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How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law

By Niels Petersen[*]

A. Introduction

The principle of proportionality is on the rise. A growing number of constitutional and international courts refer to some form of proportionality in their jurisprudence.[1] At the same time, the principle is receiving more and more attention in international legal scholarship. Yet proportionality has not remained uncontested. In particular, some scholars have severely criticized the core of the proportionality test, which involves a balancing of competing values. This balancing is accused of being irrational because it requires placing incommensurable values on the same scale.[2] In a famous dictum, Judge Scalia once claimed that balancing competing constitutional values is like determining "whether a particular line is longer than a particular rock is heavy."[3]

Constitutional courts often have to resolve conflicts between competing values. These may be conflicts between an individual right and a public interest or between two competing individual rights. They have to strike a balance between individual freedom and public security or between the freedom of the yellow press and the right to privacy of celebrities. The proportionality principle provides a means for the resolution of conflicting constitutional values. The advantage of balancing is that it avoids the creation of abstract

[*] Dr. iur. Senior Research Fellow at the Max Planck Institute for Research on Collective Goods, Bonn. E-mail: petersen@coll.mpg.de.

[1] *See* AHARON BARAK, PROPORTIONALITY—CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 181–210 (2012).

[2] *See* BERNHARD SCHLINK, ABWÄGUNG IM VERFASSUNGSRECHT 134–35 (1976); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–76 (1987); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 259 (1996); RALPH CHRISTENSEN & ANDREAS FISCHER-LESCANO, DAS GANZE DES RECHTS—VOM HIERARCHISCHEN ZUM REFLEXIVEN VERSTÄNDNIS DEUTSCHER UND EUROPÄISCHER GRUNDRECHTE 357 (2007); Tavros Tsakyrakis, *Proportionality: An assault on human rights?*, 7 INT'L J. CONST. L. 468, 474 (2009); GRÉGOIRE C.N. WEBBER, THE NEGOTIABLE CONSTITUTION 92–93 (2009).

[3] *See Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 897 (1988).

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hierarchies of values and thus does not prejudice the legitimacy of the involved values as such; rather, it only deals with their weight in the concrete case.[4]

As valuable as the critique of balancing is for highlighting the methodological limits and implications of the concept, it only has practical bite if there are convincing alternatives for the resolution of value conflicts in constitutional law. This contribution will look at such alternatives and analyze their underlying assumptions. It will proceed in three steps: First, it will recapitulate the construction of the case for balancing and its critique; second, it will look at reduced forms of proportionality, which abstain from a substantial balancing, and at the English principle of Wednesbury reasonableness; third, it will analyze categorical forms of rights interpretation. The final part concludes the assessment.

B. Balancing and Its Critique

The most prominent proponent of balancing is Robert Alexy, who developed the "weight formula" in order to rationalize balancing. In the first part of this section, we will take a brief look at Alexy's theory. Subsequently, we will analyze the critique of balancing in more detail. In the third part, we will take a look at attempts to reconstruct balancing through further formalization.

I. Alexy's Weight Formula

The solution of norm conflicts through the means of balancing is the core of Alexy's theory of principles.[5] In his justification of balancing, he distinguishes between an internal and an external justification.[6] The internal justification has a formal structure expressed through the weight formula,[7] which consists of three factors: The intensity of the restriction of the two competing aims (I), their weight (W), and the resilience of the empirical assumptions (R):[8]

$$W_{i,j} = \frac{I_i * W_i * R_i}{I_j * W_j * R_j}$$

[4] *See* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COL. J. TRANSNAT'L L. 73, 88 (2008); *see also* Wojciech Sadurski, *Reasonableness and Value Pluralism in Law and Politics*, *in* REASONABLENESS AND LAW 129, 140 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009).

[5] *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 66–69 (2002).

[6] Robert Alexy, *On Balancing and Subsumption. A Structural Comparison*, 16 RATIO JURIS 433, 435 (2003).

[7] *Id*. at 443–48; Robert Alexy, *Balancing, constitutional review, and representation*, 3 INT'L J. CONST. L. 572, 575 (2005).

[8] Alexy, *supra* note 6, at 446.

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If $W_{i,j}$ is greater than one, principle i wins in the balancing process. If it is smaller than one, principle j prevails.[9] If it is exactly one, there is a stalemate between the two principles. The external justification refers to the values, which are attributed to the different factors of the weight formula. Alexy acknowledges that it is not possible to determine these values through a logical operation. He only requires the attribution to be justified with plausible reasons.[10]

II. The Critique of Balancing

The analytical critique of this concept of balancing is well known.[11] There are two different ways to establish a relationship between two values. On the one hand, one can make relative assertions, which consist of determining whether a specific good has a smaller or a greater value than the good of comparison. Such a relation can be measured through ordinal scales.[12] This presupposes that the compared goods are comparable.[13] On the other hand, it is also possible to establish a relationship on a ratio scale, which permits a statement about the ratio of two competing values, such as to ascertain that good "A" is twice as valuable as good "B." For the establishment of a ratio scale, the compared goods not only have to be comparable, but they also have to be commensurable. The arithmetic operations that Alexy proposes in his weight formula require that the different factors of the formula be measured on a ratio scale, because otherwise a multiplication or division of the different factors that are included in the weight formula would not be possible.

It is doubtful, however, whether such a ratio scale of constitutional values can be established. Even if the attribution of abstract values to competing constitutional interests is a problem of external justification that does not follow the rules of formal logic, but only requires plausible reasons, it is unclear what the standards for such reasons are. There are some disputable attempts in German constitutional law scholarship to establish a hierarchy of constitutional values.[14] But even these approaches only try to establish ordinal relationships. It seems impossible, therefore, to find a common normative currency for the competing constitutional values that would allow relating them on a ratio scale. Even Alexy

[9] *See id*. at 444.

[10] *See* Alexy, *supra* note 7, at 576–77.

[11] *See* SCHLINK, *supra* note 2.

[12] *See id.* at 136.

[13] *See* Ruth Chang, *Introduction*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 1, 6 (Ruth Chang ed., 1997).

[14] *See* HARALD SCHNEIDER, DIE GÜTERABWÄGUNG DES BUNDESVERFASSUNGSGERICHTS BEI GRUNDRECHTSKONFLIKTEN. EMPIRISCHE STUDIE ZU METHODE UND KRITIK EINES KONFLIKTLÖSUNGSMODELLES 221–39 (1979); *see also* Nils Jansen, *Die Abwägung von Grundrechten*, 36 DER STAAT 27, 46–53 (1997).

