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Proportionality and 'Deference' in Contemporary Constitutional Thought

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In a recent piece called 'Critical Perspectives on Social and Economic Rights, Democracy and Separation of Powers',[1] Karl Klare developed a novel and important argument in favour of judicial activism on behalf of constitutionally entrenched social and economic rights. His argument aims at both the legislature and the executive, and includes both invalidating and requiring particular actions. The innovation is that he treats the norm of judicial deference to the elected legislature and executive as a 'consideration' among others, one that might or might not lead the judge to uphold a statute in spite of his personal view that it is unconstitutional. It is of variable weight, according to him, depending on the particular context, rather than a categorical command.[2]

In an article called 'Freedom and Constraint in Adjudication',[3] I tried some years ago to imagine what it would be like to be a left liberal activist judge faced with a labour law dispute in which the law seemed to favour what he saw as an unjust result. The case was between private parties, with constitutional overtones, but not involving judicial review of legislation.

In this chapter I deploy the phenomenological method of 'Freedom and Constraint' to interpret and extend Klare's analysis, not necessarily in the direction he would have chosen. A phenomenological account of the judge thinking about deference has to start with a 'situation'. I will try to reconstruct the experience of a

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[1] K Klare, 'Critical Perspectives on Social and Economic Rights, Democracy and Separation of Powers' in HA García, K Klare and LA Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (New York, Routledge, 2014).

[2] ibid.

[3] D Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 4 *Journal of Legal Education* 518.

judge who has a specific place in a typology of judges and is operating in a specific political and legal cultural context. Of course, there are many other dimensions of the situation that might be relevant.

I. Contemporary Legal Thought

My judge is firmly situated in 'contemporary legal thought'.[4] By this I mean the set of typically contradictory jurists' ideas and attitudes that have come to dominate, transnationally, following the weakening of faith in socially oriented legal thought[5] and the partial revival of elements of classical legal thought.[6] There are three aspects of contemporary legal thought that are directly relevant to the topic addressed here.

A. Proportionality

The first of these is the slow transformation of the teleological jurisprudence developed by the social jurists between the 1890s and the 1940s into a jurisprudence of 'balancing' or 'proportionality'. Constitutional courts around the world sometimes deploy formal proportionality analysis as the reasoning technique for resolving conflicts between constitutionally protected rights and government powers, between protected private rights, between central and federated powers (the US, the EU), and between international courts and treaty signatories. In all its variants, the method is a complex amalgam of elements from social and classical legal thought.[7]

Jurists typically present the procedure as having three steps, only the third of which will concern us in this chapter. The first step is to decide whether the challenged action falls within the power of the defendant, whether a state or private actor, and at the same time whether the plaintiff has suffered an injury to the right (or subordinate power) alleged. This step seems typically to be performed in a conceptual or inductive/deductive manner, reminiscent of classical legal thought, by 'defining the scope' of power and right. The second step is to determine whether there was a 'less intrusive means' by which the actor could have accomplished

[4] See D Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in DM Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge, Cambridge University Press, 2006).

[5] ibid 25.

[6] ibid 37.

[7] ibid; D Kennedy, *A Critique of Adjudication [fin de siècle]* (Cambridge, Harvard University Press, 1997); J Bomhoff, *Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse* (Cambridge, Cambridge University Press, 2013); A Marzal Yetano, *La dynamique du principe de proportionnalité: Essai dans le contexte des libertés de circulation du droit de l'Union européenne* (LGDJ/ Institut Universitaire Varenne, 2014).

the legitimate objective established in the first part. The notion is that if the goal could have been accomplished by another means that would have a smaller (or negligible) impact on the plaintiff's entitlement, the means is illegitimate. This step is derived from the teleological jurisprudence characteristic of social legal thought.[8]

The third step, or 'true' or 'per se' balancing or proportionality, is the only one that will concern us here. The jurist performs it only if the first two steps yield neither a conceptual nor a teleologically convincing resolution of the case. In this sense, (true) balancing is the legal reasoning method of last resort.

The conflicting considerations to be balanced include the legal desiderata identified by the social jurists as 'interests' to be taken into account when interpreting 'law as a means to an end' (certainty, flexibility, security, innovation, social cohesion, social welfare, individual autonomy, and so forth).[9] But they also include the canonical classical categories of rights, powers, duties, privileges and so forth.

A typical jurisprudential reflection of this development was Ronald Dworkin's argument for including 'principles' with 'weight' (eg *pacta sunt servanda*, no one should profit by their own wrong, but also rights 'as trumps') into the formal definition of law, thereby overthrowing the mode of positivism according to which law was rules.[10] Dworkin to the contrary notwithstanding,[11] proportionality in contemporary practice has always included policies as well as principles, rights and powers.[12]

In both classical and social legal thought, and in both common law and civil law jurisdictions, the technique of proportionality was only marginally acknowledged, perhaps more in the US than elsewhere. In the US, it was present before World War II in nuisance, negligence and antitrust, and in the law of the federal 'commerce clause'. In the civil law, it found a prominent place in administrative law and in variants of abuse of right doctrine.[13]

[8] Thus legal ontogeny recapitulates legal phylogeny. In these first two steps the jurist may very well be covertly balancing in deciding the scope of rights and powers and the intrusiveness of means. cf R Alexy, *A Theory of Constitutional Rights* (New York, Oxford University Press, 2010) 399. Indeed, one way to understand the formal structure is that it permits courts to decide the vast majority of cases by manipulating these first conceptual or teleological steps, to make the outcome seem less discretionary and so less controversial than it would be if reached through the third 'true balancing' step. Critics of the outcome then bring to bear the 'hermeneutic of suspicion' described in s I.C below, to show legal error in the service of ideology. See D Kennedy, 'The Hermeneutic of Suspicion in Contemporary American Legal Thought' (2014) 2 *Law and Critique* 91.

[9] RV Jhering, *Law as a Means to an End*, trans I Husik (Boston, Boston Book, 1913).

[10] RM Dworkin, 'The Model of Rules' (1967) 1 *The University of Chicago Law Review* 14.

[11] RM Dworkin, 'Hard Cases' (1975) 6 *Harvard Law Review* 1057.

[12] Kennedy (n 7) 119.

[13] Kennedy (n 7); See D Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"' (2000) 1 *Columbia Law Review* 94; D Kennedy and MC Belleau, 'La place de René Demogue dans la généalogie de la pensée juridique contemporaine' (2006) 56 *Revue interdisciplinaire d'études juridiques* 163; D Kennedy, 'A Transnational Genealogy of Proportionality in Private Law' in R Brownsword et al (eds), *The Foundations of European Private Law* (Oxford, Hart Publishing, 2011); A di Robilant, 'Abuse of Rights: The Continental Drug and the Common Law' (2010) 3 *Hastings Law Journal* 687.

It seems obvious, but only in retrospect, that it was covertly pervasive in both systems, but regarded as inconsistent with the basic idea that legal interpretation is a rational practice. Today overt recognition that 'the law', as narrowly defined by, say, Hartian positivism, sometimes 'runs out', and that the proper *and fully 'legal'* last resort response is balancing, is common but controversial.[14] This has meant that many but by no means all contemporary practitioners of legal reasoning in 'hard cases' live with a measure of self-doubt.[15]

B. Institutional Competence Arguments

The second relevant aspect of contemporary legal thought is the gradual emergence within the discourses of legal justification (whether lawyers' briefs, judgments, legal academic literature or legal philosophy) of what are commonly called 'institutional competence' arguments, a phrase popularised by Hart and Sacks in their famous *Legal Process Materials.*[16] These are typically based on the idea that founding documents (Constitutions, charters, treatise, see Teubner)[17] define distinct roles for different institutions in a system, and that these role constraints are in some sense binding or valid.

i. Institutional Competence in General

In the conventional understanding of these systems of separated powers, the role of the judge is to 'interpret and apply' the law that defines the competences of the institutions, to ensure that each operates only within its allocated 'sphere' or 'zone'. The conventional understanding sharply contrasts 'interpreting' with 'making' law, understood to be a legislative function, not authorised for judges. Thus the 'sphere' of the judge is defined *both* by the role of policing everyone else's sphere ('competence competence') *and* by the methodological imperative that he do this through legal interpretation alone.

