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Reasonableness, Proportionality and General Grounds of Judicial Review: A Response

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Abstract

This is a response to an article written by Timothy Endicott, the principal thesis of which is that proportionality cannot and should not be a general ground of review. His thesis is predicated on doctrinal and normative assumptions. The doctrinal foundation for the thesis is mistaken, and the normative foundations are not tenable. It will be seen, moreover, that Endicott's central thesis unravels, since he acknowledges that courts should intervene under the guise of reasonableness review in cases where disproportionate burdens are imposed, even where there is nothing akin to a qualified legal right.

I. Introduction

In a previous issue of this journal Timothy Endicott authored an article concerning reasonableness and proportionality as grounds of review in administrative law. The principal thrust of the article was, as evident from the title, to deny that proportionality could ever be a general ground of judicial review. The tone is forthright, and definitive, as exemplified by phrases such as 'it is an idea whose time can never come'.[1] The article joins the significant body of literature that explores this topic.[2] Endicott's central

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[1] Timothy Endicott, 'Why Proportionality is not a General Ground of Judicial Review' (2020) 1 Keele LR 1, 2.

[2] Mark Elliott, 'The Human Rights Act 1998 and the Standard of Substantive Review' (2001) 60 CLJ 301; Michael Taggart, 'Reinventing Administrative Law', in Nick Bamforth and Peter Leyland (eds), *Public Law in a Multi-layered Constitution* (Oxford: Hart, 2003) Ch.12; Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] NZLR 423; Murray Hunt, 'Against Bifurcation', in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds), *A Simple Common Lawyer—Essays in Honour of Michael Taggart* (Hart 2009) Ch.6; Tom Hickman, *Public Law after the Human Rights Act* (Hart 2010) Ch.9; Paul Craig, 'Proportionality, Rationality and Review' [2010] NZLR 265; Tom Hickman, 'Problems for Proportionality' [2010] NZLR 303; Jeff King, 'Proportionality: a Halfway House' [2010] NZLR 327; Dean Knight, 'Calibrating the Rainbow of Judicial Review: Recognizing Variable Intensity' [2010] NZLR 393; David Mullan, 'Proportionality—A Proportionate Response to an Emerging Crisis in Canadian Judicial Review Law?' [2010] NZLR 233; P Daly, '*Wednesbury's* Reason and Structure' [2011] PL 238; James Goodwin, 'The Last Defence of Wednesbury' [2012] PL 445; Timothy Endicott, 'Proportionality and Incommensurability', Oxford University Legal Research Paper Series, No 40/2012; Cora Chan, 'Proportionality and Invariable Baseline Intensity of Review' (2013) 33 LS 1; Sir Philip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 LQR 223; Paul Craig, 'The Nature of Reasonableness Review' [2013] CLP 1; Lord Carnwath, 'From Rationality to Proportionality in the Modern Law' (2014) 44 HKLJ 1; Lady Mary Arden, *Human Rights and European Law, Building New Legal Orders* (Oxford University Press 2015) Ch.4; Jeffrey Jowell, 'Proportionality and Reasonableness: Neither Merger nor Takeover', in Mark Elliott and Hanna Wilberg (eds.), *The Scope and Intensity of Substantive Review, Traversing Taggart's Rainbow* (Hart 2015) Ch.3; Jason Varuhas, 'Against Unification', ibid. Ch.5; Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press 2015) 256–260, 268–271; Paul Craig, 'Proportionality and Judicial Review: A UK Historical Perspective', in Stefan Vogenauer and Stephen

thesis, at least at the outset, is that proportionality can never be a general ground for review, because this is only warranted where there is some qualified right that warrants its application. This is premised on doctrinal and normative argumentation. The doctrinal claim is that neither the UK nor the EU has, or ever had, a general doctrine of proportionality review. The normative claim is that this is explicable principally because the interests of persons affected by administrative decisions do not generally deserve legal protection, and that proportionality is only warranted where a qualified right exists.

This article responds to these claims. It begins with elaboration of five foundational tenets that underpin review of discretion, since clarity in this respect is essential to avoid error thereafter. The focus then shifts to proportionality, with discussion of the doctrinal and normative dimensions of the subject. It will be argued that Timothy Endicott's doctrinal claim is erroneous, insofar as it ignores the fact that in the UK there was a general ground of review for what was termed proportionability, and that the EU has had a general doctrine of proportionality review for at least 50 years. The claim that the time for the emergence of proportionality can never come is thus mistaken in both respects.

The normative argument against proportionality as a general head of review is then closely interrogated. It will be seen that the normative claim that only those with a qualified legal right warrant the protection of proportionality review is predicated on two untenable assumptions: that persons affected by administrative decisions do not generally deserve legal protection, and that intervention via proportionality necessarily entails substitution of judgment by the reviewing court and thus is only warranted for those with a qualified legal right. The discussion thereafter elaborates a normative justification for the application of proportionality review in ordinary cases of judicial review that is built on doctrinal reality.

The discussion then turns to Timothy Endicott's analysis of reasonableness review. It mirrors that of proportionality, insofar as there is a divide between the doctrinal and normative dimensions of the subject. Endicott has two principal doctrinal claims. He contends that reasonableness review was always open to varying intensity of review, such that it is mistaken to conceive of the *Wednesbury* test as embodying very limited review that requires the claimant to show that the decision was so unreasonable that no reasonable public body would have reached the contested decision. However, while varying intensity reasonableness review is now the norm, we should be cautious about regarding Lord Greene MR's judgment in this manner. He also argues more generally that reasonableness review should be regarded as part of an anti-arbitrariness

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Weatherill (eds.), *General Principles of Law: European and Comparative Perspectives* (Oxford University Press 2016); Mark Tushnet and Vicki Jackson (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press 2017); Yossi Nehushtan, 'The Non-Identical Twins in UK Public Law: Reasonableness and Proportionality' (2017) 50 Israel Law Review 69; Swati Jhaveri, 'The Survival of Reasonableness Review: Confirming the Boundaries' (2018) 46 Federal LR 137; Jud Mathews and Alec Stone Sweet, *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press 2019); J. Chan, 'Proportionality after *Hysan:* Fair Balance, Manifestly without Reasonable Foundation and *Wednesbury* Unreasonableness' (2019) 49 HKLJ 1; Yossi Nehushtan, 'The True Meaning of Rationality as a Distinct Ground of Judicial Review in United Kingdom Public Law' (2020) 53 Israel Law Review 135; Jud Matthews, 'Reasonableness and Proportionality', in Peter Cane, Herwig Hofmann, Eric Ip, and Peter Lindseth (eds), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2020); Kevin Costello, '"Wrenched from its Context": The Interpretation of Associated Picture Houses and Wednesbury Corporation' (2020) 136 LQR 609; Hasan Dindjer, 'What Makes an Administrative Decision Unreasonable?' (2021) 84 MLR 265.

doctrine. I am sceptical of any gain from regarding reasonableness review in this way, since the meaning of an anti-arbitrariness doctrine is unclear, and it does nothing more than reflect substantive conclusions about the scope of judicial review that are arrived at on independent grounds.

The focus then shifts to the normative dimension of reasonableness review. It is unequivocally clear from Endicott's doctrinal analysis of reasonableness that he regards the imposition of a disproportionate burden, or disproportionate consideration of one particular consideration, as reviewable on grounds of reasonableness, irrespective of whether there is a qualified legal right or not. This leads to conceptual and normative inconsistency and the unravelling of the central thesis of his article. Proportionality is deemed applicable either where there is a qualified legal right, or even if there is no such right, where a disproportionate burden has been imposed, or there has been disproportionate consideration of a particular interest. The conclusion is reached under the guise of reasonableness review, but the substantive rationale for intervention is based on proportionality, to which unreasonableness adds nothing other than a conclusory label. There is no explanation as to why proportionality cannot be the ground of intervention, more especially so given that the fact that it fulfilled this doctrinal role without problem in the earlier years of judicial review. This conclusion serves moreover to undermine the argument against proportionality as a general head of review. This is more especially so, when we appreciate the balancing that takes place within reasonableness review, which is discussed at the end of the article.