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concedes that constitutional values cannot be measured on a ratio scale.[15] Yet if one performs arithmetic operations that are exclusively reserved for ratio scales with ordinal values, the (arbitrary) choice of the scale can already determine the result of the balancing exercise.[16] Therefore, the formal structure of the weight formula does not provide a sufficient justification for balancing in constitutional law.

III. Normalizing the Weight of the Competing Values

Some authors try to mitigate the problem of incommensurability. They do not include the abstract weight of the constitutional values into the equation, but only the degree of their realization.[17] Paul-Erik Veel proposes an analogy to the Nash bargaining solution.[18] Nash suggested a solution for an optimization problem in cases in which the utility functions of different individuals are not comparable.[19] Veel wants to transfer this solution to the problem of incomparable constitutional values. According to his concept, every constitutional value has a cardinal value function v(x), which expresses the degree of realization of the constitutional value.[20] Veel's model is based on two assumptions: On the one hand, there are two possible measures {r1, s1} and {r2, s2} that can have an effect on the competing constitutional values *r* and *s* (e.g., carrying out or abstaining from a restriction of a fundamental right); on the other hand, the two constitutional values enjoy a minimum standard of protection, which he calls ρ and ς, while $r_2 > r_1 > \rho$ and $s_1 > s_2 > \varsigma$. Under these circumstances, the first measure can be preferred to the second if:[21]

$$[v(r_1) - v(p)][v(s_1) - v(\varsigma)] > [v(r_2) - v(p)][v(s_2) - v(\varsigma)].$$

In a recent contribution, Christoph Engel adopts a similar position.[22] He argues that a measure is justified according to the balancing test if the utility *u* for the public interest is greater than the cost *c* that occurs because of the restriction of the fundamental right—

[15] *See* Alexy, *supra* note 5, at 99 (referring explicitly to Schlink).

[16] *See* Schlink, *supra* note 2, at 136–37; DAVOR SUSNJAR, PROPORTIONALITY, FUNDAMENTAL RIGHTS, AND BALANCE OF POWERS 206–11 (2010).

[17] *See* Paul-Erik N. Veel, *Incommensurability, Proportionality, and Rational Legal Decision-Making*, 4 L. & ETH. HUM. RTS. 177 (2010); *See also* CHRISTOPH ENGEL, BESONDERES VERWALTUNGSRECHT UND ÖKONOMISCHE THEORIE 16–18 (Max Planck Institute for Research on Collective Goods, Preprint No. 2011/2, 2011).

[18] *See* Veel, *supra* note 17.

[19] *See* John Forbes Nash, *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950).

[20] *See* Veel, *supra* note 17, at 199.

[21] *See id.* at 200.

[22] *See* Engel, *supra* note 17, at 16–18.

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i.e., if u > c.[23] This equation can be transformed into u – c > 0 or into u – c > z, with *z* being a predefined intervention threshold.[24] As *u* and *c* are incommensurable, they cannot be subtracted from each other. Yet it is possible to normalize the two values by dividing them by the maximally possible utility *υ* or the maximally possible costs *ϒ*:[25]

$$[(u/\upsilon) - (c/\Upsilon)] > z$$

As *u* and υ, as well as *c* and Υ, each possess the same normative currency, the two ratios can be subtracted from each other. The equation does not compare the abstract values of the competing constitutional values, but only their degree of realization. Referring to Scalia's metaphor, we do not compare the weight of the stone to the length of the line. Instead, we analyze whether we add proportionally more length to the line than we shed weight of the stone. A measure that increases the length of the line by 20%, but reduces the weight of the stone by 10%, would be constitutional. Yet if a measure added less on one side than it removed on the other, it would violate the proportionality principle.

This approach has two problems. On the one hand, it does not avoid attributing an abstract weight to the competing constitutional values. Rather, it assumes that both values have exactly the same normative weight.[26] But this assumption is not self-evident.[27] It might be plausible if a measure that restricts a fundamental right has the purpose to enhance a competing constitutional value. But this is not always the case when constitutional courts engage in balancing. Instead fundamental rights may sometimes be restricted by public purposes, which do not necessarily enjoy a constitutional rank. In such cases it seems doubtful to assume that the competing values have the same abstract normative weight.

On the other hand, the approach assumes that the utility and the costs of a measure that restricts individual rights can be measured on a ratio scale. We thus need to make a normative judgment about the degree to which a measure restricts a specific individual right and promotes a competing public interest. Are cartoons and movie screenings that ridicule a religious community a modest or a severe impairment of the freedom of religion? Is a prohibition of such movies a modest or a severe restriction of the artistic freedom of the filmmakers?[28] An ordinal judgment already seems to be difficult in such a

[23] *See id.* at 16.

[24] *See id.* at 17.

[25] *See id*.

[26] *See* Veel, *supra* note 17, at 210–213.

[27] *See* Barak, *supra* note 1, at 364 (arguing expressly that competing constitutional values may have a different importance).

[28] *See generally Otto-Preminger-Institut v. Austria*, ECHR App. No. 13470/87, 295 Eur. Ct. H.R. (ser. A) (1994).

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case.[29] A cardinal determination that would specify whether the freedom of religion has been restricted to 30, 40, or 50 per cent through the measure seems impossible.[30]

IV. Balancing as a Normative Concept

Balancing is a normative concept. It is no pure exercise of logical deduction or mathematical calculation, but requires a normative judgment. Not even the most enthusiastic proponents of balancing would deny this need for normative reasoning.[31] They claim, however, that such normative judgments are an integral part of judicial reasoning and that balancing does not differ from what judges do in general.[32] The critics challenge this last argument. They argue that the structure of balancing requires an extent of precision that cannot be achieved through legal reasoning. Judges would have to rank constitutional values and the degree of their realization on a ratio scale, which is not feasible in judicial decision-making.[33]

Now, the balancing of incommensurable values is part of our everyday life. We often have to make choices between alternatives that cannot be translated into one common normative currency. And this necessity of comparing incommensurable options is not limited to our private lives. It is also part of political or moral decision-making. When the legislator decides about the admissibility of abortions, he has to strike a balance between the right to life of the embryo and the right to self-determination of the mother. When he adopts a law allowing for the wire-tapping of private apartments, he has to strike a balance between the right to privacy and the effectiveness of crime prevention and prosecution. The legislator, however, is asked to make such "subjective" decisions. If legislative decisions do not fit the taste of the citizens, the citizens can react by voting the legislative majority out of office.

