one constitutional value over another is also favoring one policy interest over another. Other things equal, the most acute form of this problem will appear under conditions of judicial supremacy.

C. *Judicial Supremacy: the “New Constitutionalism” and the Trustee Court*

Over the past fifty years, the “new constitutionalism” has swept across the globe, and today has no rival as a template for the organization of the state.<sup>27</sup> The model’s precepts can be simply listed: (a) institutions of government are established by, and derive

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27. By the 1990s, the basic formula of the new constitutionalism—(a) a written, entrenched constitution, (b) a charter of rights, and (c) a review mechanism to protect rights—had become standard, even for what most of us would consider non-democratic, authoritarian states. There are 194 states in a recent data set on constitutional forms compiled by Alec Stone Sweet and Cristina Andersen. Of these, 190 have written constitutions, of which 183 contain a charter of rights. There have been 114 constitutions written since 1985 (not all of which have lasted), and we have reliable information on 106 of these. All 106 of these constitutions contain a catalogue of rights, and 101 provide for rights review by a supreme or constitutional court. It seems that the last constitution to leave rights out was the racist 1983 South African constitution, hardly a model to emulate.

their authority exclusively from, a written constitution; (b) the constitution assigns ultimate power to the people by way of elections or referenda; (c) the use of public authority, including legislative authority, is lawful only insofar as it conforms with the constitutional law; (d) the constitution provides for a catalogue of rights, and a system of constitutional justice to defend those rights;<sup>28</sup> and (e) the constitution itself specifies how it may be revised. The “new constitutionalism” is based on the precept that rights and effective rights protection are basic to the democratic legitimacy of the state. It therefore rejects models of legislative sovereignty (e.g., of Australia, the French Third and Fourth Republics, and of Great Britain until recently), as well as those ideologies that would confer on one person or party unconstrained political authority.<sup>29</sup>

To be viable, the form requires massive delegation to constitutional judges. Under the classic (today virtually defunct) “legislative sovereignty” constitution, one can portray courts as agents (or slaves) of the legislature. The basic principal-agent framework, however, loses its relevance when it comes to modern systems of constitutional justice. A more appropriate metaphor is that of constitutional “trusteeship”: situations wherein the founders of new constitutions delegate expansive, open-ended “fiduciary” powers on a review court.<sup>30</sup> A *trustee* is a particular kind of agent, possessing the power to govern the rulers themselves. In the most common situation, the trustee court exercises fiduciary responsibilities with respect to the constitution, in the name of a fictitious entity: the sovereign People.

In such systems, political elites—members of the parties, the executive, the legislature—are *never* principals in their relationship to constitutional judges.<sup>31</sup> Elected officials may seek to overturn

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28. STONE SWEET, *supra* note 1, at 37.

29. For an extended discussion, see Alec Stone Sweet, *Constitutions and Judicial Power*, in *COMPARATIVE POLITICS* 217–39 (Daniele Caramani ed., Oxford Univ. Press 2008).

30. See Alec Stone Sweet, *Constitutional Courts and Parliamentary Democracy*, 25 *W. EUR. POL.* 77 (2002), (building on the contributions of Giandomenico Majone, *Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance*, 2 *EUR. UNION POL.* 103 (2001) and Terry Moe, *Political Institutions: The Neglected Side of the Story*, 6 *J. L. ECON. & ORG.* 213 (1990)).

31. In practice, some elected officials participate in some of functions usually associated with principals, such as appointment. Nonetheless, they are more often merely “players” within the rule structures provided by the constitution. They compete with each other in order to be in the position to legislate, among other things.

decisions or restrict the court's powers, and they may seek to influence the court in other ways (e.g., through appointments). As a formal matter, however, in order to reverse the court, they would have to succeed in amending the constitution. The decision rules governing constitutional revision, however, are usually more restrictive than those governing the revision of legislation, and amendment procedures may involve other actors outside of their control. In many of the states under consideration in this paper, for example, amendment of rights provisions is a practical or legal impossibility; and in the EU and the WTO, the decision-rule governing treaty-amendment is unanimity of the Member States.

Modern constitutionalism is characterized by structural judicial supremacy, where the principals have, in effect, transferred a bundle of significant "political property rights" to judges, for an indefinite duration. Structural supremacy is a purely formal construct; it varies by degrees across systems; and nothing in the notion tells us anything about how judges will actually exercise their powers. However, institutionalized supremacy means that the outcomes produced through constitutional adjudication will be inflexible, "being more or less immune to change except through adjudication," so long as some minimally robust conception of precedent exists.<sup>32</sup> In such a situation, judges have every interest in building doctrine—argumentation frameworks—capable of being decoupled from specific policy outcomes.

#### D. *Balancing, Argumentation, Proportionality*

One of our claims is that PA has provided an important *doctrinal* underpinning<sup>33</sup> for the rights-based expansion of judicial authority across the globe. In the rest of this paper, we will portray it as a type of operating system that constitutional judges employ in pursuit of two overlapping, general goals:

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32. Stone Sweet, *Path Dependence, Precedent, and Judicial Power*, in ON LAW, POLITICS, AND JUDICIALIZATION, *supra* note 19, at 112, 120.

33. We recognize that many academic lawyers and social scientists are deeply suspicious of purely doctrinal explanations of the evolution of legal systems. Our explanation relies on doctrine being conceptualized in a particular way, namely, as a discursive frame for norm-based argumentation that enable the litigating parties and the judge to bridge the domain of law and the domain of interest-based conflict.



- to manage potentially explosive environments, given the politically sensitive nature of rights review.
- to establish, and then reinforce, the salience of constitutional deliberation and adjudication within the greater political system.

PA provides basic materials for achieving both objectives, in a relatively standardized, easy-to-use form. Under conditions of supremacy and a steady case load, a trustee court has powerful reasons to seek to draw the major actors in the polity into the processes it governs, and to induce them to use the modes of deliberation that it curates. In so far as they do, political elites will help to legitimize the court and its doctrines, despite or because of controversy about supremacy.

### 1. Balancing

A basic task of constitutional judges is to resolve intra-constitutional conflict: legal disputes in which each party pleads a constitutional norm or value against the other. Where the tension between two interests of constitutional rank cannot be interpreted away, a court could develop a conflict rule that would determine which interest prevails. In fact, most judges are loath to build *intra*-constitutional hierarchies of norms. Instead, they typically announce that no right is absolute, which thrusts them into a balancing mode.

When it comes to constitutional adjudication, balancing can never be dissociated from lawmaking: it requires judges to behave as legislators do, or to sit in judgment of a prior act of balancing performed by elected officials. We nonetheless argue that the move to balancing offers important advantages. Consider the alternatives. A court could declare that rights are absolute, or that one right must always prevail over other constitutional values, including other rights provisions. Creating such hierarchies would, in effect, *constitutionalize* winners and losers. Further, we know of no defensible procedure for doing so other than freezing in place a prior act of balancing: in so far as judges gave reasons for having conferred a higher status on one value relative to another, they have in fact balanced. A court could also generate precedent-based covering rules for determining when a right is or is not in play, or under what circumstances one interest prevails against another. The

procedure can not save the court from charges that it legislates or balances. On the contrary, such a court dons the mantle of the supreme legislator whose self-appointed task is to elaborate what is, in effect, a constitutional code.

A court that explicitly acknowledges that balancing inheres in rights adjudication is a more honest court than one that claims that it only enforces a constitutional code, but neither balances nor makes law. It also makes itself better off strategically, relative to alternatives. The move to balancing makes it clear: (a) that each party is pleading a constitutionally-legitimate norm or value; (b) that, *a priori*, the court holds each of these interests in equally high esteem; (c) that determining which value shall prevail in any given case is not a mechanical exercise, but is a difficult judicial task involving complex policy considerations; and (d) that future cases pitting the same two legal interests against one another may well be decided differently, depending on the facts.

## 2. Argumentation Frameworks

In balancing situations, it is context that varies, and it is the judge's reading of context—the circumstances, fact patterns, and policy considerations at play in any case—that determines outcomes. A balancing court can, nevertheless, give some measure of coherence to adjudication by developing stable *procedures* for arriving at decisions. To the extent that it is successful, these procedures will take on some of the systematizing functions of precedent more broadly.

Our focus in this paper is on a particular type of procedure, an “argumentation framework.” These are discursive structures that organize (a) how litigants plead their interests, and how they engage their opponent's arguments, and (b) how courts frame their decisions. Following Sartor,<sup>34</sup> such frameworks embody a series of inference steps, represented by a statement justified by reasons (or inference rules) that lead to a conclusion. In balancing situations, such frameworks incorporate inconsistency—that is, argumentation—to the extent that each inference step offers both a defensible argument

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34. Giovanni Sartor, *A Formal Model of Legal Argumentation*, 7 *RATIO JURIS* 177 (1994). For a fuller discussion, see Stone Sweet, *supra* note 30.

and counter argument, from which contradictory but defensible conclusions can be reached. In resolving disputes within these structures, judges typically choose from a menu of such conclusions.

It is our view that a balancing court seeking to manage its environment can do no better than to propagate appropriate argumentation frameworks. Once in place, the court will know, in advance, how the parties to an intra-constitutional dispute will plead, and each side will know how the court will proceed to its decisions. Under conditions of supremacy (given a steady case load), fidelity on the part of the court to a particular framework will entrench that mode of argumentation as constitutional doctrine. To the extent that arguing outside of the framework is ineffective, skilled legal actors will use the framework, thereby reproducing and legitimizing it.

### 3. Proportionality

PA is an argumentation framework, seemingly tailor-made for dealing with intra-constitutional tensions, that is, the indeterminacy of rights adjudication. The framework clearly indicates to litigating parties the type and sequence of arguments that can and must be made, and the path through which the judges will reason to their decision. Along this path, PA provides ample occasion for the balancing court to express its respect, even reverence, for the relative positions of each of the parties. This latter point is crucial. In situations where the judges can not avoid declaring a winner, they can at least make a series of ritual bows to the losing party. Indeed, the court that moves to balancing *stricto sensu* is stating, in effect, that each side has some significant constitutional right on its side, but that the court must, nevertheless, take a decision. The court can then credibly claim that it shares some of the loser's distress in the outcome.

#### *E. The Structure of Constitutional Rights*

In contemporary rights adjudication, balancing holds sway for three basic reasons. First, rights provisions are relatively open-ended norms, that is, they are both indeterminate and in danger of being construed in an inflexible and partisan manner. As discussed, judges have good reasons to formalize a balancing procedure, and to impose

this on litigating parties. PA is such a formalization.

Second, most post-World War II constitutions state unambiguously that most rights provisions are not absolute but, rather, are capable of being limited by another value of constitutional rank. In fact, limitation clauses are the norm. Take the following examples:

- In Germany (1949), article 2.1 of the Basic Law (GG) states that “everyone shall have the right to the free development of her personality in so far as she does not violate the rights of others or offend the constitutional order or moral code.”
- In the Spanish Constitution of 1978, article 20.1.a proclaims the right to free expression, which article 20.4 then “delimits” with reference to “other rights, including personal honor and privacy.” Article 33.1 declares the right to private property, while article 33.3 provides for the restriction of property rights for “public benefit,” as determined by statute.
- Section 1 of the Canadian Constitution Act (1982) declares that: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”
- Article 17 of the Charter of Rights of the Czech Republic (1993) states: “freedom of expression and the right to seek and disseminate information may be limited by law in the case of measures essential in a democratic society for protecting the rights and freedoms of others, the security of the State, public security, public health, and morality.”
- In South Africa (1996), the extensive Bill of Rights is followed by section 36.1, announcing that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right; the importance of the purpose

of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.”

In each of these settings (*see infra* Part IV), constitutional judges have adopted PA to manage the intra-constitutional conflicts associated with rights. Put differently, judges do not develop doctrines that enable them to “enforce” limitation clauses; a law is struck down when it fails the test of proportionality. In Canada, judges apply the LRM test when they are asked to enforce the “reasonable limits” prescription of Article 1 of the Constitution Act. In South Africa, LRM testing is required by the Bill of Rights itself, but the founders based this provision on a prior ruling of the Constitutional Court to adopt proportionality as an overarching principle of rights adjudication.<sup>35</sup> Across post-1989 Central Europe, PA is automatically activated whenever the “necessity,” or “essential” nature, or “reasonableness,” of governmental measures is challenged under a rights provision.

A third reason: many modern constitutions (or constitutional theory or doctrine) require state organs, including the legislature and the executive, to work to protect or enhance the enjoyment of rights. It is a core function of constitutional and supreme courts to supervise this activity. In such situations, governments will develop arguments to the effect that their measures are not opposed to rights, but in fact stand-in for a specific right. The classic conflict—between right X and the will of the “majority” as expressed in a statute—is recast, as one between right X and a government action designed to facilitate the development or enjoyment of right Y. Courts can, and often do, interpret these disputes as tensions between two rights. Apart from adopting a formal balancing framework such as PA, we do not see how a court could position itself better to deal with such cases.

#### 1. The Trustee Court and Rights Adjudication

The move to proportionality generates what we earlier called a “second-order” legitimacy problem, in that it fully exposes the lawmaking capacities of the rights-protecting judge.

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35. *S v Makwanyane & Another* 1995 (3) SA 391 (CC) at 436 (S. Afr.). *See infra* Part IV.A.2.

The point has been made forcefully by Hans Kelsen, the founder of the modern constitutional court, and of another important strain of positivism. In his constitutional theory, Kelsen focused on the legal system as a hierarchy of norms, which judges are enlisted to defend as a means of securing the system's validity and legitimacy. In the inter-war years, Kelsen labored to rationalize constitutional review, in the face of longstanding political hostility to sharing power with judges. Most important, he distinguished what legislators and constitutional judges do, when they make law.<sup>36</sup> Parliaments are "positive legislators," since they make law freely, subject only to constitutional constraints (rules of procedure). Constitutional judges, on the other hand, are "negative legislators," whose legislative authority is restricted to the annulment of a statute when it conflicts with the constitutional law.<sup>37</sup> The distinction between the positive and the negative legislator rests on the absence, within the constitutional law, of enforceable rights. Although this fact is ignored by his modern-day followers, Kelsen explicitly warned of the "dangers" of providing for rights of constitutional rank, which he equated with natural law.<sup>38</sup> The court that sought to protect rights would inevitably obliterate the distinction between the "negative" and the "positive" legislator.<sup>39</sup> Through their quest to discover the content and scope of rights, constitutional judges would, inevitably in his view, become super-legislators.

The passage to new constitutionalism proved Kelsen right: a rights-protecting, trustee court is a positive legislator whose discretionary lawmaking authority, at least on paper, is potentially limitless. But the context for Kelsen's arguments has radically changed (Part IV). After World War II, rights and constitutional review became central to the very idea of constitutionalism. In most

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36. Hans Kelsen, *La Garantie Juridictionnelle de la Constitution*, 45 *REVUE DU DROIT PUBLIC* 197 (1928).

37. Stone Sweet, *Constitutional Judicial Review*, in *ON LAW, POLITICS, AND JUDICIALIZATION*, *supra* note 19, at 147.

38. *Id.*

39. Kelsen, *supra* note 36, at 221–41. Kelsen wrote:

Sometimes constitutions themselves may refer to [natural law] principles, which invoke the ideals of equity, justice, liberty, equality, morality, etc., without in the least defining [precisely] what are meant by these terms . . . . But with respect to constitutional justice, these principles can play an extremely dangerous role. A court could interpret these constitutional provisions, which invite the legislator to honor the principles of justice, equity, equality . . . as positive requirements for the [substantive] content of laws.

places with new constitutions, it would be a relatively simple matter to defend judicial supremacy from the standpoint of delegation theory: a political commitment to rights requires massive delegation to judges; and, if the judges do their jobs properly, they will at times impinge upon policy processes and outcomes. One could also argue that, under the new constitutionalism, there is no legitimacy problem, since the constitution itself expressly provides for rights, rights review, and the structural supremacy of the constitutional judge in certain (policy-relevant) processes. What is interesting is that neither argument has succeeded in shutting down the controversy that attends supremacy or what judges do with it. We discuss the politics of PA further in Part V.

*F. Balancing as Optimization*

Robert Alexy's book, *A Theory of Constitutional Rights*, is arguably the most important and influential work of constitutional theory written in the last fifty years. Alexy develops a "structural theory" of rights and proportionality balancing in light of the case law of the German Federal Constitutional Court (GFCC).<sup>40</sup> But the theory has far wider application, since it speaks directly to major issues raised by the new constitutionalism, and in this paper. At this point in time, Alexy's ideas constitute the basic conceptual foundations of PA. In this brief section, we briefly highlight some of the claims Alexy makes, focusing on concepts to be used further along in the paper.

For our purposes, Alexy makes two original contributions. First, he distinguishes between *rules* and *principles* and then conceptualizes principles as "optimization requirements."<sup>41</sup> Rules "contain fixed points in the field of the factually and legally possible," that is, a rule is a norm that is either "fulfilled or not."<sup>42</sup> For Alexy, principles, such as those contained in rights provisions, are norms that "require that something be realized to the greatest extent possible given the legal and factual possibilities."<sup>43</sup> The distinction makes a difference in adjudication. A conflict between

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40. ALEXY, *supra* note 13, at 13–18.

41. *Id.* at 44–61.

42. *Id.* at 47–48.

43. *Id.* at 47.

two rules can be resolved through giving primacy to, invalidating, or establishing an “appropriate exception” to, one of the rules, in relation to the other. A conflict between two principles, however, can only be managed through balancing—the judge finds that one principle outweighs the other, given a particular set of circumstances. Alexy’s account of rights yields a stipulation to the effect that rights have an inherent, non-rule-like quality. On their own, outside of a particular context of disputation or argumentation, rights do not tell us how they are to be actualized (whereas a speed limit rule contains such criteria, on its own). The scope of the “legally possible”—which sets boundary conditions to the optimization process—is determined by the opposition between principles, which is itself embedded in the specifics of a conflict.<sup>44</sup> “Conflicts of rules are played out at the level of validity,” Alexy argues, whereas “competitions between principles are played out in the dimension of weight,” given a specific context.<sup>45</sup>

If rights are “optimization requirements,” binding on all public (and in some cases, private) authorities, then rights adjudication (and therefore lawmaking more generally) reduces to balancing.<sup>46</sup> Further, the purpose of balancing must be both to resolve alleged conflicts between principles, and to aid *all of the organs of the state* in their task of optimizing rights and other countervailing principles properly.

Alexy’s second major contribution follows from his construction of balancing as a kind of *meta-constitutional rule* (Alexy does not use that phrase; in our view, he presupposes PA and balancing as a Grundnorm). A conflict between principles places judges under a duty to balance and to optimize. Although we now skip a number of steps in the argument, Alexy theorizes the necessity prong of PA—the LRM test—in terms of Pareto optimality.<sup>47</sup> Accordingly, there can be no defensible justification for allowing a public authority to infringe more on a right than is necessary for it to realize any second principle, given that the right could be optimized: the bearer of the right could be made better off if the government

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44. Rather than being a fixed property of the norms themselves (in the abstract, they are of equal weight).

45. ALEXY, *supra* note 13, at 50.

46. “Constitutions with constitutional rights are attempts simultaneously to organize collective action and secure individual rights.” *Id.* at 425.

47. *Id.* at 399.



were to choose less onerous means. Optimization is also built into Alexy's "law of balancing," which governs the "proportionality in the narrow sense" phase of PA: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other."<sup>48</sup>

Although Alexy provides a rationalization of balancing as a procedure, he acknowledges that the question of what relative weight judges should give to opposed principles, in any given dispute, falls completely outside the theory.<sup>49</sup> In our view, any proponent of PA must admit that the move to proportionality balancing reveals, rather than disguises, Kelsen's positive legislator, the rights-protecting, trustee court. Alexy can nonetheless claim, as we have, that PA generates a particular form of argumentation, and places the judge under an obligation to justify her decisions in terms of certain constraints.<sup>50</sup> Thus, to the extent that judges actually search for Pareto-optimal solutions (the necessity phase) and actually seek to comply with the law of balancing (the final balancing phase), PA is less vulnerable to the charge that it proceeds in the absence of rational criteria, and is no more than a means to package a court's (unconstrained) policy choices.

From the point of view of 2-against-1 and judicial lawmaking, it should be obvious that rulings that conform to the law of balancing, or can be portrayed as falling on some point along a Pareto frontier, will be more palatable than those that are not Pareto-optimal. From a broader-based political economy perspective, such rulings enable judges to deal with conflicts between (a) those social interests that are likely to lose the most and (b) those social interests standing to gain the most, from any new allocation of collective goods being produced by the government measure under review. The court, in effect, is stating that it took every pain to minimize the negative consequences of its ruling for the losing party or interest: the right or interest or value being pleaded by the loser requires as much. If the judges do so, then it will *always* be possible for some observers to claim that the policy effects of their rulings are an inevitable by-product of adjudicating rights claims, rather than outcomes that

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48. *Id.* at 102.

49. *Id.* at 100, 105.

50. As Alexy notes, the law of balancing is "not valueless . . . [but] identifies what is significant in balancing exercises." *Id.* at 105.

judges seek to impose on the polity. After all, the policy context—and the menu of options available to the court—were generated by the parties, not the court.