II. Judicial Review of Discretion: Foundational Tenets

Timothy Endicott's article is predicated, as will be seen, on certain implicit contestable assumptions. It is therefore particularly important to clarify the foundational tenets that shape this legal area, since clarity in this respect is essential to avoid error in relation to the positive law and its underlying normative assumptions. The core foundational tenets are as follows.

First, it is not for the courts to substitute their choice as to how the discretion ought to have been exercised for that of the administrative authority. They should not substitute judgment on the merits for that of the administration. They should not intervene, reassess the matter afresh and decide, for example, that funds ought to be allocated in one way rather than another, just because the reviewing court feels that this would be a preferable form of resource allocation. Decisions as to political and social choice are made by the legislature, or a person assigned the task by the legislature.[3] To sanction judicial intervention simply because the court would prefer a different choice to that of the administrator runs counter to this fundamental assumption and would entail a re-allocation of power from the legislature and bureaucracy to the courts. This primary proposition is based on the separation of powers and accepted by pretty much everyone working in this area, academics and courts alike.

Secondly, mere invocation of the separation of powers provides, however, no certain guide as to the criteria that ought to shape judicial review of discretion. Thus, while it is acknowledged that courts should not substitute judgment for that of the administration, it is also generally accepted that there should be some judicial controls

[3] *R v Ministry of Agriculture, Fisheries and Food, ex p. First City Trading* [1997] 1 CMLR 250, 278.

that do not lead to substitution of judgment, or too great an intrusion on the merits. The distinction found in some case law and literature between merits review and non-merits review is, nonetheless, not helpful. All tests of substantive judicial review entail the judiciary in taking some view of the merits of the contested action. This is so even in relation to the classic *Wednesbury* test.[4] What distinguishes different tests for review is not whether they consider the merits or not, but the stringency of the judicial scrutiny. It is possible to range different tests for review along a spectrum. Classic, limited *Wednesbury* review is at one end of the spectrum, judicial substitution of judgment, whereby the court imposes what it believes to be the correct result lies at the opposite end of the spectrum. Heightened *Wednesbury* review and proportionality occupy intermediate positions.

Thirdly, there is no a priori reason why the test should be framed in any particular terms. Legal systems use a variety of doctrinal labels in this regard. In the UK context, we use reasonableness and proportionality, which must be read in the light of the relative intensity with which they are applied. There is no a priori reason why the meaning ascribed to reasonableness or proportionality should be constant when applied to different types of subject matter. Endicott's analysis proceeds on the hypothesis that reasonableness review is in pole position, with proportionality perceived very much as an exceptional interloper, which can only be warranted if special considerations justify use of this ground of review. The reasons for this will be examined in more detail in due course. Suffice it to say the following for the present. The argument might be grounded in case law, to the effect that proportionality whenever deployed fits the doctrinal mould for which Endicott argues. This is however mistaken when viewed from the perspective of UK and EU law, which are the twin legal orders that Endicott considers. The argument that pole position must be accorded to reasonableness review could, alternatively, be grounded in normative argumentation as to what is the appropriate test for review of discretionary power. However, the normative dimension to Endicott's analysis is, as will be seen, predicated on assumptions that are not tenable.

Fourthly, a reasoned response to the appropriate scope of review can only be forthcoming if we press further and inquire why judicial review over discretion is regarded as warranted. This is a necessary, albeit not sufficient condition, for assessing the appropriate test for review. The reasons why legal orders exercise such control are eclectic. There are, however, three dominant themes.

There is the need to ensure that the executive does not subvert the aims of the legislation, by using the delegated power in ways that are unreasonable or disproportionate: the object of a statute providing that employees who are injured at work may be given compensation, or shall be given due compensation, may be subverted if the compensation is rarely given, or if it is parsimonious.

There is the related, but distinct idea, that discretionary power should be subject to review to enhance and support the democratic process broadly conceived. Legislatures quite properly give discretionary power to ministers, agencies and the like. The discretion is accorded because not all aspects of the regulatory schema can be specified with exactitude in the enabling legislation. Judicial oversight can help to ensure

[4] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, 233–234.

reasoned administration, transparency as to the factors that shape the discretionary choices, and some substantive control over the choices thus made.[5]

There is the idea that discretionary power should be controlled to ensure that it does not impose excessive burdens on those affected by it: if a statute empowers an agency to charge those who benefit from the work undertaken by the agency, then review is warranted to ensure that the burdens flowing from the work do not fall excessively on particular individuals, more especially when the beneficiaries of the work are a broader class of people.

Fifthly, there is no claim that any ground of review is of universal application. There will always be instances where it is felt that the particular ground of review, whatsoever it might be, is not appropriate because, for example, the subject matter is regarded as non-justiciable. The point is made at this juncture because Endicott repeatedly critiques the suggestion that proportionality should be a general ground of review by eliding the word general, with universal. No one has ever argued that proportionality should be of universal application, insofar as this connotes the absence of exceptions. The argument that it should be of general application is understood by all in this debate to mean that that it should be available in ordinary judicial review cases, subject to any exceptions based on non-justiciability and the like as are warranted.

These background precepts do not generate push button answers as to the appropriate test for review, or the intensity with which it is applied. They cannot, however, be ignored. They imbue our thinking about separation of powers with greater specificity. They are, moreover, crucial in assessing the consequences of our chosen ground of review, and the intensity with which it is applied. Thus, exiguous scrutiny, whether cast in terms of reasonableness or proportionality, signals that we accord relatively little weight to either of the preceding values, or believe that they are outweighed by some competing consideration. We must be properly mindful of such consequences and be willing to assess them accordingly.

III. Proportionality: Doctrinal Argument

The central feature of Timothy Endicott's argument is readily apparent on the face of the tin, as manifest in the title to the article. He contends that proportionality cannot be a general ground for review because the balancing entailed therein is only warranted where there is a sufficient interest to warrant this type of review, and the court is competent to undertake it. There are, he argues, only limited circumstances where these conditions are met, which leads to the conclusion that proportionality can never be a general ground of review. There are two strands to the argument, doctrinal and normative. Thus, in doctrinal terms Endicott maintains that proportionality is only deployed in circumstances that fit his theory. It is not a general standard of judicial review, which is applicable broadly across the terrain of administrative action but is closely confined to instances where there is a more particular interest/right that warrants this form of review. There is then a normative argument as to why this is sound. These arguments, which are related albeit distinct, will be evaluated in turn. The doctrinal strand of the argument is incorrect, when viewed from the perspective of UK and EU law, which are the two legal systems to which Endicott adverts.

[5] Jerry Mashaw, *Reasoned Administration and Democratic Legitimacy, How Administrative Law Supports Democratic Government* (Cambridge University Press 2018).

1. UK

Timothy Endicott draws on UK law to support his thesis that proportionality only applies in limited areas where the individual has some special interest to warrant its application, these being rights-based adjudication under the Human Rights Act 1998, EU law while we were a member thereof and cases involving legitimate expectations. There is nothing untoward with the argument thus far. To the contrary, the whole debate about reasonableness and proportionality is predicated on acceptance of the fact that the latter does not presently extend beyond these confines.[6] Endicott's argument is not, however, simply premised on the legal status quo. It is more far-reaching, to the effect that the UK legal order has never countenanced proportionality-type review beyond these confines, and should never do so, thereby reinforcing the contention that it cannot be a general ground of judicial review.

This is mistaken, because the courts routinely undertook review cast directly in terms of proportionability and disproportionability. It was an established feature and a general head of judicial review in the UK. Space precludes detailed elaboration, which can be found elsewhere,[7] but the salient features were as follows. The UK had a concept akin to that of proportionality, from the late sixteenth century onwards. The precise appellation varied, with terms such as proportionability, proportionable, and disproportionate found in the case law. It was not a formal three-part test of the modern kind, but the older UK concept shared a common theme with its more modern offspring, which is the proscription of excessive regulatory burdens and the need to ensure that the burden was objectively justified. It was used in three principal ways: as a principle of statutory interpretation; as a test of judicial review; and as a condition for regulatory intervention.

