BERKELEY JOURNAL OF INTERNATIONAL LAW

ARTICLES

BerkeleyLaw
UNIVERSITY OF CALIFORNIA

Vol. 41, No.2, 2023

BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 41 2023 NUMBER 2

ABOUT THE JOURNAL

The *Berkeley Journal of International Law* (BJIL) (ISSN 1085-5718) is edited by students at U.C. Berkeley School of Law. As one of the leading international law journals in the United States, BJIL infuses international legal scholarship and practice with new ideas to address today's most complex legal challenges. BJIL is committed to publishing high-impact pieces from scholars likely to advance legal and policy debates in international and comparative law. As the center of U.C. Berkeley's international law community, BJIL hosts professional and social events with students, academics, and practitioners on pressing international legal issues. The Journal also seeks to sustain and strengthen U.C. Berkeley's international law program and to cultivate critical learning and legal expertise amongst its members.

Website: http://www.berkeleyjournalofinternationallaw.com/
http://scholarship.law.berkeley.edu/bjil/

Journal Blog: http://berkeleytravaux.com/

Indexes: *The Berkeley Journal of International Law* is indexed in the *Index to Legal Periodicals*, *Browne Digest for Corporate & Securities Lawyers*, *Current Law Index*, *Legal Resource Index*, *LegalTrac*, and *PAIS International in Print.* Selected articles are available on LexisNexis and Westlaw.

Citation: Cite as Berkeley J. Int'l L.

Submissions: The editors of the *Berkeley Journal of International Law* invite the submissions of manuscripts. Manuscripts will be accepted with the understanding that their content is unpublished previously. If any part of a paper has been published previously, or is to be published elsewhere, the author must include this information at the time of the submission. Citations should conform to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (20th ed.) except where common sense dictates otherwise. Please review our website for additional submissions guidance and send all manuscripts to bjilsubmissions@law.berkeley.edu.

Sponsorship: Individuals and organizations interested in sponsoring the *Berkeley Journal of International Law* should contact the Editors-in-Chief at bjil@law.berkeley.edu.

BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 41 2023 NUMBER 2

CONTENTS

Articles

BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 41 2023 NUMBER 2

BOARD OF EDITORS

Judicial Activism in Transnational Business and Human Rights Litigation

Hassan M. Ahmad*

ABSTRACT

This Article explores a more expansive adjudicative role for domestic judiciaries in the United States, United Kingdom, and Canada in private law disputes that concern personal and environmental harm by multinational corporations that operate in the Global South. This expansive role may confront, but not upend, existing understandings around the separation of powers in common law jurisdictions. After canvassing existing literature on judicial activism and detailing legality gaps in the select common law home States that may warrant a more activist judicial role, this Article suggests three ways to actualize activism. First, judges can heed Thomas Franck's recognition that there is a distinction between judicial policy and foreign policy. That distinction encompasses transnational business and human rights litigation, which does not directly involve governments as parties to the litigation. Second, home State judges can prioritize the need to fill transnational access to justice gaps in two ways: expanding the list of violations in the Alien Tort Statute's "law of nations" requirement and better aligning the ex-ante/ex-post flip in "boomerang litigation." Third, transnational business and human rights litigation may be an apt area to employ judicial morality in deciding "hard cases." Judges can utilize a natural law framework that prioritizes corporate accountability over formalistic doctrinal conceptions.

DOI: https://doi.org/10.15779/Z38M03XZ5P

* Assistant Professor, Peter A. Allard School of Law, University of British Columbia. Email: ahmad@allard.ubc.ca.

INTRODUCTION

Recent trends in Western common law home State jurisdictions portend a path for Global South host State victims to pursue compensatory tort remedies against multinational corporations (MNCs) for human rights and environmental abuses.[1] Over the past few decades, home state legislatures have failed to enact statutes that include provisions around the liability of MNCs for personal and environmental harms abroad. As such, existing statutory frameworks in salient home States—the United States, United Kingdom, and Canada being the focus here—do not provide a means for home State courts to systemically impute liability upon MNCs. Moreover, home State judiciaries have tended to take restrained or deferential approaches. Consequently, corporate revenues that could be used to compensate harmed Global South victims have been effectively sheltered by home State laws.

Scholars have memorialized the above scenario as part of a "governance gap" or a "missing forum" to suggest a number of solutions that, in one way or another, expect leadership from the political branches of government.[2] This circular reasoning places faith in the very institutions that have consistently failed to create systemic avenues for Global South host State victims to seek redress from MNCs in the course of transnational commerce. Even if it also evinces some circularity, what has received relatively less attention in the literature is the role that domestic judiciaries can, in theory, play in the midst of existing legislative gaps and a previous policy of judicial restraint and deference. Distinct from the political branches of government that require a level of consensus to pass legislation, judiciaries are better situated to reverse past adjudicative approaches in a manner that results in a more consistent transfer of corporate revenues to Global South host State victims who have suffered human rights and environmental violations.

Previous scholarship from the common law world has assessed the place of domestic judiciaries vis-à-vis the political branches of government in light of constitutional constraints or established practices related to foreign affairs with other nations.[3] It is problematic to import that discourse into the realm of transnational business and human rights litigation. Whereas constitutional or foreign relations concerns often involve interactions that State governments have with actors abroad, the potential domestic law liability of MNCs in transnational

1. Sara Seck, *Conceptualizing the Home State Duty to Protect Human Rights, in* CORPORATE SOCIAL AND HUMAN RIGHTS RESPONSIBILITIES: GLOBAL, LEGAL AND MANAGEMENT PERSPECTIVES, 25, 29 (Karin Buhmann, Lynn M. Roseberry & Mette Morsing eds., 2011) (host State as "where the impact of the human rights violations is felt").

2. PENELOPE SIMONS & AUDREY MACKLIN, THE GOVERNANCE GAP: EXTRACTIVE INDUSTRIES, HUMAN RIGHTS AND THE HOME STATE ADVANTAGE (2014); MAYA STEINITZ, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE (2018).

3. *See, e.g.* Richard A. Falk, *The Role of Domestic Courts in the International Legal Order*, 39 IND. L.J. 429 (1964); Jules Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Power and International Law,* 71 VA. L. REV. 1071 (1985).

scenarios is one degree removed from prevailing understandings of foreign affairs. MNCs function within "disembedded markets," operating at an arm's-length from Western home State governments.[4] They are not per se the state or agents thereof.

In light of prevailing legislative and judicial gaps in Western home States where transnational business and human rights litigation is often commenced, I argue for a more expansive adjudicative role for home State judiciaries. This expansive role may confront—although not necessarily upend—existing understandings around the separation of powers, particularly in common law jurisdictions. However, it prioritizes the necessity of affording private law remedies to those who have experienced violations of their personal dignity and security. And it serves as a method to fill transnational access to justice gaps. In turn, judicial lawmaking can potentially curtail MNC wrongdoing in the Global South.

Part I of this Article presents literature on judicial activism from both its proponents and opponents. I outline how the concept has been understood in both domestic and transnational disputes. Part II details existing legislative and judicial gaps when it comes to transnational business and human rights litigation. Although there have been failures and deficiencies in other home States, I focus particularly on the United States, the United Kingdom, and Canada, where a large proportion of transnational business and human rights litigation has been commenced. Part III suggests three methods by which judicial activism can be actualized in common law home State courts. First, judges can heed Thomas Franck's distinction between judicial and foreign policy, which becomes acute in transnational business and human rights litigation that does not specifically include domestic or foreign governments as parties to the litigation. Second, judges can prioritize the need to fill transnational access to justice gaps given the lack of remedial avenues open to Global South host State victims. And third, this area of litigation may be a prime example to elicit judicial morality in "hard cases." Judges can utilize a natural law framework that prioritizes accountability and remedies for international human rights violations over formalistic doctrinal conceptions that have previously hindered corporate accountability.

I. ACADEMIC CONCEPTIONS OF JUDICIAL ACTIVISM

As Keenan Kmiec notes in his 2004 article *The Origin and Current Meanings of Judicial Activism*, judicial activism is often used as a concept by judges and academics without a presentation of what it actually means.[5] In his article, Kmiec construes judicial activism as consisting of five "core meanings"

4. *See generally* Peer Zumbansen, *Corporate Governance, Capital Market Regulation and the Challenge of Disembedded Markets* in CORPORATE GOVERNANCE AND THE GLOBAL FINANCIAL CRISIS: INTERNATIONAL PERSPECTIVES, 248 (William Sun, Jim Stewart, & David Pollard eds., 2011).

5. *See* Keenan Kmiec, *The Origin and Current Meanings of Judicial Activism*, 92 CAL. L. REV 1441, 1443 (2004).

or, in other words, five instances in which it can be said that a judge has exhibited activism. These instances are when: i) the political branches of government have taken arguably constitutional actions that are then nullified or overturned by courts; ii) courts fail to adhere to their own precedent or that of higher courts; iii) courts legislate from the bench; iv) courts employ novel interpretations of past laws; and v) courts make law with the results in mind.[6] In a similar vein, Sterling Harwood interprets judges as being activists when they refuse to defer to the other branches of government, relax requirements around justiciability (i.e., take an expansive view of jurisdiction), break with precedent, and loosely or creatively interpret constitutions, statutes, or judicial precedents.[7]

From these definitions and characterizations, judicial activism as a concept is intricately connected to the separation of powers. The above authors were concerned with the extent to which judicial power seeps into the normative purviews of the legislative and executive branches of government.[8] That concern alone makes judicial activism relevant in transnational disputes because it is the executive branch, through constitutional decree (in the United States) or by the practice of Crown prerogative (in Canada and the United Kingdom), that is tasked with building relations with other nations' governments. As such, separation of powers concerns are present in transnational business and human rights litigation. MNCs often contract with or align closely with host State governments and/or their militaries in the course of manufacturing and extractive activities and, increasingly, public works projects around infrastructure and transportation. Those public-private interactions can affect foreign relations.

Judicial activism is often viewed in contradistinction to judicial restraint—whether that restraint be practiced vis-à-vis the legislative process or the executive's ability to engage in foreign relations. Edward McWhinney, in the second of his two seminal articles on the US Supreme Court, argued that rather than dichotomous classifications, these two categories are better viewed as points on a continuum.[9] McWhinney surmised that a judge's decision to exhibit activism or restraint is contingent on questions of timing and technique. He asks, "[a]re there particular time periods appropriate for the exercise of strict (restrictive) judicial interpretation of a constitution or statute, and other periods in which more ample conceptions of the judicial office are desirable or necessary?"[10] He asserts

6. *See id.* at 1444.

7. *See* STERLING HARWOOD, JUDICIAL ACTIVISM: A RESTRAINED DEFENSE (1996); see *also* Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE, 236, 236–247 (1982) (six dimensions of judicial activism).

8. *See e.g.* Kmiec, *supra* note 5, at 1447; HARWOOD, *supra* note 7, at 23. Judicial activism is distinct from judicial discretion, which is about the ability for judges to make more than one right choice. *See* Kent Greenwalt, *Discretion and Judicial Decision: The Elusive Question for the Fetters that Bind Judges, Legislation*, 75 COLUM L. REV. 359 (1975); Roscoe Pound, *Spurious Interpretation*, 7 COLUM L. REV. 379 (1907).

9. Edward McWhinney, *The Great Debate: Activism and Self-Restraint and Current Dilemmas in Judicial Policy-Making*, 33 N.Y.U. L. REV. 775, 790 (1958).

10. *Id.* at 791.

that the initial periods after a statute is passed warrant more restrictive interpretations.[11]

As for technique, McWhinney takes the position that the level of judicial activism (which he relegates to expansive statutory interpretations[12]) depends largely on a nation's constitutional structure. A "simple and unitary" constitution that places significant power in the legislative and executive branches requires little, if any, judicial activism. On the contrary, a "complex constitutional structure" based on a separation of powers and "amending machinery which works only with extreme difficulty and slowness" necessitates greater responsibility—and even a primary one—upon the judiciary in matters of constitutional and statutory interpretation.[13]

While most authors have approached judicial activism in relation to domestic disputes, little has been written on the concept in relation to transnational and international disputes. In his 2012 study, Fuad Zarbiyev proposes a conceptual framework for judicial activism in international law.[14] He views activism as dependent on prevailing social conventions. He comes upon a number of variables to determine whether activism is justified for judges who interpret international legal mechanisms. These factors are:

- the conception of the judicial function (are judges pursuing "a grand design"?);
- the degree of determinacy in the system (how is the law defined and interpreted?);
- the existence of a hierarchically structured judicial system (is there an appeals structure?);
- prudential doctrines (are there times when judges ought not interfere with political branches?);
- the mechanisms of political control (are there exit routes from judicial decisions?);
- the legitimating function of legal academics (are singular judicial decisions viewed more broadly in light of neutral principles?);
- the nature of proceedings (ad hoc, advisory, or permanent tribunals);
- discursive constraints (what, if any, disciplinary rules must judges adhere to?); and

11. *Id.*

12. For this type of approach to judicial activism, *see* Wallace Mendelson, *The Politics of Judicial Activism*, 24 EMORY L. J. 43 (1975).

13. McWhinney, *supra* note 9, at 792.

14. Fuad Zarbiyev, *Judicial Activism in International Law - A Conceptual Framework for Analysis*, 3 J. INT'L DISPUTE SETTLEMENT 247 (2012).

- social legitimacy considerations (do judges have to justify their decisions to the wider public?).[15]

In the next two subsections, I review a spectrum of opinions on judicial activism, which range from more progressive takes to more conservative ones. By and large, these two camps fall within what Hugh Thirlway dichotomizes as formal versus substantive judicial activism. Formalists, much like positivists in legal philosophy, discussed later, view the law as complete with the provision of an answer to every possible scenario.[16] From this perspective, there is no room for activism (or at least very little). Therefore, when judges depart from the accepted apparatus of the law, they are, in fact, acting *ultra vires* their powers.

On the other hand, substantivists, again like their counterparts in legal philosophy, accept that there can be lacunae in existing laws. Judges can accordingly supplement or even create law by themselves without explicit authority from the other branches of government.[17] There are also intermediary positions, such as H.L.A. Hart's notion that judicial discretion is permissible in areas of "penumbra."[18] However, Hart would rightfully be classified as being closer to the formalists because, for him, the "heart of law" leaves no room for activism.[19]

As a point of caution, most of the views presented below are from American authors or those who have opined on judicial activism within the American legal system.[20] Their analyses can be analogized to other common law systems, particularly the United Kingdom and Canada, where transnational business and human rights litigation has also commenced. The general thrust of the US-centric literature concerns the extent to which judges can weigh in on a dispute when it abuts the political branches of their own government or other governments around the world.

a. Some supportive views

There is a long-held understanding that domestic judges, as arms-length actors largely insulated from political pressures once in their posts, are the

15. *Id.* at 254–57.

16. Hugh Thirlway, *Judicial Activism and the International Court of Justice* in 1 LIBER AMICORUM JUDGE SHIGERU ODA, 75–76 (Nise Ando et al. eds., 2002).

17. *Id.*

18. H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958).

19. *Id*. at 614–15.

20. *But see* Kent Roach, THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE (2016); Bruce Feldthusen, *Unique Public Duties of Care: Judicial Activism in the Supreme Court of Canada*, 53 ALTA. L. REV 955 (2016) (judicial activism in Canada). *See also* Brice Dickson, *Activism and Restraint within the UK Supreme Court*, 21 E.J.O.C.L.I. 1 (2015) (judicial activism in the United Kingdom).

cornerstone of common law systems. Brian Bix notes that Blackstone favored "judicial legislation as the strongest characteristic of the common law."[21]

Kmiec traces the first modern usage of the term "judicial activism" to Arthur Schlesinger Jr.[22] In a 1947 *Fortune* article, Schlesinger wrote that a wise judge "knows that political choice is inevitable; he makes no false pretense of objectivity and consciously exercises the judicial power with an eye to social results."[23] Despite his apparent approval of activist judges, Schlesinger thought it best for judges only to be activists in cases that concern civil liberties. He characterized the Black-Douglas "progressive" wing of the US Supreme Court, in effect, to have adopted the posture that "the Court cannot escape politics: therefore, let it use its political power for wholesome social purposes."[24] Seemingly, for Schlesinger, it would be a wholesome purpose for judges to thwart precedent, legislate from the bench, or judge with the result in mind when it affects people's civil liberties.[25] In contemporary terms, his stance would arguably encompass transnational corporate human rights violations.[26]

In his 1964 article, *The Role of Domestic Courts in the International Legal Order*, Richard Falk took a partisan position that supported judicial lawmaking independent of the political branches. He sought to push back against "[t]he paternalistic claim that the government can protect its citizens better if they are denied a judicial remedy in an international law case."[27] He confronted this parochial stance on judicial lawmaking as something that "undermines the effort to transform the law of nations into a law of mankind."[28] In another article he published three years prior, Falk had begun to develop a participatory theory of domestic courts in the international legal order. There, he argued that deference on the part of domestic judiciaries to national policy in international affairs actually results in less objective legal results.[29] He did not see a conflict between domestic courts being constituent institutions of specific States and simultaneously being agents of an emerging international order.

21. Brian Bix, *Positively Positivism*, 85 VA. L. REV. 889, 907 (1999) (reviewing ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)), cited in Kmiec, *supra* note 5, at 1444 (internal citations omitted).

22. *See* Kmiec, *supra* note 5, at 1444.

23. Arthur M. Schlesinger, Jr., *The Supreme Court: 1947*, FORTUNE MAG. (Jan. 1947).

24. *Id.*

25. *Id.*

26. Despite his dissent in *Lochner* in which he promoted "judicial self-restraint," Holmes, like Schlesinger, was supportive of some degree of judicial activism when it came to cases around civil liberties. *See Lochner v. New York*, 198 U.S. 45, 76 (1905).

27. Falk, *supra* note 3, at 430.

28. *Id.* at 430.

29. Richard A. Falk, *Toward a Theory of the Participation of Domestic Courts in the International Legal Order: A Critique of Banco Nacional de Cuba v. Sabbatino*, 16 RUTGERS L. REV. 1, 7 (1961).