This means that there are two different kinds of critique of a judicial decision. It might be wrong substantively: the wrong party won, the rule enunciated was the

[14] See generally Alexy (n 8); D Kennedy, 'A Left Phenomenological Alternative to the Hart/Kelsen Theory of Legal Interpretation' in D Kennedy, *Legal Reasoning: Collected Essays* (Aurora CO, The Davies Book Publishers, 2008).

[15] See Kennedy, 'From the Will Theory' (n 13); Kennedy (n 8); D Kennedy, 'A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary Constitutional Thoughts' in J DeSautels-Stein and C Tomlins (eds), *Contemporary Legal Thought* (Cambridge, Cambridge University Press, forthcoming).

[16] HM Hart and AM Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, tentative edition in 1957, published version edited by WN Eskridge Jr and PP Frickey (Westbury, New York, Foundation Press INC, 1994).

[17] G Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in C Joerges, I-J Sand and G Teubner (eds), *Constitutionalism and Transnational Governance* (London, Hart Publishing, 2004).

result of a mistake in legal reasoning. The observer attacks the court's decision as legally unjustifiable, because, for example, it incorrectly constrains or fails to constrain the legislature when it passes a law that impinges civil liberties.

The second kind of critique adds to the substantive objection that the court reached its wrong result by overtly or covertly abandoning correct interpretive method, which would have precluded that outcome. The judgment consciously or unconsciously reasons on bases that are appropriate only to a co-equal legislative or executive power.[18] The defender of the judgment will respond with an institutional argument in the opposite direction, to the effect that the court's methodology was fully 'legal', as well as substantively correct. These arguments are loosely associated with the notions of judicial 'passivism' and 'activism', referring to greater or lesser willingness of the court to challenge the other powers in the system.

ii. Institutional Competence and the 'Counter-majoritarian Difficulty'

Institutional competence arguments emerged and were gradually abstracted and systematised in the United States during two periods, 1895–1937, and 1954–80, of intense controversy over decisions of the US Supreme Court striking down first progressive and then conservative legislation that had strong political and legislative support. The paradigmatic cases were *Lochner v New York*[19] and *Brown v Board of Education*.[20] The arguments developed in those contexts have been globalising since the Second World War, as Constitution-making bodies in many countries have established constitutional courts with the power of final judicial review of legislation.[21] In the US and in other national contexts of review of legislation under a bill of rights, the focus of the institutional competence argument is the 'counter-majoritarian difficulty'.[22]

In the American balancing debate of the 1950s, the blurring of the line separating judicial from legislative power was sometimes condemned because it forfeited the social benefits of role specialisation, with 'competence' meaning something like effectiveness and skill in judicial, legislative and administrative practice. In contemporary constitutional discourse, the issue is typically that of 'usurpation' by judges of legislative power. The accusation is that a particular instance of judicial activism violates the rules of constitutional law and the principle of democracy. 'In a democracy', the argument goes, law-making power belongs to 'the people', and they are represented in the separation of powers by the elected legislative

[18] Kennedy (n 7) 23–38.

[19] *Lochner v New York* 198 US 45, 25 S Ct 539 (1905).

[20] *Brown v Bd of Educ*, 347 US 483, 74 S Ct 686 (1954).

[21] See eg, CN Tate and T Vallinder (eds), *The Global Expansion of Judicial Power* (New York, New York University Press, 1995) 5.

[22] I believe that this phrase was coined by Alexander M Bickel in AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, Yale University Press, 1962) 19; and elaborated by John H Ely in JH Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, Harvard University Press, 1980).

branch. The judges, because they are not elected, do not represent the democratic or majority will. Therefore if they 'make law', they usurp the legitimate powers of the other branches.

Sophisticated jurists have affirmed for more than a hundred years that what judges do and indeed have to do in important constitutional cases is more than 'just' interpretation in the classical mode of induction/deduction and conceptualism. They have recognised a consequent problem for the conventional view of the separation of powers. In exceptionally difficult questions of constitutional law, the court doing judicial review would have to go beyond straightforward conceptual reasoning (the law runs out) and open itself to the charge that it was usurping legislative power.

They have responded over time with perhaps a dozen sophisticated and often interesting explanations of how judges make law, but in a way that constrains them so as to make them very different from legislators. Then they have argued that judicial review can 'make law', in the restricted sense that is appropriate to the judicial role, and avoid the counter-majoritarian difficulty, by adopting their proposed method. An early example was Roscoe Pound's argument for teleological against formalist constitutional interpretation.[23]

Hart and Sacks, for another example, argued that if a decision invalidating a statute as unconstitutional could not be justified by 'reasoned elaboration' of the legal materials, it usurped legislative power both by inappropriate reasoning and by displacing the legitimate law maker.[24] Herbert Wechsler, a famous American jurist of the 1950s and 1960s, argued that the limit of judicial power was defined by the requirement of justification by 'neutral principles'.[25] As we will see in the next section, surprisingly and controversially, in the current 'age of proportionality' numerous contemporary jurists think that proportionality as a method is up to the justificatory task.

Competence arguments are of course not limited to the national individual rights situation. They have abstracted and generalised across the same wide range of institutional situations in which proportionality has become an important method, including, for example, judicial review of administrative action, judicial review by courts at the various levels of a federal system, and judicial review by national and international courts under human rights treaties. In Gunther Teubner's 'pluralist' transnational legal order, institutional competence issues, or something like them, arise when 'court-like' organs in non-governmental organisations interpret their founding documents.[26] Resistance to judicial power will be more complex when the opposition is no longer simply 'elected representatives of the people versus unelected judiciary'. For example, in the federal and transna-

[23] R Pound, 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605.
[24] Hart and Sacks (n 16) 362–545.
[25] H Wechsler, 'Toward Neutral Principles of Constitutional Law' (1959) 1 *Harvard Law Review* 1.
[26] Teubner (n 17).

tional contexts, the argument for democracy mixes in an often puzzling way with the argument that the court applying constitutional or treaty norms should defer in some cases out of respect for the 'sovereignty' of the entity being judged. The discussion here is limited to the variant of institutional competence argument that is directed against or in support of a national court that is reviewing national legislation challenged as an interference with constitutionally protected fundamental rights.

iii. Deference and Proportionality

In a controversy about whether the court decided correctly when striking down a statute, the losers will argue that the judgment was incorrect as constitutional interpretation. Because it was incorrect, a valid legislative choice has been displaced by a wrong judicial one, and that is a misfortune for the losing litigants and for the separation of powers. But a 'deference' argument goes a step further.

It is to the effect that, in a particular case, the court should defer to the legislature by upholding a statute against constitutional challenge (or by refusing to impose an affirmative law making obligation). Deference occurs when the justices in the majority vote to uphold the law in spite of their own best legal judgment that it is unconstitutional. A closely allied variant of this argument in European constitutional discourse is that in cases of judicial review there exist 'margins of appreciation', meaning bounded areas or 'zones' of discretion, within which courts should defer to co-equal powers.[27]

The oldest version of the institutional competence argument for deference in the constitutional context is that a judge should vote to defer unless the case for unconstitutionality is 'clear'.[28] If there is doubt, he should vote to uphold the legislation. Suppose that, *as a legislator*, he would have regarded the case as close and difficult, but would ultimately have decided that the statute was unconstitutional and voted against it for that reason. *As a judge*, the argument goes, he should defer because of the particular kind of counter-majoritarian difficulty,[29] or democratic deficit,[30] implied in displacing the elected legislator in questions for which there is no clear legal answer.

Against this background, the rise of proportionality poses serious difficulties for the traditional doctrine of deference. On the one hand, it threatens to vastly expand the number of plausible challenges to the validity of statutes. On the other,

[27] See Alexy (n 8); and V Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 8 *Yale Law Journal* 3094, 3144–47.

[28] Famously put forward in 1893 by JB Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 3 *Harvard Law Review* 129.