The courts regularly deployed proportionability as a tool of statutory interpretation and lent against the interpretation of a statute where it would place a disproportionate burden on a particular party. They used proportionability as a free-standing head of judicial review to contest the regulatory burdens placed on a particular individual flowing from a statutory scheme, or to claim benefits that were properly due under the relevant legislation, and it was used with respect for the primary decision-makers. The courts also on occasion used proportionability to limit the scope of regulatory intervention, such that, for example, the ability to charge tolls was conditional on the benefits received by users of the scheme being proportionable to the burdens thus imposed.

This case law must be seen against the backdrop of statutory provisions that contained an express requirement of proportionability. The courts would apply such imperatives, and thus became accustomed to dealing with the concept, which almost certainly encouraged use of proportionability as a general principle of judicial review in cases where there was no such requirement in the statute. To put matters in perspective, from the late sixteenth century the term proportionably was used on 763 occasions in sections of statutes, while the term proportionable can be found in 1,230 statutory

[6] It is, nonetheless, worth noting at this juncture a tension within the argument, since a legitimate expectation is not a qualified legal right, in the sense in which Endicott uses that term. Application of proportionality in this context is felt to be justified because of the nature of individual's interest, which begs the question as to why other interests cannot be so regarded.

[7] Paul Craig, 'Proportionality and Judicial Review: A UK Historical Perspective', in S Vogenauer and S Weatherill (eds), *General Principles of Law, European and Comparative Perspectives* (Hart 2017) Ch. 9.

provisions. It should, however, be noted that the great majority of statutory activity at this time took the form of private acts of parliament, where the precise terms of the legislation could often be the result of adventitious circumstance.

The broader normative import of this case law will be considered in due course below. The salient point to emphasize for present purposes is that proportionability as articulated above was a general head of judicial review. It was not confined to any single regulatory area. It was not conditional on invasion of a private right or anything analogous thereto. It was self-evidently not connected with membership of any external organization. Proportionability was part of the general fabric of judicial review as it applied for three hundred years. It formed part of judicial doctrine in a manner that was not different conceptually from that occupied by reasonableness review.

2. EU

Timothy Endicott also draws on EU doctrine to support his thesis as to the limits of proportionality review. He contends that EU law is further evidence for the proposition that proportionality is not a general ground of review, and argues that its application is explicable because individuals have qualified legal rights that warrant its application in the areas where the doctrine is used. He argues that proportionality is warranted because individuals and firms have rights to free movement that flow from the Treaty; Member States might interfere with those rights; and the EU courts then determine whether that interference is justified using proportionality.[8] For Endicott, this is further evidence of his central thesis that proportionality is not a general head of review, since it only operates within the preceding confines.

Proportionality assuredly does apply in the context of the four freedoms as elaborated above. The error resides in the assumption that this represents the totality of judicial review for proportionality in EU law. It does not. To the contrary, it is only half, and indeed the smaller half, of proportionality review in EU law. It leaves wholly out of account the application of proportionality to contest the legality of action taken by the EU institutions. These actions involve judicial review of broadly framed Treaty provisions and legislation made pursuant thereto in areas as diverse as the Common Agricultural Policy, Transport Policy, the Area of Freedom, Security and Justice, Structural Funds, Monetary Policy, Economic Policy, Anti-Dumping, and inter-institutional controls.[9] The relevant Treaty provisions commonly give broad discretion to the EU institutions, the application of which individuals contest through the tools of EU judicial review, including proportionality.

The broader normative implications of this will be addressed below. The salient point for present purposes is that EU legal doctrine does not fit the mould articulated by Endicott. It is, to the contrary, a general head of judicial review that applies across the entire EU legal terrain. Its application is not dependent on the identification of some special interest or qualified legal right of the kind articulated by Endicott that is said to warrant application of proportionality review, although the nature of the interest will affect the intensity of such review. The temptation might be to try to counter the preceding argument by suggesting that claimants in actions against EU institutions nonetheless still have some other special interest that is the warrant for

[8] Endicott (n 1) 14, fn 66.
[9] P Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) Ch. 19-20.

proportionality review. This temptation should be resisted. The argument is unsustainable. The endeavour will, moreover, collapse the very thesis being advanced, since if the concept of special interest is stretched to cover these fields then the criterion used to reach this result could equally legitimate application of proportionality in analogous domestic contexts. The reality is that proportionality challenges against EU action paradigmatically entail discretionary choices analogous in nature to those made by executives at national level that are currently reviewed for reasonableness. The reality is also that proportionality is a general head of EU judicial review because the EU courts believe that this is the preferable juridical technique for the control of discretion.

There have also been attempts to distinguish the EU jurisprudence on proportionality on the ground that the EU suffers from a democratic deficit, and that this warrants the more far-reaching proportionality review.[10] Suffice it to say the following in this respect. There is nothing in the development of proportionality, or the application thereof, by the EU courts to sustain this argument. The alleged causality between democratic infirmity and more intensive review does not, moreover, hold for the following reason. The principal strand of the democracy deficit argument is that the EU political system does not foster strong responsiveness between voting and direction of policy. This is because people vote for the European Parliament, but legislative power is also wielded by the Commission and Council, with overall direction from the European Council. This can be defended in part because EU legitimacy has always flowed from a conjunction of direct representation of voter interests through the European Parliament, and indirect representation of state interests through the Council and European Council. However, the most relevant point for present purposes is that democratic deficit in the preceding sense does not, in any sense, equate to lack of parliamentary input into the EU legislation that is enacted and subsequently reviewed by the CJEU. To the contrary, the EP has a co-equal status in the legislative process with the Council and will commonly have a greater impact on the enacted legislation than will the legislature in the UK, as judged by influence over the content of the legislation and amendments secured.

The import of the argument concerning the EU case law should be made clear at this juncture, in order to avoid misunderstanding. The fact that the EU has chosen this doctrinal path does not mean that the UK must do so. I make no such argument, nor would it be sustainable. Legal systems make their own choices as to the fabric of judicial review, which includes the appropriate tests for review of discretion. EU law was considered because Endicott uses EU doctrine to sustain his argument that proportionality is not and cannot be a general ground of review. That doctrinal claim with regard to EU law is wrong. It has been a general ground of judicial review for more than half a century. There is, moreover, no evidence that this has caused problems, in the sense of courts interfering too greatly in EU policymaking.

IV. Proportionality: Normative Argument

We turn then to Timothy Endicott's normative argument against proportionality as a general head of review. He concludes that there is 'no general reason for a doctrine that judges are to weigh the adverse impact of a public decision against the considerations in favour of it'.[11] The very formulation of the normative argument is

[10] Sales (n 2).
[11] Endicott (n 1) 22.

interesting and instructive in equal measure. Endicott rightly recognizes that the thesis for which he contends cannot be normatively defended simply by repeating what he argues is the doctrinal status quo, that some special interest/legal right is required for the application of proportionality. This would not work since repetition of a doctrinal position does not constitute a normative argument as to why that position is correct. This is more especially so, given that the doctrinal position is not, as we have seen above, such as Endicott maintains. It is necessary then to proffer normative argument as to why the doctrinal position that Endicott believes should prevail is warranted. This in turn invites scrutiny as to the soundness of that argument. There are a number of strands to this argument, which should be unpacked for the sake of analytical clarity.

1. First Argument: Parliamentary Intent

Endicott adduces two general normative arguments against proportionality being a general head of review. The first is that Parliament has not decided that there should be a general legal doctrine of proportionality.[12] This surely does not suffice to support the normative claim contended for. Let us leave aside the debate about the foundations of judicial review, and whether it should be seen in terms of the common law or legislative intent. It suffices to say for the present that there is no such express parliamentary sanction for most core features of administrative law. Thus, there was no such sanction when, for example, the courts expanded the remit of error of law, when they revolutionized the law relating to public interest immunity, when they introduced legitimate expectations into the legal lexicon, when they adopted the principle of legality, when they developed the law relating to the giving of reasons, when they recognized flexible reasonableness review, or when they expanded the reach of direct and collateral remedial provisions. If you wish to deploy a normative argument concerning the legitimacy of doctrinal development, then it must cohere with the general terrain of administrative law doctrine. There is, moreover, the fact that proportionability has, as noted above, a long lineage in administrative law.