Finally, an active rights adjudicator that balances, works to optimize, and generally seeks to follow the “law of balancing” will tend to push policy outcomes to the partisan center. It will do so to the extent that it eliminates extreme measures that might be pursued by political parties with reformist agendas. And it will do so in so far as the judicial move to PA affects, or colonizes, legislative and administrative space, by inducing policymakers to assess the proportionality of their own decision making in an ongoing way. If PA does make partisan politics more consensual over time, then that fact is likely to mitigate the legitimacy dilemmas on which we have focused here.<sup>51</sup>

#### G. *Summary*

Our argument to this point rests on two logics that are separate in principle, but are inseparable in practice. First, at least in theory, PA can help judges respond to a set of acute overlapping dilemmas, related to 2-against-1, lawmaking, and judicial supremacy. Second, PA fits the structure of rights provisions in a world dominated by the precepts of the “new constitutionalism.” Most important, new constitutions proclaim rights and then immediately provide for legitimate exceptions to them, in the guise of various constitutionally-recognized public interests. Intra-constitutional conflicts are inevitable in such systems, hence extensive delegation to constitutional judges.<sup>52</sup> In our view, the two logics will typically overlap in rights adjudication. Our explanation thus blends “political” (or “strategic”) and “legal” (or norm-governed) factors and logics, theorized in particular ways.

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51. To our knowledge, this point has not been the focus of explicitly theorizing or empirical research.

52. One could also portray the second logic in strictly formal terms: the structure of modern rights provisions necessarily implies PA. Judges, however, have choices in how best to manage rights-based, intra-constitutional conflict—they were not required to adopt PA.

### III. THE GERMAN GENEALOGY

The German Basic Law (1949) established a system of constitutional justice that not only transformed German law, politics, and state theory, but has impacted heavily on the development of constitutionalism across the globe. The GFCC has been the main agent of these changes. Our concern is with one contribution of the German experience to global constitutionalism: the emergence of PA as a formal procedure for dealing with rights claims.<sup>53</sup> We trace the antecedents of the proportionality framework back two centuries, to a corner of German administrative law—police law (*Polizeirecht*). In the second half of the nineteenth century, as the scope of the administrative state expanded, elements of PA, notably the LRM test, emerged as a core administrative law principle. Proportionality then migrated to the constitutional law in the 1950s and, under the tutelage of the GFCC, developed into the expansive balancing framework.

#### A. *From Scholars to Judges*

Scholars proposed an embryonic version of PA in the late eighteenth century, when they began to contemplate new forms of state intervention and, therefore, the prospect of regular conflict between public purposes and individual freedoms. The doctrinal area where this conflict was first seriously theorized was the developing field of *Polizeirecht*. In contemporary usage, *Polizeirecht*<sup>54</sup> denotes

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53. A generic idea of proportionality—the principle that there must be at least some minimal “fit” between actions and consequences, or between ends and means in law—has deep roots in all domains of German law. See generally Franz Wieacker, *Geschichtliche Wurzeln des Prinzips der verhältnismäßigen Rechtsanwendung*, in Festschrift für Robert Fischer 867–69 (Marcus Lutter, Walter Stimpel, & Herbert Wiedemann eds., 1997). The idea is reflected in several provisions of the Civil Code, the private law codification that went into effect at the turn of the twentieth century, and in criminal law doctrines of long standing. These latter include the mandate that the punishment fit the crime, and the doctrine of extra-statutory necessity, according to which an otherwise criminal act can be justified when the act is necessary to avoid a greater harm. See Strafgesetzbuch [StGB] [Penal Code], May 15, 1871, Reichsgesetzblatt [RGBl] 127, as amended, § 34 (concerning proportionate punishment), § 62 (concerning extra-statutory necessity); GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 779–83 (2000) (discussing judicial antecedents of StGB § 34).

54. Today, the scope of *Polizeirecht* is evoked loosely by the phrase “police power.” For a classic American statement of the “police power,” see *Ives v. South Buffalo Ry. Co.*, 201 N.Y. 271 (1911).

the law applicable to the police force,<sup>55</sup> but two centuries ago, the term had a much broader meaning. It subsumed measures designed to promote the public welfare, morality, and public safety, encompassing nearly the whole of the state's (then fairly primitive) interventions in society.<sup>56</sup>

Leading legal and political thinkers sought to ground the legitimacy of police interventions on stable principles capable of mediating the conflict between private autonomy and the public good. The conflict was taken seriously because private autonomy was highly valued in the social contractarian theories that undergirded public law thinking in late eighteenth century Germany.<sup>57</sup> In the view of jurists such as Carl Gottlieb Svarez (1746–98), individuals possessed natural rights that were permanent and prior to the state, but they had given up some of their freedom in order to realize collective goods, through the state.<sup>58</sup> The social contract justified the state's authority, but also fixed the outer bounds of that authority. Proportionality was given a central place in these early theories of the police power, as a standard governing the legality of state measures. In the words of Günther Heinrich von Berg (1765–1843):<sup>59</sup> “The first law . . . is this: the police power may

55. See CHRISTOPH GUSY, *POLIZEIRECHT* 132–33 (2003). Police law governs, for instance, the cooperation of the police with other authorities.

56. STEPHANIE HEINSOHN, *DER ÖFFENTLICHRECHTLICHE GRUNDSATZ DER VERHÄLTNISSMÄSSIGKEIT* 14 (1997); RUPPRECHT VON KRAUSS, *DER GRUNDSATZ DER VERHÄLTNISSMÄSSIGKEIT IN SEINER BEDEUTUNG FÜR DIE NOTWENDIGKEIT DES MITTELS IN VERWALTUNGSRECHT* 7 (1955).

57. See Fritz Ossenbühl, *Maßhalten mit dem Übermaßverbot*, in *WEGE UND VERFAHREN DES VERFASSUNGSLEBENS: FESTSCHRIFT FÜR PETER LERCHE ZUM 65. GEBURTSTAG* 151, 152 (Peter Badura & Rupert Scholz eds., 1993); see also HEINSOHN, *supra* note 56, at 9.

58. In Svarez's words: “The rights of command in a state or a ruler cannot be derived from an unmediated divine blessing, or from the right of the stronger, but they must be derived from a contract, through which the citizens of the state have made themselves subject to the order of the ruler for the advancement of their own common happiness.” CARL GOTTLIEB SVAREZ, *VORTRÄGE ÜBER RECHT UND STAAT* (Hermann Conrad & Gerd Kleinheyer eds., Westdeutscher Verlag 1960), *quoted in* BARBARA REMMERT, *VERFASSUNGS-UND VERWALTUNGSRECHTSGESCHICHTLICHE GRUNDLAGEN DES ÜBERMASSVERBOTS* 15 (1995).

59. Thomas Würtenberger, *Der Schutz vom Eigentum und Freiheit im ausgehenden 18. Jahrhundert*, in *ZUR IDEEN-UND REZEPTIONSGESCHICHTE DES PREUSSISCHES ALLGEMEINEN LANDRECHTS* 55, 63 (Walter Gose & Thomas Würtenberger eds., 1999). Von Berg was the first scholar to use the phrase “disproportionate” in the context of police law. See Klaus Stern, *Zur Entstehung und Ableitung des Übermaßverbots*, in *WEGE UND VERFAHREN DES VERFASSUNGSLEBENS: FESTSCHRIFT FÜR PETER LERCHE ZUM 65. GEBURTSTAG* 165, 168 (Peter Badura & Rupert Scholz eds., 1993).

go no farther than its own goals require. The police law may abridge the natural freedom of the subject, but only insofar as a lawful goal requires as much. This is its second law.”<sup>60</sup>

Berg’s laws capture the essence of the suitability and LRM tests: the police may invade citizens’ freedoms only in the service of lawful goals, and their measures may restrict those freedoms no more than necessary. The third distinctive element of PA—balancing in the strict sense—was also recognized in the eighteenth century. In his treatise, *Lectures on the State and Law*, Svarez described the balancing exercise, but insisted that it proceed with a thumb on the scale in favor of rights:

Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail . . . . The [social] hardship, which is to be averted through the restriction of the freedom of the individual, has to be more substantial by a wide margin than the disadvantage to the individual or the whole that results from the infringement.<sup>61</sup>

Although jurists had thus already devised a proportionality test for the legitimacy of state intervention in private freedoms before 1800, it is important to note that PA was not yet being deployed as a constraint on state action. It would be many decades before the judicial review of administrative acts would appear in any of the German states.<sup>62</sup> Svarez, who presented his arguments in lectures delivered to Crown Prince Friedrich Wilhelm, the later King Friedrich Wilhelm III, was in effect proposing a principle that the state should adopt for its conduct; he was not describing positive law.<sup>63</sup> However, in his role as the drafter for Prussia’s massive legal codification, the Prussian General Law of 1794 (*Allgemeines*

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60. Würtenberger, *supra* note 59, at 63.

61. CARL GOTTLIEB SVAREZ, VORTRÄGE ÜBER RECHT UND STAAT 40 (Hermann Conrad & Gerd Kleinheyer eds., Westdeutscher Verlag 1960), *quoted in* Würtenberger, *supra* note 59, at 62.

62. Würtenberger, *supra* note 59, at 64–65, 67. The first was Baden 1863; second Prussia 1875.

63. HEINSOHN, *supra* note 56, at 8–14.

*Landrecht* (ALR)),<sup>64</sup> Svarez also provided an important textual “hook” for proportionality’s later doctrinal development. The provision concerning police powers, Article 10 II 17 ALR, reads: “The office of the police is to take the necessary measures for the maintenance of public peace, security, and order . . . .”<sup>65</sup> As described below, this clause would ultimately provide the foundation for an early proportionality doctrine, once the new administrative courts took it upon themselves to review the “necessity” of administrative measures almost a century later.

Throughout the nineteenth century, scholars continued to reiterate and refine proportionality-based standards for the exercise of police power,<sup>66</sup> and these ideas were finally given agency with the establishments of administrative courts.<sup>67</sup> The most important of these courts, Prussia’s *Oberverwaltungsgericht*, or Higher Administrative Court, began operating in 1875.<sup>68</sup> Fed by a steady stream of cases, the court quickly gained a reputation across Germany as the leading expositor of administrative law principles.<sup>69</sup> By the 1880s, it was employing the “necessary measures” clause of the 1794 ALR to annul police measures on LRM grounds.<sup>70</sup> Thus, by

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64. Stern, *supra* note 59, at 168.

65. Allgemeines Landrecht für die preußischen Staaten [A.L.R.], Feb. 5, 1794, § 10 II 17.

66. Perhaps the most significant figure in the mid-nineteenth century was Robert von Mohl, whose concepts of “objective disproportionality” and “subjective proportionality” anticipated proportionality in the narrow sense and the necessity principle, respectively. ROBERT VON MOHL, III POLIZEI-WISSENSCHAFT 40 (1844), *discussed in* HEINSOHN, *supra* note 56, at 33–34. While von Mohl built on the work of earlier jurists, he grounded proportionality not in natural rights theory, as Suarez had done, but in rule of law concepts. For a fuller description of the broader theoretical underpinnings of nineteenth century public law thinkers, see REMMERT, *supra* note 58, at 52–98.

67. HEINSOHN, *supra* note 56, at 31; KRAUSS, *supra* note 56, at 3.

68. Württenberger, *supra* note 59, at 65, 67; Preußischen Verwaltungsgerichtsgesetz [Prussian Administrative Court Act], July 3 1875, Preußische Gesetzsammlung 1875 at 375.

69. MICHAEL STOLLEIS, PUBLIC LAW IN GERMANY, 1800–1914 283 (Pamela Biel trans., Berghahn Books 2001).

70. Two examples will suffice by way of illustrating the early case law. In an 1886 case, the court ruled that the police could not require, on public safety grounds, a landowner to remove a post erected at the edge of his property. Rather, all that was necessary to protect the public was requiring the landowner to light the post after dark. As the court explained, “[t]he protection from accidents . . . is indeed the task of the police; this task and the authority finds its limit, however, in that the chosen measures may not extend farther than they must to meet the goal of eliminating the danger.” Preußisches Oberverwaltungsgericht [PrOVG] [Prussian Higher Administrative Court] July 3, 1886, 13 Entscheidungen des preußischen Oberverwaltungsgerichts [PrOVGE] 426, 427. That same year, the court ruled that it was disproportionate, and hence, impermissible for the police to close down a shop in

the late nineteenth century, German administrative courts were striking down police actions that violated proportionality, which was conceptualized at that time as an enforceable LRM test.<sup>71</sup>

By the end of the nineteenth century, the principle of proportionality enjoyed a secure place in administrative law, both in judicial decisions and scholarly treatises.<sup>72</sup> In the decades that followed, the activities of the regulatory state expanded, especially at the state level, and litigation of administrative acts increased, to which judges responded by applying a LRM test. As noted, judges initially seemed to regard proportionality primarily in LRM terms, but courts did not always distinguish between the various ways that administrative measures might be disproportionate.<sup>73</sup> Over time, balancing was also contemplated and employed, but the practice was far from uniform.<sup>74</sup>

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response to the shop owner's distribution of brandy without a license. The operation of the shop was itself not unlawful; only the distribution of brandy was. And so closing the shop was a more drastic step than the police needed to take to meet the legitimate goal of enforcing the license requirement. PrOVG April 10, 1886, 13 PrOVGE 424, 425.

71. Administrative courts in the other German states soon began following Prussia's lead, striking down police measures on LRM grounds. Stern, *supra* note 59, at 168.

72. See LOTHAR HIRSCHBERG, DER GRUNDSATZ DER VERHÄLTNISSMÄSSIGKEIT 4 n.20, 5 n.21 (1980) for case and treatise citations. Leading administrative law scholar Otto Mayer wrote at some length about proportionality in police law and in fact popularized the term "proportionality." See OTTO MAYER, DEUTSCHES VERWALTUNGSRECHT 267, 351 (1895); see also George Frumkin, A Survey of the Sources of the Principle of Proportionality in German Law 29 (1991) (unpublished thesis, Univ. of Chicago) (on file with authors). Fritz Fleiner also captured the gist of proportionality with his memorable aphorism "The police should not shoot at sparrows with cannons." FRITZ FLEINER, INSTITUTIONEN DES DEUTSCHEN VERWALTUNGSRECHTS 404 (1928); see also Thomas Henne, *Mit Kanonen auf Spatzen schießen: Ein Beitrag Fritz Fleiners zur deutschen Juristensprache*, 16 DEUTSCHES VERWALTUNGSBLATT 1094 (2002) (tracing the history of this metaphor).

73. See HIRSCHBERG, *supra* note 72, at 6.

74. The diversity of views is illustrated by a pair of 1929 cases concerning the same provision, § 127 of the Criminal Procedure Law [StPO]. That provision authorized citizens to detain fleeing criminal suspects. In the case before the Hamburg Oberlandesgericht, a motorist, (wrongly) believing the driver of an oncoming car to be using his headlights improperly, drove his car into the path of the other vehicle to force it to stop. In the case before the Jena Oberlandesgericht, a hunter encountered a trespasser who then fled; unable to force the man to stop, the hunter shot and wounded him. In both instances, the question was whether the defendants' conduct fell within what was permissible under § 127. To address the question, the court in Hamburg adopted a balancing analysis, asking whether the defendant's dangerous action—the only way he could have stopped the other driver—stood "in a correct relationship to the interests of catching the wrongdoer." Urteil vom 25.3.1929, Oberlandesgericht Hamburg, 58 Juristische Wochenschrift 2842 (1929). The court in Jena, on the other hand, expressly rejected any "interest balancing" (*Güterabwägung*): the question is merely whether less restrictive means were available to stop the trespasser. As less restrictive means were not available, the shooting was permissible. Urteil vom

Constitutional rights review proved to be more problematic. Although the constitutions of most German states did contain bills of rights in the later nineteenth century, courts did not enforce those rights as trumps against otherwise legal state action. During the 1875–1918 period, administrative review had become in some respects “a functional substitute for a lack of constitutional review,”<sup>75</sup> and administrative judges routinely invoked rights, in the form of principles binding on the executive. But statutes were, at least technically, immune from judicial control.

The Weimar Constitution (1919–33) established a republic. It also contained a catalogue of “rights”—perhaps better described as a list of programmatic aspirations, since they could be overridden by ordinary statute. Nonetheless, in the 1920s, with political authority weak and divided, judges waged what legal historian Michael Stolleis has termed a reactionary “war” on politicians, triggered by takings and debt cases.<sup>76</sup> From 1921, the *Reichsgericht* (the Supreme Court) claimed for itself the authority to review the conformity of statutes with basic rights, especially property rights, which it characterized as “sacred.”<sup>77</sup> At the same time, leading jurists—including Carl Schmitt, Heinrich Triepel, Rudolf Smend, and the young Gerhard Leibholz—began to theorize rights as the foundational basis of all constitutional legality. Much of this scholarship was conservative and anti-parliamentarian, but not all of it. Triepel and Smend, at least, considered the capacities of rights to “integrate” state and society, and to reduce social tensions among classes and factions. They argued that rights were best understood as a system of “legalized values,” and that these values ought to infuse all of the constitutional law, and to impose positive duties on government. Smend renewed his efforts after 1945, and Leibholz, who joined the first GFCC in 1951, worked hard to have the Court adopt these ideas.<sup>78</sup>

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31.5.1929, Jena Oberlandesgericht, 58 JURISTISCHE WOCHENSCHRIFT 3324 (1929). These cases may represent an unusual circumstance, in that they involve ordinary citizens exercising police powers, but they do indicate that balancing was at least contemplated in proportionality analysis.

75. Michael Stolleis, *Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic*, 16 *RATIO JURIS* 266, 270 (2003).

76. *Id.* at 273. See also 4 *DOKUMENTE ZUR DEUTSCHEN VERFASSUNGSGESCHICHTE 1918–33* 36 (Ernst Rudolf Huber ed., 1992).

77. Stolleis, *supra* note 75, at 272.

78. See FRIEDER GÜNTHER, *DENKEN VOM STAAT HER: DIE BUNDESDEUTSCHE*



Had the Weimar Republic survived, it is at least possible that the Supreme Court would have generated a rights-oriented jurisprudence with proportionality doctrines at its core. Indeed, the Supreme Court of Switzerland did take steps in that direction during this same period. In 1926, the Swiss Supreme Court noted, in dicta, that health regulations infringing the constitutionally guaranteed freedom of trade and manufacturing more than necessary to protect the public were unjustifiable.<sup>79</sup>

In Germany, however, the advent of the Third Reich mooted the question, as judicial review came under attack from the Nazis and their new doctrinal establishment.<sup>80</sup> Labeling a state measure “political” was usually enough to shield it from judicial review.<sup>81</sup>

### B. *The Constitutionalization of Proportionality*

Drafted under the watchful gaze of occupying forces, the German Basic Law of 1949 established the Federal Republic as a new constitutional order grounded in a commitment to human rights enforceable as higher law. The constitution announces an extensive

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STAATSRECHTSLEHRE ZWISCHEN DEZISION UND INTEGRATION, 1949–70, 190–91 (2004).

79. Bundesgericht [BGer] [Federal Court] Sept. 24, 1926, 52 Entscheidungen des Schweizerischen Bundesgerichts [BGE] I 222 (F.R.G.). The case concerned a challenge to an order by health authorities in the canton of Zug, who banned the sale of a non-medicinal udder salve for cows on the ground that farmers might misuse it, and avoid seeking medical treatment for serious udder problems. The Court held that the ban was not authorized under Zug’s regulation for licensing the sale of medications, and further observed that, if the regulation could be read so expansively as to authorize the ban, then the regulation would violate the right to free trade and manufacture, as guaranteed in section 31 of the 1874 Constitution. Section 31 includes reservations that permit some economic regulation. The Court characterized the catch-all reservation clause for section 31 as permitting limitations on free trade “only when they are grounded in the public interest.” *Id.* at 227. Section 31 proscribes regulations that are not in the public interest, but also “those measures that may well lie in the public interest, but that could be replaced with a less far-reaching measure [eine weniger weitgehende Massnahme] with equivalent effect. Because in so far [as this is the case] the farther-reaching infringement is not justified in the common good.” *Id.* Following the German innovations of the late 1950s, the Swiss Supreme Court began applying a three-stage form of PA to restrictions on the freedom of trade and manufacturing. In time, this familiar form of analysis was applied to restrictions on other rights as well. For a more detailed discussion of Swiss developments, see Beatrice Weber-Dürler, *Zur neuesten Entwicklungen des Verhältnismässigkeitsprinzips*, in MÉLANGES EN L’HONNEUR DE PIERRE MOOR 593 (Benoît Bovay & Minh Son Nguyen eds., 2005).

80. MICHAEL STOLLEIS, *THE LAW UNDER THE SWASTIKA: STUDIES ON LEGAL HISTORY IN NAZI GERMANY* 134 (Univ. of Chicago Press 1998).

81. *Id.*

catalogue of rights (Articles 1–20) before it constitutes state organs and governmental arrangements. These rights are binding on the state (Article 1 § 3); statutes may not interfere with their “essential content” (Article 19 § 2). The Basic Law also created a constitutional court, the GFCC, and conferred upon it jurisdiction to defend those rights, in cooperation with the ordinary courts. The GFCC statute permitted individuals to bring claims of rights violations directly to the Court, and this route to judicial redress was itself constitutionalized in 1969 (Article 93 § 4a).

Immediately, jurists began arguing for the recognition of proportionality as a constitutional principle. Some, such as Herbert Krüger,<sup>82</sup> were “close associates” or followers of Rudolf Smend, and Smend’s theories about rights and constitutional “integration” enjoyed a privileged position throughout the 1950s.<sup>83</sup> At the same time, rights-oriented scholars, such as Gerhard Leibholz, were appointed to the GFCC. In hindsight, one sees the hugely important role that legal scholars played in elevating proportionality to a constitutional principle. They refined the concepts that courts employed, and provided the rationales for proportionality’s expansion.