[29] See s I.B.i and I.B.ii above.

[30] cf JHH Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights within the Legal Order of the European Communities' (1986) 3 *Washington Law Review* 1103.

its widespread use leads to fear that important questions of constitutional validity can never have clear answers in the sense required by the traditional doctrine. Something close to every single rule of public and private law can today be conceptualised as striking a balance between abstract rights, powers, values, interests and goals enshrined in the national constitution. For this reason, at the interpretive moment, every single rule is a candidate for proportionality analysis. This is Matthias Kumm's 'total constitution'.[31]

Sometimes the enemy of the judgment argues something more than that because the case was not clear there should have been deference. Suppose that the judgment invalidates the statute, using proportionality on the ground that the conceptual and teleological methods have 'run out' (the first two steps of the formal analysis are inconclusive) and there is no alternative to 'true balancing' other than 'denial of justice'.

The critic or dissenting judge answers that the method itself is not sufficiently distinct from the avowedly political method of the legislature to justify using it as a supposedly 'legal' constraint on legislative power. If unconstitutionality can be established only by balancing, the answer cannot be 'clear' in the requisite sense. The separation of powers requires that when the only possible basis for judgment is proportional, the court should defer unless there is 'no reasonable basis' for the statute.[32]

At this point, the parties will find themselves embroiled in a third aspect of contemporary legal thought, namely 'the hermeneutic of suspicion'.

C. The Hermeneutic of Suspicion[33]

The 'hermeneutic of suspicion' animates contemporary constitutional discourse when the legal question under discussion involves large political or social or economic stakes. The judge knows that there is a high consciousness among jurists of the indeterminacy of legal argument, associated with critiques revealing the prevalence of gaps, conflicts and ambiguities in standard legal materials. This goes along with a sense that both conceptual and teleological methods turn out to be frequently manipulable, with indeterminacy masked by the 'abuse of deduction'[34] (or of teleology).[35] Proportional argument is if anything more vulnerable than the

[31] M Kumm, 'Who's Afraid of the Total Constitution?' in AJ Menéndez and EO Eriksen (eds), *Arguing Fundamental Rights* (Netherlands, Springer Science & Business Media, 2006).

[32] TA Aleinikoff, 'Constitutional Law in the Age of Balancing' (1987) 5 *Yale Law Journal* 943.

[33] Kennedy (n 8); Kennedy (n 15).

[34] The phrase was coined by Francois Geny in F Geny, *Méthode d'interprétation et sources en droit privé positif: essai critique* (Paris, F Pichon Et Durand-Auzias, 1919); but the earliest example of this kind of critique seems to be Jhering (n 9) Ch VIII, p 381 et seq. See generally Kennedy, 'From the Will Theory' (n 13).

[35] For a classic example of the critique of the abuse of teleology by the social jurists, see K Klare, 'Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941' (1978) 3 *Minnesota Law Review* 265.

other methods, and serves as no more than a weakly rational last resort when the other methods do not produce convincing answers (the 'law runs out').

Jurists habitually suspect that jurists other than themselves have instrumentalised these indeterminacies to justify interpretations that are based on their political ideology rather than on the law.[36] They accuse their opponents of dressing up ideological judgments as legal judgments for the purpose of usurping legislative power. While the hermeneutic of suspicion has been a feature of constitutional law debates in the US from the end of the nineteenth century, it has generalised across all politically salient domains of law (with the 'juridification of social fields') and globalised (along with judicial review of legislation) in the contemporary period.

When the hermeneutic is directed at conceptual and teleological reasoning, the accusation is of 'motivated error' in interpretation by abuse of deduction or one-sided teleology. When directed at proportional reasoning, it is likely to have an added complexity. The accuser is likely to point out that the proportional method is in itself an invitation to usurpation of the legislative role because it requires the judge to assess the weights of conflicting considerations without any plausibly 'objective' measuring tool. The rise of proportionality has in this way multiplied occasions for suspicion of ideological corruption of adjudicative processes.

II. A Hypothetical Judge in a Hypothetical Situation

A. The Institutional Setting and the Legislation

My judge is sitting in the fifth year of a 10-year term on the nation's constitutional court, which has final authority to decide on the constitutionality of legislation. Like the other eight justices, he was nominated by the president and confirmed by the national legislature. The legislature is unicameral and elected from single member districts with a run-off system. He was elevated to the High Court from a lower court in a period of social democratic control of both the presidency and parliament. Centre right and far right parties now control both the executive and the legislature.

New legislation now challenged before the Court as unconstitutional denies non-citizens, whether legally or illegally present in the country, both various criminal due process rights granted to citizens and access to various social and economic benefits. The legislation is justified in its preamble through highly controversial factual claims about immigration, national security, personal security against crime, and equity given the alleged unequal fiscal contributions of the two groups to social provision.

[36] Kennedy (n 7) 209–12; Kennedy (n 8).

It is the common view of the legal community that the clauses of the Constitution referring to discrimination, to equality, to due process and social and economic rights, as well as to the powers of the legislature to protect national security, personal security and social welfare, are general and vague and sometimes at least apparently contradictory, and that their meanings are contested.

B. What Kind of Judge?

Now we need to specify just what kind of judge we are dealing with. There are a number of finely graded spectra along which we assess judicial attitudes. A given judge may have attitudes that it is hard or even impossible to locate along the relevant spectrum, but in our case the categories allow us to describe him accurately. The spectra:

— Formalist ('positivist', conceptualist, inductive/deductive, 'traditional') versus teleological vs proportional (balancing) versus eclectic;
— Centre left versus neoliberal versus nationalist/authoritarian/populist (NAP) versus eclectic;
— Activist versus passivist versus eclectic in relation to legislative power.

These dimensions are independent. A centre-left formalist passivist attitude toward legislation is perfectly possible and happens all the time, and moreover is not inconsistent with an opposite attitude toward executive or private power.

i. His Positions on the Spectra of Judicial Attitudes

— He believes the proportional method is in many important cases the only rational one, but is adept at conceptualist and teleological argument, and often finds one or the other convincing (easy cases).
— My judge understands that viewed from outside, his positions very roughly correspond to those of the social democratic party whose president nominated him and whose legislative members confirmed him five years ago. But he was never a member of a political party and regards himself as completely independent of party or factional discipline of any kind. He is opposed both to the NAP positions of the main right-wing party and to the neoliberal views of the conservative wing of the social democratic party.
— My judge is a judicial activist. This requires some specification.
    a. Looked at from the external perspective of a political scientist or a journalist, he has been relatively willing to make legal decisions that are understood to go counter to the interests and desires of power holders in the legislative, executive or civil society spheres.
    b. Looked at from the internal legal point of view, these decisions have been controversial because they depart from what the typical jurist's first impression is as to the likely outcome of conceptual/doctrinal reasoning.

His alternative argumentative strategy may be nonetheless conceptualist, albeit surprising, or may involve teleological or proportional argument.

c. The pattern of his activist decisions corresponds in a very general way to the agenda of the social democratic party, although he was never a member, and has often reached results inconsistent with its programme.

ii. His Judicial 'Philosophy' is Dworkinian

In his own mind, my judge understands his commitment to the rule of law in the following way: if the result of conceptual reasoning that seems plausible on first impression strikes him as unjust, he has a duty to try to find an alternative legal argument (which might be conceptual, teleological or proportional) that will lead to a just outcome. If he fails to find such an argument, he is bound to and will in fact reach the unjust result (except where he feels obliged to openly defy the law).[37]

In cases that involve the constitutionality of legislation, it is part of his conception of his oath to judge according to the law that he cannot strike a law unless he believes that the best interpretation of the Constitution is that it is invalid. In other words he fully accepts that he has a 'duty of interpretive fidelity'.[38]

Where conceptual and teleological reasoning 'run out' he has to resort to proportionality. In that case, he sees himself as bound to decide according to the balance in the particular factual context of the abstract ideals, rights, powers, principles, policies and values that are evoked in the general and particular clauses of the Constitution. These include civil, political and social rights, equality, national security, personal security, social welfare and so on.[39] Unlike Dworkin, he fully embraces 'policies' as elements in the analysis.[40]

C. His View of this Case

Although he thinks that cases sometimes have right answers when decided according to the deductive/inductive or teleological methods, it is clear to him that this case is not one of them. The law conceived that way 'runs out' so that there is no alternative to employing the method of proportionality. Entering into that procedure, he has concluded that (a) the measures enacted are within the powers of the government, and (b) that there are not available equally efficacious means that would be less detrimental to the rights of legal and illegal aliens.

