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Reasonableness and Law

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of law.[61] 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. 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). At this moment, the Lisbon Treaty has yet to be ratified, though the EC's organs have announced that they will abide by the agreement as if it were law.

After the consolidation of the ECJ's "constitutional" doctrines of supremacy and direct effect, the emergence of proportionality balancing as a master technique of judicial governance is the most important institutional innovation in the history of European legal integration. 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 (1955–1969), came to the ECJ in 1970, and served as the President of the ECJ from 1976 to 1980. Pierre Pescatore,[62] left a professorship for the ECJ in 1967, and served on the Court until 1985.

In the EC/EU context, the Court's 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" (see Stone Sweet 2004, 168–70). 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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[61] The Treaty of Rome contains no catalogue of rights. The Court cited the ECHR and the "constitutional traditions of the member states" as sources. Case 29/69, Stauder v. City of Ulm, 1969 E.C.R. 419 (1969); Case 4/73 Nold v. Commission, 1974 E.C.R. 491 (1974).

[62] Pescatore, a law professor, mentions proportionality as a general principle of law in a 1970 article, written while he was on the Court (Pescatore 1970, 350).

4.2.2 The European Convention on Human Rights

The European Convention on Human Rights (ECHR) is the most effective human rights regime in the world, today covering the territory of 47 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 document" of European public law[63]; and Luzius Wildhaber, as President of the Court (1998–2007), argued strongly in favor of enhancing its "constitutional" functions (Wildhaber 2000).

The Convention proclaims some state obligations to be firm prohibitions (of torture, degrading treatment, and slavery),[64] 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. States 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 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."

The Court subjects all Convention rights to balancing,[65] and has developed a German-style proportionality approach to Articles 8–11, and to Article 14 (non discrimination on sex, race, colour, 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

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

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

65 "In practice, the European Court engages in balancing in the context of almost every Convention right" (Rivers 2006, 182).

other High Contracting Parties of the Council of Europe, with the exception of Switzerland (Stone Sweet and Keller 2008a, 19). The main agent of this development was Professor Jochen Frowein, a member of the Commission on Human Rights (1973–1993), its Vice President (1981–1993), 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 UK, where the "*Wednesbury* reasonableness" test, a type of "rational basis" standard, governed applications for judicial review of government acts.[66] This conflict—between German-style PA and UK-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 UK'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 UK'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* 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),[67] 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 par. 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 pressing social need implied by the notion of 'necessity' in this context."[68] 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."[69] The Court did not go further. In Dudgeon v. the United Kingdom (1981),[70] 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.

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[66] See above note 6.
[67] Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) (1976).
[68] Ibid., at 22.
[69] Ibid., at 23.
[70] Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) at 24 (1981).

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),[71] and Peck v. United Kingdom (2003),[72] 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 UK judges refused to entertain pleadings based on the Convention except where claimants could show that public authorities had acted "irrationally in the sense 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 UK 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." In both cases, the Court noted that UK judges had strongly implied that they would have found for the applicants, but for the *Wednesbury* restriction.[73] Thus, it can be argued that the Court was helping UK 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[74] incorporated the ECHR into UK law and, in 1999, the House of Lords adopted PA as the procedure for determining necessity.[75] Under the Act, individuals may plead the ECHR before UK judges, and judges may enforce Convention rights. A court, 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 UK courts profess to have abandoned the "reasonableness" test when it comes to rights review, 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,[76] for example, a 2005 case involving the voting rights of incarcerated prisoners, the Strasbourg Court condemned the UK, in part, on the grounds that neither the UK Parliament, nor

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[71] Smith and Grady v. United Kingdom, 29 Eur. H.R. Rep. 493 (1999).

[72] Peck v. United Kingdom, 36 Eur. Ct. H.R. Rep. 41 (2003).

[73] Ibid. See also Smith and Grady v. United Kingdom, 29 Eur. H.R. Rep. 493 (1999).

[74] Human Rights Act, 1998, c. 42, available at http://www.opsi.gov.uk/acts/acts1998/19980042.htm.