For Falk, international disputes brought before domestic courts called for two types of autonomy: institutional autonomy (i.e., the separation of the judicial branch from the political branches of government) and doctrinal autonomy (i.e., the independence of the rules of international law from the political sphere).[30] Falk viewed the executive and judicial branches as operating within distinct spheres of interest. Whereas the executive branch acts in the public interest with the goal of reaching settlements and agreements among States around collective action problems (with indirect consequences to individuals who have been affected in one way or another by such problems), the judicial branch has a private interest in determining whether there has been a specific infringement of individual rights.[31]

Falk acknowledges that a judiciary that interprets international law in accordance with the executive branch results in a single national voice in international law disputes. However, in what he characterizes as "non-criminal and non-punitive" international law cases brought before domestic courts, he devises ten reasons that support a rationale for judicial independence, which would be akin to a more activist stance for the purposes of this Article:

- The absence or unavailability of international tribunals;
- A loss of respect for international law as a legal system if it is subservient to diplomatic processes and goals;
- Domestic courts have an opportunity to advance international law rules;
- The domesticity of the forum is not essential to the dispute;
- Judicial independence shatters the notion that sovereignty permits a State to reconcile its national interests with its international law obligations;
- A general acceptance of judicial independence will lessen the burden (or surprise) experienced by executive branches;
- Judicial independence preserves a private sphere of international transactions that do not succumb to government control;
- The visibility of domestic courts makes them averse to political pressures;
- Via their opinions, domestic courts have an educational function to teach the public about the rules of international law; and
- Domestic judicial opinions can play a role in promoting a global legal order.[32]

30. *Id.* at 431.

31. *Id.* at 432.

32. *Id.* at 440–442.

Specific to the United States, Falk views judicial independence in foreign relations-adjacent matters as a suspension of the *Bernstein* doctrine.[33] He considers it best that domestic judges retain discretion on when to opine on transnational disputes about foreign relations. Naturally, this opens the door to more activist lawmaking on the part of judges, including in transnational business and human rights litigation.

Similarly, Franck has advocated for a more expansive judicial role in transnational disputes. His 1992 book, *Political Questions/Judicial Answers,* is dedicated to addressing the fact that judicial restraint in the United States vis-à-vis the other branches of government in cases that implicate foreign relations actually stems back to colonial British common law doctrine.[34] He traces prudential doctrines around foreign relations to a British Crown Court's decision in *Nabob of Arcot v. East India Company*, a case which concerned a treaty between the Nabob and the East India Company.[35] Franck writes:

> The tradition of [judicial] abdication has been built, bit by bit, on the straw foundations of dicta imported from the British monarchial system, deployed in cases where it was irrelevant to the matters being litigated, and thus was introduced into American law essentially without benefit of genuine adversary process, let alone profound jurisprudential reflection.[36]

Franck's argument can be summarized in his statement that "there are no valid reasons—constitutional, prudential, technical, or policy-driven—for treating foreign-relations cases differently than others."[37] For him, the only relevant criterion for courts to assert jurisdiction is a "ripe dispute between parties with standing."[38]

Addressing Justice Marshall's opinion in *Marbury v. Madison*, one of the first decisions that began to construct a political question doctrine in the United States, Franck writes that "no effort is made [in *Marbury*] to explain *why* foreign affairs should be placed beyond the reach of judicial review."[39] As Franck's blocked quote above pronounces, the political question doctrine and other similar deferential and prudential doctrines employed in transnational business and human rights litigation crept into early US Supreme Court decisions in *obiter* through British cases that applied those doctrines.[40]

33. *Id.* at 21. Also, *see Bernstein v. Van Heyghen Freres,* 163 F.2d 246 (2d Cir.), *cert. denied*, 332 US 772 (1947) (the doctrine allows the executive branch to intercede in Act of State cases when adjudication would not impinge upon foreign relations).

34. THOMAS M. FRANCK, POLITICAL QUESTIONS JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992).

35. Nabob of Arcot v. the East India Company, 3 Bro. C. C. 292; 29 Eng. Rep. 544 (Ch. 1791).

36. FRANCK, *supra* note 34, at 21.

37. *Id.* at 7.

38. *Id.*

39. *Id.* at 4 (emphasis in original).

40. Also, *see id.* at 8 (referring to this phenomenon as "doctrinal cacophony").

Franck suggests US courts have implicitly made a Faustian Pact (i.e., a deal to "sell their soul") with the other branches of government. They have widened their jurisdiction with regard to domestic matters in exchange for restraint in transnational matters that abut foreign relations.[41] Like his predecessors, Franck criticizes the notion professed by some lawyers and judges that the nation must operate with a single voice—the President's. He makes a crucial point—and one that applies today to transnational business and human rights litigation in common law home States: "[w]hen courts speak in cases and thereby incidentally affect some aspect of foreign relations, they do not make foreign policy. They make judicial policy."[42] By this, he means that there is a distinction between, on the one hand, the ongoing and entrenched relationships of one government with one or more other governments around the world and, on the other hand, how individual rights are interpreted in a specific dispute that crosses State boundaries. I will return to this notion later as one way in which home State courts can engage in activism.

b. Some restrained views

Like more progressive views, restrictive views of the judicial branch's ability to make or fill gaps in the law (in both domestic and transnational disputes) also go back centuries to proponents of legal positivism. Jeremy Bentham (whom Dworkin identifies as the father of the positivist movement) characterized judicial lawmaking as "miserable sophistry."[43] David Dyzenhaus attributes Bentham's contempt of judicial lawmaking to two things.[44] First, Bentham was concerned that appointed judges who come from elite social classes would be reticent to progressive legislative reform. Second, common law judiciaries would be apt to see themselves as safeguarding and controlling law's meaning through their place as "exclusive exponents of [artificial] reason."[45] In both instances, Bentham's contempt of common law judges stems from a perception that they view themselves as vanguards of social order.

More recently, in *Proper Judicial Activism*, Greg Jones argues that the American constitutional structure stresses restraint: judges only intervene when a decision is required to maintain the separation of powers among the co-equal branches of government. He asserts, "[t]he overarching practical principle guiding the Founders was a fear of the concentration of political power in government."[46]

41. *See id.* at 10–20 for an elaboration on this Faustian Pact.

42. *Id.* (emphasis added).

43. *See* RICHARD A. COSGROVE, SCHOLARS OF THE LAW: ENGLISH JURISPRUDENCE FROM BLACKSTONE TO HART 56–57 (1996); RONALD DWORKIN, HART'S POSTSCRIPT AND THE CHARACTER OF POLITICAL PHILOSOPHY, 24 OXF. J. LEG. STUD. 1, 27 (2004).

44. *See* David Dyzenhaus, *The Very Idea of a Judge*, 60 UNIV. TORONTO L. J. 61, 63 (2010).

45. *Id.*

46. Greg Jones, *Proper Judicial Activism*, 14 REGENT U. L. REV. 141, 146 (2001).

For Jones, only that fear of concentrated power in the hands of the political branches (particularly the executive branch) warrants judicial intervention.[47]

Contrary to the structural approach for which Jones argues, "improper judicial activism" is when judges construe that "law is only policy and that the judge should concentrate on building the good society according to the judge's own vision."[48] At odds with more expansive takes on activism forwarded by, for instance, Schlesinger and Holmes, Jones does not see a place for activism in cases that concern civil liberties or human rights.[49] He decries this type of activism as "judging in the service of conscience," a characterization he makes of the progressive wing of the Warren court.[50]

Jones' "structural judicial activism" promotes a majoritarian respect for the elected branches. In his view, activism to overturn instances of the political branches acting *ultra vires* their powers demonstrates fidelity to the constitution. Quoting Judge J. Clifford Wallace, Jones takes the position that "judges should *always* be hesitant to declare statues [*sic*] or governmental actions unconstitutional [because it] … encourages the separation of powers, protects our democratic processes, and preserves our fundamental rights."[51] In essence, Jones gives the political branches a carte blanche to legislate and engage in foreign relations as they see fit as long as they do not impinge on the powers of the co-equal branches of government.

Arguably one of the most prominent and consistent critics of judicial activism has been the University of Chicago Law School professor Eric Posner. In a 2011 article with Daniel Abebe, Posner takes the position that "Foreign Affairs Legalism" or FAL (where the judiciary weighs in on disputes that abut foreign affairs), in fact, degenerates rather than advances international law.[52] FAL critics persist with some of the arguments refuted by more progressive voices around judicial activism, namely that the fluidity of relations among States (Franck's "Too Much at Stake" category) warrants a sphere in which the executive branch has the freedom to act without being second-guessed by the judiciary.

Posner and Abebe view FAL as appearing in three distinct guises: i) the Benvenisti "competitive" or "zero-sum" model (i.e., more activist courts translate into a tightening sphere for the executive branch to define international legal rules); ii) the Koh "balanced institutional participation" model (i.e., courts play a

47. *See id.*

48. *Id.* at 144.

49. *See e.g.*, Schlesinger, *supra* note 23.

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

51. *Id.* at 166–167 (emphasis added); J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 2 (1981).

52. *See* Daniel Abebe & Eric Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 509 (2011).

role in constructing shared norms and practices that are internalized into domestic laws and politics); and iii) the Slaughter 'transnational governance networks' model (i.e., inter-State judicial dialogue to craft a global rule of law without centralized global institutions).[53] To Posner and Abebe, these models all share three themes. First, they capture judiciaries as having the capacity as well as an interest in restraining the executive branch.[54] Second, judicial intervention promotes international law.[55] And third, rather than bolstering the global rule of law, executive pre-eminence interferes with it as, to FAL proponents, executive branches often prioritize national self-interest over multilateral efforts.[56]

Posner and Abebe do not doubt that, at times, courts promote international legal rules, including widely accepted norms of international human rights. However, they view judicial decisions as having minimal effect on international law, a reality that militates in favor of more restraint.[57] Writing prior to Posner and Abebe's critique of FAL, Franck sees this approach as one of the bulwarks of the restraint camp.[58] He remains unconvinced that the judiciary should forego its rightful jurisdiction to adjudicate a foreign relations-related matter simply because it may be limited in its capacity to compel the executive branch to follow judicial decisions.

Posner and Abebe also view courts as being too slow and decentralized to develop coherent policies that affect international law.[59] Furthermore, in their view, while judges may be impartial, they are not accountable for their decisions like members of the political branches of government who must survive the next poll or vote. That unaccountability gives them "little feel" for international politics and the public interest.[60] Overall, the authors argue that judiciaries are not best-placed to handle foreign affairs-related matters. For them, domestic doctrine has not developed to handle such disputes—what Franck views as an historical accident that seeped into the common law through *dicta* opinions.[61]

It should be noted that the very characteristics that Posner and Abebe see as crutches to courts weighing in on foreign affairs-related matters are what proponents of judicial activism, in fact, see as strengths.[62] When Posner and Abebe say that courts are too decentralized, they are essentially characterizing courts as structurally incapable of building a coherent foreign policy.[63] Franck

53. *See id.* at 512–517.
54. *See id.* at 518.
55. *See id.*
56. *See id.*
57. *See id.* at 531.
58. FRANCK, *supra* note 34.
59. *See* Abebe & Posner, *supra* note 52, at 509.
60. *Id.* at 544.
61. *See id.*; FRANCK, *supra* note 34, at 21.
62. *See* Abebe & Posner, *supra* note 52, at 519.
63. *See id.* at 542.

would likely agree with that sentiment as, rather than delineating relations among State governments, judiciaries make one-off decisions in light of claims around individual rights and private law remedies.[64] Similarly, when Posner and Abebe say that courts have "little feel" for international politics, Falk would respond by noting the aforementioned conflicts of interest between the executive and judicial branches.[65] Executive branches have conciliatory or settlement objectives, whereas judicial branches have rights-based objectives.

II. HOME STATE LEGALITY GAPS

Before making a case for an expansive judicial role in transnational business and human rights litigation, it is first necessary to establish the circumstances that may lead domestic judges to assume that role. In short, there has been a consistent stream of legislative and judicial legality gaps in common law home State legal systems. As a consequence, Global South host State victims have been hindered from pursuing private law remedies pursuant to corporate human rights violations. These gaps can be broken into four categories: failed legislation, deficient legislation, judicial restraint, and judicial deference.

Statutory provisions that, in theory, could ground transnational corporate human rights litigation in a home State's jurisdiction and allow for a duty of care on the part of an MNC's parent and/or subsidiary/contracting companies remain conspicuously absent. Home State legislatures have previously exhibited ambivalence or outright opposition to statutes that would include provisions around a private right of action for corporate-related harms committed in host States, predominantly in the Global South.

Alongside legislative gaps, home State judiciaries have—although not fatalistically—practiced restraint or taken deferential stances with respect to the courts or governments of foreign host States. For instance, common law home State courts have restrictively interpreted corporate separateness as to be unwilling to pierce the corporate veil. For example, US courts have limited the Alien Tort Statute's application to State actors and for violations that take place within US territory.[66] And, at times, despite home State courts acknowledging that a host State's legal system is wholly deficient to adjudicate complex mass transnational tort claims against an MNC, they have still deemed that legal system as a more appropriate forum to hear such claims.

a. Failed Legislation

Despite recent efforts in some States to pass human rights transparency and due diligence statutes, in States where transnational business and human rights

64. *See* FRANCK, *supra* note 34, at 21–22.

65. *See* Abebe & Posner, *supra* note 52, at 544; Falk, *supra* note 3, at 432.

66. Nestlé USA, Inc. v. Doe et al., 593 U.S. ____ (2021), at 5 [Nestlé].

litigation has commenced—the United States, United Kingdom, and Canada being most notable—there are no provisions to allow for MNC tort liability for host State human rights and/or environmental harms. On occasion, individual lawmakers have introduced draft legislation only to be turned away by their legislatures.

i. Amendments to Alien Tort Statute

In its first two centuries, the 1789 *Alien Tort Statute* (ATS) was seldom invoked—and certainly not for transnational corporate-related cases.[67] Since it has been called upon in corporate tort claims for human rights violations, the statute's ambiguity around the types of defendants to which it applies and its territorial reach have barred Global South host State plaintiffs from advancing claims in US courts. The stumbling block for Global South plaintiffs in, for instance, *Kiobel v. Royal Dutch Petroleum Co.*,[68] *Sarei v. Rio Tinto, PLC*,[69] and even the Supreme Court's 2021 decision in *Nestlé USA, Inc. v. Doe*[70] has been that, without legislative guidance, appeals courts see themselves as being handcuffed such that they are unable to expand the traditional scope of customary international law violations to non-State actors, including MNCs.[71]

In 2005, Diane Feinstein introduced the ATS Reform Act (ATSRA) to clarify the jurisdiction of the US federal courts in ATS claims.[72] Had it passed, the act would have replaced the ATS's provision with the following:

> The district courts shall have original and exclusive jurisdiction of any civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort. The district courts shall not have jurisdiction over such civil suits brought by an alien if a foreign [S]tate is responsible for committing the tort in question within its sovereign territory.[73]

Additionally, the ATSRA would have replaced the term "law of nations" in the ATS's current iteration with a list of defined human rights violations. Directly relevant to transnational business and human rights disputes, the ATSRA's proposed defendants would have included "a partnership, corporation or other

67. Stephens notes that the ATS was invoked in fewer than 25 cases between 1789 and 1989. In that time, it was only cited in two successful cases: Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) and Adra v. Drift 195 F. Supp. 857 (D. Md. 1961). *See* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1472 (2014). See also Judiciary Act of 1789 § 9, 1 Stat 73, 76-77, codified as amended at 28 U.S.C. § 1350.

68. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013) [Kiobel].

69. Sarei v. Rio Tinto, PLC, 671 F.3d 736 (2011).

70. Nestlé, *supra* note 66.

71. *But see e.g.* Jordan J. Paust, *Nonstate Actor Participation in International Law and the Pretense of Exclusion Essay*, 51 VA. J. INT'L L. 977 (2010) (arguing that non-State actors have historically entered into treaties).

72. Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005), https://www.congress.gov/bill/109th-congress/senate-bill/1874/text [hereinafter ATSRA].

73. *Id.* at § 2(a).

legal entity organized under the laws of the United States or of a foreign [S]tate."[74] Consequently, US courts would no longer have been able to assert (even if in *obiter*) that corporate liability falls outside the ATS's scope.

One week after introducing the proposed act—and before it could be considered by the Judiciary Committee—Senator Feinstein withdrew the bill, citing backlash from human rights groups as a reason for the bill's withdrawal.[75] However, given subsequent research conducted by Jeffrey Davis on the concerted lobbying efforts that were undertaken by business-friendly groups that opposed the ATSRA, that justification appears suspect.[76] Davis found that from 2003 up to when the ATSRA was introduced in 2005, the Chamber of Commerce, alongside other corporate-friendly groups such as USA Engage and the Washington Legal Foundation, consistently lobbied the US State Department, the Justice Department, the National Security Council, and the US Trade Representative to eliminate the potential for systemic corporate liability under the ATS or any putative amendments.[77] Irrespective of the reason, the ATSRA never passed into law.[78]

In 2022, Senators Dick Durbin and Sherrod Brown introduced the *Alien Tort Statute Clarification Act* (ATSCA).[79] The Act was a response to the 2021 decision in *Nestlé,* where the Supreme Court rejected the ATS's extraterritorial application. In *Nestlé*, former laborers on cocoa farms in Côte d'Ivoire claimed Nestlé, a US-headquartered global food conglomerate, aided and abetted forced labor. Eight justices applied the "focus test" from *RJR Nabisco, Inc. v. European Community* to hold that child labor—the focus of the claim—occurred outside US territory.[80] Justice Thomas, who penned the majority's decision, explained that "mere corporate presence," i.e., generic operational, financial, and administrative decisions, on the part of a home State corporation or parent company does not draw "a sufficient connection between the cause of action … and domestic conduct."[81]

74. *Id.* at § 2(b)(1).

75. *See* Amnesty International, *Protecting the Law that Protects the Victims of Corporate Abuses*, CORP. ACTION NETWORK MAG. (March 2006) at 8-9, https://web.archive.org/web/20060823172448/http://www.amnestyusa.org/business/CAN_March_06.pdf.