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[29] *Accord* José Juan Moreso, *Ways of Solving Conflicts of Constitutional Rights: Proportionalism and Specificationism*, 25 RATIO JURIS 31, 38 (2012).

[30] *Accord* Iddo Porat, *Some Critical Thoughts on Proportionality*, *in* REASONABLENESS AND LAW 243, 247 (Giorgio Bongiovanni, Giovanni Sartor & Chiara Valentini eds., 2009). *See also* BENJAMIN RUSTEBERG, DER GRUNDRECHTLICHE GEWÄHRLEISTUNGSGEHALT 54–56 (2009), arguing that the determination of the degree of restriction of an individual right was still possible. Yet the author doubts that such an operation was possible for the enhancement of the public aim because a standard for the maximally possible achievement was missing.

[31] Alexy, *supra* note 7, at 576–77. One exception is probably DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 166 (2004), who argues that "proportionality offers judges a clear and *objective* test to distinguish coercive action by the state that is legitimate from that which is not" and claims that proportionality is all about sticking to the facts without involving any normative evaluation (emphasis added).

[32] Alexy, *supra* note 6; Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. TORONTO L.J. 369, 382 (2007).

[33] SCHLINK, *supra* note 2, at 158–72.

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In contrast, the critics of balancing argue that judicial balancing presupposed the development of a scale that is external to the judges' personal preferences.[34] Consequently, they claim that the balance that has been struck by the legislator should not be reviewed in the process of judicial review:[35] Striking a balance between competing aims and values is a decision about what kind of society we want to live in. This is the task of the elected representatives, who are accountable to the members of this society, not a decision of courts.

While this argument is plausible to a certain degree, it assumes that the legislator is in all circumstances the best institution to balance competing interests and values. The legislator is accountable to the electorate and is thus supposed to be in a better position than courts are to make value judgments that are representative of the society as a whole.[36] In reality, the political process is sometimes shaped in a way that certain interests are underrepresented, while others are taken into disproportionately greater consideration. For example, the political process has a tendency to neglect minority rights.[37] Furthermore, the political process is often susceptible to the dominance of influential lobbying groups, whose interests may find privileged consideration in the legislative process.[38] If one believes that one role of courts is to protect interests that are misrepresented in the political process,[39] the courts need effective means of controlling political decisions that restrict fundamental rights. Abandoning balancing would therefore require that there are equally effective alternative means of controlling the political process in fundamental rights questions.

C. Reduced Forms of Proportionality and Wednesbury Reasonableness

One alternative to balancing might be a reduced form of proportionality. Such a reduced proportionality test "without balancing"[40] only consists of the first three steps: (1) The

[34] Aleinikoff, *supra* note 2, at 973.

[35] Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, *in* FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT. KLÄRUNG UND FORTBILDUNG DES VERFASSUNGSRECHTS 445, 461 (Peter Badura & Horst Dreier eds., 2001); WEBBER, *supra* note 2, at 147–48.

[36] SCHLINK, *supra* note 2, at 211.

[37] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135 (1980).

[38] *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965).

[39] *See* ELY, *supra* note 37, at 105–79; Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 73–77 (2006); Samuel Issacharoff, *Constitutional Courts and Democratic Hedging*, 99 GEO. L.J. 961 (2010–2011).

[40] Jochen von Bernstorff, *Proportionality without Balancing: Why Judicial ad hoc-balancing is Unnecessary and Potentially Detrimental to the Realization of Individual and Collective Self-Determination*, *in* REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT (Liora Lazarus, Christopher McCrudden, Nigel Bowles eds., forthcoming 2014).

legitimate aim; (2) the rational connection test, which determines whether the measure is an appropriate means to achieve the intended goal; and (3) the least restrictive means test.[41] Another alternative would be an even more deferential test like the British Wednesbury reasonableness test, according to which the act of a public authority is illegal if the authority has "come to a conclusion that no reasonable authority could have ever come to it."[42]

I. Reduced Form of Proportionality

In constitutional law scholarship, the reduced proportionality test was first proposed by Bernhard Schlink. According to Schlink, a restriction of an individual right is justified if it seeks to achieve a legitimate aim, if the measure is suitable to achieve this aim, and if it is the least restrictive of all equally effective means.[43] Jochen von Bernstorff recently refined this approach by proposing to combine the reduced proportionality test with categorical forms of argumentation and to add bright line limitations as additional safeguards for the protection of individual rights.[44] This section will confine itself to the discussion of reduced proportionality, while the next section will deal with categorical forms of argumentation.[45]

The reduced form of the proportionality test is sometimes also applied in judicial practice. In particular, the Canadian Supreme Court effectively uses only the first three steps of the proportionality test. Although the test is four-pronged in theory,[46] the last step, the balancing of the competing values, does not have much practical significance.[47] The core of the reduced proportionality test is the least restrictive means test. The theoretical appeal of the least restrictive means test is its focus on one side of the equation, which avoids a comparison of incommensurable values. It only compares the extent to which different measures restrict an individual right, while holding the other side of the equation, the marginal social utility of the measure, constant. It can thus be compared to the *pareto* principle in welfare economics, according to which a measure is more efficient if it increases the utility of at least one person without worsening the position of any other

[41] SCHLINK, *supra* note 2, at 192–219; *see also* von Bernstorff, *supra* note 40.

[42] *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 K.B. 223 (Eng.).

[43] SCHLINK, *supra* note 2, at 192–193.

[44] Bernstorff, *supra* note 40.

[45] *See infra*, section D.

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

[47] PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 843 (2005).

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person.[48] It seems uncontroversial to adopt a measure where nobody loses while at least one person gains.

What seems to be so appealing in theory might be problematic in practice. The least restrictive means test not only requires a judgment as to whether a measure is more or less restrictive with regard to a specific individual right. It also presupposes an evaluation whether the alternative measure is as effective. This necessarily involves an empirical prognosis and often also a value judgment. Let us consider an example: In *RJR-MacDonald*, the Canadian Supreme Court had to decide about the constitutionality of a ban on tobacco advertising and an obligation of the tobacco industry to print unattributed warnings on the cigarette packages.[49]

The crucial question of the case was whether there was an available alternative to the total ban on tobacco advertising that would be less restrictive to the freedom of expression. The court discussed a partial ban that excluded purely informational advertising as potentially less restrictive alternative. However, the judges disagreed whether this partial ban was as effective as the total ban enacted by the Canadian legislature. The majority concluded that the legislator had the burden of proof to show that the partial ban was less effective and thus concluded that the total ban failed the less restrictive means test.[50]

This case illustrates that the least restrictive means test may also require complex normative and empirical evaluations by the judges. Certainly, it does not require the comparison of incommensurable values. Comparing the effectiveness of competing measures does not presuppose a translation into a different normative currency. In theory, the question could be answered by thorough empirical testing. In practice, lifting the veil of uncertainty might not always be possible, so the comparison of the alternative measures also involves a normative question of societal risk preferences. This question adds a second normative dimension to the equation, a consequence that Schlink's reduced proportionality test precisely sought to avoid.