However ... (c) the benefits to national security, personal security and tax equity are not proportional to the harm to the rights to equality, due process, and

[37] Kennedy (n 7) 161–64.
[38] R Dworkin, 'Law as Interpretation' (1982) 1 *Critical Inquiry* 179.
[39] Dworkin (n 11).
[40] See Kennedy (n 7) 124–30.

social protection guaranteed by the Constitution. He has therefore determined in his own mind that the statute is unconstitutional *unless* the doctrine of separation of powers requires him to defer to the decision of the legislature.

This means that he has in his own mind a clear answer to the typical lay argument that because his activist decisions seem consistently to be on the side of his social democratic party colleagues, he is deciding to strike the statute on political grounds and therefore usurping the power the people have conferred on the NAP adversary. His answer is that it is the Constitution itself that, faithfully interpreted, supports the social democratic position. He has subjected himself to the discipline of producing his own legal 'right answer' (Dworkin again), namely the result and the reasoning that he considers correctly proportional given constitutional values.

It follows that he does not see himself as having usurped legislative power, in the simple sense of making a 'wrong' legal judgment for political ends. Of course, pursuant to the hermeneutic of suspicion his political adversaries will condemn a decision against the statute as a politically motivated legal error. But this kind of exchange is just part of the territory of contemporary legal debate. If he chooses to defer, his erstwhile social democratic colleagues in the legislature will accuse him of betraying the activist legal truth through cowardice or opportunism.

III. Deference

The much more difficult question is whether the doctrine of separation of powers requires him to defer to the legislative judgment and uphold the statute in spite of his conviction that the best interpretation of the Constitution condemns it.

A. The Origins: Deference Linked to Proportionality

As far as I know, the first clear articulation of the argument that he should indeed do so is in Felix Frankfurter's famous concurrence in the 1951 case of *Dennis v United States*,[41] in which the US Supreme Court upheld the constitutionality of a statute criminalising speech advocating 'violent overthrow' of the government, aimed at the US Communist Party.

> The demands of free speech in a democratic society, as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.

[41] *Dennis v United States* 341 US 494, 71 S Ct 857 (1951) 525.

> But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment?—who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.
>
> Primary responsibility for adjusting the interests which compete in the situation before us of necessity belongs to the Congress. The nature of the power to be exercised by this Court has been delineated in decisions not charged with the emotional appeal of situations such as that now before us. *We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it.*[42]

Dennis is one of the earliest, if not the earliest, discussions[43] of proportionality as a legitimately legal although last-resort form of legal reasoning in the exercise of judicial review of legislation (as opposed to private and administrative law).[44] It is striking that right from this beginning it was linked to the idea of deference.

Since the end of the nineteenth century, American judges when striking statutes routinely stated that they acted only in clear cases, and dissents routinely argued that the case was not clear (See eg, *Lochner v New York*[45] and the famous article by Thayer on 'The American Doctrine of Judicial Review').[46] But in this case, Frankfurter seems to be saying something much more specific. It is because the case can only be decided by balancing that the court must defer, and the standard of 'no reasonable basis' goes far beyond the ritual requirement that the case against the statute be clear.

When *Dennis* was decided, at the dawn of the third globalisation (contemporary legal thought), there were very few acknowledged balancing cases in American constitutional law (it was several years before the German constitutional court would decide the *Luth* case).[47] It was, I imagine, plausible that balancing would be an unusual procedure, so that a requirement of extreme deference in a few cases would have little impact on the law. As it happened, balancing cases proliferated and the US court soon developed an elaborate structure of 'degrees of scrutiny' corresponding to different levels of deference. Meanwhile proportionality became the basic doctrine first of the German Constitutional Court and then of

[42] ibid, emphasis added.
[43] Aleinikoff has nothing earlier in his history. See Aleinikoff (n 32).
[44] Kennedy, 'Transnational Genealogy of Proportionality' (n 13).
[45] *Lochner v New York* (n 19).
[46] Thayer (n 28).
[47] 7 BVerfGE 198 (1958).

the European Court of Justice and the European Court of Human Rights.[48] After the 'transition' around 1989 from left and right dictatorships to at least nominal constitutional democracy, it globalised along with judicial review.[49] In the US, paradoxically, at the moment of the global triumph of an American innovation the practice went underground.[50]

Writing about the 1950s, Martin Shapiro, to my mind the period's most astute analyst of constitutional law as political discourse, predicted that balancing would be an excuse for judicial surrender to the legislature.[51] Because it lacks compelling rational structure, it would be hard to defend a balancing ruling against the charge of usurpation of the legislative prerogative of deciding political questions. To the contrary, it has long since been obvious that proportionality has been the vehicle of a radical expansion of judicial vis-à-vis legislative power. Balancing turned out to be the activists' language of choice for constructing an alternative after destabilising a targeted rule's conceptual or teleological rationale as formalist.

Judicial review as an aspect of the globalisation of contemporary legal thought means that my imaginary judge has to deal, if he wants to decide in good faith according to fidelity to law, with the separation of powers argument. According to that argument, he should uphold the statute, even though he believes that it is unconstitutional, on the ground that the legislature is the proper body to decide contestable questions of constitutional proportionality.

B. The Conceptual Arguments for and against Deference

i. The 'Legalist' or No-deference-at-all Argument

My judge could but will not respond by rejecting the whole notion of deference. He could but will not appeal to the version of the separation of powers that requires the judge to perform judicial review according to strictly legal criteria. In this view, to refuse to apply the law as he believes it to be, on the ground that 'courts are not

[48] Bomhoff (n 7) chs 1 and 3; AS Sweet and J Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transnational Law* 72.

[49] D Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2004) 162–63; Sweet and Mathews, ibid.

[50] Thus Aleinikoff writing in 1987 described balancing in US con law as 'widespread, if not dominant'. See Aleinikoff (n 32) 943–44. In 2015, Jackson sees 'the relative dearth of proportionality analysis in US jurisprudence' as an interesting phenomenon worthy of explanation, and develops an elaborate account. It includes a role for 'distinctively American fears about judging and the role of judges, in part an inheritance of Legal realism and critical legal studies', that are absent in Europe. See Jackson (n 27) 3125. She ignores the (Republican) elephant in the room, which is the political right-wing campaign against left judicial activism under the slogans of strict construction and original intent and the liberal regression under pressure, surrendering their own advanced thought from sociological jurisprudence to Legal Process. Jackson, ibid 3125. See also Bomhoff (n 7) 156–89.

[51] MM Shapiro, *Freedom of Speech: the Supreme Court and Judicial Review* (Englewood Cliffs NJ, Prentice-Hall, 1966) 103.

representative bodies', is to betray his role, rather than perform it. It is a 'refusal of justice'. This argument was skilfully made by Gerald Gunther, 'The Subtle Vices of the Passive Virtues',[52] against Alexander Bickel's *The Least Dangerous Branch*.[53]

My judge's reason for rejecting the categorical argument is that it is based on a simplistic distinction between legal interpretation and law making. As a contemporary, he cannot escape the usurpation charge simply by ignoring the role of politics in law.

In this case, according to him, conceptual and teleological reasoning run out. His solution, though held in good faith as his Dworkinian 'right answer', is based on last-resort proportional analysis of the general desiderata of national security, due process, and so forth. His understanding of these concepts as well of the Constitution as a whole corresponds roughly to that of the social democratic party that chose him, but lost the last election to the nationalist/authoritarians/populists.