76. JEFFREY DAVIS, JUSTICE ACROSS BORDERS: THE STRUGGLE FOR HUMAN RIGHTS IN US COURTS 143–144 (2008) cited in TONYA L. PUTNAM, COURTS WITHOUT BORDERS: LAW, POLITICS, AND US EXTRATERRITORIALITY 247 (2016).

77. *Id.*

78. ATSRA, *supra* note 72..

79. Alien Tort Statute Clarification Act, § 4155 117th Congress, 2d Session (2022), https://www.govinfo.gov/content/pkg/BILLS-117s4155is/pdf/BILLS-117s4155is.pdf [hereinafter ATSCA].

80. RJR Nabisco, Inc. v. European Community, 579 U.S. 325 (2016); Nestlé, *supra* note 66, at 7.

81. Nestlé, *supra* note 66, at 5.

The ATSCA is designed to clarify the ATS's extraterritorial scope. It states that "the district courts of the United States have extraterritorial jurisdiction over any tort … if … an alleged defendant is a national of the United States or an alien lawfully admitted for permanent residence … or an alleged defendant is present in the United States, irrespective of the nationality of the alleged defendant."[82] This type of automatic jurisdiction when a defendant is resident on US territory would mirror Article 4(1) of the *Brussels I Regulation* that has made *forum non conveniens* and extraterritoriality dismissals virtually obsolete in the United Kingdom.

Like the ATSRA, the ATSCA is unlikely to pass into law. Unlike the *Torture Victim Protection Act* (TVPA)[83] and the *Trafficking Victims Protections Reauthorization Act* (TVPRA),[84] which cannot compel corporations to compensate foreign plaintiffs,[85] the ATSCA (like the ATSRA) would allow for foreign plaintiffs to access corporate revenues. Given that some of the largest US-headquartered MNCs that undertake extractive and manufacturing operations in the Global South have considerable lobbying power, and have previously opposed the imposition of liability for human rights violations abroad "until hell freezes over,"[86] it is unlikely they will let up now. Consequently, the ambiguity in the American legislative landscape for transnational corporate human rights claims will likely persist.

ii. UK Corporate Liability Bills

Introduced in June 2002 as a private member's bill by Labor Member of Parliament (MP) Linda Perham, the *Corporate Responsibility Bill* would have been applicable to UK-registered companies and their foreign subsidiaries.[87] It would have required UK corporations to prepare and publish annual reports assessing "policies and performance in regards to environmental, social and economic impacts" and to minimize the effects of those impacts.[88] The Bill specifically included provisions to ensure parent companies would not be shielded from liability for actions of a foreign subsidiary.[89]

82. ATSCA, *supra* note 79.

83. Torture VictimProtection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

84. Trafficking Victims Protection Reauthorization Act of 2005 (TVPRA 2005), Pub. L. No. 109-164.

85. *But see* Mohamad v. Palestinian Authority, 132 S. Ct. 1702 (2012) (limiting defendants in TVPA claims to natural persons).

86. Aaron Marr Page, *Chevron's "Fight It Out On The Ice" Strategy For Ecuador Case Is Slipping, Fast*, HUFFINGTON POST (Mar. 27, 2015), at https://www.huffpost.com/entry/slip-sliding-whats-happen_b_6911916.

87. Corporate Responsibility Bill 2002-3 HC Bill [129], https://publications.parliament.uk/pa/cm200203/cmbills/129/2003129.pdf.

88. *Id.* at § 3.

89. *Id.* at § 6(2).

Section 6(1)(c) of the Bill stated that a parent company would be liable for compensatory damages if it was responsible for "serious physical or mental injury to persons working in or affected by those activities; serious harm to the environment; or both."[90] Other provisions explicitly stated the company's corporate structure is not a barrier to a liability determination.[91] In other words, the corporate veil, discussed as part of the judicial restraint that British and other home State courts have exhibited, could no longer be a doctrinal barrier to MNC liability.

When first introduced, the Bill received widespread praise. Signaling support of the Bill, more than 300 MPs signed an Early Day Motion.[92] It was also praised by the Corporate Responsibility Coalition, comprised of Amnesty International UK, Christian Aid, and Friends of the Earth.[93] A poll conducted by the British Department for Environment, Food and Rural Affairs found that 71 percent of the public agreed that businesses should report their environmental impact to the government.[94] Despite its backing inside and outside the government, Ms. Perham withdrew the Bill before a vote could take place.[95] While there is no published or online information available as to why the Bill was withdrawn, the following Hansard record of 19 July 2002 implicitly says it all:

Order for Second Reading read.

Hon. Members: *Object.*

Mr. Deputy Speaker: *Second Reading what day? No day named.*

Dr. Julian Lewis: *On a point of order, Mr. Deputy Speaker. I seek your guidance once again. Is there any way in which at least we can place on the record the fact that now, Labour Back Benchers' Bills are being killed by their own Government Whips?*

Mr. Deputy Speaker: *I think the hon. Gentleman has just done so.*[96]

After the demise of her initial bill, in October 2002 Perham tabled the *Corporate Responsibility (Environmental, Social and Financial Report) Bill*.[97]

90. *Id.* at § 6(1)(c).

91. *Id.* at § 6(2).

92. House of Commons, Corporate Social Responsibility EDM #113, Tabled 18 November 2002, https://edm.parliament.uk/early-day-motion/23893/corporate-social-responsibilty.

93. *See* Amnesty International UK, *UK: New Bill Would Inject Substance into Corporate Social Responsibility*, AMNESTY INTERNATIONAL: PRESS RELEASES (Jun. 19, 2003), https://www.amnesty.org.uk/press-releases/uk-new-bill-would-inject-substance-corporate-social-responsibility.

94. *Id.*

95. House of Commons, *Weekly Information Bulletin: 27th July 2002*, https://publications.parliament.uk/pa/cm200102/cmwib/wb020727/bus.htm. ("Corporate Responsibility Bill - Objected to - no day named for 2nd reading.").

96. House of Commons, Parliamentary Business, Corporate Responsibility Bill, https://publications.parliament.uk/pa/cm200102/cmhansrd/vo020719/debtext/20719-24.htm (emphasis added).

97. *Id.*

The new Bill was much like the first one—except for one key provision. The new Bill was stripped of any discussion of parent company liability included in the first Bill.[98] In their book *The Governance Gap*, Penelope Simons and Audrey Macklin have written that "there is no indication that the bill was debated."[99] Since these attempts, no legislation has been introduced in Parliament that would allow for the tort liability of parent and/or subsidiary corporations for human rights and environmental violations abroad.

iii. Canadian Corporate Liability Bills

Like the United States and United Kingdom, there is continued uncertainty in Canada with regard to the ability of host State plaintiffs to seek compensatory remedies for corporate human rights and environmental violations. Each titled *An Act to amend the Federal Courts Act (international promotion and protection of human rights)*, Bills C-323, C-354, and C-331 were introduced by New Democrat MP Peter Julian in 2009, 2011, and 2015.[100] As the title suggests, the Bills would have amended the *Federal Courts Act*[101] to expressly permit foreign claimants to initiate tort claims for international human rights matters. Similar to the failed ATSRA, the proposed bills listed specific human rights violations that would fall within the Federal Court's jurisdiction. These included, but were not limited to, genocide, slavery, extrajudicial killing, torture, and arbitrary detention.[102]

After a nearly decade-long wait, Bill C-331 reached the floor of the House of Commons in June 2019 and was rejected by a vote of 238-49.[103] Perhaps to not ostensibly promote MNC profits and jobs over international human rights, MPs cited procedural hurdles to the Bill's adoption.[104] Conservative MP Marilyn Gladu argued that it would be imprudent to give the Federal Court jurisdiction as she considered it to be in "tatters"[105]—a perplexing (and arguably disingenuous) sentiment about a long-standing judicial venue that spans all Canadian provinces and covers all matters within the federal government's jurisdiction. Liberal MP Greg Fergus cautioned against a procedure akin to the ATS, arguing the latter is

98. House of Commons, Select Committee on Environmental Audit Minutes of Evidence, Annex A: The Corporate Responsibility Bill, https://publications.parliament.uk/pa/cm200203/cmselect/cmenvaud/98/2120404.htm.

99. SIMONS & MACKLIN, *supra* note 2 at 267, n.584.

100. When Mr. Julian introduced the initial bill, he stated that it was meant to mirror the ATS. *See* Bill C-323, An Act to Amend the Federal Courts Act (international promotion and protection of human rights), 41st Parl., 2nd Sess. (2013), https://openparliament.ca/bills/41-2/C-323/.

101. R.S.C. 1985, c F-7.

102. *Id.* at § 25.1(2).

103. Bill C-331, An Act to amend the Federal Court Act, Vote #1376 on June 19th, 2019, 42nd Parl. 1st Sess., https://openparliament.ca/votes/42-1/1376/.

104. For debate transcript, *see* Bill C-331 (Historical), An Act to Amend the Federal Courts Act (international promotion and protection of human rights), 42nd Parl., 1st Sess., 2019, https://openparliament.ca/bills/42-1/C-331/.

105. *Id.*

a mere relic from America's first Congress.[106] He also argued that, rather than a statutory amendment, it is better for the common law to evolve gradually, "incrementally taking into account developments in other jurisdictions."[107] That last remark implicitly signals a tolerant view of Canadian judges taking a more activist stance to fill legislative gaps perpetuated by Canada's Parliament.

In March of 2022, Mr. Julian tabled another private member's bill, C-262, *The Corporate Responsibility to Protect Human Rights Act*. Similar to the other bills, Bill C-262 provides a private right of action for "[a] person who alleges that they have suffered loss or damage as a result of a failure by an entity to comply with its obligations to prevent adverse impacts."[108] It also allows for litigation when a corporate entity fails to develop and implement due diligence procedures to mitigate the potential for human rights-related harms in the course of business operations.[109] As of this Article's writing, Parliament has not voted on Bill C-262. However, given that Mr. Julian is part of the minority New Democrat Party and presented Bill C-262 as a private member's bill without widespread support from the governing Liberal Party, it is unlikely to pass into law.

b. Deficient Legislation

Failed legislation, like the aforementioned examples of home State bills around transnational corporate tort liability that have not passed into law, has not been the only hurdle to victims from the Global South pursuing private law remedies for corporate human rights violations. Deficient legislation is another notable legislative gap. In home States, there continues to be existing legislation that considers corporate responsibility and measures that could improve corporate behavior abroad, but does not include mechanisms for host State victims to sue MNCs in a domestic court for personal and environmental harms.

i. UK Companies Act

With 1300 sections and sixteen schedules, the *Companies Act 2006* is the primary source of corporate law in the United Kingdom.[110] It updated the *Companies Act 1985* after recommendations made in July 2001 in the British Company Law Review Steering Group's final report.[111] Muchlinski has criticized

106. *Id.*

107. *Id.*

108. Bill C-262, An Act respecting the corporate responsibility to prevent, address and remedy adverse impacts on human rights occurring in relation to business activities conducted abroad, 44th Parl. 1st Sess., 2021 § 10(1), https://www.parl.ca/legisinfo/en/bill/44-1/c-262.

109. *Id.* at § 10(2).

110. The Companies Act 2006, c. 46 (UK), https://www.legislation.gov.uk/ukpga/2006/46/contents.

111. For commentary on the Steering Group's report, *see* Peter T. Muchlinski, *Holding Multinationals to account: recent developments in English litigation and the Company Law Review I*, 39 AMICUS CURIAE 3 (2002).

that report for omitting recommendations on the liability of corporate groups.[112] This was likely not an oversight. As Mwaura notes, "one of the key reasons why [the Steering Group] … shied away from making recommendations for attributing liability to United Kingdom holding companies for acts of their foreign subsidiaries was the fact that this was going to make the United Kingdom a less competitive legal environment for business."[113] Extensive lobbying efforts deterred the Steering Group from even including recommendations in its final report about directors' liability.[114] As such, MNC liability for transnational tort claims was even further from reach.

ii. UK Modern Slavery Act

In many circles, the *Modern Slavery Act* has been welcomed as a culminating success that seeks to weed out human trafficking in transnational supply chains.[115] Like the *Companies Act 2006* and other legislation discussed in this Section, the *Modern Slavery Act*, while it includes provisions on criminal liability and reparations orders against accused persons, does not provide for corporate tort liability in instances of slavery, servitude, and forced and compulsory labor. Moreover, while Section 54 provides for disclosure requirements of UK-domiciled corporations in their supply chains, it does not contemplate private law liability or compensation for victims when those supply chains concern human trafficking or related offenses.[116] To date, UK politicians have not attempted to expand the Act's scope such that it could allow for the tort liability of UK-domiciled corporations.

iii. Foreign Corruption Acts

In the three selected common law home States, there is legislation that prohibits corruption by corporate actors in their business operations abroad, but does not include provisions around corporate human rights violations or the potential to commence tort claims when corporations commit personal and/or environmental harms abroad. As an example, the US *Foreign Corrupt Practices Act* (FCPA), which has relatively the same scope as the UK *Bribery Act* and Canada's *Corruption of Foreign Public Officials Act* (CFPOA), mandates that MNCs that operate abroad adhere to strict accounting controls and mandatory

112. *Id.*

113. Kiarie Mwaura, *Internalization of Costs to Corporate Groups: Part-Whole Relationships, Human Rights Norms and the Futility of the Corporate Veil*, 11 J. INT'L BUS & L. 85, 107 (2012).

114. Eilís Ferran, *Company Law Reform in the United Kingdom: A Progress Report*, 69 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT / RABEL J. COMP. AND INT'L PRIVATE L. 629 (2005).

115. Modern Slavery Act 2015, c. 30, § 54.

116. *Id.*

disclosure requirements. MNCs can be subject to criminal penalties for payments to foreign officials linked to securing or retaining contracts.[117]

The FCPA and related legislation in other common law home States exemplify that governments have the political will to pass legislation that enriches them through hefty fine amounts, but a lack of will when it comes to passing legislation that allows for corporate revenues to be siphoned to victims of corporate human rights and environmental harms abroad. In his book *Between Impunity and Imperialism: The Regulation of Transnational Bribery*, Kevin Davis corroborates that notion. He writes, "[i]n principle, the resulting funds [from FCPA prosecutions] could be channeled to victims of corruption … To date, however, the funds collected rarely have been used for the purpose of compensation. They typically are remitted to the Treasury of the United States."[118]

Aside from the FCPA and other legislation above, in October 2016 the UK parliament introduced the *Criminal Finances Bill*, which amended parts of the *Proceeds of Crime Act 2002*.[119] Like the FCPA, *Bribery Act*, and CFPOA, Part Five of the Act allows for the UK government—but not victims of corporate abuse—to recover civil damages for property that has been obtained through unlawful conduct, domestically or abroad.[120] Pursuant to the amendment, unlawful conduct includes gross human rights violations, specifically torture and cruel, inhuman, or degrading treatment.[121] Rather than victims who would have standing to be compensated, the UK government is able to pursue an individual or corporation that has benefited from human rights abuses committed abroad. In sum, the amendments to the Act fortified the government's ability to be compensated, leaving victims in a lurch.

c. Judicial Restraint

In transnational business and human rights litigation, common law home State courts have routinely taken conservative stances on doctrines that would otherwise allow them to assert jurisdiction or impute liability on MNCs for human rights or environmental harms abroad. Here, I review restrained stances taken with respect to applying customary international law to corporate actors, expansive notions of the corporate veil, and the extraterritorial reach of home State statutes.

117. *See* 15 USC. §§ 78dd-1, et seq. *See also* Restatement (Third) of the Foreign Relations Law of the United States § 14 cmt. D, 115 cmt. E (1987) at § 414.

118. KEVIN E. DAVIS, BETWEEN IMPUNITY AND IMPERIALISM: THE REGULATION OF TRANSNATIONAL BRIBERY 9 (2019).

119. Criminal Finances Bill, 2016-7, HC Bill [75] (UK).

120. Proceeds of Crime Act 2002, c. 29 (UK), § 243 https://www.legislation.gov.uk/ukpga/2002/29/contents.

121. *Id.*, § 241, §241A.

i. Corporate Customary International Law

Home State courts have struggled to reconcile traditional "State-centric" interpretations of international law with the reality that the contemporary corporate form increasingly performs government-like functions and asserts power and authority over individuals in a way akin to governments.[122] By and large, US courts have rejected the possibility that MNCs can be subject to customary international law norms;[123] and the Supreme Court of Canada has tepidly endorsed a "human-centric" turn in international law, even though it has not explicitly allowed for MNCs to fall within international law's ambit.[124]

Despite Harold Koh's insistence that it is a myth that US courts cannot hold private corporations civilly liable under ATS claims,[125] ATS jurisprudence since the D.C. Circuit's decision in *Tel-Oren v. Libyan Arab Republic* has developed in a fashion that distinguishes State and corporate liability.[126] In *Kiobel v. Shell Petroleum Development Company of Nigeria Ltd*, a case that involved allegations of arbitrary arrest and detention, torture, and extrajudicial killings on the part of a multinational oil company operating in Nigeria, the Second Circuit in a 2-1 split departed from its previous decision in *Flores v. Southern Peru Copper Corp*.[127] It stated:

> [c]ustomary international law is composed only of those rules that States universally abide by, or accede to, out of a sense of legal obligation and mutual concern. The marked characteristic of the whole system is a commonality of interest aligned against the enemies of all mankind. The idea of corporate liability does not withstand scrutiny in that light.[128]

In a related *Kiobel v. Shell Petroleum* decision, the court of appeals concluded there was no customary norm of corporate liability to ground an ATS claim.[129] As previous courts had "*never* extended the scope of [customary international law] liability to a corporation,"[130] the Second Circuit was unwilling to depart with established international law interpretations in order to apply the ATS to the defendant MNC.[131]

122. *See e.g.* Jay Butler, *Corporations as Semi-States*, 57 COLUMBIA J. TRANSNAT'L. L. 221 (2019).