Furthermore, a measure might pursue an aim, which is generally legitimate, and might be the least restrictive means to achieve this aim, but still be evidently disproportionate. If a pneumoenzephalography, an extremely painful medical procedure that allows seeing the brain structure more clearly, is used for the prosecution of a minor criminal offense, such a proceeding clearly seems to be out of proportion.[51] Schlink acknowledges this result, but

[48] ANNE VAN AAKEN, "RATIONAL CHOICE" IN DER RECHTSWISSENSCHAFT. ZUM STELLENWERT DER ÖKONOMISCHEN THEORIE IM RECHT 329 (2003); Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 RATIO JURIS 131, 135 (2003).

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

[50] *Id.* ¶ 163.

[51] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 542/62, 17 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 108 (July 25, 1963), http://www.servat.unibe.ch/dfr/bv017108.html.

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proposes to resolve the case on the level of the legitimate aim.[52] This solution seems to introduce balancing into the determination of which aim is legitimate and thus does not resolve the problem of incommensurability.[53]

This problem might even be more obvious if there is an alternative measure that would be slightly less effective, but significantly less intrusive than the one chosen by the legislator. An example is the labeling case law of the European Court of Justice (ECJ). If a member state establishes strict product standards in order to protect consumers against misapprehensions as to the content of the product, the ECJ usually considers labeling obligations to be a less restrictive means of consumer protection.[54] If Germany argues that a minimum content of alcohol is supposed to protect the consumer against unfair practices, the requirement to display the alcohol content is less restrictive for the free movement of goods.[55]

Strictly speaking, however, the labeling requirement is not as effective in protecting consumers against misapprehensions as a compulsive minimum standard. It may be that consumers have formed a prior belief on the alcohol content and buy a bottle of *Cassis de Dijon* without having read the label. The ECJ implicitly acknowledges the difference in effectiveness when the court does not consider labeling to be a less restrictive alternative if the protected good is more important, such as life or health.[56] The ECJ, therefore, is performing some kind of balancing in the less restrictive means test.

Finally, there is the difficult question of how to deal with external effects.[57] In the foregoing analysis, we have assumed that a measure only affects the pursued public aim and the restricted individual right. However, it may also have effects that are external to the two compared goods. A potentially less restrictive alternative measure may be significantly more costly for public finances. Does this affect the judgment under the least restrictive means test? Does it depend on how much more costly the alternative measure is? Furthermore, a less restrictive alternative might interfere with different individual

[52] SCHLINK, *supra* note 2, at 206.

[53] ANDREAS VON ARNAULD, DIE FREIHEITSRECHTE UND IHRE SCHRANKEN 263-64 (1999). One way to mitigate this problem might, however, be the introduction of certain bright line rules as proposed by Bernstorff, *supra* note 40.

[54] Joseph H. H. Weiler, *Epilogue: Towards a Common Law of International Trade*, *in* THE EU, THE WTO, AND THE NAFTA: TOWARDS A COMMON LAW OF INTERNATIONAL TRADE? 201, 222 (Joseph H. H. Weiler ed., 2000).

[55] *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, CJEU Case 120/78, 1979 E.C.R. 649, para. 13.

[56] Weiler, *supra* note 54, at 223. See also Joseph H. H. Weiler, *Brazil—Measures Affecting Imports of Retreaded Tyres (DS32)*, 8 WORLD TRADE REV. 137, 140 (2009) for a similar tendency of the WTO Appellate Body.

[57] WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 269–70 (2005); Kai Möller, *Proportionality: Challenging the critics*, 10 INT'L J. CONST. L. 709, 714 (2012).

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rights. How does this affect the analysis under the least restrictive means test? It seems that we cannot stay away from asking these questions. But if we want to find an answer, we again have to introduce a second currency, and consequently, a comparison of incommensurable values enters into our equation.

For these reasons, it seems that in practice courts cannot avoid some form of balancing even if they adhere to a reduced form of the proportionality test.[58] The comparison of two alternative measures requires some prognosis about their effectiveness and some normative judgment about how much uncertainty can be tolerated by the society in this respect. The reduced form of proportionality may thus alleviate the problem of comparing incommensurable values, but it cannot totally avoid it.

II. Wednesbury Reasonableness

The Wednesbury reasonableness test and the proportionality principle basically have the same function: They are both instruments used to scrutinize public authority, and consequently, to reconcile competing legal interests.[59] The principle was established by the Court of Appeal in the *Wednesbury* judgment in 1948, in which Lord Greene explained that a decision of a public authority has to be considered unreasonable if it is either based on the consideration of matters "which are irrelevant to what [the authority] has to consider," or if it is "so absurd that no sensible person could ever dream that it lay within the powers of the authority."[60] According to this definition, the standard of review is so broad that it only protects against arbitrary decisions.[61] Individual rights review would essentially be rendered ineffective.

In practice, British courts have thus been forced to refine the principle in order to guarantee a more effective human rights protection.[62] This was explicitly acknowledged in *Smith*, where the Court of Appeal developed the so-called "heightened Wednesbury test."[63] In *Smith*, Lord Bingham argued that:

[58] *See* Johannes Saurer, *Die Globalisierung des Verhältnismäßigkeitsgrundsatzes*, 51 DER STAAT 3, 31 (2012).

[59] David Feldman, *Proportionality and the Human Rights Act 1998*, *in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 117, 127 (Evelyn Ellis ed., 1999); Samantha Besson, *The Reception Process in Ireland and the United Kingdom*, *in* A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 31, 83 (Helen Keller & Alec Stone Sweet eds., 2008).

[60] *Wednesbury Corporation* [1948] 1 K.B. at 229.

[61] Paul Craig, *Unreasonableness and Proportionality in UK Law*, *in* THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE 85, 94 (Evelyn Ellis ed., 1999).

[62] *See* Michael Fordham & Thomas de la Mare, *Identifying Principles of Proportionality*, *in* UNDERSTANDING HUMAN RIGHTS PRINCIPLES 27, 65 (Jeffrey Jowell & Jonathan Cooper eds., 2001).