2. Second Argument: No Legal Protection for Affected Interests
(a) The Core Argument Stated

Endicott does not in fact dwell on the argument concerning parliamentary sanction. The analysis centres around the second normative argument. His foundational assumption is that 'the interests of persons affected by administrative decisions do not generally deserve legal protection'.[13] It is this that generates the conclusion that such weighing is only warranted where there is some special interest/qualified right.[14]

This foundational assumption is not tenable when judged in relation to general administrative law doctrine. It is inconsistent with central administrative law precepts, which are clearly predicated on the assumption that the interests of persons affected by administrative decisions do warrant legal protection. This is self-evidently so in relation to concepts such as, for example, natural justice, bias and the no-fettering doctrine. It is equally so in relation to error of fact, which is premised on the assumption that if there have been factual mistakes in relation to, for example, the deportation of an asylum seeker then the decision should be annulled. The interests of

[12] Ibid 19.
[13] Ibid 19.
[14] Ibid 20.

persons affected by administrative decisions are also central to challenges for error of law. The paradigmatic case is when a person contends that the meaning of the statutory term employee, disabled, the environment or asylum seeker has been legally misconstrued, thereby defeating what Parliament intended when enacting the legislation. The claimant's view in this respect is not legally determinative. The court will, however, consider whether the claimant's contention that the term has been misconstrued by the primary decision-maker is sound, and this is premised on the assumption that the interests of those that the statute is intended to protect will be accorded legal protection in relation to administrative decisions purporting to apply the statute. Doctrinal precepts such as error of law and propriety of purpose are designed, respectively, to ensure that the legal criteria in the legislation as to the scope of the public body's authority are correctly applied, and that the discretion accorded to it is used for proper purposes. Press further, and consider why this is important. The answer is in part that there will be detriment to the public interest broadly conceived. It is also in part because if these errors occur, the interests of individuals that the legislation is designed to serve will not be fulfilled: a license will be rejected on improper grounds; an asylum application will be wrongly decided; and a disability claimant will be denied a benefit.

The foundational assumption that lies at the core of Endicott's argument is also not tenable when viewed in the specific context of discretionary decisions. This is readily apparent from the very idea of variable intensity reasonableness review. The nature of the balancing process entailed by reasonableness review will be considered more fully below. Suffice it to say for the present, that this means calibrating the intensity of reasonableness review in accord with, inter alia, the nature of the interest affected by the administrative decision. This entails evaluation of the affected interest and closer scrutiny of an administrative decision that intrudes thereon. This reasoning process is premised on the hypothesis that the interests of persons affected by administrative decisions do warrant legal protection, irrespective of whether they have a qualified right or not. The difficulties with Endicott's argument are further amplified by the fact that, as will be seen below, he specifically acknowledges that decisions imposing a disproportionate burden, or that entail disproportionate weight of a particular consideration, are reviewable for unreasonableness, even where there is nothing akin to a qualified legal right. The broader implications of this reasoning will be considered below. It is, however, salient for present purposes, since the reasoning is based on the proposition that the interests of persons affected by decisions do warrant legal protection.

There are, to be sure, limits to the extent to which the administration must take the interests of those affected by administrative decisions into account. This is well recognized in legal regimes, such as the EU, where proportionality is deployed in the context of ordinary administrative decisions. This jurisprudence repeatedly attests to the fact that taking account of the impact on individuals of administrative decisions in the context of proportionality review does not afford those individuals a trump card. This does not alter the fact that the default assumption that underpins Endicott's normative argument, to the effect that 'the interests of persons affected by administrative decisions do not generally deserve legal protection' is not tenable. The assessment of the regulatory burdens that flow from discretionary decisions, and hence the protection of those affected by discretionary decisions, is properly regarded as part of judicial review, as recognized by the older UK case law on review for proportionability. Furthermore, the argument presupposes that weighing/balancing

is absent from reasonableness review, which is not tenable for reasons that will be considered below.

(b) The Core Argument Amplified: Interests that do not Warrant Legal Protection

The remainder of Endicott's normative analysis consists of further elaboration of the core argument. Thus, Endicott appears to assume that if proportionality were to apply it could prima facie mean balancing any interest of the person affected, even if illegitimate, against the decision made by the public body, such that the interest of a person seeking to bring a young person into the UK for a forced marriage, might be placed in the balance against executive action designed to prevent this. Endicott rightly states that this would be absurd, and indeed so, but it is no part of any proportionality test, nor is it in any way entailed thereby.[15] There is a related argument to the effect that proportionality should not require the court to take into account every 'legitimate' interest of an individual, where this connotes a subjective factor, such as the fact that a job applicant should be preferred because the job would mean more to that person. Endicott rightly states that such considerations are irrelevant to the public decision, but once again this is not required by proportionality analysis as undertaken in any legal system, whether in rights-based or non-rights-based cases, and the position in this respect is no different than that which pertains under reasonableness review.

(c)The Core Argument Amplified: Interests that Warrant Legal Protection and Substitution of Judgment

The foundational assumption behind Endicott's argument is, as we have seen, that the interests of persons affected by administrative decisions do not generally deserve legal protection. The difficulties with that argument were set out above. The next step of the argument is especially important. He contends that proportionality is only appropriate where there is an interest that the administrator ought to bear in mind, and that this is only so where there is a qualified legal right.[16] If we pause at this juncture the normative argument is simply circular: Endicott wishes to establish that proportionality only applies where there is a qualified legal right; this conclusion is grounded in the proposition that the interests of persons affected by an administrative decision do not generally have to be taken into account; they only have to be taken into account when you ought to bear a particular interest in mind; and this is so only where there is a qualified legal right. There must, however, be something to warrant that conclusion that avoids this circularity.

For Endicott, the justification is that only in such cases should the court itself be deciding whether the adverse impact was too great. It is assumed that when proportionality applies it entails substitution of judgment by the reviewing court for that of the primary decision-maker. Thus, speaking of the *Wednesbury* decision Endicott states that Lord Greene was correct not to pass judgment on the

[15] Ibid 19.
[16] Ibid 20.

reasonableness of the by-law, 'because he was right not to replace the councillors' proportionality reasoning with his own proportionality reasoning'.[17]

This supposition is not, however, supported by the case law on the application of proportionality even in right-based cases, where the courts have made it clear that they do not substitute judgment in this manner.[18] This is in part because application of proportionality is mediated by respect/weight afforded to the view of the primary decision-maker.[19] It is in part because the courts properly recognize that not all instances where the same right is pleaded are of equal importance, as exemplified by the contrast between free speech being used to contest limits on a shop selling pornography,[20] and free speech being an issue during elections,[21] with the consequence that the courts scrutinize the latter more closely than the former. It is also in part because in some rights-based cases, such as those dealing with equality claims relating to socio-economic discrimination, the court uses a test of manifestly without reasonable foundation.[22]

The supposition that proportionality review entails substitution of judgment is a fortiori not warranted in proportionality cases that do not entail rights, and the courts do not do so, as is readily apparent from hundreds of EU proportionality cases concerned with discretionary policy determinations.

(d) The Core Argument Amplified: Non-justiciability

The final thread of Endicott's normative argument is a repeat of a theme that runs through the article, to the effect that it would be normatively unwarranted to apply proportionality to discretionary determinations that are ill-suited to such controls. This point was addressed at the outset. There is no claim that proportionality should be of universal application. It will perforce be bounded by considerations of justiciability in a manner no different from review couched in terms of reasonableness, or indeed any other doctrinal label.

(e) The Core Argument: Conclusion

Endicott's normative argument against proportionality is grounded ultimately on twin propositions: the interests of persons affected by administrative decisions do not generally deserve legal protection; and legal protection via proportionality must be limited to those who have qualified rights, because only in those circumstances should the courts substitute judgment for that of the administration. However, neither proposition is sound. The foundational proposition is not consistent with general administrative law doctrine, or that pertaining to review of discretion; the latter

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[17] Ibid 21.