123. *See e.g.* Banco Nacional de Cuba v. Sabbatino 376 U.S. 398 (1964) [hereinafter Sabbatino]; Samantar v. Yousuf, 560 U.S. 305 (2010)

124. *See* Nevsun Resources Ltd. v. Araya 2020 SCC 5 (Can.), at ¶ 108 [hereinafter Nevsun].

125. Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 265 (2004).

126. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir., 1984).

127. Flores v. Southern Peru Copper Corp., 414 F.3d 233 (2d. Cir. 2003).

128. Kiobel v. Shell Petroleum Development Company of Nigeria Ltd. et al., 642 F.3d 268, 270 (2d. Cir., 2011) (internal citation omitted).

129. Kiobel v. Shell Petroleum Development Company of Nigeria Ltd. et al., 621 F.3d 111, 137 (2d. Cir. 2010).

130. *Id.* at 120 (emphasis added).

131. *Also see* the following cases in which US courts have interpreted the ATS in a way that limits liability to instances of State involvement: Jama v. INS, 22 F. Supp. 2d 353 (1998); Salim v.

In 2018, the Supreme Court released its decision in *Jesner v. Arab Bank PLC*,[132] an ATS case against a Jordanian bank with a US branch. The dispute, at last, called for a ruling as to whether the ATS applies to non-State actors. Justice Kennedy, along with the Court's four conservative justices, held that allowing foreign corporations to fall within the ATS's ambit would impinge on US foreign relations—a matter in the majority's view that is beyond the judiciary's powers.[133] Joined by Chief Justice Roberts and Justice Thomas, Kennedy tackled the separate issue of private corporate liability for customary international law violations. He followed the Second Circuit's approach in *Kiobel* that the ATS applies to States and individuals who act under the color of law since that was how custom developed post-World War II.[134] However, absent express legislation, the ATS does not apply to juridical persons such as corporations.[135] Kennedy also agreed with the Court in *Kiobel* that, to date, there is no "specific, universal, and obligatory" norm of corporate liability under international law.[136]

Unlike their US counterparts, Canadian courts have not completely shut the door on corporate liability under customary international law—although their jurisprudence is practically no further ahead. Without legislative guidance, Canadian courts have been left to reach for doctrinal interpretations that are well outside traditional understandings of international law. In the Supreme Court of Canada's 2020 decision in *Nevsun*, a transnational human rights claim on behalf of Eritrean plaintiffs against a Canadian mining company, the majority held that it was not plain and obvious that a tort characterized as a violation of customary international law was bound to fail.[137] Passing that low bar only meant that the plaintiffs who alleged acts of torture, forced labor, and arbitrary detention were allowed to proceed with their case, but not necessarily that customary international law norms apply to corporations.[138] In *Nevsun*, the Supreme Court held that "a compelling argument *can* … be made that since customary international law is part of Canadian common law, a breach by a Canadian company can *theoretically* be directly remedied."[139]

Mitchell, No. CV-15-0286-JLQ, Memorandum Opinion re Motion for Summary Judgment (August 7, 2017) (unreported); Saleh v. Titan Corp., 580 F.3d 1 (2009); Ibrahim v. Titan Corp., 391 F. Supp. 2d 10 (2005); Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702 (2010).

132. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018).

133. *See id.* at 12.

134. *Id.*, at Parts II-A, II-B-2, II-B-3, and III.

135. *Id at 3*.

136. *Id.* at 1390.

137. *See* Nevsun, *supra* note 124, at ¶ 113.

138. *See id.* at ¶¶ 146-148. After the Supreme Court's decision, the parties entered into a confidential settlement in October 2020. *See* Yvette Brend, *Landmark settlement is a message to Canadian companies extracting resources overseas: Amnesty International*, CBC NEWS (Oct. 23, 2020), https://www.cbc.ca/news/canada/british-columbia/settlement-amnesty-scc-africa-mine-nevsun-1.5774910.

139. Nevsun, *supra* note 124, at ¶ 127 (emphasis added).

It is up for debate whether the *Nevsun* majority actually moved the common law forward with respect to corporate liability for human rights violations in the Global South. Realistically, the plaintiffs overcame a low-threshold dismissal motion on a set of theoretical bases that may not have been adopted had the matter proceeded to the High Court on its merits. Future Canadian courts can ignore *Nevsun* and revert back to traditional State-centric notions of international law that have developed over the past decades and centuries—and were endorsed by a minority of the justices. Moreover, without legislative guidance, Canadian courts are left without systemic principles that govern when and how to apply international law to corporations.

ii. The Corporate Veil

Corporate separateness is the law's recognition that each corporate entity is subject to limited liability. A subset of corporate separateness is referred to as the "corporate veil," a term that applies when one corporation owns some or all of the shares of another corporation.[140] Absent fraud, a determination that one corporation is an alter ego of another corporation, or a determination that a foreign corporation is "so continuous and systematic" with a domestic corporation so as to be at home,[141] courts have been bound by a legal formalism that dictates centuries-old precepts of limited liability be respected. MNCs have successfully invoked the veil to dismiss transnational tort-based claims. Otherwise, as in recent British transnational corporate tort cases, discussed below, the threshold to impute the actions of one corporate entity onto another has been crafted such that a home State corporation must exercise a significant degree of control over a host State corporation—a relationship that can potentially be tweaked to ensure that home State corporations routinely avoid liability for the tortious conduct of a host State subsidiary.

US courts have upheld corporate separateness to curtail transnational tort claims for human rights violations in the Global South. In *Doe v. Unocal Corp. (2001)*, Burmese citizens alleged that a number of oil and gas MNCs were complicit in the use of forced labor to construct a pipeline.[142] After refusing to assert personal jurisdiction over the host State subsidiaries under the test for specific *in personam* jurisdiction,[143] the court turned to the "minimum contacts" test for general jurisdiction.[144] In a case that involves domestic and foreign

140. *See generally* Kurt A. Strasser, *Piercing the Veil in Corporate Groups Symposium*, 37 CONN. L. REV. 637–666 (2004).

141. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011).

142. Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001) [hereinafter *Doe*].

143. *See* Gordy v. The Daily News, L.P., 95 F.3d 829, 831–32 (9th Cir. 1996): i) did the foreign defendant purposefully avail itself of the forum State; ii) did the claim arise out of or result from the defendant's forum-related activities? and iii) is the exercise of jurisdiction reasonable?

144. Doe, *supra* note 142, at 923. General jurisdiction is typically understood as a foreign defendant's systematic and continuous business contacts with the forum State. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

corporations, that test calls for a court to "engage in a preliminary inquiry to determine whether the subsidiaries contacts are properly attributed to the [parent company] defendant."[145]

The court affirmed the general rule that a parent and subsidiary are separate legal entities such that the subsidiary's host State conduct cannot (in most circumstances) form the basis for the parent's liability.[146] It applied Supreme Court and Ninth Circuit precedents to conclude that the parent company was not an alter ego of the foreign subsidiary and that the foreign subsidiary was not the parent company's agent.[147] Evidence adduced on appeal about an intertwined relationship between the US parent and host State subsidiaries around, for instance, capital expenditures, investments, general business policies, and even shared directors and officers did not convince the court to pierce the veil.[148] Rather, like the current state of UK law, discussed below, the court required day-to-day control or significant managerial intervention on the part of the parent company over a foreign subsidiary.[149]

In the United Kingdom, the *Brussels I Regulation* (B1R) turns a personal jurisdiction inquiry into one that concerns a British parent company's duty of care to foreign plaintiffs. Explicitly, Article 4(1) of the B1R reads that "persons domiciled in a [EU] Member State shall, whatever their nationality, be sued in the courts of that Member State."[150] That provision encompasses corporate persons. Previously, the entity theory—as it manifests through tort law principles—was a hallmark of UK corporate veil dismissals.[151]

Recently, the UK Supreme Court has heard two veil-related transnational cases against British MNCs.[152] From those cases, both of which survived their respective dismissal motions, British common law around parent company liability has evolved in a way that requires a significant degree of control over a host State subsidiary. In effect, the two Supreme Court decisions have empowered

145. Doe, *supra* note 142, at 925.

146. *Id.* at 924.

147. *Id*. at 926. *See*, *e.g*., United States v. Bestfoods, 524 U.S. 51 (1998); El Fadl v. Central Bank of Jordan, 316 U.S. App. D.C. 86 (D.C. Cir. 1996); American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586 (9th Cir. 1996); Slottow v. American Cas. Co. of Reading, Pennsylvania, 10 F.3d 1355 (9th Cir. 1993); Laborers Clean-Up Contract Administration Trust Fund v. Uriarte Clean-Up Service, Inc., 736 F.2d 516 (9th Cir. 1984); Chan v. Society Expeditions, Inc., 39 F.3d 1398 (9th Cir. 1994).

148. Doe, *supra* note 142, at 926 (citing Bestfoods, *supra* note 147, at 69).

149. *See also* Alomang v. Freeport-McMoran, Inc., 811 So.2d 98, 101 (2002).

150. Regulation (EU) No. 1215/2012, of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), 2012 O.J. (L 351) Art. 4(1) [hereinafter B1R].

151. *E.g.*, AAA & Ors v. Unilever PLC, [2018] EWCA (Civ) 1532; Vava & Ors v. Anglo American South Africa Ltd, [2014] EWCA (Civ) 1130; Young v. Anglo American South Africa Limited & Ors [2014] EWCA (Civ) 1130.

152. *See* Vedanta Resources PLC v. Lungowe [2019] UKSC 20 [hereinafter Vedanta]; Okpabi v. Royal Dutch Shell Plc (Respondents), [2021] UKSC 3 [hereinafter Okpabi].

British MNCs to alter their transnational corporate relationships to ensure that it is very difficult for host State plaintiffs to meet the control threshold.

Vedanta Resources v. Lungowe was a transnational claim commenced in a British court on behalf of 1,826 Zambian villagers who alleged that the UK-based Vedanta Resources Plc (Vedanta) and its Zambian subsidiary, Konkola Copper Mines Plc (KCM), polluted local waterways resulting in personal and financial injury to local residents.[153] In its 2019 decision, the Supreme Court held there was an arguable case that Vedanta sufficiently intervened in KCM's day-to-day management.[154] Among other things, the court relied on evidence that Vedanta provided health, safety, and environmental training to KCM and vowed in public statements to address environmental and technical shortcomings in KCM's mining infrastructure.[155]

In 2021, the Supreme Court released its decision in *Okpabi v. Royal Dutch Shell* overturning High Court and Court of Appeal decisions that held Royal Dutch Shell Plc (RDS), as an anchor defendant under the B1R, did not owe a duty of care to the Nigerian plaintiffs.[156] Like *Vedanta*, *Okpabi* reached the Supreme Court in the context of a dismissal motion where the threshold for the claim to proceed was whether there was a real issue to be tried.[157] The *Okpabi* court relied heavily on *Vedanta* to conclude that RDS could, in theory, owe the plaintiffs a duty of care. Like the parent company in *Vedanta*, in *Okpabi* there was evidence adduced that RDS exercised a high level of control, direction, and oversight over the Nigerian subsidiary's operation of its oil infrastructure.[158] The court was left to grapple with whether a parent company owes a duty of care to host State plaintiffs when it i) exercises day-to-day control over a subsidiary's material operations; and ii) issues mandatory policies and standards meant to apply throughout a group of companies.[159]

The Supreme Court forwarded three principles that diverged from the Court of Appeal's ruling. First, the court had already determined in *Vedanta* that group-wide policies and standards can give rise to a duty of care—a principle overlooked by the Court of Appeal.[160] Second, the Supreme Court distinguished between de jure financial control and de facto managerial control, holding that a duty of care may arise in either circumstance. Again, it relied on its decision in *Vedanta* where Lord Briggs stated that "the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of

153. Vedanta, *supra* note 152.

154. *Id.* at ¶ 44.

155. *Id.* at ¶¶ 42–62.

156. Okpabi, *supra* note 152. The facts of Okpabi are substantially similar to Vedanta.

157. *Id.* at ¶¶ 153–159.

158. *Id.* at ¶ 29.

159. *Id.* at ¶ 76.

160. Vedanta, *supra* note 152, at ¶ 52.

supervision and control of its subsidiaries, *even if it does not in fact do so*."[161] And third, the Supreme Court found that the Court of Appeal erred by surmising parent company liability as a distinct category of negligence that must satisfy the three-part *Caparo* test.[162] Based on these reasons, the Court held that the plaintiffs' claim stood a real prospect of success.

A number of issues arise from the UK Supreme Court's decisions in *Vedanta* and *Okpabi*. Like the Supreme Court of Canada's decision in *Nevsun*, the UK decisions are not, in fact, merits determinations that move the law around transnational MNC liability forward in any substantial or systematic way. Rather, they were rendered in the context of early-stage dismissal motions that allow a claim to move forward, but do not necessarily mean it will be successful on the merits of the case.

Additionally, the Supreme Court decisions have opened a relatively easy pathway for parent companies to alter their relationships with host State subsidiaries and affiliates in order to evade transnational liability. After the decisions in *Vedanta* and *Okpabi*, corporations domiciled in the United Kingdom can continue to profit off the operations of host State corporations yet distance themselves in day-to-day control and oversight. Moreover, parent companies can decide to eliminate group-wide mandatory policies and standards and replace them with policies and standards devised and implemented by each separate corporate entity, with the ultimate result being the same as group-wide policies and standards. According to the principles laid out in *Vedanta* and *Okpabi*, those steps should nullify a parent company's duty of care to host State plaintiffs.

Finally, the corporate veil as a judicial gap for Global South host State plaintiffs to pursue compensatory remedies has also manifested in transnational claims brought to Canadian courts. *Das v. George Weston Limited* concerned transnational claims brought by Bengali plaintiffs after the Rana Plaza collapse that killed thousands of workers employed by local companies that supplied garments to Canadian MNC Loblaws.[163] The plaintiffs brought tort claims against Loblaws and Bureau Veritas, a French-incorporated consulting company that conducted "social audits" to ensure that Loblaws's Corporate Social Responsibility (CSR) policies were being implemented at the Rana Plaza and other manufacturing facilities. Unlike the US and UK cases, discussed above, the corporate entities in *Das* were not related through a traditional parent-subsidiary relationship. Rather, Loblaws entered into a contract with Bureau Veritas's Bengali subsidiary to undertake the social audits.

In a lengthy 2017 decision, Justice Paul Perell of the Ontario Superior Court of Justice dismissed the matter.[164] Even though the primary basis for dismissing

161. *Id.* at ¶ 53, cited in Okpabi, *supra* note 152, at ¶ 148 (emphasis added).

162. Okpabi, *supra* note 152, at ¶¶ 149–151.

163. Das v. George Weston Ltd, 2017 ONSC 4129 [hereinafter Das]; Das v. George Weston Ltd, 2018 ONCA 1053.

164. Das, *supra* note 163.

the transnational claim was that the plaintiffs' allegations were limitations-barred under Bengali law,[165] he proceeded to analyze the jurisdictional and liability issues as if the limitations bar did not apply.[166] He utilized the three-part test from *Caparo Industries PLC v. Dickman* to determine whether Loblaws would have owed the plaintiffs a duty of care under Bengali law.[167] And like the British cases, he concluded that Loblaws did not have sufficient control over the Bengali manufacturing companies most proximate to the plaintiffs. Therefore, it did not owe the plaintiffs a duty of care.[168]

Relying on Bengali (British) law, Perell distinguished *Das* from the English Court of Appeal's decision in *Chandler v. Cape PLC* that found direct parent company liability against the British corporation.[169] Unlike *Das*, in *Chandler* the British parent corporation owned the host State subsidiary.[170] More importantly, the parent company exerted significant control over the subsidiary and had detailed knowledge about the dangerous working conditions (and what to do about them) that eventually caused the foreign plaintiffs harm. In *Das*, Perell noted that Loblaws was not an operating parent company, but simply entered into contracts with Bengali companies to supply it with garments as well as ensure adherence to its CSR strategy.[171] In other words, Loblaws did not exercise day-to-day control over the Bengali companies and possessed little, if any, knowledge of the danger in which the foreign plaintiffs found themselves by working at the Rana Plaza.

Perell also analyzed the plaintiffs' ability to sue Loblaws under Ontario law. He held there was no basis to ignore corporate separateness to construe the (in)actions of the Bengali companies that led to the building collapse to that of Loblaws.[172] He distinguished *Das* from the Superior Court's decision in *Choc v. Hudbay Minerals, Inc.* in which the court found direct parent company liability on the part of the Canadian-domiciled corporation *without piercing the veil*—a first for a transnational human rights claim in Canada.[173] Rather than assessing proximity between the parent company and the foreign plaintiffs like the court in *Choc*, Perell considered the level of control the Canadian company possessed over

165. *Id.* at ¶ 5.

166. *Id.*

167. *See id.* at ¶ 412 ("The test from *Caparo* is that a duty of care exists when: (1) it is foreseeable that if the defendant failed to take reasonable care, the plaintiff would be injured by the acts or omissions of the defendant (the foreseeability factor); (2) there is a relationship between the plaintiff the defendant characterized by the law as one of "proximity" or of being "neighbours" one to another (the proximity factor); and (3) as a matter of legal policy it would be fair and just to impose a duty of care on the defendant (the policy factor)").

168. *Id.* at ¶ 412(d).

169. Cape v. Chandler PLC, [2012] EWCA (Civ) 525 [Chandler].

170. *Id.*

171. Das, *supra* note 163, at ¶ 46.

172. *Id.* at ¶ 540.