[63] On the 'heightened Wednesbury test' see AILEEN KAVANAGH, CONSTITUTIONAL REVIEW UNDER THE UK HUMAN RIGHTS ACT 249 (2009).

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> [I]n judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.[64]

In practice, British courts already applied elements of the proportionality principle under this heightened Wednesbury standard. This can, for example, be illustrated by the *Daly* decision of the House of Lords.[65] In this judgment, the court had to decide whether prisoners had the right to be present while authorities examined their privileged legal correspondence. The British government argued that guards might be intimidated or conditioned by prisoners to relax security standards. Lord Bingham, however, argued for the court that a blanket exclusion of all prisoners was not necessary.[66] Rather, one could restrict the exclusion to those prisoners who were disruptive or intimidating in the past.

The court clearly applies the least restrictive means test of the proportionality principle in *Daly*. In other instances, the British courts have also returned to a balancing of competing interests.[67] The Wednesbury principle and the proportionality test, therefore, do not differ to a great extent in practice.[68] The principal difference is that the reasonableness test is less structured than the concept of proportionality.[69] Therefore, it does not seem to be a more appealing alternative for replacing proportionality.

D. Categorical Forms of Argumentation

The principal alternative to proportionality approaches are categorical forms of individual rights argumentation. Although these approaches can take different forms, they all have one thing in common: They try to interpret rights as rules as opposed to principles. These rules are either established through the definition of the protected domain or through the

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[64] *R. v. Ministry of Defence, ex parte Smith* [1996] Q.B. 517, 547 (Eng.).

[65] *Regina (Daly) v. Secretary of State for the Home Department* [2001] 2 A.C. 532.

[66] *Id*., at 543.

[67] Craig, *supra* note 61, at 95.

[68] Gráinne de Búrca, *Proportionality and Wednesbury Unreasonableness: The Influence of European Legal Concepts on UK Law*, 3 EUR. PUBL. L. 561, 573 (1997); KAVANAGH, *supra* note 63, at 246. *But see* Ian Leigh, *The Standard of Judicial Review After the Human Rights Act*, *in* JUDICIAL REASONING UNDER THE UK HUMAN RIGHTS ACT 174, 202 (Helen Fenwick, Gavin Phillipson & Roger Masterman eds., 2007), claiming that the "battle" of the competing approaches is still raging.

[69] Craig, *supra* note 61, at 99; BARAK, *supra* note 1, at 374.

establishment of bright line limitations.[70] The strictest categorical approach is a deontological understanding of individual rights, which perceives rights as trumps. According to this approach, conflicts between competing values and interests have to be solved through the abstract definition of the scope of the right (discussed in subsection I). Yet many scholars perceive a purely deontological understanding of rights as inadequate and thus try to introduce some consequentialist elements into categorical argumentation. One approach would be definitional balancing that uses the balancing of competing values for the definition of the scope of an individual right (discussed in subsection II). While definitional balancing also focuses on the scope of the right, there are other approaches that share the bifurcate structure of the proportionality approach by first inquiring whether a right has been infringed before analyzing whether this infringement can be justified. Contrary to the proportionality test, this justification analysis takes a categorical form. One example is the *level* or *sphere* doctrines that the German Federal Constitutional Court has developed in the context of specific basic rights of the German constitution. This approach establishes a typology of infringements with different burdens of justification (discussed in subsection III). A similar approach is the distinction between different types of scrutiny that has been established by the U.S. Supreme Court (discussed in subsection IV).

I. Individual Rights Interpretation as an Abstract Definition of the Scope of a Right

A radical version of evading balancing competing constitutional interests, at least *prima facie*, is the conceptualization of rights as trumps.[71] According to this approach, individual rights review does not consist of a two-step test, which includes the definition of the scope of the right and the justification of restrictions. Instead, it comprises only one important step—the abstract definition of the scope of the right. Such a conception of individual rights interpretation seeks to avoid the disadvantages of the cost-benefit analysis of the balancing approach.[72] Instead, it tries to solve conflicts between individual rights and public aims through the definition of the protected domain. One of the main consequences of such an approach is that the scope of individual rights is usually defined narrowly.[73]

[70] *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184–205 (1977); HABERMAS, *supra* note 2, at 259–61; RUSTEBERG, *supra* note 30; Tsakyrakis, *supra* note 2; WEBBER, *supra* note 2, at 116–46; JOCHEN VON BERNSTORFF, KERNGEHALTE IM GRUND- UND MENSCHENRECHTSSCHUTZ (2011).

[71] DWORKIN, *supra* note 70, at 184–205.

[72] HABERMAS, *supra* note 2, at 260.

[73] Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, *in* LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 131, 134 (George Pavlakos ed., 2007).

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Most scholars defending a purely categorical approach to individual rights interpretation have a deontological understanding of individual rights.[74] With such a conception, the normative value of rights is only respected if rights are considered to be on a different level than competing public interests.[75] Conflicts between competing norms would then have to be resolved in the abstract by forming a consistent system of constitutional norms.[76] Yet, in a complex, modern society, creating such an abstract hierarchy of values is close to impossible.[77]

For this reason, Dworkin attenuates his concept of absolute rights and acknowledges the need for some restrictions. The most important ground for restricting an individual right is the protection of a competing right.[78] Furthermore, he acknowledges that there may be limitations for "compelling reasons."[79] Dworkin, however, cannot explain why rights should impose an additional cost on society independent of their content.[80] He mentions two reasons for his strong conception of individual rights: First, he refers to the Kantian idea of human dignity, and argues that there "are ways of treating a man that are inconsistent with recognizing him as a full member of the human community."[81] The consequence of this reasoning, however, is that rights are not considered strong *per se*, but are only strong to the extent that they promote human dignity. Secondly, he maintains that rights convey political equality because they protect the weaker members of society.[82] But this may not necessarily be the case, as there are some rights that equally protect the more privileged members of society.[83] Again, this argument does not *per se* justify a strong conception of rights. Therefore, while deontological arguments may sometimes have an important role

[74] *See* DWORKIN, *supra* note 70, at 193; HABERMAS, *supra* note 2, at 260 (arguing that "[t]he prospect of utilitarian gains cannot justify preventing a man from doing what he has a right to do").

[75] HABERMAS, *supra* note 2, at 259.

[76] *Id.* at 261.