Two figures stand out in particular: Rupprecht Krauss and Peter Lerche. Krauss’s influential 1953 dissertation made the case for treating the balancing test as a fundamental part of the proportionality principle, and for treating proportionality as a constitutional principle. Krauss coined the term, “proportionality in the narrow sense,” and presented it as a latent strain already present in the very concept of proportionality.<sup>84</sup> “Starting from the logical meaning of the word,” Krauss reasoned, “[proportionality] is about relating two or more quantities that can be set against a common yardstick, that is, that are comparable and fit with each other in a certain way.”<sup>85</sup> Krauss’s insistence that the concept of proportionality implied a balancing test reflected a heightened

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82. Krüger wrote expansively about proportionality’s scope already in 1950. See Herbert Krüger, *Die Einschränkung von Grundrechten nach dem Grundgesetz*, in 1950 DEUTSCHES VERWALTUNGSBLATT 625.

83. GÜNTHER, *supra* note 78, at 180.

84. Krauss also cited a Danzig police regulation that limited interventions to those that were justified on balance, considering the public and private interests at stake, to show that proportionality “in a narrow sense” was already present in positive law. KRAUSS, *supra* note 56, at 15.

85. *Id.* at 14.

solicitude for rights. He wrote: “if the measure [of legality] is only necessity [*i.e.*, the least restrictive means test], then a quite negligible public interest could lead to a severe right infringement, without being unlawful.”<sup>86</sup> Because the Basic Law’s rights guarantees were the defining feature of the new constitutional order,<sup>87</sup> Krauss argued, proportionality must apply across the board as a check on state action:

In the face of this constitutional situation it would be a contradiction to raise personal freedom to the leading state principle and at the same time to permit unnecessary restrictions of this freedom by the state to be considered lawful. It is consequently simply irreconcilable with the system of the Basic Law that the executive could be permitted to make incursions into the private sphere of individuals that go farther than is absolutely necessary to the reaching of a permissible end.<sup>88</sup>

The new constitutional order thus reduces to what amounts to a constitutional right to proportionality analysis, a point later implied by Alexy.<sup>89</sup>

Peter Lerche made his contribution as the constitutionalization of proportionality was underway, in his 1961 dissertation. While Lerche was careful to distinguish between the least restrictive means test and proportionality in the strict sense, like Krauss, he argued that the two were logically connected. The least restrictive means test on its own would be ineffectual, since “any measures at all could be presented as ‘necessary,’ if the purpose they serve is defined in wide enough terms.”<sup>90</sup> Proportionality in the strict sense must be added to the least restrictive means test, “if the principle of necessity is not to lose all substance.”<sup>91</sup> For Lerche, proportionality’s rise to constitutional stature is a function of the

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86. *Id.* at 15.

87. Krauss linked the robust conception of rights in the Basic Law to the influence of natural rights thinking. *Id.* at 39–41.

88. *Id.* at 25.

89. *Id.* at 26.

90. PETER LERCHE, ÜBERMASS UND VERFASSUNGSRECHT: ZUR BINDUNG DES GESETZGEBERS AN DIE GRUNDSÄTZE DER VERHÄLTNISSÄSSIGKEIT UND DER ERFORDERLICHKEIT 20 (1961).

91. *Id.*

changed character of citizen-state interactions in the modern welfare state. In contrast to earlier eras, modern legislation has become more administrative in character, laying out detailed, individualized regulatory programs (such as the tax code), as opposed to broad, generally applicable norms.<sup>92</sup> Moreover, the arm of the state reaches far further into the individual's private life than in previous eras.<sup>93</sup> The old, purely formal constraints on legislative legitimacy are inadequate to the task of protecting citizens from this transformed state.<sup>94</sup> Proportionality, developed in an administrative law context now mirroring the state more broadly, provides a suitably high bar that lawmakers must clear before infringing individual rights, points harkening back to Svarez.

From Svarez to Lerche, then, one finds a remarkable continuity in doctrinal commitment to developing a proportionality-based account of rights. Though this commitment was undoubtedly important, the constitutional law of the Federal Republic would henceforth be fashioned primarily by constitutional judges, not by doctrinal authority.<sup>95</sup> In 1949, the Bavarian Constitutional Court confronted a case involving article 98, paragraph 2, of that state's Constitution, which provides that "restrictions [on rights] by statute are permissible, only when urgently necessary, in the interests of the security, morals, health and well-being of the public."<sup>96</sup> The Bavarian Court held that a LRM test is to be employed if judges are to control for the "necessity" of state measures, although it cited no supporting authority for its ruling.<sup>97</sup> In 1956, that same court explained that it had derived the Proportionality Principle from the nature of the rights guaranteed in the Bavarian constitution, combined with the "*Rechtsstaat*" principle.<sup>98</sup> The GFCC moved

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92. *Id.* at 48–49.

93. *Id.* at 54.

94. *Id.* at 54–55.

95. JÖRN IPSEN, DIETRICH MURSWIEK & BERNHARD SCHLINK STAATSWECHE IM VERFASSUNGSTAAT-NACH 40 JAHREN GRUNDGESETZ: BERICHTE UND DISKUSSIONEN AUF DER TAGUNG DER VEREINIGUNG DER DEUTSCHEN STAATS RECHTSLEHRER (1989).

96. BAYERISCHE VERFASSUNG [Constitution of Bavaria], art. 98, para. 2, *translated at* [http://www.bayern.landtag.de/cps/rde/xbcr/SID-0A033D451BE906D3/www/dateien/BV\\_Engl\\_BF.pdf](http://www.bayern.landtag.de/cps/rde/xbcr/SID-0A033D451BE906D3/www/dateien/BV_Engl_BF.pdf).

97. Bayerischer Verfassungsgerichtshof [VerfGH Bayern] [Bavarian Constitutional Court] July 7, 1949, 1 II Entscheidungen des Bayerischen Verfassungsgerichtshofs [VerfGHE Bayern] 63 (76, 78) (F.R.G.).

98. VerfGH Bayern Dec. 28, 1956, 9 II VerfGHE Bayern 158 (177); *see also* Stern, *supra* note 59, at 171.

almost as quickly. It initially invoked elements of proportionality on a case-by-case basis, without citing authority or giving a rationale for its application.<sup>99</sup> To this day, the Court has not explicated the source of proportionality. As Dieter Grimm (Justice on the GFCC, 1987–99) puts it: “The principle was introduced as if it could be taken for granted.”<sup>100</sup>

By the close of the 1950s, the GFCC had elaborated the familiar multi-stage framework. In the leading case, *Apothekenurteil* (1958), the Court distinguished the LRM test from balancing in the strict sense for the first time, as separate elements of the proportionality principle. That case involved a challenge to a Bavarian law regulating drug stores based on the freedom of occupation provision of Article 12 ¶ 1 of the GG. In framing its analysis, the GFCC focused on the tension between individual rights and public goals, a tension that demands balancing and a concern for optimization:

The [purpose of] constitutional right should be to protect the freedom of the individual [while the purpose of] the regulation should be to ensure sufficient protection of societal interests. The individual’s claim to freedom will have a stronger effect . . . the more his right to free choice of a profession is put into question; the protection of the public will become more urgent, the greater the disadvantages that arise from the free practicing of professions. When one seeks to maximize both . . . demands in the most effective way, then the solution can only lie in a careful balancing [*Abwägung*] of the meaning of the two opposed and perhaps conflicting interests.<sup>101</sup>

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99. See Bundesverfassungsgericht [BVerfG][Federal Constitutional Court], June 3, 1954, 3 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 383 (399) (F.R.G.) (holding an electoral law constitutional because it expressed “a suitable means to serve the goal,” and “did not overstep the border which is drawn by the principle of proportionality between means and ends.”). See also Eberhardt Grabitz, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung der Bundesverfassungsgericht*, 98 ARCHIV DES ÖFFENTLICHEN RECHTS 568, 569 n.1 (1973) (detailing earlier precursors of proportionality analysis in decisions of the GFCC).

100. Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 385 (2007).

101. BVerfG June 11, 1958, 7 BVerfGE 377 (404–05).

Why did proportionality and balancing take on the prominence it did at this particular point in time? We cannot answer the question conclusively, but we would emphasize the following. First, the Basic Law provided for constitutional rights of a particular structure, to which PA and balancing were perfectly suited (as argued in Parts II.C and II.D of this paper). Second, core elements of PA were native to Germany. All public law scholars and judges would be familiar with LRM testing; and all private law judges had experience with balancing, from the German Civil Code. Several provisions of the Code call for judges to weigh certain interests against others, most famously sections 138,<sup>102</sup> 343,<sup>103</sup> and 228,<sup>104</sup> although none of these provisions require courts to engage in balancing rights and state interests. Nonetheless, balancing was part of the broader judicial toolbox, and even public law judges would not find the analytical structure of balancing wholly alien. The GFCC has always contained a mixture of judges with private and public law backgrounds, which also would have facilitated the development of PA. Third, law professors were not only appointed to the Court, they also tended to dominate it intellectually. In the 1950s, law professors untainted by Nazi sympathies (and therefore appointable) would also have possessed far more prestige than any other high court judge.

Perhaps most important, the new West Germany had firmly committed to protecting fundamental rights at the highest possible level, while the prestige of political parties and legislative authority was relatively low. At the same time, a deep commitment to the administrative and welfare state, and the demands of post-War reconstruction, implied an important role for government. Given the structure of German rights provisions and its own wide jurisdiction, the GFCC would inevitably confront a vexing question: should a

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102. Section 138, essentially a ban on unconscionable contracts, provides that a legal transaction is void if “by exploiting the predicament, inexperience, lack of sound judgment, or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.” Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Reichsgesetzblatt [RGBl] 195, as amended, § 138, ¶ 2, *translated at* [http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html).

103. Section 343 provides that “disproportionately high” liquidated damages can be reduced to “a reasonable amount,” taking into account “every legitimate interest of the obligee, not merely financial interest.” BGB § 343, ¶ 1.

104. Section 228 provides that a person who damages or destroys another’s property acts lawfully, “if . . . necessary to ward off the danger [caused by the property] and the damage is not out of proportion to the danger.” BGB § 228. *See also* BGB § 904.

state measure that passes a LRM test *automatically* prevail over the rights they infringe and, if so, on the basis of what theory of rights, or of the constitution? Even a measure that is narrowly tailored to achieve a legitimate state purpose may nonetheless infringe more on an individual's right than is tolerable, *given existing constitutional commitments*. In adding a balancing stage, the German Court avoided having to defend the superiority of a framework that ended with the LRM test.

If the Court were to justify its move to PA today, we would argue, it would invoke these considerations: the priority of rights, given the recent Nazi past; the structure of rights, taking account of the modern welfare state and commitments to social democracy; and the rationality of the proportionality principle as a well-theorized general principle of law that “flows,” in Grimm’s words, “from the rule of law or the essence of fundamental rights,”<sup>105</sup> and confers basic legitimacy on the system as a whole.

In any event, after *Apothekenurteil*, the GFCC’s invocations of PA became more confident and the structure of its analysis more formalized. In 1963, the Court suggested that it would deploy PA to all cases in which a right is restricted,<sup>106</sup> and in 1965, it announced, with no supporting citations, that “in the Federal Republic of Germany, the principle of proportionality possesses constitutional status.”<sup>107</sup> In 1968, the GFCC declared proportionality to be a “transcendent standard for all state action” binding all public authorities.<sup>108</sup> While, at this time, the Court did not always employ all the steps of PA to decide a case, especially when proportionality was only one of the legal issues raised,<sup>109</sup> in subsequent cases it took care to be explicit about how it would use the different elements of PA.<sup>110</sup> The constitutionalization of proportionality proceeded swiftly

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105. Grimm, *supra* note 100, at 386.

106. BVerfG June 10, 1963, 16 BVerfGE 194 (201).

107. BVerfG Dec. 15, 1965, 19 BVerfGE 342 (348–49). In this case, the court found that a lower court violated the plaintiff’s constitutional rights by not considering whether the pre-trial detention of the plaintiff, a 75-year-old retired admiral charged with murder in connection with an order he gave during World War II, was consistent with the principle of proportionality.

108. BVerfG Mar. 5, 1968, 23 BVerfGE 127 (133).

109. In the case cited in footnote 108, for instance—a challenge by a Jehovah’s Witness to his punishment for refusing to perform civil service—the court skipped straight to proportionality in the narrow sense. *Id.* at 134.

110. BVerfG Jan. 15, 1970, 27 BVerfGE 344 (352).

thereafter.<sup>111</sup>

The impact of the GFCC's rights jurisprudence on German law and politics has been deep and pervasive. For various reasons, virtually every major policy issue that arises will eventually make it to the Court, in the form of a rights claim. The voluminous literature on the "judicialization" of the German legislative process<sup>112</sup> focuses on the pedagogical authority of the Court's rights jurisprudence in legislative processes (a politics of anticipatory reaction that takes place *during* the legislative process). PA undergirds judicialization, because it leads the court to put itself in the shoes of policymakers, and then to walk through their decision-making processes, step-by-step, evaluating constitutional legality of decisions along the way. (And when the conduct at issue is not legislative, but a discretionary act taken within some statutory framework, the court may walk through the analysis *twice*: both for the authorizing statute, and for the discretionary action, either of which could infringe a right.) The result has been the production of a relatively detailed set of proscriptions about how legislators and administrators should behave, if they wish to exercise their authority lawfully in virtually all important policy domains. In the shadow of proportionality review, and particularly balancing in the strict sense, German lawmakers engage in meaningful constitutional deliberation, and systematically so.

Rights and balancing have also been crucial to the "constitutionalization" of the private law, initiated by the GFCC's ruling in *Lüth* (1958).<sup>113</sup> According to the Court—following the doctoral dissertation of Günter Dürig<sup>114</sup>—the "value system"

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111. By Eberhart Grabitz's count, by 1973 the FCC had already used proportionality analysis in 132 cases. Grabitz, *supra* note 99, at 570 n.3 (1973).

112. The classic study is CHRISTINE LANDFRIED, *BUNDESVERFASSUNGSGERICHT UND GESETZGEBER* (The Federal Constitutional Court and the Legislature) (1984). See also ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE*, 61–126 (2000); Donald P. Kommers, *The Federal Constitutional Court in the German Political System*, 26 *COMP. POL. STUD.* 470 (1994); Christine Landfried, *Judicial Policymaking in Germany: The Federal Constitutional Court*, 15 *W. EUR. POL.* 50 (1992).

113. BVerfG Jan. 15, 1958, 7 BVerfGE 198.

114. In the 1950s, Dürig was the principal proponent of the view that the GG set out "an objective order of values" that penetrated every aspect of the legal order. See Günter Dürig, *Grundrechte und Zivilrechtsprechung, in VOM BONNER GRUNDGESETZ ZUR GESAMTDEUTSCHEN VERFASSUNG: FESTSCHRIFT ZUM 75. GEBURTSTAG VON HANS NAWIASKY* 157 (Theodor Maunz ed. 1956). In its *Lüth* ruling, note 113 *supra*, the GFCC borrowed heavily from Dürig's thesis, which held that constitutional rights applied in private law



expressed by the *Grundgesetz*, and in particular its system of rights, “influences all spheres of law.” As a result, “every provision of the private law (i.e., the various codes, especially the Civil Code) must be compatible with this system . . . and every such provision must be interpreted in its spirit.”<sup>115</sup> Private law judges must do so through balancing. When they fail to strike a proper balance between rights and other legal interests, they violate not only “objective constitutional law,” but also the subjective right of the individual. The ruling created a new cause of action, against the civil law judge, which the GFCC would hear through the constitutional complaint procedure. As subsequently developed, the *Liith* line of jurisprudence means that “all private law is directly subject to constitutional rights”—and therefore to balancing—radically enhancing the presence of constitutional rights, and the GFCC, in German private law.

#### IV. DIFFUSION

In this section, we examine how judges, in three national and three international systems, came to adopt PA. We are interested here in how judges represent what they are doing when they turn to PA, and if and how PA gets “constitutionalized” as a meta-principle of judicial governance. We will not attempt to survey all of the similarities and differences observed when we examine the use of PA comparatively, across these systems. One finding deserves emphasis in advance. In each of the systems examined, judges adopted PA to deal with the most politically salient, and potentially controversial, issues to which they could expect to be exposed. In our view, this is powerful evidence for arguments made in Part II of this paper.

As important, proportionality’s impact has not been confined to the judiciary. To different degrees across our cases, legislatures and executives have adapted to the adoption of PA in ways that reinforce its status as a constitutional commitment. The exact shape and scope of these developments depend heavily on the particular institutional structures and legacies onto which PA has been grafted. A complete account of how non-judicial actors internalize

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relationships, thereby expanding the scope of constitutional balancing in the private law dramatically. We thank Robert Alexy for alerting us to Dürig’s contribution.

115. BVerfG Jan. 15, 1958, 7 BVerfGE 198 (205).

proportionality into their own decision-making procedures lies beyond the scope of this article. Nonetheless, it is clear that such internalization can and does occur, with important consequences for our understanding of “judicial” authority *vis à vis* “political” authority.

A. *National Legal Systems*

From a comparative law perspective, PA exhibits a viral quality, spreading relatively quickly from one jurisdiction to another. In post-1989 Central and Eastern Europe, for example, virtually every constitutional court has adopted PA on the German model; most did so all but immediately, citing the case law of the GFCC and the European Court of Human Rights as authority.<sup>116</sup> PA is also gaining ground in Central and South American legal systems, and citations of Alexy in law journals are on the rise. In this section, we focus on the cases of Canada, South Africa, and Israel, partly because these systems have not historically been much influenced by German or Continental law. In Canada, South Africa, and Israel, the proportionality framework was unknown prior to the initiation of rights review, and rights review was unknown until quite recently. Once rights and review were established, the high courts of the respective systems quickly adopted PA.

1. Canada

The Canadian Supreme Court adopted proportionality analysis in the mid-1980s as the technique for deciding rights claims under Canada’s Charter of Rights and Freedoms. Prior to the Charter’s enactment, in 1982, the constitution—the British North American Act (1867)—contained only a handful of rights considered to have constitutional status.<sup>117</sup> In 1960, a statutory Bill of Rights

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116. WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POST-COMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* 287 (2005) (“The Courts in Central and Eastern Europe have clearly followed the path of the proportionality doctrine as developed by their Western counterparts, and in particular, by the European Court of Human Rights.”). Sadurski discusses the use of PA by the courts of Bulgaria, Croatia, Lithuania, Slovakia, Slovenia, Czech Republic, Poland, Estonia, Hungary, Romania, but the list is not exhaustive.

117. These included rights of denominational schools and some language rights.

granted the Supreme Court the authority to construe statutes in light of rights,<sup>118</sup> but not the power to invalidate legislation, and the Court's enforcement of the Bill of Rights was considered "meek" and roundly criticized.<sup>119</sup> The Charter, by contrast, contains an extensive catalog of rights and an invitation to courts to review statutes for infringements of those rights. Under section 1, the Charter "guarantees" rights "*subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*"<sup>120</sup>

In the first cases arising under the Charter, Canada's Supreme Court managed to avoid announcing a doctrinal formula for determining permissible limits on Charter rights.<sup>121</sup> In the *Big Mart* (1985) case, the Court signaled in *dicta* that it would turn to "a form of proportionality test" once a true conflict between a right and a statute arose.<sup>122</sup> The Court laid out the terms of proportionality analysis the next term, in *Regina v. Oakes*.<sup>123</sup> At issue was a provision of the Narcotics Act which created a rebuttable presumption that a person found to be in possession of drugs was, in fact, trafficking the drugs. Defendants who failed to provide sufficient evidence to rebut the presumption would be subject to the penalties for trafficking. Mr. Oakes claimed that the provision violated his right to the presumption of innocence under section 11(d) of the Charter.

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Constitution Act of 1867 §§ 93, 133.

118. CANADIAN BILL OF RIGHTS § 2: "Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared." Led to a mode of deferential textual analysis under Section 2, the Supreme Court did not develop coherent standards of review under the Bill of Rights regime. It struck down only one statute under the Bill of Rights, in *R. v. Drybones*, [1970] S.C.R. 282 (Can.).

119. Janet L. Hiebert, *New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?*, 82 TEX. L.REV. 1963, 1970 (2004). See also Andrew Lokan, *Rise and Fall of Doctrine under Section 1 of the Charter*, 24 OTTAWA L. REV. 163, 169 (1992).

120. CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 1 (emphasis added).

121. See, e.g., *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 (Can.) (holding that the claimed right was not implicated by the challenged statute); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.) (holding that the challenged statute was invalid because its purpose was impermissible).

122. *Big M Drug Mart*, [1985] 1 S.C.R.(Can.) at 352.

123. *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.).

Once the Court had concluded that the provision constituted a *prima facie* violation of the right to the presumption of innocence, it moved on to consider whether the Narcotics Act was nonetheless a permissible limitation of the right under section 1. Chief Judge Dickson, writing for the Court, broke the inquiry into two parts. The threshold question was whether the statute was “of sufficient importance to warrant overriding a constitutionally protected right or freedom,” meaning, “at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society.”<sup>124</sup> If the statute satisfied this condition, its defenders bear the burden of showing “that the means chosen [were] reasonable and demonstrably justified.” Citing the dicta in *Big Mart*, the Court described this hurdle “as a form of proportionality test.”<sup>125</sup> Noting that “the nature of the proportionality test will vary depending on the circumstances,” Judge Dickson explained that “[t]here are, in my view, three important components of a proportionality test”:

First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance.’<sup>126</sup>

Applying the analysis to the facts of the case, the court concluded that the Narcotics Act provision failed to satisfy section 1. Although “[t]he objective of protecting our society from the grave ills associated with drug trafficking, is, in my view, one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases,”<sup>127</sup> the statute did not survive the rational connection test: “it would be irrational to infer that a person had an

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124. *Id.* at 138–39.