173. *See* Choc v. Hudbay Minerals Inc. et al, 2013 ONSC 1414. In Choc, the court allowed the claims to proceed on a theory of direct parent company liability.

the host State companies most proximate to the foreign plaintiffs.[174] This approach is a more traditional veil piercing analysis. Perell again concluded that the lack of day-to-day oversight on the part of the Canadian parent company meant there was an insufficient degree of control that would otherwise permit him to ignore corporate separateness.[175]

iii. Extraterritoriality

In US jurisprudence, the presumption against extraterritoriality provides that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[176] To assert jurisdiction, US courts have required express congressional intent of extraterritorial statutory application.[177] Underlying this deferential approach to Congress is the concern that "the Judiciary . . . not erroneously adopt an interpretation of US law that carries foreign policy consequences not clearly intended by the political branches."[178] The presumption has evolved over time and as the Supreme Court has interpreted different statutes. After the Court's 2016 decision in *RJR Nabisco, Inc. v. The European Community*, there appears to be a three-step determination of a statute's extraterritorial application: i) express congressional intent; ii) focus (whether the provision in question involves domestic application); and iii) injuries on US territory.[179]

With the doctrine well-established, the Supreme Court in *Kiobel* rejected the ATS's extraterritorial application in transnational human rights claims against British, Dutch, and US oil companies. The Court affirmed the rule that where parties and actions are strictly outside US territory, the matter remains beyond the ATS's scope.[180] The Court's ruling in *Kiobel* fell in line with how the presumption developed over the preceding decades. Applying the presumption to the ATS, the Court's majority wrote in *Kiobel* that "[n]othing in the text of the statute suggests that Congress intended causes of action recognized under it to have extraterritorial reach."[181] Finding authority in *Morrison*, Justice Breyer's concurring opinion in *Kiobel* left the door open for matters that touch and concern US territory with sufficient force.[182] However, absent congressional action to enact a statute more specific than the ATS—something Congress has refused to

174. Das, *supra* note 163, at ¶ 435.

175. *Id.* at ¶ 450.

176. *See, e.g,.* Kiobel, *supra* note 68, citing Morrison v. National Australia Bank Ltd., 561 U.S. 247 (2010).

177. *See* United States v. Bowman, 260 U.S. 94, 98.

178. *See* Kiobel, *supra* note 68,, citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991).

179. RJR Nabisco v. European Cmty., 136 S. Ct. 2090, 2101 (2016).

180. Kiobel, *supra* note 68.

181. *Id.* at 7.

182. *See* Al-Shimari v. CACI Premier Technology, Inc., 758 F.3d 516 (2014) where the "touch and concern" principle has been applied to allow for the ATS's extraterritorial application.

do—the presumption against extraterritoriality remains a barrier to transnational claims against corporations for alleged conduct abroad.[183]

In *Nestlé*, an eight-judge majority of the Supreme Court ruled that the "focus" of the host State plaintiffs' claims—child labor in the Ivory Coast—occurred outside US territory. The majority affirmed *Kiobel* and dismissed the plaintiffs' claims, finding that the ATS does not have extraterritorial reach except in rare instances. Justice Thomas, who penned the majority's decision, explained that "mere corporate presence," as in generic operational, financial, and administrative decisions, on the part of a home State corporation or parent company does not draw "a sufficient connection between the cause of action . . . and domestic conduct."[184]

d. Judicial Deference

Other than home State decisions in which courts have taken restrained approaches to dismiss transnational business and human rights litigation or failed to advance doctrine in a substantial way, there is a set of doctrines that have been invoked to dismiss transnational business and human rights litigation out of deference to host State governments and courts. Here, I briefly review *forum non conveniens* and act of State reasons advanced by US and Canadian courts.

i. Forum Non Conveniens[185]

Forum non conveniens (FNC) sits at the intersection of judicial and political considerations in transnational disputes that often lead home State courts to adopt deferential approaches.[186] Over the past few decades, the doctrine's development has been propelled by transnational litigation involving MNC defendants that seek FNC dismissals, "not necessarily because they prefer the alternative forum, but because this will often represent the last they will see of the litigation."[187] In FNC analyses, US courts tend to prioritize deference to a host State's sovereignty over US national interest in a matter that implicates an American MNC. In other words, FNC considerations have routinely been undergirded by notions of comity.[188]

183. Kiobel, *supra* note 68, at 14.

184. Nestlé, *supra* note 66, at 5.

185. FNC has been expunged in the United Kingdom. *See* Owusu v. Jackson [2005] E.C.R. I-1383.

186. This interplay between adjudication and politics is alluded to in Philippa Webb, *Forum non conveniens: Recent Developments at the Intersection of Public and Private International Law, in* RESOLVING CONFLICTS IN THE LAW: ESSAYS IN HONOUR OF LEA BRILMAYER, 79 (Chiara Giorgetti & Natalie Klein, eds. 2019).

187. Jacqueline Duval-Major, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650, 672 (1992).

188. The Supreme Court offered the following definition of comity in *Hilton v. Guyot*, 159 U.S. 113, 164 (1895): "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nations."

Gardner argues this focus on comity is misplaced because the Supreme Court in *Gulf Oil Co. v. Gilbert* was not necessarily concerned about the integrity of another State's sovereignty. Rather, *Gilbert* was about the administration of justice in the federal court system *among US states*.[189] Despite Gardner's opposition to comity-centric approaches to FNC, US courts have dismissed transnational human rights cases involving MNCs on such grounds. *In Re Union Carbide Corp. Gas Plant Disaster* [*Bhopal*], a transnational claim involving an explosion at a gas plant in India owned by a subsidiary of the US corporation Union Carbide, is an oft-cited example.[190]

The Indian government, recognizing myriad deficiencies in its own legal system, chose to commence a transnational claim in New York where both the district court and court of appeals dismissed the case on FNC grounds.[191] Indicating comity concerns, both courts took the position that adjudicating the claims in the parent company's home State would impinge on India's sovereignty and deprive it of the opportunity to develop its own tort laws.[192] However, evidence submitted in the course of the FNC dismissal motion painted a picture of the Indian legal system as far from an "independent and legitimate judiciary" able "to mete out fair and equal justice." Rather, the evidence overwhelmingly suggested that India was ill-equipped to handle the complex factual and legal issues related to the matter. The Indian government submitted evidence substantiating that its legal system lacked sufficient tort precedents relating to personal injury.[193] It also submitted evidence of widespread corruption, endemic delays, and the absence of class actions and contingency fee regimes.[194] Yet, those assertions were of "no moment with respect to the adequacy of the Indian courts."[195]

The courts also recognized that were there to be a liability finding in the Indian system, the case would, in essence, have to be re-litigated in US courts in the course of enforcement proceedings. To square the circle such that re-litigation would not be required, one of the conditions the district court imposed as part of the FNC dismissal was that the MNC defendant would have to abide by an Indian court's judgment. As that condition was waived on appeal,[196] it is a wonder how the matter was dismissed to a legal system implicitly recognized by a US court as

189. Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 405–406 (2017).

190. *See* Lydia Polgreen & Hari Kumar, *8 Former Executives Guilty in '84 Bhopal Chemical Leak*, N.Y. TIMES (Jun. 7, 2010); Dinesh C. Sharma, *Bhopal: 20 Years On*, LANCET (Jan. 8, 2005), cited in STEINITZ, *supra* note 2, at 48.

191. In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842, 847 (S.D.N.Y. 1986) [hereinafter Bhopal]; In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d. 195 (2d. Cir., 1987) [hereinafter Bhopal Appeal].

192. Bhopal, *supra* note 191, at 867.

193. *Id.* at 849.

194. *Id.* at 851.

195. *Id.*

196. Bhopal Appeal, *supra* note 191.

being inadequate to adjudicate the novel and complex issues related to the transnational claim. After the court of appeals' decision, the case proceeded in the Indian courts with the difficulties noted in the FNC adequacy analysis. The claims were never adjudicated on the merits. Two years after the US dismissal and five years after the explosion, the parent company settled with the plaintiffs for an arguably paltry sum of $470 million USD in return for a full waiver of all legal claims.[197]

Another FNC example where home State courts deferred to host State judiciaries involves transnational claims against Del Monte when Guatemalan banana farm workers accused the American MNC of arbitrarily detaining and threatening to kill them after failed labor negotiations.[198] Although the Eleventh Circuit initially allowed the claims to proceed, finding it had subject matter jurisdiction under the ATS and TVPA, it eventually dismissed the transnational claims on FNC grounds.[199]

In *Aldana v. Del Monte Fresh Produce Inc.*, the court of appeals upheld the district court's FNC dismissal. It respected the distinction spearheaded in *Piper Aircraft Co. v. Reyno* that a foreign plaintiff is afforded less deference in forum choice.[200] In the adequacy analysis, rather than delve into whether Guatemalan courts had substantive laws and procedural rules sufficient to adjudicate the claims, the US courts concluded the Guatemalan legal system was adequate by the fact that the host State had jurisdiction over all the parties and that the plaintiffs had no reason to fear for their safety because they would not have to physically appear in a Guatemalan court.[201] This result again evidences the focus US courts place upon a host State's sovereignty.

The public interest factors discussed in *Aldana* illustrate the courts' repeated deferential approach. The court of appeals affirmed the district court's assertion that the dispute was "quintessentially Guatemalan" since it involved one of the country's largest employers; even though the MNC was headquartered in the United States, comity considerations were also at the forefront when the Appeals Court asserted that were it to retain jurisdiction, it would send the tacit message that the "Guatemalan judicial system is too corrupt to justly resolve the dispute."[202] And even though the *Aldana* Appeals Court decision upheld the FNC dismissal, it accepted that corruption and other deficiencies in the Guatemalan

197. One comparative study found that had Bhopal victims been compensated according to the same principles as those in asbestos cases against US corporations litigated in US courts, the settlement amount would be in excess of $10 billion USD. *See* Edward Broughton, *The Bhopal Disaster and Its Aftermath: A Review*, ENVIRONMENTAL HEALTH: A GLOBAL ACCESS SCIENCE SOURCE, www.ncbi.nlm.nih.gov/pmc/articles/PMC1142333/, cited in STEINITZ, *supra* note 2, at 49.

198. Aldana v. Del Monte Fresh Produce NA, Inc., 578 F.3d 1283 (11th Cir. 2009) [Aldana], *en banc reh'g denied*, 452 F.3d 1284 (11th Cir.2006), cert. denied, 549 U.S. 1032.

199. Aldana, *supra* note 198.

200. *Id.* at 1303.

201. *Id.* at 1290–1292.

202. *Id*. at 1299.

system were facts "at war with the [lower court's] undisputed finding that Guatemalan courts constitute an adequate alternative forum."[203]

In Canada, the FNC doctrine has also been used to bring an effective end to litigation—at least for the purposes of a liability determination against Canadian MNCs. One such example is the Quebec Superior Court's decision in *Recherches Internationales Quebec v. Cambior Inc.*, a claim brought on behalf of Guyanese citizens against a Canadian mining company following a cyanide spill that resulted in water contamination.[204] Like its American counterparts, the court in *Cambior* ignored what it characterized as "scathing" evidence that Guyana's judicial system "was nothing more than an appendage of the repressive administrative dictatorship it served."[205]

Similar to the US approach that prioritizes comity considerations over the home State's national interest in adjudicating a transnational dispute, the court in *Cambior* deferred to the Guyanese legal system by accepting evidence that it was adequate even though "there is room for substantial improvement."[206] Soon after a Guyanese claim was commenced, it was dismissed on procedural grounds with the only available information online being a press release on Cambior's website saying the claim was struck for "repeated failure to file an affidavit by the plaintiffs."[207]

ii. Act of State

In transnational disputes, act of State is one out of a number of prudential common law doctrines whereby a court decides that overseas conduct is so closely tied to a foreign government that a defendant—public or private—cannot be liable for an alleged wrong.[208] Although its application overlaps among States, in US jurisprudence the doctrine is a defense on the merits whereas in the United Kingdom it is one of abstention in which British courts deny jurisdiction.[209]

203. *Id.*

204. Recherches Internationales Québec v. Cambior Inc., 1998 CanLII 9780 [*Cambior*]. Even though Quebec is the sole civil law jurisdiction in Canada, I include the discussion on *Cambior* as the Court in its FNC analysis found the common law precedents, particularly the Supreme Court of Canada's decision in Anchem Products Inc. v. B.C. (W.C.B.), [1993] 1 S.C.R. 897, to be a useful guide in interpreting Article 3135 of the Quebec Civil Code. *See id.* ¶ 25.

205. *Id.* ¶ 73.

206. *Id.* ¶ 80.

207. *See Press Release, Cambior, Dismissal of OMAI-Related Class-Action Suit in Guyana* (Feb. 22, 2002), https://web.archive.org/web/20130523223956/https://www.thefreelibrary.com/Cambior%3A+Dismissal+of+OMAI-Related+Class-Action+Suit+in+Guyana.-a083149306.

208. Other prudential doctrines include foreign sovereign immunity and the political question doctrine. *See* Michael J. O'Donnell, *A Turn for the Worse: Foreign Relations, Corporate Human Rights Abuse, and the Courts Symposium: Healing the Wounds of Slavery: Can Present Legal Remedies Cure Past Wrongs: Note*, 24 B.C. THIRD WORLD L.J. 223, 223–266 (2004).

209. On the distinction between the doctrine in the United States and United Kingdom, *see* John Harrison, *The American Act of State Doctrine*, 47 GEO. J. INT'L L. 507, 556–561 (2016).

Irrespective of that distinction, the doctrine has been an obstacle for Global South plaintiffs when they try to procure compensatory remedies from MNCs alleged to have committed human rights abuses.

In the United States, the doctrine has been successfully invoked to dismiss transnational human rights cases against MNCs. District and appeals courts in California applied the *Banco Nacional de Cuba v. Sabbatino* factors in a series of decisions concerning alleged acts of torture, forced labor, and confiscation of property by the sitting Burmese government (State Law and Order Restoration Council or SLORC) against local villagers in the course of oil extraction activities by Unocal Corporation.[210] The prospect for an act of State defense arose due to the fact that Unocal entered into a joint venture with the Burmese military to construct an oil pipeline. In one decision, *Roe v. Unocal Corp.*, the defendant MNC brought a motion to dismiss on the basis that adjudicating the plaintiff's claims would require the district court to "pass judgment on the validity of SLORC's official military acts."[211]

Proceeding through the *Sabbatino* test, the court in *Roe v. Unocal Corp.* determined that SLORC was, in fact, the legitimate Burmese government and thus a foreign sovereign. It also concluded that an order to undertake public works (such as those related to building a pipeline for oil extraction) constitutes an official military act. Concerning the balancing factors, the court held that requiring the plaintiff, a Burmese military officer, to work on a civil construction project without pay does not constitute a violation of international law.[212] Therefore, there was insufficient codification or consensus to set aside the doctrine's application. In addition, the plaintiff's claims would "most likely touch national nerves"[213] indicating a high degree of deference to the host State. Lastly, there was nothing to suggest that SLORC was no longer in existence.[214] The act of State doctrine thus served as a merits-based rule of decision to dismiss the transnational case, leaving the foreign plaintiff with no further avenue in the United States to seek compensatory remedies.

210. *See* Sabbatino, *supra* note 123 at 423, 428 (court must assess whether i) there was an official act of a foreign sovereign performed within its own territory; and ii) the relief sought or the defense interposed would require a court to declare the official act invalid). *Also see* W.S. Kirkpatrick Co., Inc. v. Environmental Tectonics Corp. International, 493 U.S. 400, 406 (1990) ("Act of State issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign.").

211. *See* Roe v. Unocal Corp., 70 F. Supp. 2d 1073, 1076 (C.D. Cal., 1999).

212. *Id.* at 1082.

213. *Id.* at 1081.

214. *Id.*

III. WEAPONIZING ACTIVISM: THREE PRINCIPLED BASES IN TRANSNATIONAL BUSINESS AND HUMAN RIGHTS LITIGATION

In light of the legislative and judicial gaps presented in the previous Part, Global South host State plaintiffs are left with a stark reality. In theory, they can approach their own courts, but would be confronted with political pressure and judicial systems that have rarely, if ever, adjudicated transnational corporate tort claims against MNCs headquartered in Western States.[215] Furthermore, the vast majority of MNC assets that could satisfy a judgment are held outside host States where human rights and environmental harms take place and where a private law claim would be commenced in a domestic court.[216] Without the ability to lobby the political branches of government in home States to ameliorate statutory laws in their favor, Global South victims have persisted in their attempts to advance novel theories of jurisdiction and liability in Western common law courts.

If the law around transnational corporate liability for human rights harms is going to allow host State victims from the Global South a consistent avenue to hold MNCs accountable, home State judiciaries may likely have to act *sua sponte* to forge a restitutionary pathway. This Part provides three bases by which home State judiciaries can turn course from the restrained and deferential approach taken in the past. First, common law judges can heed Franck's argument that foreign relations concerns are, in fact, a relic of the colonial past and that there is a marked distinction between foreign policy and judicial policy. Second, judges can view themselves as appropriate conduits to fill prevailing transnational access to justice gaps. And third, judges may choose to regard transnational business and human rights litigation as an appropriate area to incorporate what some legal philosophers have characterized as "permissible judicial morality."

It is arguably easier for a handful of judges to veer in a different doctrinal direction than it is for a majority faction of legislatures from various political parties to pass legislation that would allow foreign plaintiffs with no voting power to sue Western-headquartered MNCs in home State courts. As Alexander Hamilton wrote in *The Federalist No. 78*, courts, compared to the other branches of government, are "the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws."[217] In his 18th treatise, Blackstone wrote that judges are "depositary of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land."[218] Perhaps in no area can that quote be

215. *See generally* Craig Forcese, *Deterring Militarized Commerce: The Prospect of Liability for Privatized Human Rights Abuses*, 31 OTTAWA L. REV. 171 (1999). *See also* Araya v. Nevsun Resources Ltd., 2016 BCSC 1856 ¶¶ 71–126, for various deficiencies in Eritrea's judicial system.

216. *See* Surya Deva, *Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations Against Overseas Corporate Hands of Local Corporations*, 8 NEWCASTLE L. REV. 87, 97–98 (2004).

217. *See* THE FEDERALIST NO. 28 (Alexander Hamilton).

218. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

more applicable today than in transnational business and human rights litigation that is marred by legality gaps that beckon for judges to fulfill their roles as "living oracles."

The political branches of government function with relatively short electoral timelines and are subject to the whims of corporate lobbying power. Judiciaries exist at an arm's-length from the litigants that appear in court. Therefore, there are ostensibly little, if any, political or economic interests at play for home State judiciaries when it comes to transnational corporate human rights disputes. In all, judge-made law appears to be the "low hanging fruit" in the pursuit of MNC accountability for human rights and environmental harms in the Global South.