[77] *See* Christoph Engel, *Inconsistency in the Law: In Search of a Balanced Norm*, *in* IS THERE VALUE IN INCONSISTENCY? 221, 230 (Christoph Engel & Lorraine Daston eds., 2006).

[78] DWORKIN, *supra* note 70, at 193.

[79] *Id*. at 200.

[80] François Du Bois, *Rights trumped? Balancing in constitutional adjudication*, 2004 ACTA JURIDICA 155, 174 (2004).

[81] DWORKIN, *supra* note 70, at 198.

[82] *Id*. at 198–99.

[83] Christoph Möllers, *Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts*, *in* DAS ENTGRENZTE GERICHT 281, 342 (Matthias Jestaedt, Oliver Lepsius, Christoph Möllers & Christoph Schönberger eds., 2011).

to play in the individual rights discourse,[84] there are no compelling moral reasons for totally excluding consequentialist arguments.[85]

II. Definitional Balancing

One way to include consequentialist reasoning into a categorical framework of argumentation is definitional balancing.[86] Such definitional balancing is used for defining the abstract scope of an individual right. In contrast to the balancing of the proportionality test, definitional balancing is not based on the facts of the individual case. Rather, it creates categorical exceptions for a specific right.[87] One example is the parameters of freedom of speech under the First Amendment of the United States Constitution. Society agrees that not every act of speech can enjoy absolute protection under the First Amendment.[88] If this were not true, defamation and perjury would be protected, as would anticompetitive agreements between business enterprises that fall under Section 1 of the Sherman Act. Certain restrictions of the scope of the freedom of speech seem to be necessary.

In this context, definitional balancing is an instrument to limit the abstract scope of the freedom of speech. For example, the U.S. Supreme Court engaged in definitional balancing in its *New York Times v. Sullivan* decision.[89] There, the Court had to decide whether libel laws had violated the First Amendment. The New York Times had been sentenced to pay damages to a public official because it had published an advertisement that admittedly contained false statements. The Supreme Court reversed this sentence. It held that the First Amendment required that a public official could not recover "damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice.'"[90]

[84] Kumm, *supra* note 73, at 153–164.

[85] *Accord* Péter Cserne, *Consequence-Based Arguments in Legal Reasoning: A Jurisprudential Preface to Law & Economics*, *in* EFFICIENCY, SUSTAINABILITY, AND JUSTICE TO FUTURE GENERATIONS 31, 41–44 (Klaus Mathis ed., 2011).

[86] Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942 (1968); Moreso, *supra* note 29, at 39–43.

[87] *See* Moreso, *supra* note 29, at 42 (arguing that "moral principles should be formulated including their defeaters").

[88] Nimmer, *supra* note 86, at 936–37; Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 417 (1993).

[89] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[90] *Id*. at 279–80.

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The Court based its conclusion on teleological arguments: The risk of libel charges may deter people from criticizing public officials for their conduct and thus limit the variety of public debate.[91] Still, the Court does not include defamatory speech as such as protected by freedom of speech. The Court thus engages in consequentialist balancing.[92] Balancing in *New York Times v. Sullivan* was not an *ad hoc* balancing.[93] Instead, the Court established a rule that specified conditions under which defamatory speech was protected and which could serve as a guideline for future cases.

Definitional balancing shares some of the same problems that plague proportionality balancing. The criticism that balancing compares incommensurable values also concerns definitional balancing, as the latter has to determine the abstract weight of competing values and principles. The advantage of definitional balancing is that the scope of application of balancing is restricted. The more experience a constitutional system has with the resolution of conflicts of competing value, the more stable patterns will emerge.[94] The evolution of a constitutional system will thus lead to a more rule-based adjudication even if the rules are established through definitional balancing.

Critics of definitional balancing claim that the approach compromises one of the asserted strengths of the balancing methodology by not taking into account the concrete circumstances of each individual case.[95] The proportionality test permits courts to account for the complexity and unpredictability of situations that are governed by legal rules. Strict rules are often over- and under-inclusive.[96] By abstaining from establishing strict rules, proportionality balancing maintains a considerable amount of flexibility that permits judges to react to the specific circumstances of each individual case.

Some authors consider this flexibility to be the major weakness of proportionality balancing.[97] On the one hand, proportionality balancing is supposed to compromise the

[91] *Id.* at 379.

[92] Nimmer, *supra* note 86, at 943.

[93] *Id.*

[94] Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* EUROPEAN AND US CONSTITUTIONALISM 49, 58 (Georg Nolte ed., 2005).

[95] Aleinikoff, *supra* note 2, at 979–980.

[96] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 591 (2005).

[97] RUSTEBERG, *supra* note 30, at 64–76; WEBBER, *supra* note 2, at 110–14; Jochen von Bernstorff, *Kerngehaltsschutz durch den UN-Menschenrechtsausschuss und den EGMR: Vom Wert kategorialer Argumentationsformen*, 50 DER STAAT 165, 184–90 (2011); von Bernstorff, *supra* note 40.

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predictability of judicial decisions.[98] Definitional balancing thus has the advantage of establishing rules, which create legitimate expectations among citizens and public officials to which these rules are addressed.[99] On the other hand, proportionality balancing is also supposed to impair the rule orientation of the legal discourse.[100] Rule-oriented decisions set precedents that unburden courts by allowing them to refer to pre-established categories and create argumentative burdens that have an effect transcending the individual case.[101]

Whether one prefers definitional over proportionality balancing thus depends on a very fundamental understanding of the function of the law. If law is about taking the most adequate decision in each individual case or—phrased differently—if law is about *Einzelfallgerechtigkeit*, then the proportionality principle provides the necessary flexibility to pursue this aim. If law is rather supposed to generate predictability and create legitimate expectations, then categorical forms of argumentation are preferable. In this case, definitional balancing would trump its proportionality counterpart.

III. The Level Doctrine Approach: Categorical Typology of Infringements

Categorical forms of argumentation are not limited to the definition of the scope of an individual right. They can also be applied in the second step of a bifurcated individual rights analysis, where courts determine whether the infringement with an individual right can be justified. One example is the *level* or *sphere* doctrines that the German Federal Constitutional Court applies in the context of some basic rights, specifically the freedom of profession[102] and the right to privacy.[103] Under this approach, the court establishes a

[98] RUSTEBERG, *supra* note 30, at 69–70; WEBBER, *supra* note 2, at 110–111; von Bernstorff, *supra* note 97, at 189; Moreso, *supra* note 29, at 38.

[99] Von Bernstorff, *supra* note 97.