NAP jurists have a very different construction of the very same constitutional text, one that supports a different assessment of the weights of the contending considerations, and a judgment that the statute is a valid exercise of legislative power. My judge believes that this reading is 'wrong', and like the other participants in contemporary legal consciousness, he is quick to apply the hermeneutic of suspicion to their argument. He thinks that they are committing an ideologically motivated legal error and are in denial about the flaws in their reasoning.

But ... he does not believe that the statute has 'no reasonable basis' or that its unconstitutionality is 'clear' according to widely accepted non-partisan canons of legal reasoning. He is perfectly capable of placing himself in a 'third' position vis-à-vis himself and his opponent and applying the hermeneutic of suspicion to his own good faith conviction about the right answer. He recognises that his view is in all probability influenced, first, by his own ideological priors, which guide his work of legal interpretation,[54] and second by the history of interpretive work by others of his ideological persuasion.

At this point, he has to ask himself whether there is a meaningful difference between his debate with his conservative colleagues on the bench and the debate in the legislature. Judicial review in this case may be distinctively 'legal',[55] and may sometimes dictate or exclude particular outcomes, but not in this case: it is not plausible here that professional judgment under a duty of fidelity to the materials is a 'check' on the political passions of the moment. It appears merely to substitute highly technical but eminently manipulable legal language of judges for the more open politics of the legislators. Since judicial review is final (absent constitutional amendment), the political judgment of the elected legislature has been overruled by the political judgment of the judges.

[52] G Gunther, 'The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review' (1964) 1 *Columbia Law Review* 1.

[53] Bickel (n 22).

[54] Dworkin (n 11).

[55] Klare (n 1) 6.

True they were selected by the president with the consent of the parliament, but they are not now subject to any electoral check. The judge concedes that in cases such as this, their power to decide against the will of the legislative majority faces a 'democratic deficit' or 'counter-majoritarian difficulty'. Under the right circumstances (to be considered below), our judge believes he will be obliged to defer.

ii. The Conceptual Argument for Deference in Proportionality Cases

Having rejected the conceptual argument against deference, the judge will consider the conceptual argument in its favour. The reader will already have guessed that if this argument fails, as the 'legalist' or 'no-deference-at-all' argument did, the judge will have to choose a 'last resort'.

Here again is Frankfurter's argument for the position that deference is always required when the judgment must be based on proportionality:

> Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. Their essential quality is detachment, founded on independence. History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures.[56]

Given (1) the reconcepualisation of the rules of public and private law as compromises of constitutionally protected rights, powers, principles, values and interests (Kumm, 'total constitution');[57] (2) the pervasive sense of the indeterminacy of the constitutional law rules supposedly regulating these conflicts; and (3) the concomitant rise of proportionality as an accepted, fully 'legal' methodology, the Frankfurter proposal to defer unless the legislation has 'no rational basis' would seem to reduce the scope of judicial review so radically as to be inconsistent with the 'normal' understanding of the separation of powers.

If we view the doctrine of separation of powers as a 'valid norm' of the constitutional order, it appears to have two components. The first is that the court is to interpret and apply the Constitution as law to strike down legislation that violates it. The second is that the court is to restrict itself to interpreting and applying, and never to exercise the law-making power conferred on the legislature. As Martin Shapiro argued in 1966, in the contemporary situation, the Frankfurter 'no reasonable basis' test amounts to allowing the second command to abolish the first.[58] In other words, the situation appears to be one in which the conceptual method for applying the separation of powers as a legal norm 'runs out'.

[56] *Dennis* (n 41) 525.
[57] Kumm (n 31).
[58] Shapiro (n 51).

iii. Splitting the Difference: Alexy's Solution

In the 2010 Postscript to his *A Theory of Constitutional Rights* (1986),[59] Robert Alexy developed a complex theory of deference in the specific context of his theory of proportionality as the master method of legal reasoning. It is striking that it was written specifically for the English translation of the work. It signals something like the merger of the American and German debates on the issue.

Alexy starts from the premise that democracy and constitutional rights are contradictory ideas, each claiming supremacy over the other. Moreover, 'the problem of epistemic or knowledge-related discretion can be resolved by balancing formal and substantive principles'.[60] My best effort at a translation would be: 'the problem of the discretion of the legislature in situations of uncertainty about the right answer can be resolved by balancing the principle of the separation of powers against the principle of respect for constitutional rights'.

Alexy might have developed his prescriptions for deference from this starting point in a direction like the one suggested by Klare. Instead he produced a set of conceptual distinctions that define spheres or zones without the need for case-by-case assessment of pros and cons. The distinctions are:

- First distinction: Between questions of constitutional validity that have certain versus uncertain answers under the test of proportionality. Where the answer 'is' certain, there is no room for deference. The judge must apply the law, as in the 'legalist' position above, *unless* the proportional method produces 'stalemate'. In that case, the legislature can choose between equally valid alternatives.
- Second distinction: Between questions of constitutional validity that 'are' uncertain because relevant facts are uncertain, and questions that 'are' uncertain because the correct balance of legal reasons is uncertain. The determination of uncertain facts is a part of law-making (not interpretation) and therefore belongs to the democratically legitimated legislature.
- Third distinction: Among situations where the legal answer is uncertain, between those where two solutions are equally likely legally correct, and situations in which one is more likely correct than the other ('there are constitutional rights on both sides [so] there is an epistemic stalemate between them'). In the stalemate, there is no 'definitive Ought'. 'The principle of the decision-taking competence of the democratically legitimated legislature' means that the legislature can decide the constitutional question.[61]

My judge, much more American than German, will experience each of Alexy's distinctions as unable in practice to answer the question of deference. The distinctions—between certainty and uncertainty, between factual and normative

[59] Alexy (n 8).
[60] ibid 414.
[61] ibid 421–22.

uncertainty, and between legal uncertainty with or without stalemate—are themselves obviously uncertain, subject to inflection by the very passions they are supposed to tame. In the case before my judge, each of them could go either way, to indicate or forbid deference.

Alexy's approach is at the extreme opposite pole from the phenomenological, because it posits the truth of law as external to the practitioner, denying the practitioner's experience of its relativity to his work on the materials. The hermeneutic of suspicion makes short work of justifying upholding a statute because the correct balance 'is' uncertain. It will seem obviously preferable to confront directly the pro and con arguments about deference that will be masked by a certainty test.

C. The Proportional Approach to Deference: The Separation of Powers as a 'Consideration'

Confronted with what looks like a choice between two evils, my judge will explore the argument that he should regard the separation of powers as one of the 'conflicting considerations' that the judge should consider when trying to decide whether to uphold a statute he would reject as unconstitutional if he were a legislator rather than a judge. It is worth quoting at length Karl Klare's argument that it is a wrong interpretation of the rule of law to say that, *no matter what the context*, a judge conscious of the at least partially political character of his choice of interpretation should defer to the legislature.

> For time-honored theoretical and historical reasons, the countermajoritarian concern is always a respect-worthy consideration. Limitations of institutional competence should always be considered. But that is precisely what the countermajoritarian and institutional competence concerns are—*considerations* in a complex balancing of multiple sometimes conflicting factors. How powerful the countermajoritarian and institutional competence factor is in any given case depends on the circumstances. Within an overall proportionality template, it may sometimes be appropriate to subordinate those concerns to other considerations. Surely we cannot rule out this possibility a priori.[62]

In his canonical argument for deference to the legislature, Frankfurter offers no considerations on the other side. He proposes nothing that would push a judge who believes that the statute 'is' unconstitutional to refuse deference and strike it down, other than the judge's own hypothetical preference for free speech over national security in the case at hand.

This is not surprising given that Frankfurter was methodologically strongly committed to the teleological, rather than proportional method, and the latter was barely beginning to seem an inevitable last resort in important cases. In the

[62] Klare (n 1) 19 (footnotes omitted).

teleological method, the purposes or interests on the winning side are listed as conclusive and there is no overt balancing.[63]

i. Considerations against Deference

In the judge's proportional judgment, the gains to national security, personal security and tax equity were not worth the loss to equality, due process and social and economic rights. The first argument against deferring is that he believes that the statute entails a serious departure from the true meaning of the Constitution: it impairs the value of the rule of law which binds the legislature no less than the judiciary. Second, the constitutional distortion moves the Constitution away from what the judge understands to be true (social democratic) values.