Once in their posts, common law judges are politically independent and not beholden to corporate lobbying power like the elected branches of government. Judiciaries, particularly in common law jurisdictions, are able to advance the law incrementally—especially in light of the dearth of legal principles that apply to transnational corporate tort claims today for human rights and environmental violations in the Global South. Simply because judiciaries have been reticent in the past in asserting jurisdiction or advancing principles around transnational corporate tort liability does not mean they necessarily need to take the same tack in the future.

The three methods to judicialize transnational business and human rights litigation, noted above, are not mutually exclusive. Rather, they overlap with one another in some respects. For instance, judges may view their ability to fill transnational access to justice gaps or the ability to adjudicate matters related to foreign relations as part of judicial morality. The overall point is that there are doctrinal and philosophical bases, detailed below, to expand the judicial role such that transnational business and human rights litigation can overcome long-standing hurdles and potentially allow for Global South host State victims to more frequently recover compensatory remedies from powerful MNCs.

a. Heeding Franck: Judicial Policy vs. Foreign Policy

Both lawyers representing MNCs in home State transnational business and human rights claims as well as home State governments that have intervened in select cases have asserted a peculiar argument: the adjudication of such claims by home State courts interferes with foreign relations. Above, I outlined arguments made in the context of the act of State doctrine. In addition to that example, there have been instances in transnational business and human rights disputes in which defendants or intervenors have argued that litigation impinges on foreign policy. For instance, interventions by the Department of State during George W. Bush's tenure as President regularly raised foreign relations concerns.[219]

219. Interventions during the Obama and Trump administrations did not per se make foreign policy arguments but did oppose transnational business and human rights claims on other grounds. *See e.g.* Brief of the United States as Amicus Curiae Supporting Neither Party at 5, Jesner, *supra* note 132.

In *Sarei*, the Department of State submitted a letter to the Central District of California stating that "continued adjudication of the claims … would risk a potentially serious impact … on the conduct of our foreign relations."[220] Similarly, in *Doe v. Unocal Corp.* (2003),[221] the Department of Justice argued "the ATS … raises significant potential for serious interference with the important foreign policy interests of the United States."[222] There, the Bush administration not only opposed ATS arguments in that particular case, but opposed the entire line of ATS human rights cases up to that point. The government argued that "the ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral and legal judgment on … foreign acts."[223] In *In Re South African Apartheid Litigation*, the US government as well as the governments of the United Kingdom, Canada, South Africa, Germany, and Switzerland submitted briefs arguing against the ability of US courts to assert ATS jurisdiction over MNCs for transnational human rights violations.[224] In its brief, the Bush administration argued that the suit would harm its economic interests abroad in addition to jeopardizing its relations with foreign governments.[225]

Should home State judiciaries treat transnational business and human rights cases as non-justiciable because host State commerce overlaps with concerns about a nation's foreign policy? A logical place to start in answering this question is to understand how foreign relations and the law around it have been characterized. Definitions of foreign relations law emphasize that it sits at the intersection of domestic laws and international law or international affairs. Curtis Bradley defines it as the "[d]omestic law of each nation that governs how that nation interacts with the rest of the world."[226] For him, foreign relations law concerns a domestic judiciary's authority in cases that relate to international affairs. Similarly, Helmut Philipp Aust and Thomas Kleinlein view foreign relations law as bridging domestic and international laws or, otherwise, setting boundaries between the two.[227]

The above definitions are crafted in a broad enough manner such that *any* relation or overlap of domestic law with international affairs can fall within the realm of foreign relations law and, at one time or another, can be the basis for a

220. Letter from William H. Taft IV, Legal Adviser of the Dep't of State, to J. Robert D. McCallum, October 3, 2001; *Sarei*, *supra* note 69, at 1181.

221. Doe v. Unocal Corp., 395 F.3d 978 (9th Cir. 2003).

222. Brief for the United States of America as Amici Curiae at 4, 11.

223. *Id.*

224. In re S. Afr. Apartheid Litig., 617 F. Supp. 2d 228, 276 (S.D.N.Y. 2009).

225. Brief for the United States as Amicus Curiae in Support of Petitioners, American Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (No. 07-919).

226. THE OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW 3 (Curtis A. Bradley ed., 2019).

227. *See generally*, Helmut Philipp Aust & Thomas Kleinlein, *Introduction*, *in* ENCOUNTERS BETWEEN FOREIGN RELATIONS LAW AND INTERNATIONAL LAW: BRIDGES AND BOUNDARIES 1–20 (Helmut Philipp Aust & Thomas Kleinlein eds., 2021).

domestic court to take a restrained approach to jurisdiction in a given case. However, there are justifiable bases in transnational business and human rights cases to keep the two realms (i.e., domestic and international) separate. The primary basis may be what Franck has suggested—that judicial policy does not constitute foreign policy. The idea that a judge adjudicating the private law rights of former employees or third-party community members affected by an MNC's conduct in a host State in the course of extractive or manufacturing activities impinges on a country's foreign relations seemingly aggrandizes a domestic court's role.

Individual judges or judicial panels are tasked with applying the law to a set of facts *in a single case*. One jurisdictional or merits-based judicial decision does not constitute a country's foreign policy. However, it constitutes a precedential doctrine that persists within a judicial system over time. Moreover, as Derek Jinks and Neal Katyal have noted, we need not be so naïve as to think judges play such a seminal role in foreign relations that their opinions in one case will attenuate relations between States.[228] Judicial decisions are subject to legislative and executive overhauls across the common law world. Yet, to date, in the common law home States analyzed in the previous Part, there is no explicit indication of legislative intent that would serve as a basis to bar home State courts from adjudicating transnational business and human rights litigation.

Richard Falk noted decades ago the apparent conflict of interest between the judiciary and the executive in matters of international politics. As he remarked, the executive is focused on conciliatory settlement to maintain good relations among States. The judiciary is rights-focused, interested in resolving particular claims before a court.[229] In other words, common law judiciaries ought to be concerned primarily with the litigants before them that have an interest in resolving a private law dispute in accordance with established or potential doctrine.

Adjudication by domestic judiciaries may have a broader public interest role, including (likely tangential) consequences on how an MNC or home State government interacts with a host State government and/or its population. However, as opponents of judicial activism note, judiciaries are neither tasked with nor have expertise in broader public policy or international affairs. That a decision on a singular dispute based on a specific fact pattern will have ripple effects on a country's foreign relations is presumptuous. It elicits unwarranted anxieties that a decision to assert jurisdiction or impute liability on an MNC for extraterritorial conduct will attenuate interstate relations and weaken political and/or economic fortunes.

Anxieties around foreign relations becomes even more unwarranted if we factor in that the home States routinely involved in transnational business and

228. Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L. J. 1230, 1253 (2007).

229. Falk, *supra* note 3, at 432.

human rights litigation (i.e., the United States, the United Kingdom, Canada, the Netherlands, and France) are relatively powerful countries with long-standing and entrenched relations with Global South host States where MNCs operate. A domestic judiciary adjudicating a case around the private rights of a single or group of host State plaintiffs will not, and likely cannot, upend those established realities. Rather, as has recently been the case, it is *government* action that tends to weaken foreign relations. Iran's nuclear program, Russia's invasion of Ukraine, China's human rights violations against its Uighur minority, and Saudi Arabia's role in the killing of journalist Jamal Khashoggi have been the source of recent foreign relations tensions. None of these scenarios per se involve MNCs engaged in transnational commerce.

Moreover, instances of MNC-related litigation that overlap with foreign relations have concerned an MNC headquartered in a *different* country from the adjudicating court, not in the same sovereign State. One example is the arrest and extradition hearings of Huawei executive Meng Wanghou in Canada.[230] There is greater normative authority for a court to adjudicate a claim that involves a corporate party headquartered within the same sovereign territory. Arguably, a foreign State—particularly one like China with significant extraterritorial commercial interests—would be perturbed by another country's courts adjudicating a claim against one of its largest corporate actors. However, a home State court in the United States or Canada, for instance, that hears a private law claim around the conduct of an MNC headquartered on its territory is well within its adjudicative jurisdiction.

On a different note, opponents of judicial activism argue that a nation is no longer speaking with one voice (i.e., the president's or the executive's) when a court decides to assert jurisdiction or impute liability on an MNC headquartered on its territory. That claim is unfounded. For one, although judges may be able to curtail corporate behavior (and even this caveat is suspect), they are not positioned to alter government behavior with respect to relations with foreign governments. A liability finding against an MNC does not bar the executive branches of home and host State governments from freely interacting with each other in much the same way as prior to a court case. In short, the separation of powers not only renders the judiciary independent of the executive, but likewise renders the executive independent of the judiciary.

Furthermore, MNC liability does not bar a host State government from encouraging and facilitating foreign investment. It may require MNCs to pay host State employees better wages with fewer hours and with safer working conditions; or it may require MNCs to remediate a plot of land or to maintain better oversight of contracted officials or militias, so they no longer harm or even kill host State inhabitants. In these instances, private law affects corporate behavior and, as such, should not be scapegoated for attenuating foreign relations when there is no (or only equivocal) indication that it has such far-reaching influence.

230. For facts, *see* United States v. Meng, 2020 BCSC 785.

b. Filling Transnational Access to Justice Gaps

Falk characterizes adjudication as a form of participation. Among other things, participation in the adjudicative process ought to afford parties the opportunity to present reasoned arguments before a neutral adjudicator pursuant to an alleged breach of a right.[231] Unfortunately, as a result of the legislative and judicial gaps discussed above, coupled with ongoing problems in host State legal systems, a transnational access to justice gap has been developed for plaintiffs who have experienced personal or environmental harms committed by MNCs headquartered in Western common law States.

Contrary to the requirements outlined in the Third Pillar of the *United Nations Guiding Principles on Business and Human Rights*, existing access to justice gaps in transnational business and human rights litigation mean there is no viable judicial avenue for host State victims, largely from the Global South, to pursue private law claims.[232] As discussed above, there has been some progress in the United Kingdom and Canada pursuant to the Supreme Courts of those home States rejecting early-stage dismissal motions based on corporate veil and customary international law grounds. Nevertheless, lawyers who represent host State plaintiffs in transnational business and human rights litigation are typically fighting an uphill battle in light of the existing vacuum of legality.

In *The Nature of the Judicial Process*, Benjamin Cardozo writes that "[t]he rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice."[233] He argued that one function of the courts was to fill gaps in the law "which are found in every positive law in greater or less measure."[234] That scenario now confronts common law judges in home States. For Wallace Mendelson, judicial activism is particularly warranted in a democratic society "when other political forces have abdicated their role of directing social change.[235] In the midst of legality gaps, then, judges not only have the ability but a duty to advance the common law in a way that allows for transnational corporate human rights claims to be heard on their merits.

A number of doctrines can be addressed when we speak about common law judiciaries filling transnational access to justice gaps. I focus on two areas here. First, given the failure of Congress to amend the ATS as well as the evolving nature of transnational violations, US federal courts may consider reading in additional customary international law violations into the ATS's singular

231. Falk, *supra* note 29.

232. UN Office of High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, (June 16, 2011), https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf .

233. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 19 (1921).

234. *Id.* at 12.

235. Mendelson, *supra* note 12, abstract.

provision. In *Nestlé*, Justice Sotomayor argued for this approach only to be outvoted by the Court's conservative wing. Otherwise, at least when it comes to tort liability that can directly compensate host State victims, US-based MNCs will be given a carte blanche with respect to how they operate in Global South host States as there will be no basis for jurisdiction in the home State.[236] Second, related to FNC dismissals, common law courts can retain jurisdiction in transnational business and human rights litigation to a greater extent so host State plaintiffs no longer have to litigate a case from start to finish in a host State court only to learn that a host State court's judgment cannot be enforced in a home State. Also, home State courts can better align FNC and foreign judgment enforcement analyses at the enforcement stage.

As a preliminary remark on this Section, those who may critique the notion that a judiciary cannot *sua sponte* advance principles of corporate liability to fill access to justice gaps should consider the US Supreme Court's 1909 unanimous decision in *New York Central & Hudson River Railroad Co. v. United States*.[237] There, the Court acknowledged that the changing nature of society demanded that corporations, just like natural persons, be held criminally liable for illegal conduct.[238] By construing corporate criminal liability in the absence of legislative guidance, the Court rejected the notion that a corporate entity could not commit a crime. The Court's own words are worth reproducing as they constitute precisely the type of acknowledgement currently missing on the part of home State judiciaries in transnational business and human rights litigation:

> We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act in the subject matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and *to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject matter and correcting the abuses aimed at.*[239]

i. Expanding the "Law of Nations"

Since the ATS's post-*Filártiga* revival, a debate has persisted around the requirement that a defendant must violate the "law of nations." Should that term be interpreted in a way that honors what the "law of nations" meant when the

236. Nestlé, *supra* note 66, slip op. at 5–11 (opinion of Thomas J.).

237. New York Central & Hudson River Railroad Co. v. United States, 212 U.S. 481 (1909).

238. *Id.*

239. *Id.* at 496 (emphasis added).

statute was enacted in 1789 or what the "law of nations" encompasses today? This debate arose recently in the Supreme Court's 2021 decision in *Nestlé*, a string of plurality opinions that, as a result, have frozen the "law of nations" to its 18th-century understanding.

The potential role for judicial activism comes out of a discussion in *Nestlé* around which branch of government can rightfully expand the violations that fall within the ATS's "law of nations" requirement. Justice Thomas (joined by Justices Gorsuch and Kavanagh) deemed that role to be almost uniquely a legislative task.[240] In contrast, Justice Sotomayor (joined by Justices Breyer and Kagan) did not see that role in ATS disputes to be beyond the judiciary's ability.[241] In his plurality opinion, Justice Thomas took a deferential stance, stating upfront that "[w]e cannot create a cause of action that would let them [the plaintiff and respondents] sue petitioners. That job belongs to Congress, not the Federal Judiciary."[242]

Justice Thomas's position may be considered reasonable in the post-*Erie* era in which there is no federal common law,[243] but the language he uses to support deference to Congress is jarring and something that Justice Sotomayor in her own plurality opinion likewise notices.[244] Justice Thomas asserts that the Court is prohibited from creating a new cause of action under the ATS and "must refrain from creating a cause of action [a new violation under the "law of nations"] whenever there is *even a single sound reason to defer to Congress*."[245] For that proposition, he cites the Court's 2020 decision in *Hernandez v. Mesa*, which did not resort to the "single sound reason" language, even in Justice Thomas's own concurring opinion.[246]

As Justice Thomas and other conservative justices had done before, in *Nestlé* he limits the ATS's ambit to the three international law tort violations the statute initially encompassed: violation of safe conduct, infringement of the rights of ambassadors, and piracy.[247] He asserts that "[a]liens harmed by a violation of international law must rely on legislative and executive remedies, not judicial remedies."[248] His primary concern with judicial remedies is something that Franck directly argued against—"[t]he Judiciary does not have the 'institutional capacity' to consider all factors relevant to creating a cause of action that will 'inherently' affect foreign policy."[249] What that "institutional capacity" looks like

240. Nestlé, *supra* note 66, slip op. at 5–11 (opinion of Thomas J.).

241. *See id.* slip op. at 1–12 (opinion of Sotomayor J.).

242. *Id.* at 5 (opinion of Thomas J.).

243. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

244. Nestlé, *supra* note 66, slip. op. at 4 (opinion of Sotomayor J.).

245. *Id.* at 6 (emphasis added).

246. *See* Hernandez v. Mesa, 140 S. Ct. 735 (2020).

247. Nestlé, *supra* note 66, slip. op. at 7 (opinion of Thomas J.).

248. *Id.* at 6.

249. *Id*. at 10.

(and why Congress, not the judiciary, possesses it) is unspecified in Thomas's opinion.

Thomas indicates, like the Court did in *Hernandez*, that the federal judiciary should avoid "upsetting the careful balance of interests struck by the lawmakers."[250] For him, a judicial expansion of the ATS would amount to second-guessing Congress, a point that Justice Sotomayor explains with historical evidence is, in fact, contrary to the intentions of the First Congress. Moreover, the concern with Justice Thomas's deferential stance is that the political branches of government in the United States and other common law home States have been unwilling to legislate private law remedies for transnational corporate human rights violations. With each branch—for one reason or another—shirking responsibilities, host State victims from the Global South who approach US courts for remedies are left without a viable basis to argue for jurisdiction.

To be fair, Justice Thomas's opinion does not completely rule out the prospect for judicial discretion to widen the ATS's scope, but places that discretion at such a high threshold that if it was not exercised in a well-documented case of child slavery, as *Nestlé* was, it is difficult to see where that discretion would apply. He views judicial discretion as "an extraordinary act that places great stress on the separation of powers."[251] Again, he does not explain that assertion. His approach is also markedly distinct from that of Cardozo and others who saw it well within the judiciary's purview to fill gaps in the law in the face of reticence by the political branches.[252]

In her plurality opinion, Justice Sotomayor argued that Justice Thomas's views on the role of the judiciary in creating new causes of action under the ATS are, in fact, unmoored from the ATS's history as well as from the world that surrounds us.[253] She begins her opinion with the critique that likely stands out to many who read Thomas's words: the world has changed in the last two centuries since the ATS was first interpreted. She writes, "[l]ike the pirates of the 18th century, today's torturers, slave traders, and perpetrators of genocide are *hostis humani generis*, an enemy of all mankind."[254] That understanding alone may be the most robust basis for judiciaries to *sua sponte* fill gaps in the law around transnational business and human rights litigation. Courts ought to update doctrine in accordance with the realities of the world around them, especially when the political branches have failed to enact new laws to align doctrine with the vicissitudes of globalization. Chilling doctrine of a bygone era that is unrecognizable in today's world threatens to delegitimize judiciaries by necessitating their reliance on the political winds of the day.

250. *Id.* at 8 (internal citation omitted).

251. *Id.* at 7.