[100] Von Bernstorff, *supra* note 97, at 184; *similarly* CHRISTENSEN & FISCHER-LESCANO, *supra* note 2, at 360; FRIEDRICH MÜLLER & RALPH CHRISTENSEN, JURISTISCHE METHODIK. BAND I: GRUNDLEGUNG FÜR DIE ARBEITSMETHODEN DER RECHTSPRAXIS 110 (10th ed. 2009).

[101] Von Bernstorff, *supra* note 97, at 187.

[102] *See* Bundesverfassungsgericht [BVerfGE - Federal Constitutional Court], Case No. 1 BvR 596/56, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 377, 405–08 (June 11, 1958), http://www.servat.unibe.ch/dfr/bv007377.html.

[103] *See* Bundesverfassungsgericht [BVerfGE - Federal Constitutional Court], Case No. 1 BvL 19/63, 27 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, 6–7 (July 16, 1969), http://www.servat.unibe.ch/dfr/bv027001.html; Bundesverfassungsgericht [BVerfGE - Federal Constitutional Court], Case No. 2 BvR 28/71, 32 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 373, 378–79 (Mar. 8, 1972), http://www.servat.unibe.ch/dfr/bv032373.html; Bundesverfassungsgericht [BVerfGE - Federal Constitutional Court], Case No. 2 BvL 7/71, 33 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 367, 376–77 (July 19, 1972), http://www.servat.unibe.ch/dfr/bv033367.html.

typology of infringements, which assumes an ordinal ranking of the intensity of certain types of infringements. The burden of justification for an infringement depends on the category to which it belongs. The stronger the assumed intensity is, the higher is the burden of justification.

One example is the three-level doctrine that the *Bundesverfassungsgericht* developed in the pharmacist judgment in the context of the freedom of profession.[104] According to this doctrine, there are three possible types of infringements on the freedom of profession, each of which requires a different burden of justification. The mildest form of infringement is a regulation of the mode of the professional practice. Such infringements are justified if there is a rational basis for the regulation and if it does not burden the individual unreasonably.[105] The second step concerns subjective entry requirements to the profession, according to which an individual can only practice a specific profession if he or she possesses the necessary qualification. Such requirements are permissible if they are necessary to secure an adequate exercise of the professional duties.[106]

The severest form of infringement is that of objective entry requirements, which impose restrictions independent of the qualifications of the respective candidate. Such objective entry requirements are, in particular, quotas that limit the number of people who can exercise a specific profession or study a certain subject. Such restrictions can only be justified in exceptional circumstances, i.e., if they are necessary to fend off verifiable or highly probable, serious dangers for exceptionally important societal interests.[107]

Such typologies are created in a balancing process because they distinguish between more and less severe infringements of the respective individual right and determine different levels of justification for potential restrictions. The establishment of these categories is thus similar to the definitional balancing that we discussed in the previous section. The advantages and disadvantages are also very much the same. While categorical reasoning for the justification of restrictions strengthens the predictability of judicial decisions, it forfeits some flexibility.

Subjective entry requirements to a profession do not necessarily have to be more severe than regulations of professional practice. Such regulations may sometimes seriously

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[104] *See* Bundesverfassungsgericht [BVerfGE - Federal Constitutional Court], Case No. 1 BvR 596/56, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 377, 405–08 (June 11, 1958), http://www.servat.unibe.ch/dfr/bv007377.html..

[105] *Id.* at 406.

[106] *Id.* at 407.

[107] *Id.* at 408 ("im allgemeinen wird nur die Abwehr nachweisbarer oder höchstwahrscheinlicher schwerer Gefahren für ein überragend wichtiges Gemeinschaftsgut diesen Eingriff . . . legitimieren können").

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impede the exercise of a specific profession, as they may alter the content of what the profession is about. Whether an infringement stemming from a specific category imposes more severe restrictions than an alternative infringement from a typologically less severe category rather depends on the context.[108] In practice, the Federal Constitutional Court sometimes deviates from the categorization of the three-level doctrine if the context of the case suggests such a deviation.[109] This increase in flexibility comes at a price because this practice is basically a retreat from categorical reasoning to proportionality balancing.

IV. The American Model of Tiered Review

The final model of categorical reasoning that will be discussed briefly in this contribution is the American model of tiered review that differentiates between different levels of scrutiny. Basically, the U.S. Supreme Court employs three tiers of review: Rational basis, intermediate scrutiny, and strict scrutiny. This system of tiered review was established gradually. The rational basis review was developed as a response to the activist approach of the *Lochner* era,[110] in which the Court had challenged many legislative efforts of labor and market regulation.[111] Consequentially, rational basis review was very deferential[112] and did not guarantee an effective individual rights review.

The introduction of strict scrutiny was an attempt to construct a system of preferred constitutional rights, which enjoyed stronger protection.[113] Under the strict scrutiny test, restrictions of a privileged right can only be justified if they serve a "compelling state interest."[114] Finally, the Supreme Court introduced a third step in between the two already

[108] BODO PIEROTH & BERNHARD SCHLINK, GRUNDRECHTE – STAATSRECHT II, 922 (27th ed. 2011).

[109] Joachim Wieland, *Art. 12*, *in* GRUNDGESETZ-KOMMENTAR 111 (Horst Dreier ed., 2d ed. 2004).

[110] *Lochner v. New York*, 198 U.S. 45 (1905).

[111] Richard H. Fallon, *Strict Judicial Scrutiny*, 54 U.C.L.A. L. REV. 1267, 1287 (2007).

[112] *See*, *e.g.*, *Olsen v. Nebraska ex rel. Western Reference & Bond Association*, 313 U.S. 236, 246 ("We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where it was left by the Constitution—to the states and to Congress").

[113] Fallon, *supra* note 111, at 1270. *See*, *Braunfeld v. Brown*, 366 U.S. 599, 612 (1961) (Brennan J. concurring and dissenting) ("The right of a state to regulate . . . may well include . . . power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting."). "But freedoms of speech and of press, of assembly, and of worship, may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect." *Id.*

[114] *See NAACP v. Button*, 371 U.S. 415, 438 (1963); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963); *Shapiro v. Thompson*, 394 U.S. 618, 634, 638 (1969). On the history of the emergence of the compelling state interest standard see Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 361–92 (2006).

existing standards in the 1970s.[115] According to this intermediate scrutiny test, a discriminating or rights-infringing measure is only justified if it is "substantially related" to "important governmental objectives."[116]

This system of tiered review appears to be very similar to the definitional balancing and the categorical typology of infringements discussed in the previous two sections. If certain constitutional rights enjoy the protection of strict scrutiny, while others are subject to intermediate scrutiny or the rational basis test, the tiered system attributes different values to different rights. At least the establishment of the categories thus requires an implicit balancing.[117] Furthermore, the Supreme Court employs, in practice, two principal interpretations of the strict scrutiny test.[118] On the one hand, the court searches for illicit governmental or legislative motives.[119] According to this interpretation, a discrimination or restriction of an individual right is immediately condemned if its purpose was forbidden. On the other hand, the court often engages in a weighted balancing test, in which it has to evaluate whether the state interests are sufficiently important to override the constitutional rights.[120] Therefore, it seems that at least in practice, the tiered system of review does not lead to an exclusively categorical reasoning. Instead, the Supreme Court

[115] Fallon, *supra* note 111, at 1298.