125. *Id.* at 139.

126. *Id.* (internal citation omitted).

127. *Id.* at 141.

intent to traffic on the basis of his or her possession of a very small quantity of narcotics.”<sup>128</sup>

Why did the Supreme Court choose to read the limitation clause as a proportionality requirement? “[R]easonable limits . . . as can be demonstrably justified in a free and democratic society” could be interpreted to mean “proportional limits,” but that reading is not compelled by the text. The language of section 1 seems equally open to a more relaxed “reasonableness” or “rational basis” standard. But the Court’s choice for a more searching review of legislative restrictions on rights might make sense in light of the Charter’s history. In 1980, after more than a decade of failed efforts to pass a human rights instrument,<sup>129</sup> Canada’s new Liberal government made a concerted push with a new Charter proposal in 1980.<sup>130</sup> In an effort to forestall opposition from the provinces, which had blocked previous efforts in the 1970s, the proposed draft included a fairly permissive limitation clause. The government’s draft would recognize rights “subject only to such reasonable limits as are *generally accepted* in a free and democratic society with a *parliamentary system of government*.”<sup>131</sup>

When the Parliament’s Special Joint Committee on the Constitution held hearings on the proposed draft, they encountered strong opposition to this broad limitation clause from a wide range of witnesses.<sup>132</sup> In response to this criticism, the government revised the clause. Out went the reference to “a parliamentary system of government,” with its overtones of parliamentary supremacy, and the requirement that limits be only “generally accepted.” In the new draft, reasonable limits on rights must be “prescribed by law” and capable of being “demonstrably justified” in a “free and democratic society.” The government could now “go to the provinces and

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128. *Id.* at 142.

129. Lorraine E. Weinrib, *Of Diligence and Dice: Reconstituting Canada’s Constitution*, 42 U. TORONTO L.J. 207, 211–18 (1992).

130. Janet L. Hiebert, *The Evolution of the Limitation Clause*, 28 OSGOODE HALL L.J. 103, 118–19 (1990).

131. The Canadian Charter of Rights and Freedoms, Revised Discussion Draft of Sept. 3, 1980, (Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, Sept. 8–12, 1980), *quoted in* Hiebert, *supra* note 130, at 119 (1990) (emphasis added).

132. Janet Hiebert reports that the witnesses included “civil liberties groups, university professors, women’s groups, ethnic associations, legal groups, policemen, and crown counsel,” the “overwhelming majority” of whom were opposed to the limitation clause as written. *Hiebert, supra* note 130, at 122.

defend the new, more rigid, clause with claims that the public supported a stronger Charter.” The Charter was enacted with this revision to section 1.<sup>133</sup>

Against this backdrop, most early commentators understood the limitation clause to set a rather high hurdle for rights violations even before the Court applied the clause in cases. A treatise from 1983 suggests that, in applying the limitation clause, courts “should look to whether the impugned law is a fair, reasonable and appropriate exercise of the power of the state or whether it is an unreasonable, unnecessary and arbitrary interference with the right of the individual to a fundamental freedom or a right as set out in the Charter.”<sup>134</sup> Walter Tarnopolsky, who had advocated more robust rights protections for years, noted the affinity between the Charter limitation language and limitation clauses in the ECHR. Tarnopolsky suggested that, in interpreting the new Charter’s limitation clause, “resort might be made to the jurisprudence of the tribunals under the European Convention . . . for guides to such reasonable limits.”<sup>135</sup> As discussed below, both the European Court of Justice and the European Court of Human Rights were then developing a jurisprudence of proportionality around its limitation clauses.<sup>136</sup> Thus, although it was hardly preordained that the Supreme Court would treat the limitation clause as a proportionality requirement, this interpretation does not appear to be inconsistent with the basic intent to provide robust rights protection in the Charter.

Although *Oakes* is recognized as a landmark case, it introduced the four-step proportionality analysis to Canadian law with relatively little fanfare. The opinion stressed the continuity with the pre-existing body of section 1 precedent, in particular, *Big Mart*, which anticipated proportionality’s use in this context. With respect to the balancing phase of PA, which was not mentioned in *Big Mart*, the Court devoted a paragraph to explaining why it was a necessary

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133. Hiebert, *supra* note 130, at 125–26. The provinces did insist on an override clause, to permit legislative overrides of Charter rulings, to counterbalance the more stringent requirement. See Lorraine E. Weinrib, *Canada’s Constitutional Revolution: From Legislative to Constitutional State*, 33 *ISR. L. REV.* 13, 31 (1999).

134. MORRIS MANNING, *RIGHTS, FREEDOMS, AND THE COURTS: A PRACTICAL ANALYSIS OF THE CONSTITUTION ACT*, 1982 146 (1983).

135. Walter S. Tarnopolsky, *The Constitution and Human Rights*, in *AND NO ONE CHEERED: FEDERALISM, DEMOCRACY, AND THE CONSTITUTION ACT* 261, 269–70 (Keith Banting & Richard Simeon eds. 1983).

136. See *infra* Parts IV.B.1 and IV.B.2.

element of the test: that even important laws that satisfy the first two elements could still cause such harmful effects as to outweigh their value.

What is striking is that the *Oakes* Court made no reference to foreign antecedents of its proportionality analysis, and referenced no other authority. The formula presented in *Oakes* is so close to the German version of PA that we can presume the Court was familiar with German doctrine. The Canadian Supreme Court does not avoid citing foreign law on principle; indeed, discussions of foreign analogues are quite common. *Oakes* itself contains a detailed discussion of the presumption of innocence in the constitutional law of the United States. The silence here suggests that, rather than resting on a foreign pedigree, the court wishes to present proportionality as a reasoned and sensible approach to the particular problem posed by Charter rights.<sup>137</sup> Judge Dickson's strikingly non-dogmatic statement that, *in his view*, proportionality has four elements underlines that the court is developing the framework of analysis through a process of reasoned argument.

In any case, it did not take long for the proportionality framework developed in *Oakes* to be accepted as standard operating procedure in Charter litigation. In 1987, justification of right-limiting statutes under section 1 was identified straightforwardly with a

[r]equirement of proportionality of means to ends [that] normally has three aspects: a) there must be a rational connection between the measures and the objective they are to serve; b) the measures should impair as little as possible the right or freedom in question; and c) the deleterious effects of the measures must be justifiable in light of the objective which they are to serve.<sup>138</sup>

And, in 1989, the court in *Irvin Toys* could declare that “[i]t is now well established that the onus of justifying the limitation of a right or freedom rests with the party seeking to uphold the limitation . . . and

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137. More recently, the Court has become more open about acknowledging the German influence. See *Attorney General of Canada v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 (Can.).

138. Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, para. 103 (Can.).

that the analysis to be conducted is that set forth by Dickson C.J. in *R. v. Oakes*.<sup>139</sup>

Since that time, the *Oakes* proportionality framework has had a pervasive impact on the rights review practice of Canada's Supreme Court. Since the *Irvin Toys* decision, *Oakes* has been cited in nearly two hundred decisions of the Court.<sup>140</sup> The Court found in PA a formula that allowed it to inject itself into contentious rights disputes, something the Court had never been willing to do under the old Bill of Rights regime.<sup>141</sup>

But judicial decisions tell only part of the story of proportionality's impact in Canada. As in Germany, the Court's Charter jurisprudence has induced significant changes "upstream," requiring other government actors to consider proportionality as part of the legislative process. *Oakes* and related decisions have had, as Hiebert has shown, "an important influence on bureaucratic and political cultures, which became more receptive, or at least more resigned, to the importance of assessing proposed legislation from a Charter perspective."<sup>142</sup> Knowing that their actions will be subject to judicial review for conformity with the Charter, legislators have an incentive to consider the proportionality of their policymaking, and to build a record of their deliberations, in order to "Charter-proof" their policies.<sup>143</sup>

Considerations of proportionality enter into the earliest stages of policy formation in Canada. Legislation proposed by the government must be pre-screened for Charter conflicts before being presented to the Cabinet,<sup>144</sup> and in the event that proposed legislation would violate Charter rights in the view of the Justice Minister, the Justice Minister is required by law to make a report to Parliament.<sup>145</sup>

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139. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 (Can.).

140. As of January 13, 2009.

141. See *supra* note 118 and accompanying text.

142. Hiebert, *supra* note 119, at 1970.

143. Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7, 27 (2006) [hereinafter Hiebert, *Parliamentary Bills of Rights*]; see also Janet L. Hiebert, *Legislating Under the Influence of Charter Norms* 16 (forthcoming 2009) [hereinafter Hiebert, *Legislating Under the Influence*].

144. Hiebert, *Legislating Under the Influence*, *supra* note 143, at 13.

145. Hiebert, *supra* note 119, at 1971. Many provinces have adopted a similar pre-review process. JAMES B. KELLY, GOVERNING WITH THE CHARTER: LEGISLATIVE AND JUDICIAL ACTIVISM AND FRAMERS' INTENT 214 (2005).



Such a report would doom proposed legislation,<sup>146</sup> and to avoid this result, executive branch lawyers take an active role in crafting policy to fit the dictates of proportionality.<sup>147</sup> While this executive branch process takes place behind closed doors, Parliament also considers whether proposed legislation is consistent with the Charter, and this process is very public. When Charter challenges are anticipated, Parliament works diligently to show that it has carefully chosen the legislative means best suited to meeting an important government objective. Hearing testimony, floor statements, and social science data can all be added to bolster this point.<sup>148</sup> Parliament may also send statutes into the world with preambles that stress how the legislation is narrowly tailored to address an important objective.<sup>149</sup>

Parliament is likely to make the most extensive record of Charter issue deliberations when a serious challenge under the Charter is anticipated—as when previous legislation on the same subject was struck down.<sup>150</sup> To take just one example, in 1997 the Supreme Court struck down bans on the advertising and promotion of tobacco products as disproportionate violations of the freedom of expression.<sup>151</sup> Working together, the departments of Health and Justice drafted a new Tobacco Act with an eye to satisfying constitutional concerns.<sup>152</sup> The new restrictions were crafted to follow the guidance offered in *RJR-MacDonald*: rather than a comprehensive ban on advertising, the new approach focused on “lifestyle” advertising.<sup>153</sup> When Parliament considered the new legislation, it also took pains to demonstrate the proportionality of the new law. The Senate’s Standing Committee on Legal and Constitutional Affairs, for instance, called a parade of legal experts

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146. JANET L. HIEBERT, *CHARTER CONFLICTS: WHAT IS PARLIAMENT’S ROLE?* 12–13 (McGill-Queen’s Press 2002).

147. KELLY, *supra* note 145.

148. HIEBERT, *Legislating Under the Influence*, *supra* note 143, at 10.

149. See Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, *Charter Dialogue Revisited—Or “Much Ado About Metaphors”*, 45 *OSGOODE HALL L.J.* 1, 48 (2007).

150. The “dialogue” between the Parliament and the Supreme Court that ensues after the Court invalidates a statute has received sustained scholarly attention in Canada. See Hogg, Bushell & Wright, *supra* note 149, at 1; Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)*, 35 *OSGOODE HALL L.J.* 75 (1997). At root, the subject of this “dialogue” is proportionality.

151. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 (Can.).

152. HIEBERT, *supra* note 146, at 85.

153. *Id.*

who testified as to the proportionality of the revised statute.<sup>154</sup>

Nonetheless, in a 2007 case, the Supreme Court heard a Charter challenge to the revised Tobacco Act and regulations. This time, the Court concluded that the Act was consistent with the Charter.<sup>155</sup> Parliament's careful efforts to demonstrate the statute's proportionality paid off. As the Court noted, "[t]he government presented detailed and copious evidence in support of its contention that where the new legislation posed limits on free expression, those limits were demonstrably justified under s[ection] 1 of the Charter."<sup>156</sup>

It is important to note here that Parliament, when faced with judicial invalidation of a statute, could achieve its policy objectives without taking the trouble to pass a new statute and make a case for its proportionality. The Charter contains a "notwithstanding" clause that permits Parliament (and the provincial governments) to pass legislation in the face of judicial findings that the law violates Charter rights.<sup>157</sup> But the Parliament has never availed itself of the notwithstanding clause to override a judicial ruling.<sup>158</sup> Members of Parliament and the government evidently regard it as too "politically costly" to invoke the clause.<sup>159</sup> But this reluctance is itself a measure of the Court's success at establishing the legitimacy of a proportionality-based rights review in Canadian constitutional culture. If the Court's use of PA analysis on Charter right claims were regarded as judicial overreaching, politicians could override the Court's rulings without incurring political costs.

Seeing how the government and Parliament have incorporated

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154. *Bill to Regulate the Manufacture, Sale, Labelling and Promotion of Tobacco Products: Hearings on C-71 Before the Standard Senate Committee on Legal and Constitutional Affairs, Issue 54—Evidence—Afternoon Sitting* (April 3, 1997), available at [http://www.parl.gc.ca/35/2/parlbus/commbus/senate/Com-e/lega-e/54evb-e.htm?Language=E&Parl=35&ses=2&comm\\_id=11](http://www.parl.gc.ca/35/2/parlbus/commbus/senate/Com-e/lega-e/54evb-e.htm?Language=E&Parl=35&ses=2&comm_id=11).

155. *Attorney General of Canada v. JTI-Macdonald Corp.* [2007] 2 S.C.R. 610, para. 8 (Can.).

156. *Id.*

157. CANADIAN CHARTER OF RIGHTS AND FREEDOMS § 33. The "Notwithstanding Clause" applies to most, but not all Charter rights, and the legislation can have effect for not more than five years (subject to renewal).

158. Quebec, on the other hand, invoked the notwithstanding clause to maintain for several years a ban on non-French commercial signs in the face of a Supreme Court ruling that such a policy violated equality and language rights. An Act to Amend the Charter of the French Language, Statutes of Quebec, ch 54 [1988].

159. Hiebert, *Parliamentary Bills of Rights*, *supra* note 143, at 19–20.

proportionality standards into the legislative process puts the Supreme Court's Charter jurisprudence in another light. Some commentators have argued that the Supreme Court has become more deferential to Parliament in reviewing legislation since the time of *Oakes*.<sup>160</sup> The charge raises fierce methodological issues but, arguably, one could arrive at exactly the opposite conclusion. As the other branches have taken on responsibility for considering proportionality, and as they are socialized into what is a new system of policymaking, the Court has had less of a need to conduct Charter analysis *de novo*. Further, the Court has made clear that there is rarely a single "right answer" to questions under section 1: what is crucial to these politics is that the relevant decision-maker makes clear how it has deliberated proportionality. As the Court has noted:

The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. *On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.*<sup>161</sup>

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160. See, e.g., Sujit Choudhry, *So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1*, 34 SUP. CT. L. REV. (2d) 501, 506–09 (2006); Lokan, *supra* note 119; Lorraine E. Weinrib, *Canada's Charter of Rights: Paradigm Lost?*, 6 REV. CONST. STUD., 119 (2002). This view is far from universal. Other commentators have lamented the Court's "judicial activism" under the Charter. See, e.g., F.L. MORTON & RAINER KNOPFF, *THE CHARTER REVOLUTION AND THE COURT PARTY* (2000); see also Christopher P. Manfredi, *The Day the Dialogue Died: A Comment on Sauvé v. Canada*, 45 OSGOODE HALL L.J. 105, 116 (2007) (describing proportionality and minimal impairment analyses as "strong forms of substantive review").

161. *RJR-MacDonald Inc. v. Canada* (Attorney General), [1995] 3 S.C.R. 199, para. 160 (Can.). See also *JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, para. 43 (Can.).

Again, a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem. There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and

Thus, the Court looks to Parliament to demonstrate its own conclusions about the proportionality of legislation.<sup>162</sup>

Some critics of PA in Canada have also suggested that the balancing step of PA has become irrelevant,<sup>163</sup> and it is true that no statutes determined to satisfy the earlier steps of the analysis have been invalidated on grounds of “proportionality of effects,” to use the Canadian term. In 2007, however, the Supreme Court took pains to repudiate these critics, confirming that it considered balancing in the strict sense to be essential to rights review under the Charter:

Although cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be weighed against the impact on the right. If rational connection and minimal impairment were to be met, and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective.<sup>164</sup>

In the Commonwealth family of legal systems, the Canadian Supreme Court has been an important agent in PA’s diffusion. In most Commonwealth systems, adopting proportionality means abandoning less rigorous standards of judicial review derived from traditional principles of equity and reasonableness. The Irish High Court, which has exercised strong powers of rights review since 1937, embraced PA in only 1994, citing *Oakes* as authority.<sup>165</sup> By

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balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives.

*Id.*

162. The Court has also deferred to Parliament on the rational connection element of the analysis. See *JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, para. 41.

Deference may be appropriate in assessing whether the requirement of rational connection is made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament’s decision as to what means to adopt should be accorded considerable deference in such cases.

*Id.*

163. See PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 816–17 (2003); Choudhry, *supra* note 160.

164. *JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, para. 46.

165. *Heaney v. Ireland* [1994] 3 IR 593 (Ir.).

1997, it could assert that proportionality was “a well-established tenet of Irish Constitutional Law.”<sup>166</sup> In South Africa and the U.K. (examined at length below), LRM now provides the standard, not *Wednesbury* reasonableness (a cousin of rational basis, in American parlance).

In New Zealand, where the main tenets of parliamentary sovereignty have been retained, judges nonetheless adopted PA, through the *Oakes* test.<sup>167</sup> The 1990 Bill of Rights Act (like the 1960 Canadian Act) ranks as ordinary legislation that expressly forbids courts from striking down statutes for inconsistency with the listed rights,<sup>168</sup> while directing courts to construe statutes to be consistent with rights where possible.<sup>169</sup> The limitation clause closely resembles Canada’s Charter language, laying down a “reasonableness” standard.<sup>170</sup> New Zealand’s judges have yet to agree on how these two clauses relate: should courts impose a saving construction first, and then inquire whether the statute so construed unjustifiably limits rights; or should they first ask whether the law as applied unjustifiably limits rights before searching for an alternative construction?<sup>171</sup> Yet from the start, the courts have read the limitation clause to require *Oakes*-style PA rather than a *Wednesbury* reasonableness standard or some other test.<sup>172</sup> In recent years, New

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166. *Rock v. Ireland* [1997] 3 IR 484, 500 (Ir.).

167. See *Ministry of Transport v. Noort* [1992] 3 N.Z.L.R. 260 (C.A.) (citing *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, 373–74 (Can.), for the proportionality test in *Oakes*). The program for the 2004 Australasian Institute of Judicial Administration conference on proportionality, featuring papers and speeches by Australian and New Zealand judges, gives one measure for the impact of proportionality in New Zealand. 22nd AIJA Annual Conference, Proportionality—Cost-Effective Justice? (Sept. 17–19, 2004) available at <http://www.aija.org.au/ac04/papers.htm>. See also The New Zealand Legal Method Series, Rights and Freedoms in New Zealand: the Bill of Rights Comes of Age (July 27–28, 2007), available at [http://www.law.auckland.ac.nz/uoa/fms/default/law/news/docs/Bill\\_of\\_Rights\\_Conference.pdf](http://www.law.auckland.ac.nz/uoa/fms/default/law/news/docs/Bill_of_Rights_Conference.pdf).

168. Bill of Rights Act 1990, 1990 S.N.Z. No. 109 § 4.

169. *Id.* § 6.

170. *Id.* § 5 (“Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”).

171. See *Hansen v. The Queen* [2007] 3 N.Z.L.R. 1 (S.C.); *Noort*, [1992] 3 N.Z.L.R. 260.

172. See *Noort*, 3 N.Z.L.R. at 283. See PHILIP A. JOSEPH, *The New Zealand Bill of Rights Experience*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 283, 305 (Philip Alston ed., Oxford Univ. Press 1999) (discussing *Noort*’s affirmation of the *Oakes* test).

Zealand's courts have carved out a significant role for themselves in reviewing the proportionality of legislation, notwithstanding the weakness of the Bill of Rights. In 2000, the Court of Appeals suggested that courts may have a duty to declare statutes inconsistent with the Bill of Rights, even though courts lack the power to invalidate statutes.<sup>173</sup> In 2007, the Supreme Court (citing *Oakes* at length) followed this lead, declaring that a reverse onus provision disproportionately infringed the presumption of innocence, and that no saving construction could be found.<sup>174</sup> This new assertiveness may comprise an important turning point for the judiciary. The courts now seem willing to use PA as the means of supervising legislative activity and protecting rights.<sup>175</sup>

In Australia, which does not possess a written charter of rights of any kind, senior judges now intensively debate the merits of proportionality.<sup>176</sup>

## 2. South Africa

The mid-1990s were years of rapid constitutional development for South Africa, and the constitutionalization of proportionality was among the major outcomes. As part of the transition from the apartheid regime, an Interim Constitution was ratified in November 1993. Chapter 3 of the Interim Constitution contained an extensive catalog of fundamental rights, along with a limitation clause—section 33—reminiscent of Canada's.<sup>177</sup> The interim constitution also established South Africa's Constitutional Court and vested it expressly with the power of judicial review.<sup>178</sup>

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173. *Moonen v. Film and Literature Bd. of Review* [2000] 2 N.Z.L.R. 9, 17 (C.A.).

174. *Hansen*, [2007] 3 N.Z.L.R. 1.