These are considerations against deference to be weighed against the argument that the representative legislature is a better reflection of democratic will, and more competent to deal with broad issues of policy (courts perform well only 'within narrow limits').

ii. Dimensions of Strength of the Deference Argument (cf Alexy)[64]

In making his proportional argument against deference in the South African Supreme Court's interpretation of the constitutional clauses about social and economic rights, Klare points out[65] that there is a wide variety of more or less activist approaches the judge can take if he decides to challenge the legislature with regard to this statute. He could demand a 'second look', give a chance to amend within a given time or risk invalidation, choose to invalidate some or many parts with variable effect on the viability of the legislation, invalidate but suggest means by which the aims could be constitutionally accomplished, and many more. It will be a consideration against deference that the statute's bad effects can be prevented or mitigated in a way that only minimally, though effectively, challenges legislative power.

The proportional argument will incorporate the notion of a gradient of more or less intrusive action in review, along with the variability of the gains and losses to the competing considerations that favour and oppose deference. Imagine the degree of deference on the Y axis and the degree of impairment of civil, political and economic rights on the X axis. More impairment means less deference, and vice versa.

a. The more serious the consequences for the values that lost out in the legislative determination, the weaker the argument for deference.

[63] See Kennedy, 'From the Will Theory' (n 13) 116–21.

[64] These considerations are analogous to Alexy's 'laws of balancing' but applied to deference rather than to the substantive balance. See Alexy (n 8) 102.

[65] Klare (n 1) 19–20.

b. The more gentle and nuanced the proposed challenge to the legislative judgment, the weaker the deference argument.

There are doubtless a number of similar gradients in play, for example:

c. The stronger the legal case against the law, according to conventionally accepted standards, and the greater the judge's subjective certainty that his 'right answer' is indeed right, the weaker the case for deference.
d. The greater the judge's certainty as to the factual consequences of upholding versus striking the statute, the weaker the case for deference.
e. As Klare argues,[66] the weaker the democratic pedigree of the statute, the weaker the case for deference. An apartheid or communist era statute whose continued enforcement allows strong parties to exploit others with no relation to the goals and values of the democratic regime should be struck down, in a way that invites the legislature to find its own new solution to the question posed.

iii. Should the Democratic Defects of the Legislature be a Consideration Affecting the Strength of the Argument for Deference in Judicial Review?

Suppose that the judge considers that in the present political situation a NAP elected president and a NAP elected legislature are frequently violating constitutional guarantees of civil, social and economic rights. The discriminatory legislation against non-citizens is part of a general right-wing political programme.

Suppose that electoral procedures, including the drawing of electoral boundaries, vote-counting procedures, the financing of campaigns and control of the media, have been continuously revised so as to keep the NAP regime in power. The revisions make the rules of electoral competition more favourable to incumbents than those of any other European democracy. Voter participation in parliamentary elections, partly because of the new rules, hovers around 50 per cent.

The judge is committed to a proportional approach to answering the legal question. Is it forbidden, permissible or required, in assessing the argument for deference, to take into account the actual quality of the democratic process? The argument that 'Courts are not representative bodies. They are not designed to be a good reflex of a democratic society', has force. But what if the legislature is not even arguably a good reflex, and the consequences of deference for democratic values appear likely to be severe? To exclude consideration of the democratic quality of the legislature seems irrational. When the stakes are high for democratic

[66] Klare (n 1) 20.

values, the judge should be less deferential in reviewing statutes produced by only nominally democratic institutions that threaten those values than in reviewing statutes produced in better conditions, subject of course to the multiple grids already mentioned. As Klare puts it:

> Traditional SOP discourse under-weighs or entirely ignores the democratic shortcomings of shabby, dysfunctional, or corrupt legislative processes. Complacency about democratic deficits in modern parliamentary politics may blind constitutional theory to 'routine political ineffectiveness and quiescence—rooted in social and economic inequality—of masses of ordinary citizens'.[67]

iv. Should there be Less Deference where Judges are More Democratically Accountable?

The argument for deference depends on the idea that the judiciary is a 'counter-majoritarian' institution. Suppose the constitutional judges are selected for life terms by the president, without legislative advice and consent, from the ranks of senior sitting judges who are themselves co-opted from the corps of lower court judges.

The argument that this court suffers from a 'democratic deficit' will be strong. But what if the legislature elects the court from its own members, under a requirement of approval by three quarters of legislators in office, to staggered renewable 10-year terms (so that no legislative session will elect a majority, barring deaths in office), and judges have the possibility of re-election by their legislative peers (so they have something to lose by flouting them).

Now imagine that our judge was elected through a complex compromise between social democratic and NAP forces in the legislature, made necessary by the complex selection procedure I just described. At the same time, imagine that a new NAP majority has gerrymandered the electoral map so effectively that future social democratic electoral victories will be impossible even if the party secures a substantial majority of the votes overall. In this hypothetical, the legislature is more 'democratically defective' than the judiciary and the counter-majoritarian difficulty close to non-existent. In such a case, our judge would regard the argument for deference as weak.

Of course, these are counterfactual examples the judge uses to decide whether in his much more nuanced case he can even consider the actual democratic quality of legislature and judiciary. He will conclude from the hypothetical that he is not just permitted but obliged to at least consider the possibility that there is no judicial deficit.

[67] Klare (n 1) 21, citing RD Parker, 'The Past of Constitutional Theory—and Its Future' (1981) 42 *Ohio State Law Journal* 223.

D. The Problem of 'Universalisation'

The alternatives to the 'proportional deference' (PD) test that our judge has adopted seem to be the 'no reasonable basis' test on one side, and the 'legalist' or no-deference-at-all approach on the other. In the view of our judge, neither is conceptually required by the Constitution regarded as basic law. The basic objection to each alternative is that it purchases a measure of clarity (at least clarity in theory) at the expense of potentially disastrous arbitrariness from the point of view of constitutional values. In short, too much deference or too little. But of course PD as an answer is open to many and serious objections as well, several of which come under the rubric of universalisation. In this part, assume that our judge is going to base his judgment on PD, and explain it in his opinion, giving the arguments outlined above.

i. Goose and Gander Universalisation: Will You Accept it when they do the Same Thing to You?

There is what one might call a Kantian universalisation question here: if the 'maxim' of his judgment is PD, can our judge 'will it to be law universal?' That would mean judging it equally right for a NAP judge facing a symmetrically reversed legal/political issue to apply PD to justify nullifying progressive legislation.

I think our judge will fully accept that his NAP adversary is 'entitled' to do PD. Sauce for the gander. Of course, our judge is likely to disagree very strongly, indeed to regard as contrary to law and legality, the results that the NAP judge arrives at. But these will be objections to the legal reasoning by which the NAP judge concluded that the statute was unconstitutional, and to the NAP judge's application of the standard of proportional deference. They will not be objections to the norm of PD through which the NAP judge approaches the problem.

This is not quite the end of the story, for two reasons. First, the judge may be of the view that if he adopts PD as his maxim, it will indeed be used by NAP judges, with disastrous legal results. These might far outweigh, he fears, the beneficial legal results that flow from his and like-minded colleagues adopting and then using the standard in this and future cases when they are in the majority.

If this is the situation, the argument against announcing PD as a norm is obviously strong. If we assume (for the moment) the judge's duty to declare his true reasons for his judgment, this is also a strong motive to adopt one of the alternatives (defer unless 'no reasonable basis' or 'one right answer'). Of course, it might also be the case that our judge believes that what he or his majority say about PD will have little or no effect on NAP judges in future cases.

In the US context, in the 1950s, several very prestigious conservative federal judges practised (or said they practised) strong deference toward liberal legislation. They might have been less deferential if their liberal adversaries had put forward PD to justify activist review. But it is not clear that there are any deferential

conservatives remaining in the US context. If they have instead adopted some covert version of PD, our judge might well think it is he who is evening things up by doing it openly.