[18] See, e.g., *Bank Mellat v HM Treasury* [2013] UKSC 399 [21], [71]; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 [272]; *R (Lord Carlile of Berriew QC) v Secretary of State for the Home Department* [2014] UKSC 60 [20], [31], [57]-[58], [67]-[68], [86]-[89], [105], [111]; *General Medical Council v Michalak* [2017] 1 WLR 4193 [20]-[22].

[19] For discussion of the case law and accompanying literature, see, P Craig, *Administrative Law* (9th edn, Sweet & Maxwell 2021) Ch 20.

[20] *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420.

[21] *R (ProLife Alliance) v BBC* [2004] 1 AC 185.

[22] See, e.g. *In re G (Adoption: Unmarried Couple)* [2009] AC 173; *DA v Secretary of State for Work and Pensions* [2019] UKSC 21.

proposition is not sustainable, since courts do not substitute judgment for that of the administration when engaging in proportionality review. The normative rationale for the conclusion that proportionality must be limited to qualified legal rights is not therefore sustained.

3. The Normative Argument: Asymmetry between Reasonableness and Proportionality

There is a further difficulty with Endicott's reasoning. This is the asymmetry that pervades his doctrinal and normative treatment of reasonableness and proportionality. Discussion of the former is premised throughout on close attention to the meaning and intensity of reasonableness review. The treatment of the latter stands in stark contrast: the normative consideration of proportionality is premised on the assumption that substitution of judgment on the various parts of the proportionality inquiry is the norm, that balancing is always central to the inquiry and that relative intensity of review is of little importance, the latter being dismissed with the cursory statement in three lines that less intensive review does not cure the supposed malaise of having proportionality review outside his preferred domain.[23]

Legal doctrine does not, as we have seen at the outset of this section, determine the normative soundness of the legal status quo, hence the need for further inquiry. The converse is, however, also true. Normative argument designed to test a doctrinal position is unsound if it is not premised on an accurate picture of that very doctrine. The courts do not substitute judgment on the various stages of the proportionality inquiry, more especially so in ordinary cases of judicial review, and no one has suggested that they should do so. A normative argument that is premised on a flawed reading of the legal status quo will itself be flawed.

V. Normative Argument: An Alternative View

1. Twin Precepts: Doctrinal Reality and Normative Evaluation

It is perforce right to engage in normative inquiry to assess the desirability of legal development. This should, however, be informed by twin considerations.

In doctrinal terms, it means considering such development against the reality of the existing doctrinal frame and how it is applied: we do not proceed on the assumption that courts substitute judgment and we do not proceed on the hypothesis that balancing is at the centre of the exercise in most cases since, for reasons that will be explicated below, this is incorrect. In normative terms, it is equally important to connect our analysis with the values that underpin legal intervention in this area. These values were adumbrated above.

The relationship between the values on which legal intervention is premised, and the ambit of legal doctrine is important. We should test legal doctrine, and proposed developments thereof, in terms of how well they do or do not effectuate the underlying values. The analysis that follows seeks to develop these twin precepts, articulating what it would mean in doctrinal terms to extend proportionality beyond its existing

[23] Endicott (n 1) 22.

terrain and testing this against the background values that inform judicial review in this area.

2. Doctrine and Doctrinal Reality

In understanding the doctrinal implications of such development, we do not have to search for hypotheticals, since we have ready-made legal doctrine derived from the UK and the EU on which to draw. They provide a fertile source for understanding what it means to extend proportionality to the more general terrain of administrative law. What follows is clear from the EU jurisprudence. There is perforce no reason why proportionality, if applied to analogous areas in UK law, would necessarily proceed in the same way. There is, however, good reason to imagine that this would be likely, since the very same reasons that inform CJEU thinking would be likely to underpin the approach of the UK courts.

There is low intensity proportionality review. The claimant must show manifest disproportionality. It was held in *British American Tobacco*[24] that this measure of review is deemed appropriate whenever the EU legislature exercises a broad discretion involving political, economic or social choices requiring it to make complex assessments. The low intensity review is reflective of the very fact that the institutions are possessed of discretionary power, with the consequence that it is not for the reviewing court to substitute judgment on proportionality. It is particularly important to understand that this low intensity review is applicable at all three stages of the proportionality analysis. It applies at the necessity stage, the suitability stage and when considering stricto sensu proportionality.

The consequence is important, more especially so given the assumptions that underpin Endicott's analysis. The principal focus in most cases is not on the balancing stage, but rather on the necessity and suitability tests. The claimant will often fail to show the requisite manifest disproportionality in relation to these hurdles. When a case proceeds to stage three, proportionality stricto sensu, the claimant faces an uphill task, since by definition the contested regulatory measure has survived scrutiny for necessity and suitability. The CJEU, by dint of having gone through stages one and two, will be familiar with the contested measure and has decided that it is fit for purpose judged by these criteria when viewed in the light of low intensity review. It will often reject stage three claims where the alleged harm is that the regulatory measure imposed some greater cost than would otherwise have been borne. The balancing at stage three is fine-tuned by reason of the fact that the case has been

[24] Case C-491/01 *R v Secretary of State for Health, ex p British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* [2002] ECR I-11453 [123]. See also, e.g., Case C-210/03 *The Queen (Swedish Match AB and Swedish Match UK Ltd) v Secretary of State for Health* [2004] ECR I-11893 [48]; Case C-344/04 *R (IATA) v Department for Transport* [2006] ECR I-403 [80]; Case C-380/03 *Germany v European Parliament v Council* [2006] ECR I-11573 [145]; Case C-266/05 P *Jose Maria Sison v Council* [2007] ECR I-1233 [33]; Case C-558/07 *The Queen, on the application of S.P.C.M. SA v Secretary of State for the Environment, Food and Rural Affairs* [2009] ECR I-5783 [41]-[42]; Case C-62/14 *Gauweiler v Deutscher Bundestag*, EU:C:2015:400 [68]; Case C-157/14 *Société Neptune Distribution v Ministre de l'Économie et des Finances*, EU:C:2015:823 [76]; Case C-477/14 *Pillbox 38 (UK) Limited, trading as Totally Wicked v Secretary of State for Health,* EU:C:2016:324 [49]; Case C-72/15 *PJSC Rosneft Oil Company v Her Majesty's Treasury,* EU:C:2017:236 [146].

through the preceding stages of the test. The balancing inquiry is, therefore, more laser-like and specific than it would otherwise have been.

The commonly held presupposition that proportionality as applied in this area entails more balancing than that which prevails under reasonableness review is flawed. It reveals a lack of understanding of the case law, and the way in which the concept is applied. The reality is, as will be seen, when we consider reasonableness review, that balancing is often more prevalent than when proportionality is used.

3. Normative Dimension and Background Values

Judicial review cast in the preceding terms fits with the three-fold purpose that underpins judicial review in this area. The first two stages of the proportionality inquiry, when combined, help to ensure that the purpose of the legislation is not undermined by the way in which the discretion is exercised. They also foster reasoned administration, transparency and the democratic imperative by requiring the administration to explicate why it felt that the contested measures were fitting to achieve the statutory goals, and why a particular regulatory option was chosen.

The fact that the review is low intensity ensures that the separation of powers is not transgressed. It is, nonetheless, still meaningful. Thus, the CJEU will commonly separate out the contending arguments and address them in turn, in a way that is not common in reasonableness review cases. The structured nature of proportionality review facilitates this inquiry. It thereby enhances administrative accountability, by requiring the administration to explicate why the contested measure was introduced and why it was suitable to attain the stipulated legislative goals. It also fosters judicial accountability, since it behoves the court, if it disagrees with the administration, to explain clearly why it felt that the contested decision did not meet the necessity or suitability criterion.

The third stage of the proportionality inquiry speaks to the need to take account of the impact of the administrative action on the individual, suitably modulated in the manner adumbrated above. This coheres with a long-standing UK tradition whereby the courts policed the proportionability of the regulatory burden to ensure that it was not excessive, while being suitably mindful of the discretion that inhered in the administration.