175. See Janet L. Hiebert, *Parliamentary Bills of Rights*, *supra* note 143, at 14–15.

176. Murray Gleeson, Chief Justice of Australia, Address at the Australian Bar Association Conference: Global Influences on the Australian Judiciary (July 8, 2002), available at [http://www.hcourt.gov.au/speeches/cj/cj\\_global.htm](http://www.hcourt.gov.au/speeches/cj/cj_global.htm).

177. S. AFR. (Interim) CONST. 1993. Section 33 provided that fundamental rights may be limited by law of general application, so long as the limitation is reasonable, “justifiable in an open and democratic society based on freedom and equality,” and does not “negate the essential content of the right in question.” The constitution further provided that limitations on a subset of fundamental rights—including the rights to human dignity, freedom from forced labor, and freedom of conscience—were permissible only when such limitations were “necessary.” § 33(1).

178. *Id.* § 98(5).

The new Constitutional Court initially resisted applying PA to the limitation clause, but this resistance evaporated almost immediately. In *State v. Zuma and Two Others*, its first decision on the issue, the Court confronted a fact pattern similar to that of *Oakes*: a constitutional challenge to a “reverse onus” provision that placed on criminal defendants the burden of showing police confessions to be involuntary.<sup>179</sup> The Court found a *prima facie* violation of the constitutional presumption of innocence, but declined to deploy PA to determine the provision’s constitutionality. While acknowledging that the proportionality “criteria may well be of assistance to our courts in cases where a delicate balancing of individual rights against social interests is required,” the Court insisted that “section 33(1) itself sets out the criteria which we are to apply, and [we] see no reason, in this case at least, to attempt to fit our analysis into the Canadian pattern.”<sup>180</sup>

The Court overcame its resistance to PA in its very next decision on the limitation clause. Significantly, the justices of the newly-constituted Court spent a week in Germany visiting with the judges of the GFCC shortly before issuing the ruling.<sup>181</sup> *State v. Makwanyane*<sup>182</sup> presented a challenge to the constitutionality of the death penalty. Writing the lead opinion, President Chaskalson found that the statute represented a *prima facie* violation of the constitutional right against cruel, inhuman, and degrading punishments.<sup>183</sup> He then turned to proportionality: “The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality.”<sup>184</sup> Proportionality, in the court’s view, is “implicit in the provisions of section 33(1)”:

The fact that different rights have different implications for democracy, and in the case of our Constitution, for ‘an open and democratic society

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179. *S v Zuma & Others* 1995 (2) SA 642 (CC) (S. Afr.).

180. *Id.* at 660.

181. Craig Smith, *An American’s View of The Federal Constitutional Court: Karlsruhe’s Justices*, 2 GERMAN L.J., available at <http://www.germanlawjournal.com/article.php?id=17>.

182. *S v Makwanyane & Another* 1995 (3) SA 391 (CC) at 436 (S. Afr.).

183. *Id.* at 434.

184. *Id.* at 436.

based on freedom and equality’, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.<sup>185</sup>

The Court then laid out a laundry list of factors that bear on PA:

In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.<sup>186</sup>

Chaskalson explicitly referenced foreign sources of authority for the move, discussing the role of PA in German, Canadian, and European law, noting differences and similarities with the South Africa context.<sup>187</sup> He then turned to consider the death penalty’s proportionality. The putative objects of the statute—deterrence, prevention and retribution—were weighed against “the factors, which taken together, make capital punishment cruel, inhuman and degrading: the destruction of life, the annihilation of dignity, the elements of arbitrariness, inequality and the possibility of error in the enforcement of the penalty.”<sup>188</sup> Although the *Makwanyane* formula treats proportionality as a single-stage, multi-factored balancing, elements of a suitability and a least-restrictive means inquiry are present. In the end, the death penalty came up short, as there was little evidence that the death penalty was a more effective deterrent than the less infringing alternative of life imprisonment, and retribution had little value in the post-apartheid constitutional order,

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185. *Id.*

186. *Id.*

187. *Id.* at 436–39.

188. *Id.* at 448.



which was expressly dedicated to reconciliation.<sup>189</sup>

*Makwanyane*'s approach was adopted in subsequent cases. Initially, proportionality was treated more as a pragmatic approach to applying the limitation clause than as an ineluctable principle of law.<sup>190</sup> When South Africa adopted a permanent constitution in 1996, however, PA was elevated to the status of a constitutional principle. The Interim Constitution's limitation clause was revised to incorporate the factors named in *Makwanyane* as elements of PA.<sup>191</sup> Crucially, the Constitutional Court certified that the new Constitution was consistent with the interim document's Constitutional Principles.<sup>192</sup> The Court considered, and rejected, objections to the effect that section 36(1) did not comply with international norms on human rights, and hence, with the right guarantees in the Interim Constitution, because it did not include a "necessity" requirement on rights limitations.<sup>193</sup> The Court held section 36(1) to be valid, essentially because PA defines best practice standards for necessity review:

It is true that international human rights instruments indicate that limitations on fundamental rights are permissible only when they are "necessary" or "necessary in a democratic society." But "necessity" is by no means universally accepted as the appropriate

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189. *Id.* at 446, 451.

190. *See, e.g., S v Williams & Others* 1995 (3) SA 632 (CC) at 649 ("In *S v Makwanyane* this Court dealt with s 11(2) of the Constitution on the basis that s 33(1) is applicable to breaches of that section. I follow the same approach in the present case." (citation omitted)).

191. The limitation clause reads:

36. Limitation of rights

1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

1. the nature of the right;
2. the importance of the purpose of the limitation;
3. the nature and extent of the limitation;
4. the relation between the limitation and its purpose; and
5. less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

192. *Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC). The Constitutional Court was given responsibility for certification by section 71(2) of the Interim Constitution.

193. *S v Williams & Others* 1995 (3) SA 632 (CC) at 804.

norm for limitation in national constitutions. The term has, moreover, been given various interpretations, all of which give central place to the proportionate relationship between the right to be protected and the importance of the objective to be achieved by the limitation. The content this Court gave to the limitations clause in IC [Interim Constitution] 33(1) in *S v Makwanyane and Another* conformed to that interpretation. Indeed, NT [New Text] 36(1) is substantially a repetition of what was said in that judgment. But what matters for present purposes is that the conceptual requirement established by international norms relative to proportionality or balancing be met. The choice of language lay with the CA [Constitutional Assembly]. The criteria set out in NT 36(1) do in fact conform to internationally accepted standards, and comply with CP [Constitutional Principle] II.<sup>194</sup>

Since the mid-1990s, proportionality has become a cornerstone of the work of South Africa's Constitutional Court. Writing in 2003, Justice Albie Sachs declared that “[p]roportionality

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194. *Id.* at 804–05. It should be noted that proportionality gained other footholds in South African law in addition to section 36(1) during this period, although these developments are less relevant to our purposes. Section 33(1) of the Final Constitution created a “right to administrative action that is lawful, reasonable and procedurally fair.” This provision, and legislation passed pursuant to it, has been described as imposing a form of proportionality test. See Promotion of Administrative Justice Act of 2000 § 6(f); *Carephone (Pty) Ltd v No & Others* 1999 (3) SA 304 (LC) (S. Afr.); CLAUDIA LANGE, UNREASONABLENESS AS A GROUND OF JUDICIAL REVIEW IN SOUTH AFRICA: CONSTITUTIONAL CHALLENGES FOR SOUTH AFRICA’S ADMINISTRATIVE LAW (2002); Cora Hoexter, *Standards of Review of Administrative Action: Review for Reasonableness*, in A DELICATE BALANCE: THE PLACE OF A JUDICIARY IN A CONSTITUTIONAL DEMOCRACY 61, 64–65 (2006).

In addition, South Africa’s Promotion of National Unity and Reconciliation Act, signed into law in 1995, created a committee competent to grant amnesty for “any act, omission or offence on the grounds that it is an act associated with a political objective.” Promotion of National Unity and Reconciliation Act, No. 34 of 1995 § 18(1). In determining whether a given deed is “associated with a political objective” within the meaning of the statute, it lists a number of factors to be considered, including “the relationship between the act, omission or offence and the political objective pursued, and in particular the directness and proximity of the relationship and the *proportionality of the act, omission or offence to the objective pursued.*” *Id.* at § 20(3)(f) (emphasis added). Although the Amnesty Committee did not apply any sort of structured proportionality analysis, it did sometimes rely on a rough least restrictive means test to determine whether amnesty was appropriate. See, e.g., Cornelius Johannes Van Wyk, Amnesty Decision No. 1050/96 (Dec. 6, 1996).

and balancing are at the heart of constitutional litigation in our country,” and estimated that as many as three quarters of the Court’s cases require the justices to engage in a balancing analysis.<sup>195</sup> Under section 36(1)’s proportionality framework, the Court has resolved a number of high profile disputes, including constitutional challenges to the corporal punishment of juveniles,<sup>196</sup> anti-sodomy statutes,<sup>197</sup> felon disenfranchisement,<sup>198</sup> a prohibition on cannabis as applied to Rastafarians, who use it for religious purposes,<sup>199</sup> and a number of criminal procedure rules alleged to burden the presumption of innocence.<sup>200</sup>

In its development since the mid-1990s, “South African limitations jurisprudence has borrowed extensively from Canadian limitations jurisprudence.”<sup>201</sup> However, PA does not take the exact same form in the two jurisdictions: in particular, the analysis in South Africa is not always conducted in a sequence of discrete steps.<sup>202</sup> But even if “as part of its overall, nonmechanical assessment, the [Court] does not always disaggregate the various strands of the test,” as in Canada, “[t]he least restrictive means part of the test has been perhaps the most important in practice . . . .”<sup>203</sup>

Like its Canadian and German counterparts, the South

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195. Albie L. Sachs, *The Challenges of Post-Apartheid South Africa*, 7 GREEN BAG 2d 63, 67 (2003).

196. *S v Williams & Others* 1995 (3) SA 632 (CC) (S. Afr.).

197. *Nat’l Coalition for Gay and Lesbian Equality & Another v Minister of Justice* 1999 (1) SA 6 (CC) (S. Afr.).

198. *Minister of Home Affairs v Nat’l Inst. for Crime Prevention & the Re-integration of Offenders (NICRO) & Others* 2005 (3) SA 280 (CC) (S. Afr.).

199. *Prince v The President of the Law Soc’y of the Cape of Good Hope* 2001 (2) SA 388 (CC) (S. Afr.).

200. See, e.g., *S v Mello & Another* 1998 (3) SA 712 (CC) (S. Afr.). For a discussion of the Constitutional Court’s jurisprudence under the limitations clause, see ZIYAD MOTALA & CYRIL RAMAPHOSA, *CONSTITUTIONAL LAW: ANALYSIS AND CASES* 414–32 (2002).

201. Kevin Iles, *A Fresh Look at Limitations: Unpacking Section 36*, 23 S. AFR. J. HUM. RTS. 68, 69 (2007).

202. In the words of Justice Ngcobo:

None of these factors [in § 36(1)] is individually decisive. Nor are they exhaustive of the relevant factors to be considered. These factors together with other relevant factors are to be considered in the overall enquiry. The limitation analysis thus involves the weighing up of competing values and ultimately an assessment based on proportionality.

*Prince v The President of the Law Soc’y of the Cape of Good Hope* 2001 (2) SA 388 (CC) (S. Afr.) (internal citation omitted).

203. Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 842 (2007).

African Constitutional Court also recognizes that the LRM test permits deference to legislative judgments. As an academic authority has noted, “[t]he use of a value-based, context-sensitive standard to determine the reasonableness of legislative and other limitations of fundamental rights, which is based on proportionality and balancing, is hardly consistent with the idea of a rigid separation between the legislative and judicial functions.”<sup>204</sup> For its part, the Court expects the parliament to consider the constitutional issues as part of its policymaking process. In *S. v. Manamela* (2000), Justices O’Regan and Cameron noted that:

[T]he problem for the Court is to give meaning and effect to the factor of less restrictive means without unduly narrowing the range of policy choices available to the Legislature in a specific area. The Legislature when it chooses a particular provision does so not only with regard to constitutional rights, but also in the light of concerns relating to cost, practical implementation, the prioritization of certain social demands and needs and the need to reconcile conflicting interests. The Constitution entrusts the task of legislation to the Legislature because it is the appropriate institution to make these difficult policy choices. When a court seeks to attribute weight to the factor of “less restrictive means” it should take care to avoid a result that annihilates the range of choice available to the Legislature. In particular, it should take care not to dictate to the Legislature unless it is satisfied that the mechanism chosen by the Legislature is incompatible with the Constitution.<sup>205</sup>

In contrast to Canada, executive-branch domination of lawmaking in South Africa makes it difficult to assess the upstream impact of the Court’s proportionality jurisprudence on the legislative process. Especially following 1998 reforms that strengthened

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204. Henk Botha, *Rights, Limitations, and the (Im)possibility of Self-Government*, in *RIGHTS AND DEMOCRACY IN A TRANSFORMATIVE CONSTITUTION* 13, 14 n.5 (Henk Botha, Andre Van der Walt & Johan Van der Walt eds., 2003).

205. *S v Manamela & Others* 2000 (3) SA 1, 41 (CC) (S. Afr.) (O’Regan, J., and Cameron, AJ, dissenting). The majority in this case declared its agreement with these principles. *Id.* at 20.

presidential institutions,<sup>206</sup> legislative proposals in South Africa are thoroughly vetted by a battery of presidential and cabinet teams before they receive a public airing in the National Assembly.<sup>207</sup> This vetting includes consultation with state law advisers, who certify that bills are consistent with the Constitution and existing law.<sup>208</sup> It is these early stages of the legislative process, which take place out of the public eye, that offer officials the best opportunity to consider whether statutes that restrict fundamental rights meet the requirements of proportionality. This is because the National Assembly's influence over policy is "tangential at best,"<sup>209</sup> owing to the limited budgetary and staffing resources available to legislators, the large number of legislators, and displacement of parliamentary oversight by executive branch bodies.<sup>210</sup> In this different institutional context, it may be that we will not see the legislature build a record of its own analysis of the proportionality of proposed legislation.

### 3. Israel

Israel is one of the four countries in the world today without a codified, entrenched constitution.<sup>211</sup> The country nonetheless possesses a Supreme Court that became a powerful court when it began, in the 1980s, to inject rights and doctrines of judicial review into the higher law.<sup>212</sup> In this same period, the Court was in the throes of developing a kind of indigenous, proto-proportionality doctrine. Once the use of PA in other legal systems came to its attention in the 1990s, the Court quickly adopted the standard, German-based framework. It then used PA both for determining when limitations on rights were permissible, and for judging the

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206. PHIROSHAW CAMAY & ANNE J. GORDON, *EVOLVING DEMOCRATIC GOVERNANCE IN SOUTH AFRICA* 316–17 (2004).

207. In addition to the National Assembly, South Africa's bicameral parliament includes a National Council of Provinces that represents the country's nine provinces and has a still more limited role in policy formation than the National Assembly.

208. DEWALD VAN NIEKERK ET AL., *GOVERNANCE, POLITICS, AND POLICY IN SOUTH AFRICA* 88–89 (2001); see also Arthur Chaskalson, *Dialogue: Equality and Dignity in South Africa*, 5 *GREEN BAG* 2d 189 (2002); Republic of South Africa, Department of Justice and Constitutional Development, *The Legislative Process*, available at <http://www.doj.gov.za/2004dojsite/legislation/legprocess.htm>.

209. ANTHONY BUTLER, *CONTEMPORARY SOUTH AFRICA* 95 (2004).

210. *Id.* at 95–96; CAMAY & GORDON, *supra* note 206, at 337.

211. The others are Bhutan, New Zealand, and the United Kingdom.

212. Aeyal M. Gross, *The Politics of Rights in Israeli Constitutional Law*, 32 *ISR. STUD.* 80, 85 (1998); Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Israel's Constitutional Revolution*, 33 *COMP. POL.* 315 (2001).

legality of administrative action. Today, arguably, the Israeli Supreme Court applies PA more consistently and rigorously than any other judicial body in the world.

Israel's most important "proto-proportionality" cases share a similar fact pattern. Regulation 119 of the Defense (Emergency) Regulations, a holdover from the days of the British Mandate,<sup>213</sup> gives military commanders wide latitude in taking measures responsive to terrorist acts. In cases challenging these responses as "excessive," the Supreme Court adopted a simplified form of proportionality analysis. *Hamri v. Commander of Judea and Samaria* (1982)<sup>214</sup> concerned Mahmoud and Rathab, two West Bank men, who confessed to stabbing a night-watchman to death on a mission ordered by the Fatah organization.<sup>215</sup> The Israeli military commanders ordered his house demolished as a deterrent to future would-be terrorists.<sup>216</sup> The petitioner in the case, Mahmoud's father and Rathab's uncle, asked the court for an order nisi against the commander of Judea and Samaria to show why he should not refrain from demolishing the house.<sup>217</sup> Writing for the Court, then-Justice Aharon Barak held that the order to destroy the house was reasonable given the very serious acts of murder committed by the two young men.<sup>218</sup> Although he did not use the word "proportionality," the essence of his argument was that administrative measures had to bear a proportionate relationship to the prohibited acts that triggered them. The fact pattern in *Turkeman v. Minister of Defense*<sup>219</sup> was similar: a West Bank man shot two Israelis, killing one and wounding the other, and the military commander ordered the demolition of his domicile. Here, however, the house belonged to the offender's mother, and she shared it with her seven sons, the oldest of whom was married and had his own family.<sup>220</sup> The military had ordered the whole house razed after having decided that it was impossible to demolish only part of the house. Justice Barak, writing for the Court, found the measure unreasonable. "Every authority, no matter how extensive, has to be exercised in a reasonable way," he wrote,

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213. Defense (Emergency) Regulations, 1945 P.G. no. 1442, Supp. No. 2, p. 1089.

214. HCJ 361/82 Hamdi v. Commander of Judea and Samaria [1982] IsrSC 36(3) 439.

215. *Id.* at 440, translated in I PALESTINE Y.B. INT'L L. L. 129, 130 (1984).

216. *Id.* at 443–44, translated in I PALESTINE Y.B. INT'L L. L. 129, 133 (1984).

217. *Id.* at 439, translated in I PALESTINE Y.B. INT'L L. L. 129, 129 (1984).

218. *Id.* at 444, translated in I PALESTINE Y.B. INT'L L. L. 129, 133 (1984).

219. HCJ 5510/92 Turkeman v. Minister of Defense [1993] IsrSC 48(1) 217.

220. *Id.* at 218–19.

insisting that the commander must choose a response that corresponds to the gravity of the offense.<sup>221</sup> This time, the Court overturned the demolition order as “disproportionate,” and substituted an order sealing off two rooms of the house, so that the married son could continue to live there.<sup>222</sup> Although the Court did invoke the principle of proportionality in *Turkamen*, there was no reference yet to the doctrine in other jurisdictions.

Scholarly commentary paved the way for the judicial acceptance of PA. A 1994 comparative piece by law professor (and later, Supreme Court Justice) Itzhak Zamir was the first important piece to focus on the connections between proportionality in German and Israeli administrative law.<sup>223</sup> Concurrently, Aharon Barak’s 1994 commentary on Israel’s new Basic Law of Human Dignity and Freedom explicitly advocated the *Oakes* proportionality analysis as the method for determining when rights must yield to public law.<sup>224</sup>

In their capacity as Justices on the Supreme Court, the authors of these pieces quickly and forcefully brought this cosmopolitan perspective on proportionality into the law of Israel. Justice Zamir surveyed other jurisdictions’ acceptance of proportionality and made a strong pitch for giving it the “proper status and weight” in Israel’s law, in *Euronet Golden Lines [1992] Ltd. v. Minister of Communication*.<sup>225</sup> For his part, as Chief Justice, Barak offered an extensive discussion of the origins and diffusion of proportionality analysis in his *Ben-Atiyah v. Minister of Education, Culture & Sports* concurrence.<sup>226</sup> Barak even found antecedents of proportionality in Maimonides’s injunction to treat illness with powerful medicines

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221. Fania Domb, *Judicial Decisions: Judgments of the Supreme Court of Israel Relating to the Administered Territories*, 25 ISR. Y.B. ON HUM. RTS 323, 348 (1995) (summarizing *Turkeman*).

222. *Turkeman*, [1993] IsrSC 48(1) at 220.

223. Itzhak Zamir, *Israeli Administrative Law Compared to German Administrative Law*, 2 MISHPAT U’MIMSHAL [Law and Government in Israel] 109, 130 (1994). A 1990 piece by Professor Segal was also influential, although it lacked the extensive engagement with international materials. Zeev Segal, *Disproportionality in Administrative Law*, 39 HAPRAKLIT 501 (1990).

224. 3 AHARON BARAK, INTERPRETATION IN THE LAW: CONSTITUTIONAL INTERPRETATION (1994).