All this assumes that the national political system is operating 'normally' so that it at least plausible for our judge to see it as like a long running game with rules that are pretty much accepted by everyone. This is in part because everyone assumes that over the long run the 'sides' can expect gains and losses to be relatively stable and at least minimally acceptable to all players.

It is worth noting that in the post-'transition' period of globalising judicial review, no small number of national systems around the world have descended into a Schmittian 'crisis of parliamentary democracy'.[68] In such a crisis, political actors come to believe that they cannot treat politics as like a game in which the point is to win or lose 'by the rules'. In a crisis, particular decisions that are legitimate under the present rules appear likely to the actors to have irreversible rule-transforming and system-transforming future effects. In the US context, this is a plausible interpretation of the *Citizens United* decision.[69] At that point, it may appear that resolving the crisis in the 'right' way is much more important than any consequences that might follow after the fact from the framing of a norm of PD.

ii. Administrable Universalisation: Will Any Imaginable Standard of Proportional Deference Violate Minimum Rule of Law Norms of Legal Certainty and Restraint of Judicial Arbitrariness?

A second kind of universalisation objection is distinct from the goose/gander question. Again, we imagine a debate about whether judges should declare PD as the governing interpretation of what separation of powers requires in judicial review of legislation.

It is the traditional objection to proportionality tests in private, public and international law that they are uncertain on multiple dimensions. 'Proportion' or 'balance' is a metaphor not an intelligible prescription. According to the critique, the relevant considerations are not specified by positive law and the choice of 'weights', once considerations are specified, seems blatantly subjective, as compared to conceptual or teleological reasoning.

The resulting uncertainty is arguably a violation of the rule of law because it deprives the citizenry of assurance that they can avoid sanction by obedience. More important, the use of a proportionality test in the context of deference is in itself arguably a violation of separation of powers doctrine, because it poses no

[68] C Schmitt, *The Crisis of Parliamentary Democracy* (Cambridge MA, MIT Press, 1985).
[69] *Citizens United v FEC*, 558 US 310, 130 S Ct 876 (2010).

meaningful restraint on the usurpation of legislative power by the constitutional court. The considerations our judge proposes for PD seem either hopelessly indefinite (harm to constitutional values) or blatantly ideological or political (democratic deficits).

The first response to this argument, almost always ignored by it proponents, is that proportionality in the PD argument is a last resort. To attack it without defending either no-deference-at-all or 'no reasonable basis' is just wasting our time.

Proportionality is the dominant mode of reasoning in difficult constitutional law cases throughout Europe. Since the end of the nineteenth century, proportionality has been the basic technique of European administrative law in cases where the conflict is between the 'legitimate interests' of the citizen and the public interest. It is far too late to claim that it is fundamentally illegitimate, inconsistent with the rule of law or separation of powers in the abstract.

In the US, it corresponds to some overt practice, eg in the Fourth Amendment, but corresponds to sub rosa actual practice across the whole domain of the law of individual rights against the state, because judges are unwilling to accept either alternative in practice. This is most obvious in 'degrees of scrutiny' of legislation depending on the imputed importance of the infringed right and the imputed 'compellingness' of the state interest. The avoidance of the word 'proportionality' has to do with the odd rhetorical battles between liberal and conservative constitutional jurists in the US (eg strict constructionism versus living constitutionism).

The permissible considerations in proportionality are restricted by the requirements that they be themselves universalisable (ie, not explicitly partisan, ideological, religious, etc) and that they be derivable from the legal materials that are sources of positive law.

Proportional deference if adopted as a norm would evolve through application, like other norms of the same type. While not likely to become a highly administrable standard, it would develop, for example, by working out lists of permissible and impermissible factors and through the force of precedent. The common objection that proportional judgments cannot have precedential force is obviously incorrect, for two reasons.

First, the proportionality test produces a new norm, which in many cases will be highly 'material' and therefore administrable, in spite of its origin in the only weakly rational balancing calculus. For example a rule of restricted deference to a statute enacted under dictatorship and never reconsidered after the transition to democracy would be easy to apply. Even when the court chooses not a bright line rule, but an ad hoc 'standard', requiring balancing in each case, the balance in a particular case will determine a future case by a fortiori reasoning if there is no plausible argument that at least one losing argument from that case is stronger in this one.

In short, the arguments against PD based on the general critique of proportionality are subject to responses developed by its partisans over the last decades.

They may be stronger or weaker in this case, but they do not seem to be different in kind. And for our judge, the first is still the most important: there is no viable alternative to PD, given the arbitrariness of either the 'reasonable basis' test or the no deference position.

IV. Deciding on the Basis of Proportionality to Cast Proportionality as Deduction or Teleology to Avoid Bad Consequences of Candour

We know already that jurists are divided in terms of their explicit positions between the formalist/positivists, teleologists, proportionalists and eclectics. We also know that they practice a hermeneutic of suspicion amongst themselves, accusing one another of letting political ideology bias their judgment causing them to adopt incorrect legal positions. Now suppose that the informed politically active public (or at least the relevant lay elites) have a somewhat different view. They tend to be uninformed formalists, believing that there are always correct answers, but also confirmed cynics, convinced that judges like all other officials are very often corrupt, personally or politically.

In spite of his proportional beliefs, the judge may anticipate quite reasonably that if he is going to vote to invalidate the statute, he should cast his activist attack in formalist conceptual or teleological terms, even though he does not think those methods can answer the legal question ('the law runs out'). A fortiori, he should treat the separation of powers issue in conceptual (no deference) rather than proportional language. The reason being that if the public were to realise the extent to which his centre left solution rests on a partially political method, they would react in one of two ways, each undesirable.

Some might lose their naive belief in the objectivity of judicial review and conclude that the power is such a serious danger to democracy that it should be eliminated. By eroding faith in the distinction between courts and the other branches, left judicial activism might kill the formalist goose that lays the golden eggs of left judicial power. But of course the consequences are incalculable. Other parts of the public might conclude that liberal judges are usurpers, using their political method in violation of the rule of law, which could be restored by the selection of true jurists, namely right-wing formalist/positivists.

My view is that it is permissible for the judge to write and speak in bad faith, making himself plausible as a formalist/positivist, so long as *but only so long as* he honestly believes it is (a) necessary to prevent serious bad consequences for the body politic (b) taking into account the negative consequences. In other words, there is always the possibility that there will be a third moment of proportional judgment. This time it will be neither about the substance of the legal case for or

against the statute nor about the weight of the democratic deficit in the decision whether or not to defer. The judge will take into account all the same kinds of concerns about universalisation, administrability and unintended consequences that he brought to bear in deciding on PD, but this time he will decide case by case whether to try to mislead at least part of the public.

This view has been, I think, very generally rejected among the scholars associated with critical legal studies, including Karl Klare, whose analysis I have followed closely up to this point.

A. Always Already in Bad Faith

Rather than defend this 'outrageous' position at length, I will argue for it by analogy. There are three analogous institutional 'situations' that, I have argued elsewhere, put the judge as a matter of course in a similar kind of dilemma. They derive from one of the role conflicts that in my view define his existential situation. The conflict in question is between, on one side, his duty to state his reasons in good faith, and on the other his obligation to see that justice is done in fact, in the world.[70]

In the situations I have in mind, the judge's duty to think about the real life consequences for constitutional values, as he understands them, may legitimately lead him to give reasons in bad faith if doing otherwise has bad enough consequences. In this case, we are supposing that terrible consequences may follow if our judge openly casts the underlying legal question in terms of proportionality (deductive/teleological reasoning having 'run out'), and then in terms of PD, and then turns the democratic deficit into a factual question.

It seems plain to 'sophisticated observers' that many a judge responds to this dilemma by 'abusing deduction'. He persuades himself that (what seems to the observer) a patently false deductive or teleological argument settles the case. He does this not as a conscious strategy, as proposed above, but 'in denial' of what he is 'really' doing to escape the psychic pain of role conflict. This is bad faith in the particular Sartrean sense of self-deception that avoids taking responsibility for one's actions.[71] According to my argument here, the judge will not be departing, conceptually or ethically, from his everyday rhetorical practice if he abandons denial and consciously and deliberately casts his argument in this case in the seriously misleading rhetoric of legal necessity.