252. CARDOZO, *supra* note 233.

253. *See generally id.* (opinion of Sotomayor J).

254. *Id.* at 2 (internal citation omitted).

MNCs have skillfully used now-outdated doctrines to avoid the prospect of redistributing their revenues to Global South host State victims of human rights and environmental harms. What is required is not only the wisdom but the courage of the 1909 US Supreme Court, which did not view powerful corporate actors as beyond its adjudicative powers. Of course, with the current conservative super-majority on the US Supreme Court that increasingly appears to be curtailing rather than expanding rights (for US citizens as well as foreign plaintiffs), it is unlikely in the near future that any majority of the Court will be inclined to read in further violations into the ATS's "law of nations" requirement.

With that said, if there are enough justices who adopt Sotomayor's view in *Nestlé* that the ATS can be expanded without legislative intervention, it should be at the forefront of the Court's collective mind. Expanding the scope of the "law of nations"—extraterritoriality considerations aside—is one of the most expedient ways to effectuate transnational corporate tort liability. With Congress likely to be divided on any legislative action to overhaul a future judicial decision that expands the ATS's scope, it is a reasonable assumption that a judicially-motivated expansion of the ATS would remain in place for the foreseeable future and bind lower court judges in subsequent transnational claims commenced in the United States.

ii. FNC / Foreign Judgment Enforcement

The second doctrinal area that leaves a potential transnational access to justice gap for common law home State courts to fill is what Christopher Whytock and Cassandra Robertson characterize as an ex-ante/ex-post flip around FNC dismissals and foreign judgment enforcement, otherwise referred to as "boomerang litigation."[255] To elaborate, in the rare instance in which an FNC dismissal in a home State court subsequently results in a host State judgment against an MNC, foreign plaintiffs have had to return to the home State to enforce that judgment because MNC defendants have been unwilling to accept a host State court's decision. Moreover, MNCs retain assets primarily where they are headquartered. Common law home States courts, particularly in the United States, have applied the FNC doctrine in transnational corporate human rights claims leniently and then taken a stricter approach at the recognition and enforcement stage.

An example of this ex-ante/ex-post flip is the dibromochloropropane litigation against Dow, Shell, Dole Foods, and a number of other American MNCs on behalf of thousands of banana farm workers in Latin American host States who became sterile, despite the chemical previously being banned in the United

255. *See* Webb, *supra* note 186, at 92; Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COL. L. REV. 1444, 1451 (2011) (discussing "boomerang litigation").

States.[256] In *Delgado v. Shell Oil Co.*, a district court in Texas dismissed consolidated claims on FNC grounds holding the cases would be better litigated in Latin America, the Philippines, the Ivory Coast, and Burkina Faso.[257] As an indication that the court in *Delgado* prioritized the "convenience to the parties" and "local interest" elements of the FNC analysis devised by the Supreme Court in *Gilbert*, it presented an analysis of the adequacy of twelve different host States' legal systems in a mere eight pages.[258] As such, the court's adequacy analysis was woefully deficient. Moreover, the court only needed one paragraph to address whether a host State judgment would be enforceable in a US court. It surmised that judgment enforceability would not be a concern given that the MNC defendants expressed a willingness to satisfy a host State judgment.[259] Perhaps more in-depth analysis would have attuned the district court to what would happen after it dismissed the transnational claim on FNC grounds.

After the FNC dismissal, some of the plaintiffs were able to obtain a $489.4 million USD judgment against Shell in Nicaragua—one of the host States that received a superficial adequacy analysis in the FNC dismissal in *Delgado*.[260] After the Nicaraguan judgment, Shell filed a complaint in the Central District of California to request a declaration that the foreign judgment was unenforceable as it was "rendered under a system that does not provide impartial tribunals."[261] The plaintiffs, now the defendants in the enforcement action, argued that Shell had changed its position from the FNC motion in *Delgado*—a proposition the District Court in that case thought unlikely on the mere basis that the MNC stated it would fulfill a host State judgment.[262] They argued that if the court denied enforcement, there would be "no place on this earth where an individual poisoned by DBCP may have his or her day in court."[263] Rather than defer to the host State court's jurisdiction as the *Delgado* court did when it initially dismissed the claim on FNC grounds, the enforcing court accepted the MNC's argument that it was, in fact, not subject to a Nicaraguan court's personal jurisdiction, even though accepting host State jurisdiction was a condition of the FNC dismissal in the first place. Consequently, the foreign judgment was deemed unenforceable.[264]

256. Shell and Dow manufactured DBCP and Dole used it in host States. *See* Delgado v. Shell Oil Co., 890 F. Supp. 1324, 1337 (S.D. Tex. 1995) aff'd 231 F.3d 165 (5th Cir. 2000).

257. *See id.*

258. *See id.* at 1358–1365.

259. *Id.* at 1369.

260. See Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx), 2004 U.S. Dist. LEXIS 31125, at 13 (C.D. Cal. May 18, 2004).

261. *Id.* at 6.

262. *Id.* at 5.

263. Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment at 4, 12–13, Shell Oil Co. v. Franco, No. CV 03-8846 NM (PJWx) 2005 WL 6187868 (C.D.Cal. Aug. 3, 2005), 2005 WL 6187868, [hereinafter Franco 2005] cited in Whytock and Robertson, *supra* note 255, at 1477.

264. Franco 2005, *supra* note 263.

Another instance of the ex-ante/ex-post flip revolved around Chevron/Texaco's environmental harms in Ecuador.[265] After FNC dismissals in the United States, the plaintiffs ultimately obtained a $9.5 billion judgment through the Ecuadorian courts against the parent company of Chevron's global conglomerate.[266] The plaintiffs first attempted to enforce the judgment in the United States where the parent company has assets.[267] In a full bench trial that resulted in an almost 400-page decision, Kaplan J. of the Southern District of New York ruled that the Ecuadorian judgment was procured through fraud and corruption—a conclusion that corroborates Tarek Hansen and Whytock's assertion that when FNC dismissals neglect the likelihood of enforcement, plaintiffs are left without a meaningful remedy.[268]

Rather than accepting the foreign judgment at face value and giving the Ecuadorian courts the same deference as in the FNC proceedings, the district court concluded that lawyers for the plaintiff had fabricated evidence, made bribes, and ghost-written documents.[269] Kaplan J. forcefully wrote, "[i]f ever there were a case warranting equitable relief with respect to a judgment procured by fraud, this is it."[270] That decision barred enforcement anywhere in the United States. Also, it was subsequently upheld on appeal with *certiorari* denied by the Supreme Court.[271]

Like the judicial reticence to expand the list of violations that fall within the ATS's "law of nations" requirement, common law home State courts can choose to take a different approach to the current ex-ante/ex-post flip in transnational business and human rights litigation to avoid systemic transnational access to justice gaps that have left Global South host State victims without a viable judicial avenue to seek and recover compensation from MNCs. There are at least two ways that home State judiciaries can become more activist in this regard to ensure that host State plaintiffs have viable pathways to compensatory remedies in the future.

First, home State courts can assume less deference to a host State's legal system, which elicits an unfounded paternalism that dictates to a host State that it ought to adjudicate the transnational claim in place of a home State court. That was the precise tack taken in *Bhopal* that ultimately sank any chance the Indian victims had of recovering a substantial sum of money from Union Carbide. Home

265. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014), aff'd, 833 F.3d 74 (2d Cir. 2016).

266. *Id.*

267. See Aguinda v. Texaco, Inc., 303 F.3d 470, 473 (2d Cir. 2002).

268. Tarik R. Hansen & Christopher A. Whytock, *The Judgment Enforceability Factor in Forum Non Conveniens Analysis*, 101 IOWA L. REV. 923, 926 (2016). ("The foreign enforceability factor is often neglected").

269. Chevron Corp. v. Donziger, 974 F. Supp. 2d 362.

270. *Id.* at 384.

271. The plaintiffs subsequently attempted to enforce the Ecuadorian judgment against Chevron's Canadian subsidiary. The Ontario Court of Appeal denied that attempt in Yaiguaje v. Chevron Corp., 2018 ONCA 472.

State courts in *Delgado*, *Bhopal*, and in other instances have been too superficial in their analyses around the adequacy of the host State court in question to adjudicate the complex transnational tort claim at hand.[272] Greater due diligence at the FNC dismissal stage would keep more transnational cases in home State courts, which could eventually lead to liability determinations against an MNC for extraterritorial human rights or environmental harms. At a minimum, keeping these types of claims in the home State would result in a greater likelihood of settling. These settlements could be obtained without the time and effort required to litigate lengthy claims in host State courts, only to re-litigate them in a home State at the enforcement stage.

The second way that home State courts can overcome the ex-ante/ex-post flip is to honor the decision of the FNC dismissing court that a host State court is sufficiently adequate to adjudicate the transnational claim *and* that any judgment rendered by a host State court—subject to glaring signs of corruption or other deficiencies in how host State proceedings took place—will be recognized and enforced by the home State. In line with academic conceptions of judicial activism, this view of foreign judgment enforcement may already have the result in mind. By being more lenient at the enforcement stage, home State judiciaries are acknowledging that host State plaintiffs ought to be afforded a remedy that they would not be otherwise able to secure from an MNC defendant.

As mentioned above, an MNC's retained assets are unlikely to be held by a host State subsidiary. Couple that reality with a home State court's unwillingness to enforce a host State judgment and host State plaintiffs are effectively barred from a private law remedy in home State courts. John Locke famously wrote that "he who hath received any damage has, besides the right of punishment common to him with other men, a particular right to seek reparation from him that has done it."[273] A right that cannot be enforced to render a remedy is arguably no right at all. Global South host State plaintiffs who can neither have their claims adequately adjudicated by their own courts nor enforced by a home State court are consequently subjected to a law-free zone of impunity in which MNCs can commit human rights and environmental harms without the possibility of compensatory redress.

c. A Contemporary Space for Judicial Morality

Above, I presented two methods by which home State judiciaries may be inclined to take more activist stances in contemporary transnational business and human rights litigation. They can heed Franck's notion that judicial policy is distinct from foreign policy. Otherwise, they can fill transnational access to justice

272. Bhopal Appeal, *supra* note 191, at 867; Delgado, *supra* note 256, at 1358–65. *Also see*, *e.g.*, Sequihua v. Texaco Inc., 847 F. Supp. 61, 64 (S.D. Tex. 1994); Aldana, *supra* note 198; Cambior, *supra* note 204, ¶ 73.

273. JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 6 (Crawford B. Macpherson, ed., 1980) (emphasis added).

gaps by expanding the violations as part of the "law of nations" in the ATS or by mitigating what has become an ex-ante/ex-post flip with regards to FNC dismissals and foreign judgment enforcement. In this Section, I present a third potential basis for activism to take hold in home State courts: the implementation of judicial morality via a rights-based conception of the rule of law.

Legal philosophers have debated the place of extra-doctrinal judicial morality in resolving disputes in State-sanctioned courts. Inevitably, this debate touches on some fundamental concepts, including how we define law itself as well as what constitutes the rule of law. Generally, legal positivists lie on one end of that debate. Joseph Raz identifies two theses that encompass the positivist conception.[274] The "sources thesis" requires that all laws have an identifiable source. He defines it as the following: "[a] law is source-based if its existence and content can be identified by reference to social facts alone, without resort to any evaluative argument."[275] In other words, a positive legal rule and a fact pattern suffice to decide a dispute before a neutral adjudicator. This is Raz's preferred thesis. He critiques the other two theses that he terms the "incorporation thesis" and the "coherence thesis."[276] The incorporation thesis, prominently supported by H.L.A. Hart, is that "[a]ll law is either sourced-based or entailed by source-based law."[277] In essence, the incorporation thesis, albeit slightly broader than the sources thesis, still falls within the realm of legal positivism.

Defended in recent times by Ronald Dworkin, the coherence thesis opposes positivistic views of the rule of law. It asserts that "law consists of source-based law together with the *morally soundest justification of source-based law*."[278] The coherence thesis illuminates the divide around how judges should decide "hard cases" like transnational business and human rights litigation that typically involve novel fact patterns, ambiguous statutory frameworks, or unstable doctrinal referents.[279] It argues for more reliance on extra-legal principles outside of established doctrine.

For Dworkin, the rule of law can manifest via either a "rule book conception" (akin to Raz's sources or incorporation theses) or a "rights-based conception."[280] Under the rule book conception, judges only interpret and apply legislation as intended and enacted by elected branches of government.[281] Relatedly, judges will be reticent to advance the common law and opt to await legislative guidance.

274. *See e.g.* H. L. A. HART, THE CONCEPT OF LAW (3rd ed., 2012); JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS (rev. ed. 1988).

275. RAZ, *supra* note 274, at 211.

276. *Id.*

277. *Id.* at 210.

278. *Id.* at 211 (emphasis added).

279. Ronald Dworkin, *Political Judges and the Rule of Law* in A MATTER OF PRINCIPLE 264 (Ronald Dworkin ed., 1985).

280. *Id*. at 262–269.

281. *Id*. at 262.

In matters of statutory interpretation, the rule book conception manifests via i) semantic theories, ii) group-psychological theories that inquire into what legislators intended when they devised a particular rule, or iii) historical theories that suggest what legislators *would have* enacted if they were tasked with legislating the exact issue that appears before a judge in a hard case.[282] For Dworkin, the rule book conception seeks to rectify the rule book so that "the collection of sentences is improved so as more faithfully to record the will of the various institutions whose decisions put those sentences in the rule book."[283]

The primary justification for the rule book conception is "the argument from democracy," which asserts that elected branches of government (as opposed to an appointed judiciary) represent the will of the people. That will should not be overridden by a small group of legal elites who substitute their morality in place of the public's collective morality that translates into positive legislated rules.[284] Of course, this idea may be subject to challenge on the basis that electoral politics may, at times, render the will of the public somewhat distinct from how elected branches of government are actually constituted. As one example, in three of the last five US presidential elections, the nominee that has garnered fewer votes nationally has won the election on the basis that he won more electoral college seats.

On the other hand, pursuant to a rights-based conception that Dworkin supports, legal persons have moral rights and duties with respect to one another (as well as rights against the State) that may not be captured by the rule book.[285] Upon demand, moral rights can be enforced by judicial institutions erected by the State. Dyzenhaus writes that "[t]he role of judges in Dworkin's conception is reduced to that of transmitting the content of the moral law. … [T]hey have to decide what interpretation of the positive law relevant to the matter shows the law in its best moral light."[286] The ultimate question that the rights conception asks is whether the plaintiff has a moral right that ought to be enforced in court. As such, it takes Locke's foregoing principle seriously to oblige a legal remedy to a moral right irrespective of whether the rule book has anything explicit to say about either of them.[287]

The two distinct conceptions diverge on whether judges should make what Dworkin calls "political decisions" in hard cases, meaning whether they should elicit a principle other than what is explicitly allowed for or entailed by the rule book. For Dworkin, although the rule book is not the exclusive source of rights, a moral right must be consistent with the rule book. To substantiate that assertion, he gives a radical example he calls the Christian principle, which would not fall

282. *Id.* at 265–266.

283. *Id.* at 267.

284. *Id.* at 270–271.

285. For an overview of the rights conception, *see id.* at 267–269.

286. Dyzenhaus, *supra* note 44, at 65.

287. Dworkin, *supra* note 279, at 267.

within his rights-based conception of the rule of law. Under the Christian principle, a judge in a compensatory claim could deny a damages award against an indigent defendant on the basis that the relatively more solvent plaintiff in the dispute should forego the claim as a sort of alms-giving.[288] Although the Christian principle may adhere to a judge's underlying morality, for Dworkin it contravenes "the vast bulk of the rules in the rule book" and, as such, would not be a viable political decision by a judge under the rights-based conception.[289]

Debated on a relatively more philosophical level, there is little explication in the rights-based and rule book conceptions of any specific considerations around foreign plaintiffs who are central to transnational business and human rights litigation. With that said, Dworkin recognizes that the rights-based conception he supports favors what he calls "entrenched minorities." He writes, "since, all else equal, the rich have more power over the legislature than the poor, at least in the long run, transferring some decisions from the legislature [to the judiciary] may for that reason be more valuable to the poor."[290] Implicitly acknowledging the argument from democracy, Dworkin posits that the majoritarian bias of legislatures works against entrenched minorities whose rights are ignored by elected branches of government—an assertion that accords with the lack of legislatively-mandated tort remedies for foreign plaintiffs who allege harm on the part of MNCs that operate in the Global South.[291]

Foreign plaintiffs from the Global South neither have the power of the vote nor the power of the purse in home States where their private law claims have been and will likely continue to be adjudicated in the future. These plaintiffs are not practically capable of influencing the legislative process in the way that corporate lobbying groups, for instance, opposed the ATSRA (and will likely oppose the ATSCA). On that basis, home State judges may be inclined to insert a level of morality to conclude that host State plaintiffs ought to be afforded a viable judicial avenue to compensatory remedies.

Penned by now retired Justice Rosalie Abella, the Supreme Court of Canada's majority decision in *Nevsun* illustrates how judicial morality can take hold in transnational business and human rights litigation.[292] As discussed above, one of the issues in *Nevsun* was whether the Eritrean plaintiffs would be able to seek tort remedies pursuant to *jus cogens* human rights violations long recognized under international law.[293] Justice Abella affirmed the court's approach in a prior case, *Kazemi v. Islamic Republic of Iran*, that *a jus cogens* norm "is a fundamental tenet of international law that is non-derogable."[294] In *Nevsun*, the issue before

288. *Id.* at 268.

289. *Id.* at 268–269.

290. *Id.* at 281.

291. *Id.*

292. Nevsun, *supra* note 124.

293. *Id.* ¶¶ 83–85.