VI. Reasonableness: Doctrinal Argument

We turn now to consideration of reasonableness as a test of judicial review. The analysis will proceed in tandem with that concerning proportionality, with the initial focus on doctrine, followed by the normative dimensions of the topic.

1. Wednesbury and Flexible Reasonableness Review

Timothy Endicott has much that is of interest to say about the *Wednesbury* case and the reasoning therein. There are, nonetheless, key features of his depiction of the legal doctrine that warrant closer attention. There is the claim that *Wednesbury* embodied a flexible doctrine of reasonableness from the outset, and there is the related claim

that it should be seen as part of an anti-arbitrariness doctrine. These arguments will be considered in turn.

We begin with the argument that Lord Greene MR in *Wednesbury* should be read as articulating a flexible test for reasonableness review, the application of which could differ depending on circumstance and context.[25] This is the accepted legal reading of reasonableness review now,[26] and recognition of the variability of such review is welcome.

It is perforce true, as Endicott states, that all judgments must be seen in the factual context in which they were delivered. There is, moreover, indubitably force in the argument put by Kevin Costello, to the effect that the case should be read in the context of local authority powers, and more especially the battles extant at that time between cinemas and religious organizations. He rightly notes that the application of *Wednesbury* to central government discretionary power only became the norm in the mid-1960s.[27]

While the ruling might have been confined to the local authority terrain, it was nonetheless generalized, such that the default position was that exercise of discretionary power that survived scrutiny for purpose and relevancy would only be invalidated if it was so unreasonable that no reasonable public body would have made it. We should, moreover, understand the reality of the more modern case law. The courts have rightly recognized the flexibility of the reasonableness test, but the default position is still the *Wednesbury* test as classically articulated. In a very great many cases it will be for the claimant to show that no reasonable public authority could have made the contested decision, and this, combined with the reluctance to advert to evidentiary considerations, renders it very difficult for claimants to succeed.

2. Wednesbury and Arbitrariness

We turn then to the other central feature of Endicott's doctrinal analysis, which is the depiction of reasonableness review in terms of an anti-arbitrariness doctrine. There is undoubtedly case law that frames judicial intervention in the language of arbitrariness.[28] To regard reasonableness review in these terms begs, however, a whole series of questions.[29] The most obvious is the more particular meaning to be ascribed to arbitrary and capricious, and whether the meaning thus ascribed captures the facts of the cases. The flexibility as to the meaning of these terms is readily apparent from US case law, where early cases required something very extreme to warrant judicial intervention, what Martin Shapiro labelled as the 'sanity test',[30] with the same phrase

[25] Endicott (n 1) 3.
[26] Sir John Laws, 'Wednesbury', in C Forsyth and I Hare (eds), *The Golden Metwand and the Crooked Cord* (Oxford University Press 1998) 185; A Le Sueur, 'The Rise and Ruin of Unreasonableness?' [2005] JR 32; D Wei Wang, 'From Wednesbury Unreasonableness to Accountability for Reasonableness' (2017) 76 CLJ 72.
[27] Costello (n 2).
[28] See, e.g., *Sharp v Wakefield* [1891] AC 173 [179]; *Kruse v Johnson* [1898] 2 QB 91.
[29] For insightful analysis of the relationship between rationality, reasonableness and arbitrariness, see Nehushtan, 'The True Meaning of Rationality' (n 2).
[30] M Shapiro, 'Codification of Administrative Law: The US and the Union' (1996) 2 ELJ 26, 28.

arbitrary and capricious later being deployed to justify hard look review, whereby the courts interrogated discretionary decisions far more closely than hitherto.[31]

The salient issue for present purposes is what meaning Endicott ascribes to these terms, since this is crucial for any assessment of the fit between such labels and existing doctrine. He regards the concept as flexible, but this does not take us very far. The closest that we get to Endicott's view is when he states that 'Lord Greene MR did not articulate the central notion of arbitrariness -- that is, of a decision that is indistinguishable from the mere will and private affections of the officials who acted'.[32] This is indubitably central to the concept of arbitrariness. However, this in turn reveals the difficulty of regarding arbitrariness thus conceived as the background imperative underlying reasonableness review. If reasonableness review were thus conceived then the instances where reasonableness could be argued at all would be extremely rare, and there is no evidence that courts regard this as a necessary facet of the inquiry when undertaking such review.[33] The argument that reasonableness review can be explicated as being part of an anti-arbitrariness doctrine, which entails at its core the idea of decisions that are indistinguishable from mere will and private affection, is not sustainable.

It is, as evident from the foregoing, possible to interpret the terms arbitrary and capricious more broadly, but clarity in this respect is essential, since otherwise there is no basis from which to assess the argument. Endicott provides hints of a broader view when he states in relation to *Wednesbury* that if 'a court is in a position to say – because the by-law is oppressive or arbitrary– that the by-law exceeds the latitude that a local council ought to have to decide what considerations to act on, and how to respond to them, then there is ground for quashing the by-law.'[34] This formulation is, in reality, as problematic as that considered in the previous paragraph, albeit in a different way. The reasoning is premised on finding that the by-law was oppressive or arbitrary, from which it is then legitimate for the court to conclude that the council exceeded the latitude afforded to it. If arbitrariness connotes the need to find a decision that is indistinguishable from the exercise of will and private affection, then we are back with the dilemma in the previous paragraph. If arbitrariness has a broader connotation, then we need clarity in this respect, since it shapes intervention via reasonableness review. Interestingly and tantalisingly Endicott states but a few lines earlier, that proportionality is but a particular aspect of unreasonableness, such that it is unreasonable to respond disproportionately to but one consideration, or to inflict disproportionate damage on a person.[35] It may be that this furnishes the requisite arbitrariness, but this has nothing to do with a decision that is indistinguishable from

[31] *Greater Boston Television Corp. v Federal Communications Commission* 444 F.2d 841, 850-53 (DC Cir 1970), cert denied 403 US 923 (1971); *Environmental Defense Fund Inc v Ruckelshaus* 439 F.2d 584 (DC Cir 1971); *Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile Insurance Co* 463 U.S. 29, 42-43 (1983); H Leventhal, 'Environmental Decision making and the Role of the Courts' (1974) 122 U Pa LRev 509; R Stewart, 'The Reformation of American Administrative Law' (1975) 88 Harv L Rev 1667; R Stewart, 'The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decision Making; Lessons From the Clean Air Act' (1977) 62 Iowa L Rev 713; A Aman, 'Administrative Law in a Global Era: Progress, Deregulatory Change & The Rise of the Administrative Presidency' (1988) 73 Corn L Rev 1101.

[32] Endicott (n 1) 10.

[33] See, e.g., *Braganza v BP Shipping Ltd* [2015] UKSC 17 [42], where Lady Hale acknowledged that the action was not arbitrary, but held that it was unreasonable.

[34] Endicott (n 1) 3.

[35] Ibid 3.

the exercise of mere will or private affection. It also raises a broader range of normative considerations that will be considered below.

The lack of clarity as to the meaning of the terms arbitrary and capricious begs the further inquiry as to what is to be gained by seeking to place reasonableness review within this conceptual frame. Conceptual labels have to earn their place within the legal lexicon. There is no doubt that the term arbitrary and capricious could be used to capture cases that verge on bad faith, wherein it is meaningful to think of legal intervention as being warranted because the decision-maker acted from will and private affection. Such cases are very rare. When we move beyond those confines the reality is that such terms merely provide a conclusory label for our decisions as to the scope of reasonableness review, adding nothing to the substance of that determination. In the UK, substantive intervention over discretionary determinations is framed in terms of purpose, relevancy, and reasonableness. The decision as to how intensive reasonableness review should be, and to what extent it should be reinforced through review of evidence, is not determined or assisted by placing the conclusion, whatsoever it might be, within the frame of arbitrariness. This is readily apparent in the US, where the Administrative Procedure Act 1946 frames intervention over discretionary determinations in terms of an arbitrary and capricious test.[36] This can accommodate very limited review of discretion or hard look review, but the terms arbitrary and capricious do not provide an ex-ante tool that predetermines this outcome.