225. HCJ 987/94 *Euronet Golden Lines (1992) Ltd. v. Minister of Comm’n* [1994] IsrSC 48(5) 412, 435.

226. HCJ 3477/95 *Ben-Atiya v. Minister of Educ., Culture & Sports* [1995] IsrSC 49(5) 1, 9. *Ben-Atiyah* was actually published after *United Mizrahi Bank*, but it was argued several months before *United Mizrahi Bank*.

only if weaker medicines fail.<sup>227</sup> *Ben-Atiyah* involved a program which allowed students the opportunity not to take the matriculation examination in a certain subject.<sup>228</sup> However, the Ministry of Education denied access to this program to students enrolled in schools that, in past years, had high instances of cheating on the matriculation examinations.<sup>229</sup> Barak would have overturned the ministry's order on proportionality grounds, while the other two judges decided the case in terms of reasonableness, a lower standard than LRM in Israeli law.<sup>230</sup>

The decisive turning point for proportionality came in *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*,<sup>231</sup> a landmark in Israeli constitutional law. In that case, creditors had challenged a statute that permitted a special governmental body to cancel debts on the grounds that it violated the right to property guaranteed in Israel's Basic Law on Human Dignity and Liberty.<sup>232</sup> The first question for the Court was the question of judicial review: whether the Court possessed the power to strike down legislation that contravened rights named in the Basic Laws.<sup>233</sup> The Court answered in the affirmative.<sup>234</sup> Although the Basic Laws were passed through the procedure for ordinary legislation by Israel's parliament, the Knesset, the Court held that the catalog of fundamental rights had constitutional stature.<sup>235</sup> Therefore, the Knesset could pass statutes that infringed on those rights only if they satisfied section 8 of the Basic Law: the limitation clause.<sup>236</sup> This read: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."<sup>237</sup>

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227. *Id.*

228. *Id.* at 5. The matriculation examination is a national test required in order to graduate from High School (similar to the Regents diploma in New York).

229. *Id.* at 6.

230. *Id.* at 15–16.

231. CA 6821/93 *United Mizrahi Bank plc v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.

232. *Id.* at 223–34.

233. See Omi, *Leading Decisions of the Supreme Court of Israel and Extracts of the Judgment*, 31 ISR. L. REV. 754, 766 (1997).

234. *Id.*

235. *Id.* at 766–67.

236. *Id.* at 768.

237. Basic Law: Human Dignity and Liberty, 5752–1992, S.H. 1391 (Isr.). The limitations clause was amended in 1994 to permit explicit legislative override of Basic Law



Writing for himself and six other members of the Court, Chief Justice Barak held that the debt-cancelling statute did create a *prima facie* violation of the property right, and then turned to consider whether the statute nonetheless satisfied the limitations clause.<sup>238</sup> In interpreting the limitation clause, Chief Justice Barak took the final element—“to an extent that does not exceed what is necessary”—to be a constitutional requirement of proportionality.<sup>239</sup> Barak went on to note that a form of proportionality is recognized in Israeli administrative law, and used comparative examples to show that the move of proportionality from administrative law to the constitutional level has ample precedent in other legal systems.<sup>240</sup> He explained that proportionality began in administrative law in Europe, “and from there spread to the constitutional law of most countries in Europe and outside of it.”<sup>241</sup> Barak quoted *Oakes* on the elements of the proportionality test and cited to German authorities.<sup>242</sup> He concluded that the statute met the conditions of the limitation clause.<sup>243</sup>

After it was introduced in *United Mizrahi Bank*, the four-stage proportionality analysis was embraced by Israel’s Supreme Court, and its application has not been confined to adjudicating rights claims under the Basic Laws. The *Oakes*-style proportionality test was also applied as a check on administrative actions.<sup>244</sup> The 2004 *Beit Sourik* case demonstrated how much bite PA has attained in Israel’s law. The case raised a challenge to plans for the controversial separation fence intended to impede terrorist access to Israel.<sup>245</sup> The proposed route for the fence would separate thousands

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provisions. Basic Law: Human Dignity and Liberty—Amendment, 5754–1994, S.H. 1454 (Isr.), available at [http://www.knesset.gov.il/laws/special/eng/basic3\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm).

238. See Omi, *supra* note 232, at 769.

239. *Id.* at 789. Barak’s opinion was not the only one to mention proportionality; President Shamgar also mentioned proportionality as an element of the limitation clause. See *United Mizrahi Bank* [1995] IsrSC 49(4) at 335–52. But because Justice Barak’s discussion was more extensive and because he wrote for a majority of the Justices, while President Shamgar wrote only for himself, we focus on Barak’s analysis.

240. See *United Mizrahi Bank*, at 436.

241. *Id.* Barak specifically mentions Canada and South Africa.

242. *Id.* at 436–37.

243. *Id.* at 446.

244. See, e.g., H CJ 4541/94 Miller v. Minister of Def. [1995] IsrSC 49(4) 94 (upholding right to equality in the context of military service); H CJ 3278/02 Ctr. for the Def. of the Individual v. Commander of the IDF [2002] IsrSC 57(1) 385 (judicial review of administrative detention by army).

245. H CJ 2056/04 Beit Sourik Village Council v. Government of Israel [2004] IsrSC 58(5) 807, translated in ISR. L. REP. 264 (2004).

of West Bank farmers from their fields and would require the seizure of many local inhabitants' lands. The petitioners claimed violations of Israeli administrative law and international law.<sup>246</sup>

Writing for a unanimous three-justice panel, Barak found that the route violated proportionality in the strict sense.<sup>247</sup> Justice Barak ruled that the plans satisfied the suitability and LRM sub-tests: the fence was rationally connected to the goal of security, and no alternative route that infringed on human rights less could provide the same level of security.<sup>248</sup> But the gains in security that followed from the choice of the challenged route as opposed to a less intrusive alternative simply were not sufficiently high to justify the infringement:

The difference between the security benefits required by the military commander's approach and the security benefits of the alternate route is very small in comparison to the large difference between a fence that separates the local inhabitants from their lands and a fence that does not create such a separation or that creates a separation which is small and can be tolerated.<sup>249</sup>

The *Beit Sourik* decision placed an unprecedented amount of weight on PA. The outcome in this high profile case turned entirely on the balancing test. Thus, the Court conceded that striking down the proposed route will reduce Israel's security, and still the Court struck it down.<sup>250</sup> Moreover, the Court had not even found a *prima facie* violation of a constitutional right to justify this move.<sup>251</sup> In *Beit Sourik*, proportionality figured as a general principle of administrative law, not as a means to determine when limitations on basic rights are constitutionally permissible. Perhaps because PA was made to do so much work in this decision, Chief Justice Barak justified proportionality at some length in his opinion. He described proportionality as a "basic principle" of law that "transverses all

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246. *Id.*

247. *Id.* at 861, translated in ISR. L. REP. 264, 332 (2004).

248. *Id.* at 849–50, translated in ISR. L. REP. 264, 308–09 (2004).

249. *Id.* para. 61.

250. *Id.* at 861–62, translated in ISR. L. REP. 264, 323 (2004).

251. The court finds these rights within article 46 of the Hague Regulations and article 27 of the Fourth Geneva Convention. *Id.* at 832–36, translated in ISR. L. REP. 264, 289–93 (2004).

branches of the law.”<sup>252</sup> It is part of the “universal” solution to the “general problem in (international and national) law” of “balancing security and liberty.”<sup>253</sup> Barak then went on to demonstrate proportionality’s doctrinal roots as “a general principle of international law” as well as Israel administrative law.<sup>254</sup> The decision also stressed how similar the PA framework is across diverse legal systems, including international law, common law, civil law, and Israeli law.<sup>255</sup>

The judiciary is not the only branch of government to be affected by the constitutionalization of proportionality in Israel. According to Chief Justice Barak, “the executive branch has internalized the constitutional revolution.”<sup>256</sup> All government legislation and administrative actions “are carefully evaluated to determine if they pass constitutional muster,” and the Attorney General and departmental legal advisers have inculcated the civil service in the framework of rights analysis.<sup>257</sup> Chief Justice Barak also wrote that “the legislative branch takes the constitutional change seriously,” and “exercises great caution on this issue.”<sup>258</sup> However, unlike in Canada, Israel’s Supreme Court continues to conduct its proportionality analysis *de novo*, without regard to the judgments of other branches regarding the constitutionality of their actions.<sup>259</sup>

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252. *Id.* at 836–37, translated in ISR. L. REP. 264, 293 (2004).

253. *Id.*

254. *Id.* at 837–48, translated in ISR. L. REP. 264, 294–95 (2004).

255. *Id.* at 839–40, translated in ISR. L. REP. 264, 296–97 (2004).

256. Aharon Barak, *Human Rights in Israel*, 39 ISR. L. REV. 12, 19 (2006).

257. *Id.*

258. *Id.*

259. The Court forcefully defended its prerogative to make an independent proportionality ruling in the *Beit Sourik* case:

The second question examines the proportionality of the route of the separation fence, as determined by the military commander. This question raises no problems in the military field; rather, it relates to the severity of the injury caused to the local inhabitants by the route decided upon by the military commander . . . The standard for this question is not the subjective standard of the military commander. The question is not whether the military commander believed, in good faith, that the injury is proportionate. The standard is objective. The question is whether, by legal standards, the route of the separation fence passes the tests of proportionality. This is a legal question, the expertise for which is held by the Court.”

IsrSC 58(5) 807, para. 48.

## B. *International Regimes*

We now turn to the consolidation of PA in three regimes created by international law: the European Convention on Human Rights, the European Community, and the World Trade Organization. Through their courts, these regimes have evolved important constitutional features, leading scholars to engage in lively debates about whether they have been “constitutionalized” in some meaningful way.<sup>260</sup> Regardless of how we respond to this issue,<sup>261</sup> these debates are data. They alert us to the fact that something transformative has happened to which traditional concepts and categories, drawn from comparative or international law and politics, may not easily apply.<sup>262</sup>

In each of the cases, PA is directly implicated in the processes and outcomes on which scholars typically focus when they argue about constitutionalization. The finding should not surprise. In each regime, a trustee court has been delegated the task of enforcing treaties, and these instruments possess, or have evolved to manifest, a now familiar structure. Core treaty values, such as a right of an individual or a state, are qualified by other important values, qualifications expressed in the form of derogations that states may claim in the public interest. In our view, a court that adjudicates conflicts arising from such a structure is a court operating in a constitutional mode, inherently, irrespective of how one understands the “constitutional” nature of the regime more broadly. The fact that the high courts of these regimes have embraced PA, a global constitutional standard, supports the point.

### 1. The European Community

The Treaty of Rome, which entered into force in 1959, constituted the European Community (EC), the first pillar of the European Union.<sup>263</sup> Most important, the Treaty laid down a blueprint

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260. See *supra* notes 2–4.

261. See Alec Stone Sweet, *What is a Supranational Constitution? An Essay in International Relations Theory*, 55 REV. POL. 441 (1994).

262. Neil Walker, *The EU and the WTO: Constitutionalism in a New Key*, in THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES 31 (Gráinne De Búrca & Joanne Scot ed., 2001).

263. Treaty Establishing the European Economic Community, Mar. 25, 1957, 298

for building a “single” or “common” market. Market-building was to proceed through two linked processes. “Negative integration” refers to the process through which barriers to cross-border economic activity within Europe would be removed; and “positive integration” refers to the process through which the EC’s legislative organs would produce “harmonized,” “supranational” market regulations, to replace the kaleidoscope of national measures.

In 1970, the European Court of Justice (ECJ) took a first step toward recognizing proportionality as an unwritten, general principle of EC law.<sup>264</sup> It derived a necessity requirement (LRM) from a ban on discrimination, without citing source or authority. Today proportionality governs lawmaking and adjudication in virtually all important domains of law established by the Treaty of Rome. Indeed, the consensus among doctrinal authorities is that proportionality is inherent to any proper legal system, and therefore to the EU, being “an expression of the principle of rule of law.”<sup>265</sup>

PA constitutes the foundation of the ECJ’s jurisprudence on the four freedoms—free movement of goods, labor, capital, services (and establishment)—and of the Court’s approach to indirect sex discrimination.<sup>266</sup> It is at the heart of the Community’s largely judge-

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264. We believe that the first instance in which the ECJ applied a LRM test was in the *Internationale Handelsgesellschaft* case, where it stated: “A public authority may not impose obligations on a citizen except to the extent to which they are strictly necessary in the public interest to attain the purpose of the measure.” T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 152 (5th ed. 2003) (citing Advocate General Dutheillet de Lamothé in Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1146). In that case, the Advocate General derived it from former Article 40 (now Article 34) of the Treaty, the pertinent part of which states: “The common organization [for administering the Common Agricultural Policy] shall be limited to pursuit of the objectives set out in Article 33 and shall exclude any discrimination between producers or consumers within the Community.” Jürgen Schwarze, *The Role of General Principles of Administrative Law in the Process of Europeanization of National Law*, in *STUDIES ON EUROPEAN PUBLIC LAW* 24, 37 (Luis Ortega Alvarez ed., 2005). In any event, in *Schraeder*, the Court announced that “the principle of proportionality is one of the general principles of Community law. By virtue of that principle, measures . . . are lawful provided that [they] are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question. Of course, when there is a choice between several appropriate measures, the least onerous measure must be used . . . .” Case 265/87, *Schraeder v. Hauptzollamt Gronau*, 1989 E.C.R. 2237, 2269.

265. Schwarze, *supra* note 263, at 37.

266. STONE SWEET, *supra* note 2, at 165–70; see generally Giacinto della Cananea, *Beyond the State: The Europeanization and Globalization of Procedural Administrative Law*, in *STUDIES ON EUROPEAN PUBLIC LAW*, *supra* note 263, at 68.

made system of administrative law, and applies to mergers and anti-trust law. PA also dominates the ECJ's approach to the fundamental rights, which the Court incorporated into the Treaty of Rome, during the 1969–74 period, as “general principles of law.”<sup>267</sup> The Member States have ratified these moves in various ways, helping to institutionalize proportionality as an overarching, constitutional principle. The ill-fated 2004 European Constitution contained an elaborate, 54-article, Charter of Fundamental Rights of the European Union. Following the ECJ's lead, Article 52 states:

Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

The Charter, including Article 52, was part of the package of reforms agreed to by Member States in December 2007 (the Lisbon Treaty), now in the process of being ratified.<sup>268</sup>

After the consolidation of the ECJ's “constitutional” doctrines of supremacy and direct effect,<sup>269</sup> the emergence of proportionality

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267. Case 4/73, *Nold v. Comm'n*, 1974 E.C.R. 491, 507. The Treaty of Rome contains no unified catalogue of rights and instead establishes them in various articles of Titles I and III. See *supra* note 262. The Court cited the “constitutional traditions common to the Member States” and the European Convention on Human Rights as sources. *Id.*; see also Case 127/73, *Belgische Radio en Televisie v. Societe Belge des Auteurs, Compositeurs et Editeurs*, [1974] 2 COMMON MKT. L. R. 238, 246–47; Joseph H.H. Weiler & Nicolas J.S. Lockhart, “*Taking Rights Seriously*” *Seriously: The European Court and its Fundamental Rights Jurisprudence—Part I*, 32 COMMON MKT. L. REV. 51, 84–94 (1995).

268. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, ¶ 8, Dec. 13, 2007, 2007 O.J. (C 306) 1, 13, available at <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2007:306:SOM:EN:HTML>.

269. The doctrine of supremacy, first announced in *Costa*, lays down the rule that, in any conflict between an EC legal rule and a rule of national law, the former must be given primacy. Case 6/64, *Costa v. E.N.E.L.*, 1964 E.C.R. 1141, 1159–60. Indeed, according to the Court, every EC norm, from the moment of entry into force, “renders automatically inapplicable any conflicting provision of . . . national law,” including national constitutional rules. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629, 643. Where the doctrine of direct effect holds, EC norms confer—directly upon individuals—legal rights that public authorities must respect, and which can be pleaded in the national courts. The Treaty of Rome contains no supremacy clause, and does not provide for the direct effect of Treaty provisions or an important category of legislation, namely, the directive. See STONE SWEET, *supra* note 265, at 66–71.

balancing as a master technique of judicial governance is the most important institutional innovation in the history of European legal integration. We will briefly illustrate the point here with reference to the major outcomes produced by the Court in the free movement of goods domain, focusing on Article 28 of the Treaty of Rome, which prohibits non-tariff barriers to trade. No other provision of the Rome Treaty has been more implicated in market-building, and in defining the relationship between the scope and authority of European law, on the one hand, and the regulatory autonomy of the Member States, on the other.

The Rome Treaty required the Member-States to eliminate national barriers to intra-EU trade by the end of 1969, while enjoining the EC's legislative organs to adopt "harmonized" EC market regulations in a timely fashion. Article 28 states that "Quantitative restrictions on imports and all measures having equivalent effect [MEEs] shall be prohibited between member-states." Article 30 permits a Member State to derogate from Article 28, on grounds of public morality, public policy, public security, health, and cultural heritage, though derogations may "not . . . constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States." In its jurisprudence on Article 28, the Court would later add additional headings, including consumer protection, the protection of working conditions, and environmental protection.<sup>270</sup>

By the early 1970s, for various reasons, the Member States had made little effort to abolish MEEs—non-tariff barriers—on their own, and harmonization efforts had stalled in Brussels. The Court then took the lead. In a series of rulings responding to preliminary references from national judges, the ECJ gave almost unlimited scope to the reach of Article 28. In *Dassonville* (1974), its first ruling on Article 28, the Court announced that "all trading rules . . . capable of

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270. With *Cassis de Dijon*, the ECJ added "fiscal supervision," the "protection of public health," the "fairness of commercial transactions," and defense of the consumer." Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649, 662. Subsequent rulings added the "improvement of working conditions," Case 155/80, *Sergius Oebel*, [1983] 1 COMMON MARKET. L.R. 390, 399, and the "protection of the environment," Case 302/86, *Comm'n v. Denmark (Danish Bottles)*, 1988 E.C.R. 1-4607, 4630. Although the Court's source for these new headings is Article 28 (originally Article 30 before renumbering in 1999 by the Treaty of Amsterdam), they are subject to PA in exactly the same way that the Court treats claims for derogations under Article 30 (originally Article 36).

hindering directly or indirectly, actually or potentially” intra-EC trade constituted MEEs, and were therefore presumptively illegal.<sup>271</sup> The ECJ understood the political implications of its holding for both negative and positive integration. The unconstrained removal of national regulations would strip bare legal regimes serving an otherwise legitimate public interest. Further, where the EC’s legislator was unable to produce harmonized legislation in a timely fashion, this lack of protection might not only endure, but could weaken public and political support for integration down the road. The ECJ therefore ruled that the Member States could, within reason, continue to regulate the production and sale of goods in the public’s interest, pending harmonization. But it stressed that the judiciary would control the condition of “reasonableness” strictly, on a case-by-case basis. In its next important ruling on the matter, *De Peijper* (1975), the Court held that all claimed derogations to Article 28 would be subject to a LRM test.<sup>272</sup> Finally, in *Cassis de Dijon* (1979), the Court extended the reach of Article 28—and thus of the *Dassonville* formulation and the application of LRM tests—to all national measures, thereby capturing all market regulations, including those applying to domestic and foreign goods without distinction.<sup>273</sup>

The impact of adjudicating Article 28 on the overall course of European integration has been profound and multi-dimensional. After *Dassonville*, and for more than two decades afterwards, the litigation of Article 28 in national courts dominated the Court’s case load. The issues raised were inherently constitutional ones and, in responding to them, the Court, not the Member States, generated the constitutional blueprint for market federalism in Europe. In enforcing Article 28, the legal system punched large holes in national regulatory frameworks. As important, it also raised the costs of political deadlock in Brussels, produced templates for harmonized legislation, and enhanced the power of the Commission and transnational business *vis à vis* Member State governments. As a great deal of sophisticated empirical research has shown, the Court’s Article 28 jurisprudence was critical to “the relaunching of Europe,” and the breaking of the impasse, through the Single European Act

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271. Case 8/74, *Procureur du Roi v Benoît and Gustave Dassonville*, 1974 E.C.R. 837.

272. Case 104/75, *Officier van Justitie v. De Peijper*, 1976 E.C.R. 613.

273. Case 120/78, *Cassis de Dijon*, 1979 E.C.R. 649.



(1986).<sup>274</sup>

The Court's impact on the evolution of market federalism in the Europe rests on two necessary doctrinal conditions, which should be considered against the backdrop of its status as a trustee court.<sup>275</sup> The first is the consolidation of direct effect and supremacy of Article 28 in national legal orders: direct effect enabled individuals to plead Article 28—which confers upon them trading rights—before national judges; and supremacy required national judges to enforce these rights when they come into conflict with national measures. The second is the move to PA, which organizes deliberation about the proper limits of national regulatory autonomy, given the EC's commitment to free trade. Hans Kutscher and Pierre Pescatore were the intellectual leaders in this move. Kutscher, who was a judge on the German Federal Constitutional Court during its crucial foundational period (1955–69), came to the ECJ in 1970, and served as the President of the ECJ from 1976 to 1980. Pierre Pescatore<sup>276</sup> left a professorship for the ECJ in 1967, and served on the Court until 1985.

The legal system uses PA as an instrument for determining when national regulations are, in fact, Article 28-illegal non-tariff barriers. If a national measure does not pass the LRM test, then it constitutes “a disguised restriction on trade between Member States” under Article 30.<sup>277</sup> One might wonder at an international court that claims for itself the authority to generate and consider alternative means to achieving policy goals. After all, national governments and

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274. See, e.g., MICHELLE P. EGAN, *CONSTRUCTING A EUROPEAN MARKET: STANDARDS, REGULATIONS, AND GOVERNANCE* (2001); MIGUEL POIARES MADURO, *WE, THE COURT: THE EUROPEAN COURT OF JUSTICE AND THE EUROPEAN ECONOMIC CONSTITUTION* (1998); STONE SWEET, *supra* note 2, ch. 3 (concerning the free movement of goods); Joseph H.H. Weiler, *The Transformation of Europe*, 100 *YALE L.J.* 2403 (1991).

275. Its rulings on the Treaty can only be “overturned” by unanimous vote of the Member States, which now number twenty-seven.

276. Pescatore, a law professor, mentions proportionality as a general principle of law in a 1970 article, written while he was on the Court. Pierre Pescatore, *Fundamental Rights and Freedoms in the System of the European Communities*, 18 *AM. J. COMP. L.* 343, 350 (1970).