[75] 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 adopted PA.

[76] Hirst v. United Kingdom, App. n. 74025/01 (Eur. Ct. H.R. October 6, 2005).

the judiciary, had "ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on a right of a convicted prisoner to vote."[77] 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 (see White 2007).

Under the Court's supervision, PA in now the process of diffusing to every national legal order in Europe, where it will typically be absorbed as a *constitutional* principle (Stone Sweet 2008b, 688, 698–701). 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 pointedly criticized the UK 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.

4.2.3 The World Trade Organization

The World Trade Organization (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 (Long 1985, 70–71; Hudec 1992). 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 (see Stone Sweet 1997, 1999). States began to litigating 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 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

[77] Ibid., pars. 79–80.

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 object. The AB is gradually exerting dominance over the normative 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. Article XX contains a list of "General Exceptions" to the GATT. Measures that come under one of the headings listed in 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 judges to be "necessary": "to protect public morals" (XX [a]); "to protect human, animal, or plant life and 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. In response to litigation, panels and the AB developed a host of balancing techniques, and proportionality in particular, to control the use of these exceptions, and to develop GATT-WTO law. 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 (see, e.g., Howse and Tuerk 2006), human rights (see, e.g., Cleveland 2002), and environmental protection (see, e.g., Ramangkura 2003)—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. Moreover, the AB has at times decided 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).[78] In this dispute, the EC 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

[78] 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.

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." 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.). 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 LRM test, and the U.S. advocated a rational basis standard. 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. had 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 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.[79]

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 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

[79] Ibid., recital 5.26.

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 *Thailand—Cigarettes* (1990),[80] 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.[81] Thailand taxed foreign-produced cigarettes at a higher rate than the domestic equivalent and subjected importers to a special licensing at a procedure. 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." The Panel then gave a polite bow to Thailand, recognizing the importance of the interests being pleaded, before moving to LRM analysis.

Our interest here is on how the Panel fleshed out the LRM standard.[82] 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 (par. 81) precisely because the Panel could so easily come up with less-restrictive-on-trade alternatives.

Once the new WTO legal system began operating, panels and the AB simply adopted the LRM approach to necessity analysis, refining it over time. In all 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.[83] As it has developed, the WTO version of necessity analysis 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 [. . .] common interests or values are, the easier it would be to accept as "necessary" a measure designed as an enforcement instrument. There are

[80] 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).

[81] See, e.g., ibid., par. 3.

[82] ibid., recitals 72–80.

[83] On this point, see Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 5 (January 10, 2001), pars. 162–6.

> other aspects of the enforcement measure to be considered in evaluating 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,[84] chaired the AB college that decided this case, and likely wrote the decision.

5 All Things in Proportion

Over the past half-century, most of the world's most powerful high courts 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 difficult situations in which these values would come into tension or conflict. Proportionality review is inescapably an exercise in applied constitutional 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

[84] Mr. Ehlermann sat on the AB from 1995 to 2001, finishing as its chairman. Previously he had served the European Commission as Director-General of the Legal Service (1977–1987), and Director-General for Competition (1990–1995).

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 *Wednesbury*-based deference. 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, that court'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 Section 2 helps us to understand part of what is going on, but only in the abstract. The case studies supplement this understanding, and allow is to make at least the following points, each of which deserves more attention.

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 the EC, the ECHR, and 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 (Dimaggio and Powell 1991, 63) call a process of "coercive isomorphism": the diffusion of institutional forms and practices through legal obligation backed up by monitoring and enforcement mechanisms. The Luxembourg and Strasbourg courts commanded other national courts to deploy PA, and announced that they would supervise how national judges actually do so. 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" (ibid.) 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 support for the basic claims made in Section 2, 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 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, and how they do so may 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 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 than a vice of PA, is never immune from attack by those who believe that a more determinate, more 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 and the EC/EU, 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 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," as part of 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 (see Grimm 2007, 393–95). It uses the first two stages to pay its respects, first, to the