[116] *Craig v. Boren*, 429 U.S. 190, 197 (1976).

[117] BARAK, *supra* note 1, at 512. But see also Schauer, *supra* note 88, at 430–31, who criticizes the consequentialist reading of the tiered system of review using the metaphor of different rights as armors of different strengths:

> Just as the piercing of my hypothetical armor by a bullet scarcely demonstrates that bullets and armor are basically the same thing . . . so too does the ability to point out that rights are frequently or occasionally pierced by mere interests . . . scarcely demonstrates that deontological rights and consequentialist interests are interestingly reducible to the same coin.

Id.

Yet Schauer leaves open how to determine the thickness of the armor and the strength of the bullet if not through consequentialist reasoning.

[118] Siegel, *supra* note 114, at 393–94. See also Fallon, *supra* note 111, at 1302–15, who identifies three categories, the third being a nearly categorical prohibition (*see id.* 1303–05).

[119] ELY, *supra* note 37, at 145–48; Siegel, *supra* note 114, at 393; Fallon, *supra* note 111, at 1308–11. *See also* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998) (arguing that this search for illicit motives should be the core of individual rights review).

[120] Siegel, *supra* note 114, at 394; Fallon, *supra* note 111, at 1306–08; Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 102, 116 (2011). *See also* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 813 (2006) (making the empirical observation that the application of strict scrutiny does not automatically lead to the unconstitutionality of the state measure).

sometimes feels urged to use balancing in order to resolve conflicts between individual rights and public interests.[121]

E. Conclusion

The resolution of conflicts between individual rights and public interests remains a complex issue. It was not the aim of this contribution to propose an optimal strategy. Each of the discussed approaches has certain virtues, but also considerable flaws. The preference for one of these approaches thus does not depend on the "rationality" of the different approaches. It rather depends on normative conceptions of the role of constitutional courts in the political system and on the nature of rights and legal argumentation. In particular, there are three dimensions of background assumptions that allow for a categorization of the different approaches.

The first dichotomy is between deontological and consequentialist understandings of rights. A purely deontological conception of rights necessarily requires a categorical approach to interpretation, as balancing logically implies that rights are not considered as ends *per se*, but as values that have a price and that may, consequently, be partially outweighed by specific public aims. It will be difficult, however, to justify such a purely deontological conception for all individual rights, which does not exclude that deontological reasoning can have its place as one part of a broader conception of rights.[122]

The second dichotomy concerns the tension between predictability and flexibility. Categorical approaches enhance the establishment of rules, which have a guiding function for future judicial decisions. These approaches increase the predictability of the legal system, but also reduce its fit as strict rules usually have the tendency to be over- and under-inclusive. Balancing gives the judges more flexibility to tailor a solution for each individual case. Of course, this presupposes that the judges are in the best position for such problem solving.

This leads us to the final and probably most important point. The discussion about proportionality and balancing is essentially about different conceptions of what role courts should play in a democratic society and in the political system.[123] Balancing conveys political power to judges.[124] It gives them the ability to evaluate competing legal values. The weaker the constraints imposed by the legal method are, the more such value

[121] E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW. CONTROLLING EXCESSIVE GOVERNMENT ACTIONS (2009); Mathews & Stone Sweet, *supra* note 120.

[122] *See* Kumm, *supra* note 73, at 153–64.

[123] Schauer, *supra* note 94, at 64.

[124] Stone Sweet & Mathews, *supra* note 4, at 161–62.

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judgments have to be qualified as an act of policy making.[125] This is probably the core of the critique of the "rationality" of proportionality balancing.[126] If the "rationality" of balancing is criticized, critics basically claim that the legal ties of proportionality are too feeble to prevent judges from policy-making.[127] Therefore, they either advocate approaches that are more deferential to the legislator, such as the reduced proportionality test, or more constraining for the judges, such as the categorical approaches.[128]

It seems that the discussion about balancing should thus turn to these underlying assumptions. Instead of focusing on the rationality question, the discussion should focus on the role of courts in the political system instead of relying on implicit assumptions. While the respect of legislative decisions is an important principle of judicial decision-making, deference cannot be unlimited if judicial review is to remain meaningful. Consequently, constitutional law scholarship still has some way to go to find a methodology for the resolution of value conflicts that strike the right balance between the respect for value judgments of the legislator and the maintenance of effective judicial review.

[125] *Cf.* Thomas Kleinlein, *Judicial Lawmaking by Judicial Restraint? The Potential of Balancing in International Economic Law*, 12 GERMAN L. J. 1141, 1167 (2011) ("The more rational judicial balancing is, the less problematic its justification is.").

[126] *Accord* Mathews & Stone Sweet, *supra* note 120, at 122 (arguing that the hostility toward judicial balancing is often paired with a suspicion of judicial law making).

[127] *See* Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, *in* INSTITUTIONAL REASON: THE JURISPRUDENCE OF ROBERT ALEXY 307, 310 (Matthias Klatt ed., 2011) ("When critics like Habermas accuse the balancing process of being irrational, however, it appears that what they really mean is *unconstrained.*").

[128] Courts can also exercise considerable political power using formalist or categorical approaches, *cf.* Cohen-Eliya & Porat, *supra* note 2, 279–80 (discussing *Lochner*); Niels Petersen, *Völkerrecht und Gewaltenteilung – Die aktuelle Rechtsprechung des U.S. Supreme Court zur innerstaatlichen Wirkung von völkerrechtlichen Verträgen*, *in* VÖLKERRECHT IM INNERSTAATLICHEN BEREICH 49, 63 (Christina Binder, Claudia Fuchs, Matthias Goldmann, Thomas Kleinlein & Konrad Lachmeyer eds., 2010) (discussing *Medellín*).

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