277. The ECJ may proceed through each stage of PA, including balancing in the strict sense, although the LRM test clearly has the most bite and importance. In addition, the ECJ sometimes integrates elements of balancing in the strict sense into necessity analysis. See FEDERICO ORTINO, *BASIC LEGAL INSTRUMENTS FOR THE LIBERALISATION OF TRADE: A COMPARATIVE ANALYSIS OF EC AND WTO LAW* 471 (2004). For a recent overview of the state of PA in the Court's approach to Article 28, see Opinion of Advocate General Miguel Poiares Maduro, C-434/04, *Ahokainen v. Virallinen Syyttäjä* (Public Prosecutor), 2006 E.C.R. I-09171, ¶¶ 23–32.

legislators have already balanced the interests at play in such cases. In response to this concern, it would seem, the ECJ quickly developed the practice of identifying alternative, Article 28-compatible, policies that one could reasonably expect the Member State to have adopted in the first place. In such cases, the Court goes out of its way to demonstrate that its preferred options are more appropriate and effective means of achieving the pleaded state interest, in addition to being less restrictive on intra-EC trade. As a strategic move, it would seem that the more easily the Court can generate a list of reasonably available, at least as effective, alternatives to the defendant's Article-28 illegal measures, the more the Court's policymaking role can be defended. We will explore this point further in the next section, with respect to WTO practice, and again in the conclusion.

In the EC/EU context, the Courts' move to proportionality can be characterized as having "constitutional" importance—or is inherently constitutional—in at least two ways. First, when it deploys PA, the ECJ is doing what constitutional and supreme courts do, namely, managing tensions and conflicts between rights and freedoms, on the one hand, and the power of the EC/EU and of Member States, on the other. Second, harnessed to the "constitutional" doctrines of supremacy and direct effect, PA constitutes a mechanism of coordination between the supranational legal order and national legal orders. When the ECJ first embraced it at the end of the 1960s, proportionality was native to only one Member State: Germany. In its jurisprudence on the free movement of goods, indirect sex discrimination, and other legal domains, the ECJ required national judges to use PA when they reviewed the legality of national law and practice under EC law. As has been documented, some national judges initially resisted this "obligation."<sup>278</sup> As the formalization of the principle of proportionality has proceeded, resistance has been steadily withering, a process reinforced by choices made by the European Court of Human Rights.

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278. See STONE SWEET, *supra* note 2, at 168–70.

## 2. The European Convention on Human Rights

The ECHR<sup>279</sup> is the most effective human rights regime in the world, today covering the territory of 46 states and more than 800 million people. The Convention, which entered into force in 1953, established a basic catalogue of rights binding on the signatories, and new institutions charged with monitoring and enforcing compliance. Distinctive at its conception, the ECHR has evolved into an intricate legal system. The High Contracting Parties, in successive treaty revisions, have steadily upgraded the regime's scope and capacities. They have added new rights, enhanced the powers of the European Court of Human Rights, and strengthened the links between individual applicants and the regime. For its part, the Strasbourg Court has built a sophisticated jurisprudence, whose progressive tenor and expansive reach have helped to propel the system forward. Today, the Court is an important, autonomous source of authority on the nature and content of fundamental rights in Europe. In addition to providing justice in individual cases, it works to identify and to consolidate universal standards of rights protection, in the face of wide national diversity. In a 1995 decision, the Court called the ECHR "a constitutional instrument" of European public law<sup>280</sup>; and Luzius Wildhaber, as President of the Court (1998–2007), argued strongly in favor of enhancing its "constitutional" functions.<sup>281</sup>

The ECHR, it was originally assumed, established minimal, lowest-common denominator, standards for basic human rights.<sup>282</sup> Yet, today, it is obvious that the Court routinely develops what have been, for many Member States, "new" rights and remedies.<sup>283</sup> In

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279. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

280. *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (ser. A) at 27 (1995).

281. Luzius Wildhaber, *A Constitutional Future for the European Court of Human Rights?*, 23 HUM. RTS. L.J. 161 (2002).

282. See Danny Nicol, *Original Intent and the European Convention on Human Rights*, 2005 PUB. L. 152.

283. According to the Court, the ECHR is not a "static" but a "living instrument," and its contents must be interpreted to secure effective rights protection for individuals, as European society evolves. Alongside this teleology of purpose and effectiveness, the Court has developed an overarching comparative methodology, one result of which is to ensure a creative role for itself. In defining the content and scope of Convention rights, the Court will typically survey the state of law and practice in the Member States, and sometimes beyond. Where it finds an emerging consensus on a new, higher standard of rights protection among states, it may move to consolidate this consensus, as a point of Convention law binding upon all members. Formally, the Court's role is restricted to determining whether a Member State

response, Member States have neither rolled back their commitments nor curbed the Court. Instead, they have added new rights to the Convention catalogue, using a series of optional protocols; and they have introduced major organizational and procedural changes, the most important of which came through Protocol 11. Protocol 11, which entered into force in November 1998, centralized administrative authority to process claims in the Court.<sup>284</sup> Under Protocol 11, individuals petition the Court directly, after exhausting domestic remedies. Most Member States have also enhanced the status of Convention rights through “domestication”: the incorporation of the Convention into domestic law. In most cases, incorporation means that individuals may plead Convention rights before national judges, who can directly enforce them. A victim of its success, the post-Protocol 11 system is chronically overloaded, with a backlog of over 100,000 pending cases already judged to be admissible. In 2006, the Court received more than 50,000 individual petitions and issued 1,560 judgments on the merits.<sup>285</sup>

The Convention proclaims some state obligations to be firm prohibitions (of torture, degrading treatment, and slavery),<sup>286</sup> but most rights are “qualified” in various ways. Most important for our purposes, Articles 8–11 are qualified by a necessity clause. States may only “interfere” with the exercise of rights to privacy and respect for family life, and the freedom of thought, conscience, religion, expression, assembly, and association, when such interferences are “necessary in a democratic society” and “in the interests of” some specified public good. Legitimate state purposes mentioned include “national security,” “public safety,” “the economic well-being of the country,” “the prevention of disorder or crime,” “the protection of health or morals,” and “the protection of

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has infringed upon Convention rights in any specific case. Increasingly, it would seem that the Court considers that an important oracular function inheres in its jurisdiction. Today, the Court is the unrivalled master of the Convention, a posture it uses to construct European fundamental rights in a prospective and progressive way.

284. In the beginning, the European Commission of Human Rights (established in 1954), was charged with monitoring compliance with rights under the Convention, filtering applications, and bringing enforcement actions to the European Court of Human Rights (established in 1959). With Protocol 11, the Commission was abolished and its most important functions were given to the Court.

285. EUROPEAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 2006, p 13, available at [http://www.echr.coe.int/NR/rdonlyres/4729C3F9-D38F-42AC-8584-BCA56E26BC5C/0/Annual\\_Report\\_2006.pdf](http://www.echr.coe.int/NR/rdonlyres/4729C3F9-D38F-42AC-8584-BCA56E26BC5C/0/Annual_Report_2006.pdf). The 2007 Report has not yet been released.

286. These are contained in Articles 3 and 4, respectively.

the rights and freedoms of others.” These rationales for restricting rights are exhaustive: Article 18 prohibits states from infringements “for any purpose other than those . . . prescribed.”<sup>287</sup>

The Court subjects all Convention rights to balancing,<sup>288</sup> and has developed a German-style proportionality approach to Articles 8–11, and to Article 14 (non discrimination on sex, race, color, language, religion, political opinion, national origin, etc.). Like national constitutional courts, the Court faced the problem of determining the standard for judging necessity, but the problem was exacerbated by wide national variance in approaches to judicial review. By the early 1970s, the proportionality framework was routinely used in Germany, and was just emerging in the EU under the ECJ’s tutelage, but PA was virtually unknown in all of the other High Contracting Parties of the Council of Europe, with the exception of Switzerland.<sup>289</sup> The main agent of this development was Professor Jochen Frowein, a member of the Commission on Human Rights (1973–93), its Vice President (1981–93), and long associated with the Max Planck Institute for Comparative and International Law, Heidelberg, including as director.

The Court’s turn to proportionality was heavily conditioned by its confrontation with cases coming from the U.K., where the “*Wednesbury* reasonableness” test—a type of highly deferential, “rational basis” standard—governed applications for judicial review of government acts.<sup>290</sup> This conflict—between German-style PA and U.K.-style reasonableness—is a deeply structural one, implicating the most basic constitutional precepts of a legal system wherever it arises. Simplifying a complex reality, the U.K.’s accession to the EC led judges to create exceptions to certain core precepts of parliamentary sovereignty. The ECJ’s supremacy doctrines meant relaxing the U.K.’s doctrine of implied repeal and enforcing EC law, even against subsequent law; and the move to proportionality meant evolving new remedies, and the relaxation of the *Wednesbury*

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287. See *supra* note 278.

288. “In practice, the European Court engages in balancing in the context of almost every Convention right.” Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174, 182 (2006).

289. Alec Stone Sweet & Helen Keller, *Introduction: The Reception of the ECHR in National Legal Orders*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 19 (Alec Stone Sweet and Helen Keller eds., 2008).

290. *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948] 1 K.B. 223 (U.K.).

standard. But traditionalists could nonetheless assert that these exceptions were limited to those legal domains governed directly by EC law. Because the ECHR potentially governs virtually all domains of law and judicial practice, the Strasbourg Court's adoption of PA had the potential of fatally undermining not only *Wednesbury*, but every other practical implication of parliamentary sovereignty.

The Court's first serious dealings with the limitation clauses of the Convention came in *Handyside v. the United Kingdom* (1976),<sup>291</sup> an Article 10 case involving the censorship of a book on public morals grounds. In its ruling, the Court observed that "the adjective 'necessary,' within the meaning of Article 10 (2) is not synonymous with 'indispensable' [and] neither has it the flexibility of such expressions as . . . 'admissible,' . . . 'useful,' 'reasonable,' or 'desirable.'" Nevertheless, it was "for national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of 'necessity' in this context."<sup>292</sup> The Court then found that the U.K. had exercised its "margin of appreciation"—today jargon denoting the discretion of states to strike the proper balance in the first instance—on the matter properly, but insisted that the use of such authority must "go hand in hand with . . . European supervision."<sup>293</sup> The Court did not go further. In *Dudgeon v. the United Kingdom* (1981),<sup>294</sup> however, the Court declared measures that criminalized homosexual acts to be "disproportionate," on LRM grounds, in the context of the right to privacy (Article 8). Building on *Dudgeon*, the Court then entrenched a version of PA as a general approach to qualified rights.

In doing so, the Court became a powerful agent in PA's diffusion into national legal orders. In two more recent privacy cases, *Smith and Grady v. United Kingdom* (1999),<sup>295</sup> and *Peck v. United Kingdom* (2003),<sup>296</sup> the Court strongly criticized U.K. courts for continuing to apply *Wednesbury* rather than a LRM-based necessity test. In *Peck*, the Court noted that U.K. judges refused to entertain pleadings based on the Convention except where claimants could show that public authorities had acted "irrationally in the sense

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291. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) (1976).

292. *Id.* at 22.

293. *Id.* at 23.

294. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 24 (1981).

295. *Smith and Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999).

296. *Peck v. United Kingdom*, 36 Eur. H.R. Rep. 41 (2003).

that they had taken leave of their senses, or had acted in a manner in which no reasonable authority could have acted.” In both *Smith and Grady* (unlawful discrimination against homosexuals in the armed services) and *Peck* (unlawful broadcasting of closed circuit camera footage) the Court held that the absence of necessity review by the U.K. courts, *per se*, constituted a breach of Article 13: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority.”<sup>297</sup> In both cases, the Court noted that U.K. judges had strongly implied that they would have found for the applicants, but for the *Wednesbury* restriction.<sup>298</sup> Thus, it can be argued that the Court was helping U.K. judges overcome a restriction that had made it impossible for them to fulfill their obligations under the Convention.

Peck’s application for judicial review was rejected by the High Court in 1997, and the European Court’s judgment on the merits did not come until 2003. In the meantime, the 1998 Human Rights Act<sup>299</sup> incorporated the ECHR into U.K. law and, in 1999, the House of Lords adopted PA as the procedure for determining necessity.<sup>300</sup> Under the Act, individuals may plead the ECHR before U.K. judges, and judges may enforce Convention rights. A court,

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297. *Id.* at 137:

Where a public authority has exceeded its powers or has acted irrationally or has reached a decision in breach of the rules of procedural fairness, then a person aggrieved may challenge the decision by means of judicial review. If a decision is so disproportionate to its intended objective as to be irrational, the Court will strike it down. The English courts do not recognise proportionality as a separate head of judicial review. However, in the case of *R. (Alconbury Developments Ltd) v. Secretary of State for the Environment, Transport & the Regions* [sic] [2001] 2 Weekly Law Reports 1389, Lord Slynn of the House of Lords stated obiter dictum that: ‘I consider that even without reference to the Human Rights Act 1998 the time has come to recognize that this principle [of proportionality] is part of English administrative law, not only when judges are dealing with Community acts but also when they are dealing with acts subject to domestic law.’

298. *Id.* See also *Smith and Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999).

299. Human Rights Act, 1998, c. 42, available at <http://www.opsi.gov.uk/acts/acts1998/19980042.htm>.

300. In *de Freitas v. Permanent Secretary of Ministry of Agriculture, Fisheries, Lands, and Housing*, 1 A.C. 69, 80 (P.C. 1998), the Privy Council of the House of Lords observed that to determine whether a limitation on Convention rights was arbitrary or excessive the courts should ask themselves “whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.”

however, may not annul or disapply statutes that violate the Convention—it may only issue a declaration of incompatibility. The Government and Parliament can maintain incompatible statutes, but they must give reasons for why they have chosen to do so (the doctrine of implied repeal does not apply). The judicial politics of the Human Rights Act are in rapid development, and PA will be central to how the relationship between judges and legislators evolves.

Although U.K. courts profess to have abandoned the “reasonableness” test when it comes to rights review under the Act, they do not always apply the LRM test with rigor. Many judges, even those on high courts, consider necessity analysis to be an inherently legislative mode of decision-making; some use the necessity stage merely to affirm legislative discretion, even sovereignty. In doing so, they expose themselves to censure under the Convention. In *Hirst v. United Kingdom*,<sup>301</sup> for example, a 2005 case involving the voting rights of incarcerated prisoners, the Strasbourg Court condemned the U.K., in part, on the grounds that neither the U.K. Parliament, nor the judiciary,<sup>302</sup> had “ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote.”<sup>303</sup> In consequence, the British and the Scottish Governments are now preparing reforms, while taking care to build a record of their own proportionality-based determinations.<sup>304</sup>

Under the Court’s supervision, PA is now in the process of diffusing to every national legal order in Europe, where it will typically be absorbed as a *constitutional* principle. In the territory covered by the Convention today, the failure on the part of national courts to use PA when they adjudicate qualified rights and non-discrimination cases is itself an infringement of Convention rights—to judicial remedy. Further, the scope of the proportionality principle extends to the exercise of all public authority. In *Hirst*, the Court

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301. *Hirst v. United Kingdom*, App. No. 74025/01 (Eur. Ct. H.R. Oct. 6, 2005).

302. Writing for the Divisional Court, Lord Justice Kennedy stated: “The European Court also requires that the means employed restrict the implied Convention rights to vote are not disproportionate, and that is the point at which, as it seems to me, it is appropriate for this court to defer to the legislature.” *Id.* at para. 16.

303. *Id.* at paras. 79–80.

304. See Isobel White, *Convicted Prisoners and the Franchise*, (House of Commons Library Standard Note SN/PC/1764, Jan. 24, 2007), available at <http://www.parliament.uk/commons/lib/research/notes/snpc-01764.pdf>.



pointedly criticized the U.K. Parliament, as well, for having failed to deliberate the proportionality of legislation when it was adopted. Proportionality is a transnational principle that casts an ever-deepening shadow over both national rights adjudication and policymaking more broadly conceived.

As in the EC/EU, PA constitutes a basic mechanism of coordinating between the ECHR and national legal systems, and among diverse national systems. In our view, this type of coordination is inherently constitutional. As it has developed in the ECHR, PA is the means by which the Court supervises how states use their margin of appreciation to delimit rights on the ground. Further, the Court has developed a simple comparative method for determining when “new” rights have emerged, and when the scope of existing rights expands. Typically, it will raise the standard of rights protection, in a given area, when a sufficient number of states no longer limit rights in that area for reasons of public interest. The margin of appreciation enjoyed by states shrinks as consensus on higher standards of rights protection emerges among states, which then shifts the balance in favor of the right claimant. The Court can thus claim that there is some external, “objective” means of determining the weights to be given to the values in conflict, and it can usually (until recently) claim that its bias is majoritarian and transnational.

Finally, we have focused on the U.K. case, stressing the Strasbourg Court’s choice to require national officials to assess the proportionality of acts that limit Convention rights. Yet, for the vast majority of national judges operating under the Convention, adopting PA enhances significantly their authority relative to that of legislative and executive officials. In strongly monist Netherlands, where the prohibition of judicial review of statute trumps the bill of rights, the Convention now plays the role of a shadow constitution, or surrogate charter of rights, since the ECHR is directly enforceable by the courts, whereas Dutch rights are not.<sup>305</sup> The turn to PA requires the Dutch courts to do what before they were forbidden to do, and they are now doing it. The same is true of the situation in France. The courts now review the Conventionality of French laws, despite the prohibition of judicial review, and they do so using a proportionality standard, which is a far more intrusive standard than those (manifest

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305. See *supra* note 289, at 686.

error, illegality, *ultra vires*) that PA replaced. In Italy, proportionality is driving out the more relaxed reasonableness standard. We could go on; but our point is that, in virtually every European state, the relationship between judicial power and all other public authority is being redrawn.<sup>306</sup> The major exception is Germany, where PA had already been constitutionalized. Once the Strasbourg Court adopted PA, it created the potential for conflict with the GFCC, since individuals may apply to Strasbourg when they believe that German courts have failed to balance correctly.<sup>307</sup>

### 3. The World Trade Organization

The WTO, which entered into force on January 1, 1995, absorbed or replaced institutional features that had evolved under the General Agreement on Tariffs and Trade (GATT). The GATT-WTO's purpose is to facilitate the expansion of international trade, through legislating and enforcing trade law for its members: sovereign states. In 1948, when the GATT entered into force, "anti-legalism" reigned in the regime.<sup>308</sup> The treaty did not provide for TDR, and diplomats pointedly excluded lawyers from GATT organs. In the 1950s, TDR nonetheless emerged, in the form of the Panel System. Panels, of three to five members, usually GATT diplomats, acquired their authority through the consent of two disputing states. In the 1970s and 1980s, the system underwent a process of judicialization.<sup>309</sup> States began to litigate disputes aggressively, deploying lawyers who used standard litigation techniques; jurists and trade specialists replaced generalist diplomats on panels; and panels began treating their output as case law, a process encouraged

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306. The volume, *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS*, *supra* note 288, examines the influence of the case law of the European Court of Human Rights on eighteen national legal systems. Among other things, the book tracks and evaluates comparatively the effects of decisions on the part of national courts to adopt PA. For a comparative assessment, see *supra* note 288, at 698–701.

307. Major conflicts have, in fact, ensued. See Elisabeth Lambert Abdelgawad & Anne Weber, *The Reception Process in France and Germany*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS*, 35–37, 41.

308. OLIVIER LONG, *LAW AND ITS LIMITATIONS IN THE GATT MULTILATERAL TRADE SYSTEM* 70–71 (Martinus Nijhoff Publishers 1985); Robert E. Hudec, *The Judicialization of GATT Dispute Settlement*, in *IN WHOSE INTEREST?: DUE PROCESS AND TRANSPARENCY IN INTERNATIONAL TRADE* 137 (M.H. Hart and D. Steger eds., 1992).

309. See Alec Stone Sweet, *The New GATT: Dispute Resolution and the Judicialization of the Trade Regime*, in *LAW ABOVE NATIONS: SUPRANATIONAL COURTS AND THE LEGALIZATION OF POLITICS* 118, 124 (Mary L. Volcansek ed., Univ. Press of Fl. 1997); Stone Sweet, *supra* note 19, at 165.

and ratified by the litigating lawyers. Judicialization helped to generate the conditions necessary for the emergence of the WTO, which established a system of adjudication on the basis of compulsory jurisdiction. The panel system was, in part retained, but it is today crowned by a high appellate instance, called the Appellate Body (AB).

By our definition, the AB of the WTO is a trustee court. The myriad treaty instruments comprising the substantive law of the WTO can only be revised by unanimous vote (of 151 members today). The legal system provides third party dispute settlement to states, but virtually all important disputes are linked to questions of treaty interpretation. Thus, as in any constitutional regime, TDR and rule-adaptation (constitutional lawmaking) are nested activities. States are fully aware of this fact, and they use the panel system and the AB, in part, to evolve treaty rules they favor, and to block interpretations to which they reject. The AB is gradually exerting dominance over the legal evolution of the regime, which is to be expected given the legal system's steady case load, and the AB's trustee status.

The core legal text is the GATT (1947, 1994), which lays down the basic rules and principles of international trade. National law and practices related to taxation—customs regulatory transparency, subsidies, currency and balance of payment management, and the like—may all be manipulated in ways that will make them discriminatory, non-tariff barriers to trade. The GATT seeks to make such manipulation illegal, through a mixture of rules and standards governing such policies.