VII. Reasonableness: Normative Argument

We turn now to consider the normative dimension of reasonableness review, and focus on the normative argumentation that underpins Endicott's analysis. There are three points to consider in this regard.

1. Reasonableness and Proportionality: Conceptual Consistency

We begin with consideration of the conceptual consistency of Endicott's treatment of reasonableness and proportionality. Consider in this respect the following quotation, which was referred to in the previous analysis:[37]

> Proportionality is a particular aspect of reasonableness, since it is unreasonable to respond disproportionately to one consideration, or to inflict disproportionate damage on an interest that the decision maker ought to take into account. Reasonableness is not a general standard of review of local council by-laws (and, therefore, it is not a general standard of review of executive action). Neither is proportionality in particular. But if the court is in a position to say –because the by-law is oppressive or arbitrary– that the by-law exceeds the latitude that a local council ought to have to decide what considerations to act on, and how to respond to them, then there is ground for quashing the by-law. Understood in that way (in accordance with the doctrine that, as we will see, was already well established in English law), *Wednesbury* was a sound decision.

[36] Administrative Procedure Act 1946, s. 706(2)(A).
[37] Endicott (n 1) 3.

There is a similar, albeit not identical, formulation later in the article, where Endicott frames the argument as follows:[38]

> We should note that it is possible for a public authority to act arbitrarily by imposing a disproportionate impact on such interests, where the disproportion is capricious or oppressive. And then the decision can be overruled by a court as *Wednesbury* unreasonable. *Wednesbury* unreasonableness is not in itself a proportionality doctrine, but it entails a form of proportionality: if a decision has such a disproportionate impact on interests that the decision maker ought to have in mind, that no reasonable decision maker would do such a thing, then the decision would be unlawful under Lord Greene's doctrine. Again, it is useful to have recourse to *Slattery* and to *Kruse*, and not just to Lord Greene's judgment. The real doctrine is that, where a local council ought to take some interest into account, even if the person affected does not have a qualified legal right to the protection of the interest, the court will interfere with a decision that is so disproportionate in its impact on that interest that it is arbitrary or capricious or manifestly unjust or oppressive.

These quotations raise questions concerning the conceptual consistency of Endicott's thesis. We are told repeatedly that proportionality is and should only be applicable in instances where there is some special interest/qualified right that warrants such scrutiny. It is the headline of the article and the dominant theme. We are told repeatedly that only in such instances do the interests of the claimant warrant such legal protection. It is, however, readily apparent from the quotations set out above that this is, in reality, not Endicott's thesis. Proportionality is the animating force justifying legal intervention in these cases where there is no qualified right and no special interest. Legal intervention in such instances is said to be warranted because of the disproportionate impact on the person affected, as Endicott recognizes. Such intervention is formally located within reasonableness review, but this cannot mask the fact that disproportionality is the substantive rationale for intervention and that unreasonableness does nothing more than operate as the vehicle through which this conclusion is expressed.

The conceptual coherence of the initial thesis is thereby undermined and the thesis unravels. This is more especially so, since it will normally not be apparent whether the burden is excessive, or whether there has been disproportionate consideration of one particular interest, without closer examination and weighing of the relevant factors in the case. The argument in the quotation must, moreover, mean that variable intensity reasonableness review could be applicable in such cases, if this is warranted by the nature of the interests involved. This would then translate into more intensive proportionality review, albeit with the conclusion of the analysis formally expressed in the language of reasonableness.

The conceptual coherence of the thesis is indeed further compromised. Endicott set out to argue that proportionality was only appropriate where there was a qualified legal right or something akin thereto, but his argument reveals the opposite. We now see that disproportionate burden, or disproportionate consideration of an affected

[38] Ibid 18.

interest, can also trigger legal intervention, even where is no qualified legal right and that such cases warrant legal protection. There is then a choice as to the modality of such protection. We can formally locate this within unreasonableness review, but, as noted above, unreasonableness performs no substantive function other than to express the conclusion of the proportionality calculus. There is, therefore, every reason why the legal ground for intervention should be framed in terms that reflect the substance of what has occurred, which is proportionality.

The line between Endicott's thesis and that which he opposes falls away. His thesis now reads as follows: proportionality is properly applicable where there is some qualified right or special interest, and is also properly applied where there is disproportionate damage, or disproportionate consideration of a particular interest, even where no such special interest or qualified right is present, provided that it is sufficiently serious. The thesis he opposes reads, and has always read, as follows: proportionality can be of general application, with differential intensity of review in cases where rights or important interests are implicated, and lower intensity proportionality applicable in cases involving discretionary policy choices, where it will be for the claimant to show manifest disproportionality.

2. Reasonableness and Proportionality: Normative Consistency

The second issue is related to, albeit distinct from, the first and concerns the 'fit' between Endicott's normative arguments adduced in the context of proportionality, and his analysis of reasonableness review. There is a danger of inadvertently 'playing both sides of the normative street' at the same time.

The salient issue is how the reasoning in the preceding quotations can be reconciled with the normative argument against proportionality. This was, as we have seen, to the effect that there is 'no general reason for a doctrine that judges are to weigh the adverse impact of a public decision against the considerations in favour of it',[39] which was in turn grounded on the contention that 'the interests of persons affected by administrative decisions do not generally deserve legal protection'.[40] The argument against proportionality weighing or balancing in ordinary judicial review cases was constructed on these normative foundations. The argument was criticized above.

The relevant point here is, however, the tension between the reasoning in the quotations and Endicott's opposition to proportionality review. The conflict is readily apparent. The conclusion that it is unreasonable to respond disproportionately to one consideration, or to inflict disproportionate damage on an interest that the decision maker ought to take into account, is premised on the assumption that the interests of persons affected by administrative decisions are worthy of protection. The conclusion is also premised on the assumption that some weighing or balancing is legitimate, since the very determination that there has been disproportionate damage to an interest, or disproportionate consideration of one interest, necessarily assumes some comparator with the damage suffered by other interests, or the relative lack of consideration given to other interests. The tension in these respects is exacerbated by the fact that it will often not be apparent at the outset whether there is such disproportionate damage to an interest, or disproportionate consideration of an

[39] Ibid 22.
[40] Ibid 19.

interest. The conclusion will only be apparent after the very balancing has been undertaken.

This, however, runs counter to the arguments deployed by Endicott when putting his normative case against proportionality. It cannot logically be maintained at one and the same time that it is legitimate for a court to reason in the manner set out in the quotations when carried out under the banner of reasonableness, but not if conducted directly under the guise of proportionality. This is more especially so given the fact that proportionality review does not, as Endicott assumes, entail substitution of judgment in such cases, or anything akin thereto. To the contrary, it is necessary for the claimant in cases concerning discretionary policy choices to show manifest disproportionality. It is applicable at all three stages of the analysis, including proportionality stricto sensu, and the claimant must prove the requisite disproportionality at one such stage.

It is no answer to suggest that these positions can be reconciled by placing the conclusion in the context of reasonableness review under the further banner of oppressiveness or arbitrariness. This will not do, in part because this adds nothing substantively to the conclusions already reached on grounds of proportionality, and in part because even if it did add something, whatsoever that might be, it does not thereby alter the fact that judicial intervention is still predicated on the court taking into account the interests of those affected by the decision, and weighing them, which are the very things that Endicott denies should happen when discussing the normative dimension of proportionality.

An alternative response to the foregoing might take the following form. Endicott might argue that his normative case against proportionality was qualified by the word 'generally', and that this adverbial form saves his argument from the preceding inconsistency. The argument would then be that the interests of persons affected by administrative decisions do warrant legal protection, and balancing is warranted, even though there is no qualified legal right, when those decisions have a significant disproportionate impact in the sense conveyed by the quotations.