It will seem to him that the direness of the decision to mislead is further palliated by the inevitability that the wielders of the hermeneutic of suspicion on the other side will attack his bad faith argument as just that. In other words,

[70] Kennedy, *Critique of Adjudication* (n 7) 192–212; Kennedy (n 8); Kennedy (n 15).
[71] See Kennedy, *Critique of Adjudication* (n 7).

his dishonesty is not as bad as it at first appears because it is in the context of a struggle to persuade, rather than in the context of authoritative pronouncement that his first guilty intuition might have suggested it might be.

B. The Duty to Persuade in the Collective Judicial Decision Process[72]

Because he is part of a collective rather than individual decision process, the judge has regularly to deal with questions of good faith in argument that are analogous, at least loosely, to his problem vis-à-vis the public. In this context of struggle, the judge has already to deal with the question of bad faith argument vis-à-vis his colleagues. Within that process, he will as a matter of course argue to his colleagues about how the court should decide, that is, he will argue to them that they should vote in one way rather than another. The dilemma of good faith arises when he is convinced that to state his true, proportionality-based reasons for an outcome will be unconvincing or even counterproductive in mustering a majority for that outcome. When good faith argument threatens to bring about a result that is seriously disastrous from the point of view of legal truth as he sees it, he has to make a difficult choice. He will not think it obvious that he should choose frankness '*et ruat Justitia*' ('though justice perish').

Now suppose that his position wins out in the sense that he is part of a majority coalition that will vote for some part of, but not all of, what he thinks is the correct legal outcome. The good faith problem will present itself once again if he is charged with drafting a majority opinion. All insiders understand that the 'author' of the majority opinion justifying the compromise outcome as legally correct will present the compromise as legally compelled from top to bottom, rather than as an incoherent assemblage. The justices on both sides who participated in the negotiation understand that this is a misrepresentation of the reasoning behind the outcome, but it is hardly bad faith as to them. (The dissenting opinions will take issue in equally legalist terms.) The general public, as we are imagining, has no access to what happened in the negotiation. In this hypothetical, the judge first offers what he regards as a bad but convincing argument for his preferred outcome and then justifies what he regards as an only partly just result through the abuse of induction/deduction or proportionality.

This example is supposed to make the proposal, that the judge should misrepresent his proportional argument for striking down the statute as formalism, seem close to the normal or routine of judicial practice.

[72] Kennedy (n 15).

C. Should the Liberal Activist Judge Back off if Backlash Threatens?

Suppose that an activist attack on the discriminatory statute will produce first a legislative and then a popular backlash, orchestrated by the regime and its captive media. Suppose that there is a real possibility that the executive and legislature will collaborate to restrict judicial power, for example by constitutional amendment, or adding judges to the court, or by impeachment, or restricting financing or changing selection procedures. Is it permissible to take these into account?

I would say yes, citing the hoary precedent of Chief Justice Marshall's famous tactics of delay and equivocation on the path to successfully imposing judicial review. Here the judge upholds the statute although he thinks it is unconstitutional and that there is no proportional case for deference. His opinion explaining the outcome, in whatever legalist terms, will be a good deal more misleading than the recasting of proportionality as deduction or teleology.

Felix Frankfurter[73] and his disciple Alexander Bickel thought it a sometimes-plausible alternative to this mode of bad faith for the court to deploy American constitutional procedural devices that allow deference without discussing the merits. By denying standing, denying a justiciable case or controversy, and refusing to judge 'political questions', a court defers without affirming. In Bickel's version, the Court manipulates the doctrines on the basis of an unacknowledged political calculus in which deference stores legitimacy for Schmittian cases in which the judiciary is the last bastion against disaster.[74]

D. Bad Faith Deference in Hopes of Reversal

It may be helpful in addressing this question to add a third typical situation which is one in which the national constitutional court is in some complex way subject to review by a transnational court. This might be the European Court of Human Rights, or the European Court of Justice, or the Inter-American Court of Human Rights. In the American federal context, state supreme courts are subject to US Supreme Court review when, for example, they impose or prevent the legalisation of gay marriage (if they do so on federal constitutional grounds).

The analogy to the situation of an intermediate appellate court subject to review by a supreme court is real but imperfect. It is well known, indeed obvious, that lower courts strategise to avoid reversal. In our hypothetical situation, if the transnational instance has meaningful power to reverse the national court, our judge

[73] Felix Frankfurter, 'The Supreme Court of the United States' in A Macleish and EF Pritchard Jr (eds), *Law and Politics: Occasional Papers of Felix Frankfurter* (New York, Harcourt, Brace, 1939).

[74] Bickel (n 22) 169–99.

will surely adjust his argument with that in mind. But it is by no means obvious that the sole strategic goal is to avoid reversal.

Suppose that our judge is reasonably certain that if his court upholds the statute it will be taken to the transnational instance, which will strike it down. If this is the case, there might be a strong argument that a majority that regards the statute as unconstitutional should uphold it, arguing deference, hoping to divert the backlash to the international level. Is it possible to argue that doing so would violate the ethical duty of the judge, no matter how serious the consequences for the court if it challenged the executive and legislative power of the NAP forces at this particular juncture? If the court's jurisdiction might not survive the backlash, 'deference in bad faith' is arguably the ethically obligatory posture.

The point of the argument by analogy is that for the judge to deliberately reformulate his proportional argument in conceptual or teleological language in order to avoid seriously evil consequences is consistent with, indeed milder than, a number of other practices that constitutional judges legitimately engage. In contrast with 'backing off' or 'deferring in hope of reversal from above', the judge is acting to achieve what he himself believes to be the legal 'right answer'.

Moreover, as I pointed out at the beginning of this section, he writes within contemporary legal consciousness imbued with the hermeneutic of suspicion, and therefore knows that his formulation will be subject to critique as exactly what it is: a motivated error in legal reasoning in pursuit of an ideological project. He can pride himself that at least he knows what he is doing, unlike many of his colleagues who manage to maintain themselves in denial while producing identical words.

To spare you, dear reader, the ennui of infinite regress, I will not ask: if the judge believes he must sometimes lie, should he announce this position at some point in advance of any particular case arising?

V. Conclusion: Judging and Politics as a Vocation

Finally, the judge will appeal directly to Max Weber's famous essay, *Politics as a Vocation.*[75] According to Weber:

> [A]ll ethically oriented action can be guided by either of two fundamentally different, irredeemably incompatible maxims: it can be guided by an 'ethics of conviction' or an 'ethics of responsibility.' ... In the former case this means, to put it in religious terms: 'A Christian does what is right and leaves the outcome to God,' while in the latter you must answer for the (foreseeable) *consequences* of your actions.[76]

[75] M Weber, 'Politics as a Vocation' in D Owen, TB Strong (eds) and R Livingstone (trans), *The Vocation Lectures*, (Indianapolis, Hackett, 2004).

[76] ibid 83.

The ethic of conviction is Kantian, prohibiting doing things that are wrong 'in themselves', such as, in our case, lying. The ethic of responsibility holds that it may be necessary to violate that ethic without a universalisable counter-ethic that will tell you when the violation is justified:

> [N]o ethic in the world can say when, and to what extent the ethically good end can 'justify' the ethically dangerous means and its side effects.[77]
>
> ...
>
> In truth, politics is an activity of the head but by no means *only* of the head. In this respect the adherents of an ethics of conviction are in the right. But whether we *should* act in accordance with ethics of conviction or an ethics of responsibility, and when we should choose one rather than the other, is not a matter on which we can lay down the law to anyone else.[78]

With Dostoyevsky, Kierkegaard and Nietzsche in the background, the Weberian judge in the post-formalist, post-absolutist age has to decide 'without a warrant' and suffer the moral consequences if after the fact he turns out to have done wrong.

[77] ibid 84.
[78] ibid 91–92.