Unlike the post-Single European Act EU, the GATT-WTO has been unsuccessful at generating “positive integration”: law to address the negative externalities of trade. By default, Article XX (GATT) has become the main site for testing the limits of state competences to deal with such problems unilaterally, through litigation. Article XX contains a list of “General Exceptions” to the GATT.<sup>310</sup> Measures that come under one of the headings listed in

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310. The list begins after the “chapeau,” which states: “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 . . .” General Agreement on Tariffs and Trade (GATT) art. XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S.

Article XX, and meet the conditions that have been developed by panels and the AB, are permitted. Permissible exceptions include those national “measures” that are judged to be “necessary”: “to protect public morals” (XX [a]); “to protect human, animal, plant life or health (XX [b]); and “to secure compliance” with “customs enforcement” and “the protection of patents, trademarks and copyrights, and the prevention of deceptive practices” (XX [d]). Other headings include exceptions for measures “relating to”: “the products of prison labour” (XX [e]); and “the conservation of exhaustible natural resources” (XX [g]).

In a regime otherwise dominated by free trade values and legislative inertia, adjudicating Article XX has become the main “forum” in the WTO for deliberating countervailing interests and values.<sup>311</sup> In response to litigation and in an effort control the use of these exceptions and advance GATT-WTO law, panels and the AB developed a host of balancing techniques, often focusing on proportionality. Much of the law, politics, and scholarly discourse concerned with the question of if and how trade law can accommodate “societal values” other than free trade—including public health,<sup>312</sup> human rights,<sup>313</sup> and environmental protection<sup>314</sup>—is organized by the AB’s Article XX jurisprudence, and speculation on how the AB will decide cases in the future. The AB has been successful at focusing attention on Article XX by making it clear that WTO judges considers these values to be, at least *a priori*, as important as free trade.<sup>315</sup> Moreover, the AB has at times decided

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311. We focus here on disputes in which Article XX exceptions are pleaded by States. The legal system also uses PA, for varied purposes, to deal with disputes arising under other WTO agreements. See Mads Andenas and Stefan Zleptnig, *Proportionality: WTO Law in Comparative Perspective*, 42 *TEX. INT’L. L.J.*, 371, 416–23 (2007).

312. See, e.g., Robert Howse & Elisabeth Türk, *The WTO Impact on Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute*, in *TRADE AND HUMAN HEALTH AND SAFETY 77*, 77–78 (George A. Bermann & Petros C. Mavroidis eds., Cambridge Univ. Press, 2006).

313. See, e.g., Sarah Cleveland, *Human Rights Sanctions and International Trade: A Theory of Compatibility*, 5 *J. INT’L ECON. L.* 133 (2002).

314. See, e.g., Varamon Ramangkura, *Thai Shrimp, Sea Turtles, Mangrove Forests and the WTO: Innovative Environmental Protection Under the International Trade Regime*, 15 *GEO. INT’L ENVTL. L. REV.* 677 (2003).

315. A message reinforced by the AB’s insistence that claims to exceptions under Article XX must take place before Panels may proceed to analysis under the “chapeau,” which addresses free trade concerns, e.g., whether the measure under review constitutes “an arbitrary or unjustifiable discrimination between countries” or is a “disguised restriction on

that they outweigh trading rights.

The LRM test, with its “reasonably available alternative” corollary, emerged in a pre-WTO dispute, *U.S.—Section 337 of the Tariff Act of 1937* (1989).<sup>316</sup> In this dispute, the EC, pleading Article III, ¶ 4 (GATT),<sup>317</sup> successfully challenged a U.S. measure that treated patent infringement litigation differently, depending on the site of production of the good. The statute in question blocked access to the federal courts of cases involving foreign products manufactured under an American patent, pushing them into an agency, the International Trade Commission, where procedures and remedies were less advantageous for imports. The U.S. pleaded Article XX (d): the measure was “necessary to secure compliance with laws . . . relating to . . . the protection of patents.”<sup>318</sup> Indeed, it claimed that Section 337 “provided the only means of enforcement” available to it, since patent infringement cases involving goods manufactured abroad would always pose special problems (service of process, enforcement of judgments, etc.).<sup>319</sup> For its part, the EC could see no reason why the federal courts should not be used, and the Panel agreed.

What is crucial is the disagreement about the standard to be applied in necessity review: the EC argued for the application of a

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international trade.” GATT, *supra* note 309, at art. XX. See Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, paras. 112–22 WT/DS58/AB/R (Oct. 12, 1998). On the relationship between proportionality analysis and the review of state measures under the chapeau, see Andenas and Zleptnig, *supra* note 310, at 413–15. They state, *inter alia*, that “the AB focuses on the balancing of competing rights, interests, and obligations as a pre-dominant feature within chapeau analysis . . . [a] “process that resembles a proportionality analysis.” *Id.* at 414–15.

316. GATT Panel Report: *United States—Section 337 of the Tariff Act of 1930*, Nov. 7, 1989, GATT B.I.S.D. (L/6439-36S/345 36th Supp.) at 345 [hereinafter GATT Panel Report].

317. This reads as follows:

Article III: National Treatment on International Taxation and Regulation

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4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

318. GATT, *supra* note 309, art. XX(d).

319. GATT Panel Report, *supra* note 315, paras. 3.62, 3.63.

LRM test, and the U.S. advocated a rational basis standard.<sup>320</sup> It would seem that each side was proceeding on the basis of their understanding of how LRM tests are used *in their own systems*. In European national constitutional law, and under the Treaty of Rome and the ECHR, it is not rare to see statutes and administrative measures pass necessity review. In the U.S., the outcome is heavily prejudged: once a court decides to proceed to strict scrutiny, the act under review is likely to be invalidated under a LRM test. “Strict in theory, fatal in fact” goes the maxim. Indeed, the U.S. argued that: “Under the Community’s proposed standard, adoption by a contracting party of a regime different from that adopted by other States, for example for the protection of human, animal or plant life and health or of public morals, could never be justified . . . since it would have a trade restrictive effect and could not be shown to be objectively ‘necessary.’”

The three-member Panel, which included a former ECJ Judge and proponent of PA, Pierre Pescatore, simply adopted a solution that would be familiar to any consumer of the ECJ’s Article 28 (EC) case law, well-established in 1989:

[A] contracting party cannot justify a measure inconsistent with another GATT provision as “necessary” in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.<sup>321</sup>

As a technique of judicial review, the application of LRM analysis in GATT-WTO proceedings has proved to be as intrusive as it is in any national constitutional system. Much like their ECJ

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320. The U.S. had argued that: “The requirement [of necessity] did not impose an obligation to use the least trade restrictive measure that could be envisaged; this would invite continuous disputes regarding measures that the CONTRACTING PARTIES had clearly intended to exempt from the obligations of the General Agreement.” GATT Panel Report, *supra* note 315, para 3.59.

321. *Id.* recital 5.26.

counterparts, WTO judges will block claimed exceptions to GATT rules when a national measure fails proportionality, but only after scrutinizing, in micro detail, why and how the measure was adopted and applied in the first place. With necessity analysis, we would emphasize that such rejection is conditioned by a constraint. As in the EC, WTO judges routinely identify specific, “reasonably available,” less-restrictive-on-trade, policy alternatives that would pass the LRM test. Indeed, one might consider whether such a burden constitutes a kind of informal duty that binds the judge who would censure a measure on LRM grounds.

The next case involving necessity review under Article XX illustrates the point. In *Thai Cigarettes* (1990),<sup>322</sup> the U.S. attacked Thailand’s treatment of imported cigarettes, taking its arguments on necessity directly from *U.S.—Section 337 of the Tariff Act of 1937*, the case it had just lost.<sup>323</sup> Thailand taxed foreign-produced cigarettes higher than the domestic equivalent,<sup>324</sup> and subjected importers to a special licensing procedure.<sup>325</sup> In response, Thailand invoked Article XX (b), which permits national measures that are “necessary to protect human . . . life or health.” The measures under review, it claimed, were designed “to protect the public from harmful ingredients in imported cigarettes, and to reduce the consumption of cigarettes in Thailand.”<sup>326</sup> The Panel then gave a polite bow to Thailand,<sup>327</sup> recognizing the importance of the interests being pleaded, before moving to LRM analysis. Thailand could prevail “only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.”<sup>328</sup>

Our interest here is on how the Panel fleshed out this

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322. GATT Panel Report: Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, Nov. 7, 1990, GATT B.I.S.D. (DS10/R-37S/200) [hereinafter *Thai Cigarettes*].

323. See, e.g., *Thai Cigarettes*, para. 3.

324. In violation of art. III (GATT), on national treatment, and taxation.

325. In violation of art. XI (GATT), prohibiting quantitative restrictions.

326. *Thai Cigarettes* para. 76.

327. *Thai Cigarettes* para. 73. “[T]he Panel accepted that smoking constituted a serious risk to human health and that consequently measures designed to reduce the consumption of cigarettes fell within the scope of Article XX(b). The Panel [also] noted that this provision clearly allowed contracting parties to give priority to human health over trade liberalization; however, for a measure to be covered by Article XX(b) it had to be ‘necessary.’” *Id.*

328. *Id.* para. 75

standard.<sup>329</sup> The Panel suggested that other countries use labeling and “ingredient disclosure” requirements to permit “governments to control and the public to be informed of, the content of cigarettes.” Indeed, it went so far as to state that: “a non-discriminatory regulation . . . coupled with a ban on unhealthy substances, would be an alternative consistent with the GATT.” On the issue of reducing smoking, the Panel suggested that Thailand had a wide range of GATT-consistent options available to it: it could launch a publicity campaign against smoking; it could ban advertising of all cigarettes, or smoking in public places; it could enhance warnings on cigarette packages; it could use the state monopoly—the Thai Tobacco Monopoly—to restrict supply and raise prices. Thailand failed the necessity test (paragraph 81) precisely because the Panel could so easily come up with less-restrictive-on-trade alternatives.<sup>330</sup>

Once the new WTO legal system began operating, panels and the AB simply adopted the LRM approach to necessity analysis, refining it over time.<sup>331</sup> In WTO rulings rejecting an Article XX exception on necessity grounds coming after *Thai Cigarettes*, one finds the same compulsion to access the legitimizing resources of Pareto optimality.<sup>332</sup> As it has developed, the WTO version of necessity analysis often absorbs the balancing in the strict sense phase, importing elements of Alexy’s “law of balancing” into its jurisprudence. In *Korea-Beef* (2001), the AB provided a subtle analysis of the proportionality of national measures, with regard to the public health exception, and clarified its approach to necessity in important dicta:

The more vital or important . . . [the] common interests or values are, the easier it would be to accept as “necessary” a measure designed as an enforcement instrument. There are other aspects of the enforcement measure to be considered in evaluating

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329. *Id.* paras. 72–80.

330. *Id.* para. 81.

331. As far as we are aware, systematic treatment of the development and use of PA by GATT panels and the WTO “courts” does not exist, but see Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403 (2003), which focuses on the evolution of necessity analysis and its relationship to “cost-benefit analysis” under conditions of regulatory uncertainty.

332. See Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, paras. 162–66, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 5 (Dec. 11, 2000) [hereinafter *Korea Beef*].



that measure as “necessary.” One is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The greater the contribution, the more easily a measure might be considered to be “necessary.” . . . [D]etermination of whether a measure . . . [is] “necessary” . . . involves in every case a process of weighing and balancing a series of factors [that] include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

Claus-Dieter Ehlermann, a German, a veteran senior official of the European Commission, and a leading proponent of PA in trade law,<sup>333</sup> chaired the AB college that decided this case, and likely wrote the decision.

Today, scholars who argue that the WTO has been “constitutionalized” point, among other things, to the general, constitutional principle of proportionality.<sup>334</sup>

## V. ALL THINGS IN PROPORTION

Over the past half-century, most of the world’s most powerful high courts have adopted PA to deal with the most politically salient, and potentially controversial, issues to which they could expect to be exposed. The same is true of the courts of the EC/EU, the ECHR, and the WTO. Judges have embraced proportionality for similar reasons. Given the constitutional texts they have been asked to interpret and enforce, PA made it easy for them to prioritize the values that the polity itself has chosen to prioritize, even in the

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333. Mr. Ehlermann sat on the AB from 1995–2001, finishing as its chairman. Previously he had served the European Commission as Director-General of the Legal Service (1977–87), and Director-General for Competition (1990–95). *See* Biography of Dr. Dr. h.c. Claus-Dieter Ehlermann, [http://www.wilmerhale.com/clus-dieter\\_ehlermann/](http://www.wilmerhale.com/clus-dieter_ehlermann/) (last visited Oct. 20, 2008).

333. *See, e.g.,* CASS, *supra* note 4, at 55–56; Andenas & Zleptnig, *supra* note 310, at 425–26.

334. *See, e.g.,* CASS, *supra* note 4, at 34; Andenas & Zleptnig, *supra* note 310.

difficult situations in which these values would come into tension or conflict. Proportionality review is inescapably an exercise in applied constitutional (or international) lawmaking. But it also fits the mission of modern trustee courts, who govern political rulers by regulating the exercise of state authority in light of higher law norms that are assumed to be both constitutive and permanent. In each of the cases examined, courts first moved toward proportionality tentatively, before embracing it as an overarching principle of the legality. Today, judges around the world claim that PA is essential to the performance of their duties, a position the rest of us might consider more seriously. In our view, proportionality is today a foundational element of global constitutionalism.

We have also found that PA constitutes an important *doctrinal* underpinning for the expansion of judicial authority globally. This finding rests on certain necessary conditions, the most important of which is the prior turn to the New Constitutionalism. In Germany, Central Europe, and South Africa, the move to rights and PA was linked to democratization, given recent authoritarian pasts. In Canada, rights adjudication under the Bill of Rights (1960), a text possessing no supra-legislative rank, was infirm, stillborn. Under the Charter (1982), which has constitutional rank, the Canadian Supreme Court not only adopted PA but, through experience, rights have become a kind of civic religion in Canada, constraining in practice Parliament's use of its powers to override the Court's decisions. New Zealand maintained legislative sovereignty and modeled its Bill of Rights Act on the Canadian. Yet its courts, citing the Canadian Court's Charter jurisprudence as authority, embraced PA, thereby neutralizing its traditional, *Wednesbury*-based, deference posture. The move raises the question whether parliamentary sovereignty, traditionally conceived in Commonwealth countries, will survive anywhere.

More broadly, in every system examined, we found that a court's turn toward PA generated processes that served to enhance, radically, the judiciary's role in both lawmaking and constitutional development. To the extent that it is robust and on-going, PA inevitably becomes a primary mechanism of a polity's judicialization, and it triggers secondary mechanisms. Where the move to PA is successful, a court induces all other relevant actors in the system—future litigants and their lawyers, governmental

officials, legal scholars—to think of their roles in terms of proportionality. In the cases examined, that is exactly what has occurred. To be a skilled social actor in the constitutional politics of Germany, Canada, Israel, the EU, the ECHR, or the WTO means learning to reason and deploy the language of PA. For proof, consult lawyers' briefs to the proportionality judge, read the law professor's commentary on the court's rulings, or track the increasing extent to which non-judicial officials apply the principles of proportionality—and of the court's case law—to their own lawmaking. As a mode of judicial governance, PA casts a deep shadow on the lawmaking of non-judicial actors, while providing judges with a flexible means of managing sensitive legal questions in potentially explosive political environments.

We noted that the process through which proportionality has spread exhibits a viral quality. The theory presented in Part II helps us to understand part of what is going on, but only in the abstract. The case studies supplement this understanding, and allow us to make at least the following points, each of which deserves more attention in future research.

First, the emergence and early consolidation of PA depended heavily on the influence of legal scholars on judging, in Germany, and then on the influence of Germany on European law. Second, specific identifiable agents (judges and law professors-turned-judges) were instrumental in bringing PA to treaty-based regimes, including Hans Kutscher and Pierre Pescatore (to the ECJ), Jochen Frowein (to the ECHR), Pescatore and Claus-Dieter Ehlermann (to the WTO). In principle, one could map the network of individuals, and the connections between institutions, that facilitated the spread of PA. Again, one would find pervasive German influence. Third, in Europe, the EC/EU and the ECHR developed features of hierarchy that made possible what Powell and Dimaggio call a process of "coercive isomorphism": the diffusion of institutional forms and practices through legal obligation backed up by monitoring and enforcement mechanisms.<sup>335</sup> The Luxembourg and Strasbourg courts commanded other national courts to deploy PA, and announced that

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335. Paul J. Dimaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 63, 67–69 (Paul J. Dimaggio and Walter W. Powell eds., Univ. of Chicago Press 1991).

they would supervise how national judges actually do so. The codification of proportionality as positive law, through the EU Charter of Rights, for example, will further stigmatize resistance to the general movement. Fourth, as more and more courts adopted PA, the dynamics of diffusion became subject to logics of mimesis and increasing-returns (band-wagon effects): courts began copying what they took to be the emerging best-practice standard, thus ensuring the result. This process, one of choice not duty, can also be expressed in terms of what Powell and Dimaggio call “normative isomorphism,”<sup>336</sup> which explains the diffusion of forms through the building of normative consensus among an elite group, whose claim to authority and influence is knowledge-based. Judges and law professors are such a group, and those committed to PA are relatively coherent and self-regarding.

Although one finds firm support for the basic claims made in Part II of the paper, it is also clear that the kind of simple theory we have offered is neither meant or equipped to deal with much of the variance in how different courts actually use PA, on the ground as it were. The diffusion of PA adds layers of complexity to any truly comparative analysis, and some of this complexity will always escape attempts to build more general theory. Thus, though we find important, theoretically significant, similarities across cases, at least at some moderately high level of abstraction, we also confront important differences in how judges use PA, across time and jurisdiction. Most important, even a cursory survey of practice will show that, in every system, judges shape PA to their own purposes, with use. Further, we have every reason to expect that how proportionality is actually deployed, with what impact on the polity, will change over time.

One source of change will be exogenous: new issues and changing circumstances will lead judges to use PA differently. In this mode of adjudication, it is context, not the law *per se*, that varies. Change may also occur endogenously. A court, in processing a stream of cases in the same policy domain, may choose to accord more deference to legislative choices, over time, to the extent that lawmakers demonstrate that they are taking seriously proportionality requirements when they legislate. This latter dynamic, found wherever proportionality review is minimally effective, constitutes a

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336. *Id.* at 70–74.

mechanism of institutionalization (positive feedback). On the other hand, a court is likely to be stricter on necessity when PA is less entrenched as a general mode of policymaking, not least, because the Court may see the need to “teach” the basics of PA to lawmakers. Further, a point that has generated a great deal of controversy in some jurisdictions (notably Canada and the ECHR), courts may expand and contract the discretion they grant to lawmakers, at the suitability or necessity stage, when it is not confident that it has anything to teach them. This flexibility, which we count as a virtue rather a vice of PA, is never immune from attack by those who believe that a more determinate and principled approach to rights adjudication is possible, or that PA is just a fancy way to package judicial policy-making.

Variance in how courts conceive the nature and purpose of each stage of PA may also be meaningful. In Canada, most laws that fail proportionality testing do so at the necessity phase, and judges rarely move to the “balancing in the strict sense” stage—although there is evidence that this reticence might be changing. Judges may be acting on the view that post-LRM balancing exposes them too much as balancers, that is, as lawmakers. Like their counterparts on the ECJ, in the AB of the WTO, and on the Strasbourg Court, Canadian judges often engage in (what the German and Israeli Courts would consider to be) *de facto* “balancing in the strict sense,” which they build in to suitability or necessity analysis. The American Supreme Court may be doing the same when it examines a rights claim in light of the government’s “compelling interest,” in strict scrutiny analysis. In contrast, the German and Israeli Courts move more systematically to the final, balancing stage, especially when it comes to the most politically controversial issues. Compared with the Canadian Court, the German Court seems to calculate the legitimacy costs of doing so differently.<sup>337</sup> It uses the first two stages to pay its respects, first, to the importance of the policy consideration generally and, second, to the legislator’s own deliberations on the proportionality of the law. If and how such differences actually matter to outcomes (right protection, policymaking, the relationship between judges and legislators) remains a mystery, but is worthy of exploration.

Last, although PA today dominates all other approaches to

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337. See Grimm, *supra* note 100, at 393–95.

rights adjudication, courts could proceed otherwise. Judges could develop and maintain strong deference doctrines, assuring that “judicial” authority to supervise “political” authority—when it comes to balancing situations—would be exercised only at the margins, rather than systematically. In our view, traditional reasonableness postures are defensible,<sup>338</sup> but not from the standpoint of modern constitutionalism. In the United States, the Supreme Court has developed a complicated, variegated approach to rights, in part because of its deep ambivalence toward balancing. The Court has constructed some rights (e.g., political speech) as quasi-absolute—shields against (or “trumps” with respect to) state acts. For other classes of rights (e.g., those covered by the due process and equal protection clauses), the Court has assigned different standards of review to government measures, as if the underlying rights involved were arrayed on a sliding scale of importance. Measures that infringe on important rights are subject to strict scrutiny (LRM-testing), while less important rights get intermediate or rational basis (i.e., virtually no) review. One can also portray the Court’s method in negative terms, defining the scope of rights through excluding reasons: the Court decides which justifications given by the government for limiting a right are constitutionally inadmissible. In our view, all of these outcomes, to the extent that they are stable, can be traced back to seminal acts of balancing that then congeal as precedent. In any event, it is obvious that the Court has never been able to dispense with balancing.<sup>339</sup> In the next part of this project, we will examine why this is so, as we assess the evolution of American rights doctrine in light of proportionality.

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338. Jeremy Waldron, *Some Models of Dialogues Between Judges and Legislators*, 23 SUP. CT. L.REV. 7 (2004).

339. Aleinikoff, *supra* note 11.