This qualification does not work. The reason is readily apparent. Proportionality as deployed in the context of discretionary policy choices requires, as explained above, manifest disproportionality. You cannot argue, at one and the same time, that taking cognizance of significant disproportionate impact of the interests of those affected by administrative decisions and balancing is warranted via reasonableness review as in the preceding quotations, while at the same time denying this via proportionality review, wherein the latter demands manifest disproportionality and thus does not conform to the misleading picture of proportionality on which Endicott's normative analysis is based.

3. Reasonableness and Proportionality: Balancing

Endicott's argument is predicated on the assumption that the balancing entailed by proportionality is absent in the context of reasonableness review. We have already adverted to the role of balancing within proportionality and will return to this in due course. The immediate focus is on balancing within reasonableness review.

The assumption underlying *Wednesbury* is that the contested action has, or can, survive review in terms of purpose and relevance, and is then subject to reasonableness

review. Thus, when the court is dealing with reasonableness review the factors taken into account by the primary decision-maker must be, or can be, adjudged relevant, since otherwise the case would be decided via the relevancy head of review.[41] It follows that reasonableness review is often concerned with the weight accorded by the primary decision-maker to factors that must be, or can be, relevant. It is the courts' judgment as to whether the relative weight given by the primary decision-maker to considerations that are relevant is reasonable or not. This is reinforced by the fact that courts may be unsure whether to treat a consideration as wholly irrelevant, and hence take it into account when undertaking reasonableness review. The more particular issues addressed by the court in a specific case when undertaking reasonableness review, such as reasoning errors which rob the decision of its logical integrity,[42] or a common-sense decision reached in the light of all the material,[43] factor into the conclusion as to whether the relative weight accorded by the primary decision-maker to relevant considerations was reasonable. This is equally true of what have been termed indicia of unreasonableness,[44] such as the purpose, value and policy of the statute under which the discretion is exercised. Such factors inform the court's deliberation and are into account in assessing the weight and balance of the considerations that have been deemed relevant.

The Supreme Court in *Kennedy* and *Pham* held that considerations of weight and balance can arise in reasonableness cases, as well as those dealing with proportionality.[45] Judicial statements that the weight of relevant considerations is for the primary decision-maker, unless 'he has acted unreasonably in the *Wednesbury* sense'[46] reflect the fact that it is not for the court to substitute judgment on issues of weight.

It is important in this respect to disaggregate the nature of reasonableness review and the intensity with which it is deployed. The former is concerned with weight/balance for the reasons set out above. The latter will affect the relative ease or difficulty for the claimant to win such a case, but does not alter the nature of the exercise.

Higher intensity reasonableness review carries the message that the court will be more searching in its assessment of the weight given to the relevant considerations by the primary decision-maker in order to determine whether it is reasonable. The essential idea is, as noted by Hasan Dindjer, that the more intense the review, the more constricted is the range of eligible weightings for reasons. Thus, as he states, variable intensity reflects variable judgements of reasons' eligible weightings: 'where the range of eligible weightings for reasons is more constricted, review is more intense; where the eligible range is more relaxed, review is more deferential'.[47] Review of this kind is

[41] Craig, 'The Nature of Reasonableness Review' (n 2); Dindjer (n 2).
[42] *R v Parliamentary Commissioner for Administration, ex p Balchin* [1997] COD 146; *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.
[43] *Cumming v Danson* [1942] 2 All ER 653, 655; *Manchester City Council v Pinnock* [2011] 2 AC 104 [56].
[44] Daly (n 2).
[45] *Kennedy v Charity Commission* [2014] UKSC 20 [54]; *Pham v Secretary of State for the Home Department* [2015] UKSC 19 [60], [95], [107]–[110]; Craig, 'The Nature of Reasonableness Review' (n 2); Dindjer (n 2). See also, *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756.
[46] *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 764.
[47] Dindjer (n 2) 289.

also manifest in greater concern for the evidentiary foundations on which the decision has been based, as exemplified by the case law where anxious scrutiny is applied.[48]

Very low intensity reasonableness review of the kind posited by Lord Greene and Lord Diplock encapsulates the message that the court will only overturn the primary decision-maker's estimation of weight in extreme instances. This in turn renders it less likely that the reviewing court will look hard at the evidentiary foundations that underpin the reasons. However, where a consideration can be expected to be of considerable weight when the public authority makes its determination this will be taken into account by the reviewing court in deciding whether the decision was unreasonable.[49]

The balancing that takes place within proportionality review is framed, as we have seen, by the three-part nature of the test. The reviewing court assesses proportionality stricto sensu when it has considered necessity and suitability. Endicott's analysis of, and opposition to, proportionality, is predicated on the assumption that this entails substitution of judgment by the reviewing court, with a bare nod to the varying intensity of review, notwithstanding that the latter represents reality. The error in this respect was considered above. It is salient when considering the balancing that is undertaken within proportionality review of discretionary policy choices.

The very fact that review is cast in terms of manifest disproportionality, which operates at all three stages, means that the balancing is very different from the impression conveyed by Endicott's analysis. Proportionality is based on the supposition that the administration should take account of the effect of its decisions on those that are thereby impacted, and this is reflected in the very structure of the test. In the context of ordinary discretionary decisions, this is however modulated by and through the relatively low intensity review. The administration is afforded considerable leeway through such low intensity review as it plays out at the stages of necessity and suitability. If the balancing stage is reached, the court will already have examined the contested measure in detail, and approved it in terms of suitability and necessity. The balancing is, therefore, closely circumscribed by what has preceded it and the relevant contours of the issue at stage three are sharply defined.

VIII. Conclusion

There will be no attempt to precis the preceding argument. Suffice it to say the following by way of conclusion. It is important that we connect and test our prima facie conclusions on review of discretionary power against the foundational tenets articulated at the outset of this article. It is all too easy for doctrinal assumptions and positions to become divorced from the values that judicial review in this area is designed to serve.

It is important that courts do not substitute judgment on discretionary choices for that of the administration, since this runs counter to fundamental precepts of the separation of powers. It is, however, equally important for there to be meaningful review of such discretionary power for the three reasons adumbrated at the outset: to

[48] Paul Craig, 'Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application' [2015] PL 60.

[49] Compare, e.g., *R (Refugee Action) v Secretary of State for the Home Department* [2014] EWHC 1033 (Admin); *Bolton MBC v Secretary of State for the Environment* [2017] PTSR 1063; *R (M) v Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611.

ensure that the administration does not thereby impede attainment of what the legislation was designed to achieve; to facilitate accountability and enhance democracy through ensuring that the administration provides reasoned decisions that are substantively defensible; and to prevent the imposition of excessive regulatory burdens on particular individuals. These values may be served individually through judicial review in a particular case. They may however operate in tandem.

This duality is perfectly exemplified by *Rooke's Case*, one of the foundational decisions on judicial review and the case that generated review for proportionability. The court concluded that the Commissioners' of Sewers acted unlawfully, since the 'commissioners ought to tax all who are in danger of being damaged by the not repairing equally, and not him who has the land next adjoining to the river only'.[50] The reasoning strikes a remarkably modern chord. If the charge could be levied solely on the owner with land nearest the river, this might defeat the purpose of the statute 'for perhaps the rage and force of the water might be so great, that the value of the land adjoining will not serve to make the banks',[51] and it thus followed that he who derived the benefit should share the burden.[52]

We should then be cautious about review that is too exiguous. We can insist on the default *Wednesbury* test, whereby the claimant must show that the decision was so unreasonable no reasonable public body would have reached the contested decision. We can do so in circumstances where there are no mandatory relevant considerations that the administration must take into account. We can insist that the decision as to the range of such considerations chosen by the administration will only be overturned if it can be shown to be *Wednesbury* unreasonable, and reduce to vanishing point the procedural or deliberative dimension of reasonableness review. We can insist that the weight accorded to such considerations will only be overturned on *Wednesbury* grounds. We can deny the admissibility of evidence through which such administrative reasoning can be tested. We can to be sure do all of the above. We should then ask whether this constitutes meaningful review, and whether such review addresses the three values set out above.

[50] (1598) 5 Co. Rep. 99b.
[51] Ibid 100a.
[52] *Qui sentit commodum sentire debet* & *onus.*