294. *Id.* ¶ 83 (internal citations omitted).

the court was not necessarily the absence of *any* tort cause of action but whether the court ought to, in effect, recognize the particularly egregious nature of the MNC defendant's acts in a novel tort couched in international human rights law.[295]

Abella first affirmed that the human rights violations alleged by the *Nevsun* plaintiffs fell within the sphere of *jus cogens* norms. She then wrote that the "[d]evelopment of the common law occurs where such developments are necessary to clarify a legal principle, to resolve an inconsistency, or to keep the law aligned with the evolution of society. … [T]he possibility of a remedy for the breach of norms already forming part of the common law is such a necessary development."[296] Only a few paragraphs later she explicitly cites the principle that "where there is a right, there must be a remedy for its violation."[297]

How is *Nevsun* an instance of permissible judicial morality? The majority opinion recognized that, at the time, there was no distinct cause of action that could lead to a remedy for violations of *jus cogens* human rights norms as they are understood under international law. Moreover, the Canadian parliament has not legislated a cause of action for violations of customary international law. There is nothing in Canada akin to the ATS that ties a potential tort claim to a violation of the law of nations. Within that gap, the *Nevsun* majority found it appropriate to advance the common law in a manner that could afford the foreign plaintiffs a potential remedy for the specific types of harm they alleged. Abella's initial remark in her opinion substantiates that notion:

> …[M]odern international human rights law [is] the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed [i.e., through legal remedies].[298]

Abella operationalized Dworkin's rights-based conception of the rule of law without going outside of the established rulebook. She first established that international law—specifically *jus cogens* norms—forms part of Canadian common law and can thus be developed in a way that allows for a private law remedy. Even in Abella's conception of judicial morality, it was necessary for there to be an established sourced-based and doctrinal framework within which she was working in order to expand the common law in favor of host State plaintiffs who were suing a Canadian-headquartered MNC. This accords with how Dworkin interprets, for instance, the Christian principle, outlined above. In other words, she first established that it was within her adjudicative capacity to advance the common law in line with international human rights rules and norms and then did just that.

295. *Id.*

296. *Id.* ¶ 118.

297. *Id.* ¶ 120.

298. *Id.* ¶ 1 (blocked quotes added).

As a final point on judicial morality, Falk suggests a useful framework that can lead to home State courts taking less deferential stances in favor of developing common law principles in matters that concern grave human rights violations. He distinguishes between what he terms legitimate and illegitimate diversities. He writes:

> In general, municipal courts should avoid interference in the domestic affairs of other [S]tates when the subject matter of disputes illustrates a legitimate diversity of values on the part of two national societies. In contrast, if the diversity can be said to be illegitimate, as when it exhibits an abuse of universal human rights, then domestic courts fulfill their role by refusing to further the policy of the foreign legal system. In instances of illegitimate diversity, where a genuine universal sentiment exists, then domestic courts properly act as agents of international order only if they give maximum effect to such universality.[299]

To apply Falk's paradigm to transnational business and human rights litigation, consider that there will be instances in which two legal systems can reasonably differ on a procedural or substantive rule: the scope of discovery, the requirements to legally convey land, the rules of inheritance, the elements appropriate to make out a cause of action, and many others. Those instances—where courts can reasonably disagree—may warrant a lesser degree of activism or no activism at all such that one court decides to defer to another court. In the context of this Article, that may be a home State court deferring to the jurisdiction of a host State court. Practically, this can occur in the course of FNC determinations. However, cognizable universal harms, like the personal and environmental harms often at issue in transnational business and human rights litigation, necessitate a court to retain jurisdiction irrespective of a foreign court's interest in the matter because these are substantive rights that amount to more than just peripheral distinctions between two legal systems.

In transnational business and human rights litigation, a home State court that retains jurisdiction does not necessarily elicit a concern about the "policy of the foreign legal system" as Falk's quote states. Rather, it is an appreciation that there are particularly egregious harms at issue in a given claim and that a host State court may not be best placed to adjudicate a claim related to such harms. Home State courts ought to be willing to retain jurisdiction in light of established incapacities in host State legal systems and previous instances in which deference on the part of home State judiciaries has not afforded host State plaintiffs a viable avenue to compensatory remedies. This was seen above with FNC dismissals and the circumstances around "boomerang litigation." In short, the inability for a host State court to adequately adjudicate a transnational business and human rights claim is, as Falk characterized it, an example of illegitimate diversity.

Falk gives the example of the *Eichmann* trial in which an Israeli court asserted universal jurisdiction for Holocaust-related harms.[300] In his view, *Eichmann* illustrated an illegitimate diversity between Israel and a foreign

299. Falk, *supra* note 29, at 7–8.

300. *Id.* at 8–9.

State.[301] Again, in transnational business and human rights litigation, there is no explicit governmental or judicial policy that is contrary to universal human rights. Rather, the concern with deferring jurisdiction to a host State court is that fundamental human rights violations should not go unaddressed to the extent that a plaintiff is without a viable judicial avenue to recover compensation for egregious harm. Placing those fundamental rights above the jurisdictional requirements of host State in order to adjudicate a complex transnational claim (while not straying from the basic principles of the rulebook) would be an appropriate instantiation of judicial morality in future home State business and human rights litigation.

CONCLUSION

In light of a vacuum in legality, this Article has explored an opportunity for judges in common law home States to fill the "governance gap" for transnational human rights and environmental violations on the part of MNCs headquartered in the Western world. Given consistent inaction on the part of elected branches of government to enact legislative reforms, judiciaries may be the only viable source of private law remedies for Global South host State victims who have suffered egregious harms. Judicial activism would not only fulfill the natural law maxim that "where there is a right there is a remedy," it would honor the third pillar of the *UN Guiding Principles*. Activism may not take hold immediately or even in the near future, particularly with entrenched conservative wings in the judiciaries of several common law home States. However, this Article has presented some potential pathways to actualize activism when individual judges or even a majority of judges on appellate panels are prepared to embrace a more expansive adjudicative role.

301. *Id.*

BEYOND THE BINARY: TOWARD A NEW GLOBAL MODEL OF CONSTITUTIONAL RIGHTS ADJUDICATION

Oren Tamir*

Both the literature and practice of constitutional rights adjudication around the world strongly suggest that we live in a binary. Only two "models" are realistically available for us to choose from when deciding how to organize systems for adjudicating rights. The first model is proportionality analysis. *In this model, which is extremely common around the world, constitutional rights are defined expansively. And Courts then make highly granular and context-specific determinations on defending rights based on a familiar, single, three or four-step protocol. By contrast, the second model is* categorical reasoning. *In this model, which is primarily associated with the United States, rights are defined much more narrowly. And Courts then review rights claims based on predetermined but varied tiers of scrutiny or bespoke tests which (1) limit the considerations judges are allowed to weigh and (2) are often meant to be rigid and outcome-determinative. Since the domain of constitutional rights in this model is relatively narrow and because some of the outcome-determinative tests judges use under it tend to sharply bias results in favor of the right being protected, the categorical reasoning model is closely associated with Ronald Dworkin's conception of rights as "trumps."*

This Article argues that the set of choices available to us is broader than the binary. There is another model around which we can choose to organize systems for adjudicating constitutional rights. And this alternative model is importantly

DOI: https://doi.org/10.15779/Z381834381

* Postdoctoral Fellow, Harvard Law School; Adjunct Professor & Global Hauser Postdoctoral Fellow, NYU School of Law. For comments on earlier drafts and conversations about ideas in this paper I thank Asli Bali, Josh Braver, Emily Bremer, Jon Gould, Vicki Jackson, Nadiv Mordechai, David Pozen, Kari Ragnarsson, Cristina Rodriguez, Glen Staszewski, Mark Tushnet, Chris Walker, and Ilan Wurman, as well as participants in the Administrative Law New Scholarship Roundtable at Yale Law School, the Michigan Law School Junior Scholars Conference, and the International Society of Constitutional Law Mundo Conference (panel on "Beyond Backsliding"). Thanks go as well to the wonderful editorial staff of the *Berkeley Journal of International Law*. All the usual caveats apply.

distinct from the existing models: on the one hand, it allows systems to combine key elements of proportionality and categorical reasoning in surprising and previously unexplored ways. On the other hand, this new model diverges from proportionality and categorical reasoning along several crucial dimensions, including the degree of deference to political decision-makers it institutionalizes, the judicial technique and remedy for protecting rights it supplies, and this model's consistent focus on protecting rights endangered by governmental inaction.

Perhaps surprisingly, the origins of this new model are also found in the US system, much like categorical reasoning. It is just that it operates in a different corner of American public law than the one we tend to focus on: that of administrative law. This Article describes this new "administrative law model" *of constitutional rights adjudication, highlights its distinctive features, and identifies its primary strengths and costs. The Article then argues that it is already possible to identify where the administrative law model would prove attractive and should displace the reliance on the existing models, either in whole or in part. Most clearly, the administrative law model seems especially suited for the system from which it originates—the United States. And in fact, this Article suggests that recognizing that this model exists can increase the prospects of achieving meaningful and desirable change in domestic US constitutional law. However, signs of dissatisfaction with the state of constitutional rights adjudication around the world, among other things, indicate that the model could prove attractive also in other domestic jurisdictions, and even at the international level. Going forward, the administrative law model therefore deserves a permanent place in the global and comparative constitutional toolkit.*

INTRODUCTION

How might we go about structuring systems for adjudicating constitutional rights? Three possibilities seem relatively easy. The first would apply if we were full-blown rights' absolutists. True, given the world we live in today, this would probably mean having a very limited set of rights.[1] But having courts enforce them would not raise unique challenges. Judges would simply enforce them absolutely and without any qualification. A second easy option would apply if we were full-blown political constitutionalists.[2] Here, we could certainly have a broader list of rights. But, again, there would not be much of a challenge structuring rights *adjudication*. That task would simply be nonexistent and entirely political. A final easy option would be to accept that rights are not normally absolute and can be qualified, and to accept as well that judges have a place in adjudicating rights disputes. At the same time, we would forgo any attempt to structure judicial discretion in this context. When conflicts involving

1. *See, e.g.*, CHARLES FRIED, RIGHT AND WRONG 162-63 (1978) (advocating a world of absolute rights that are very limited in scope and nature).

2. *See, e.g.*, J.A.G. Griffith, *The Political Constitution*, 42 MODERN L. REV. 1 (1979).

rights surface to courts, judges would simply make what philosophers call a holistic, "all-things-considered" judgment[3] to determine the result in each case.

While easy in different ways, these options are not truly available for us today. No contemporary system appears committed to the position that all rights are absolute and cannot be qualified. This status is preserved, at most, for only a limited number of rights.[4] Similarly, the notion associated with full-blown political constitutionalism of "taking the constitution [completely] away from the court[s]"[5] might have been strong in the past, certainly in some jurisdictions. Today, however, this notion has been largely "withdrawn from sale."[6] All constitutional democracies around the world, and even nondemocracies, appear to accept that judges should have a role to play in issues of rights (though, of course, what role exactly is fiercely disputed). And the thought that the courts' role in adjudicating rights should be entirely formless or doctrinally empty also does not have much contemporary bite. There is substantial cross-cutting consensus that some sort of doctrinal structure to organize the way judges go about adjudicating rights is in fact necessary.[7]

Within this domain of the possible, even a brief exploration of the practices that exist around the world and even a peek at the relevant scholarly discussions would quickly lead one to conclude that our menu of options is a severely limited one. Simply put, we live in a binary. Only two doctrinal "models" are realistically available for us to choose from when we consider how to organize systems for adjudicating rights.

The first is *proportionality analysis*. This model is now incredibly common around the world, so much so that it is often described as a "global model"[8] of constitutional rights adjudication, or, simply, "generic"[9] constitutional law. It is employed in some form by courts from jurisdictions as diverse as Canada, South Africa, Israel, Hong Kong, Taiwan, Colombia, and Brazil, to name only a few examples. And it is also a staple of international human rights adjudication,

3. *See* Ruth Chang, *All Things Considered*, 18 PHIL. PERS. 1 (2004).

4. Usual examples include the right against being tortured, the right against an arrest solely on the ground of failure to fulfill a contractual obligation, and, most controversially, certainly in the United States., the right against the death penalty.

5. This is of course a play on the title of MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURT (1999).

6. Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 814 (2003); Stephen Gardbaum, *Separation of Powers and the Growth of Judicial Review (or Why Has the Model of Legislative Supremacy Mostly Been Withdrawn from Sale?)*, 62 AM. J. COMP. L. 613 (2014).

7. One gets a strong sense of the consensus on the desirability of doctrinal structure from reading the collection of essays in PROPORTIONALITY IN ASIA (Po Jen Yap ed., 2020) all of which assume that such need is strongly desirable and attempt to square various judicial exercises, in this case from various jurisdictions in Asia, as compatible with a doctrinal structure (explicitly or, more interestingly, implicitly).

8. KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS (2012).

9. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005).

including at the European Court of Human Rights and at the Inter-American Court of Human Rights. Among this model's key features are that constitutional rights are defined under it quite expansively. And courts then engage in a highly granular and context-specific evaluation of disputes about rights that is guided by a familiar, single, three- or four-step protocol.[10]

By contrast, the second model is *categorical reasoning*. This model is closely associated with the adjudication of constitutional rights in US courts. And, in fact, the United States may be the only jurisdiction around the world that consistently embraces this model—another example of an alleged American exceptionalism that some identify in all matters of public law and well beyond.[11] Among categorical reasoning's key characteristics are that constitutional rights are defined under it quite narrowly, certainly much more so than under the proportionality model. And courts then review claims involving infringements on rights based on predetermined classifications, labels, or bespoke tests which (1) limit the range of considerations judges are allowed to weigh or balance and (2) are often meant to be rigid and outcome-determinative. Since the scope of rights in this model tends to be narrow, and since some of the outcome-determinative tests judges employ under it sharply bias results in favor of rights, the categorical reasoning model is usually associated with Ronald Dworkin's famous characterization of rights as "trumps."[12]

This binary has for a long time now defined the debates around rights adjudication in domestic and comparative constitutional law, as well as in the community of international human rights. Scholars, judges, and practitioners constantly and passionately discuss proportionality and categorical reasoning's relative merits and demerits.[13] And, to the extent that their own jurisdiction or system of interest embraces the model they view less favorably, they advocate reforms that aim to "export," "borrow," "transplant," or "migrate"[14] the competitor model instead.

10. *See infra* Part I.B.

11. *See, e.g.*, Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. 367, 372–73 (2009); Frederick Schauer, *The Exceptional First Amendment*, AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 30 (Michael Ignatieff ed., 2005).

12. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977). For a useful discussion of the evolution of Dworkin's thought on matters of rights, *see* Paul Yowell, *A Critical Examination of Dworkin's Theory of Rights*, 52 AM. J. OF JURIS. 93 (2007).

13. The literature is extremely vast, but several of the important contributions are ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., 2002); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (Doron Kalir trans., 2012); MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE (2013); JACCO BOMHOFF, BALANCING CONSTITUTIONAL RIGHTS: THE ORIGINS AND MEANINGS OF POSTWAR LEGAL DISCOURSE (2013); DAVID M. BEATTY, THE ULTIMATE RULE OF LAW (2004); ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY, BALANCING, AND CONSTITUTIONAL GOVERNANCE (2019).

14. For a survey of, and contribution to, the debate in comparative constitutional law about the meaning of these terms and their appropriateness, *see* Vlad Perju, *Constitutional Transplants,*

For example, in recent US scholarship, Professors Vicki Jackson[15] and Jamal Greene[16] have claimed that the American system would substantially benefit from drawing on the proportionality model and relax its strong commitment to reason-by-category and rights as "trumps."[17] Doing so, they suggest, would strengthen the connection between constitutional rights adjudication and justice, which in their view requires a more expansive approach to the domain of constitutional rights and a more contextual, fine-grained analysis that a proportionality model naturally brings, and which categorical reasoning mostly blocks. They moreover claim that embracing proportionality at the expense of categorical reasoning would resolve pathologies inherent in contemporary US constitutional law and even American politics and culture much more broadly. And to be sure, the calls for more proportionality and less reason-by-category in the US system haven't been entirely academic. They have found judicial support as well. At the Supreme Court, Justice Breyer,[18] sometimes jointly with Justice Kagan,[19] and echoing earlier positions by Justice Stevens[20] and Justice Thurgood Marshall,[21] consistently expressed enthusiasm for the proportionality model at the expense of the existing categories, at least in some "pockets" of constitutional rights' law. And—particularly important perhaps given Justice Breyer's recent retirement from the Court and though speaking from a very different ideological outlook—one even finds sympathy for the proportionality frame of rights adjudication in Justice Barrett's recent concurrence in *Fulton v. City of Philadelphia*.[22]

Borrowing, and Migrations, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304 (Michel Rosenfeld & Andras Sajo eds., 2012).

15. *See* Vicki C. Jackson, *Constitutional Law in the Age of Balancing*, 124 YALE L.J. 3094 (2015).

16. *See* Jamal Greene, *The Supreme Court Term 2017—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28 (2018); JAMAL GREENE, HOW RIGHTS WENT WRONG (2021).

17. A similar extensive argument to that extent has been put forward by Professors Alec Stone Sweet and Jud Mathews in their joint work from a few years ago and more recently. *See* Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2010); STONE SWEET & MATHEWS, *supra* note 13.

18. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 682, 690 (2008) (Breyer, J., dissenting); Sorrell v. IMS Health, Inc., 564 U.S. 552, 582 (2011) (Breyer, J., dissenting).

19. United States v. Alvarez, 567 U.S. 709, 730–31 (2012) (Breyer, J., concurring).

20. Regan v. Time, Inc., 468 U.S. 641, 696 (1984) (Stevens, J., concurring); Craig v. Boren, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring).

21. Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting).

22. 140 S. Ct. 1868, 1882–83 (Barrett, J., concurring).

Conversely, scholars like Stavros Tsakyrakis,[23] Francisco Urbina,[24] and Grégoire Webber[25] (among others)[26] have argued that systems committed to the proportionality model in adjudicating rights disputes are the ones that ought to reconsider their position. For these scholars, the proportionality model has major difficulties, including its failure to capture the overriding (or deontic) quality of constitutional rights over mere interests, that it guarantees merely a weak level of protection for rights and "cheapens" them, and that it fails to achieve important rule-of-law values such as guidance, constraint, and predictability. They thus call for an injection of the categorical approach into systems that appear, in their eyes, too uncritically committed to proportionality.

Against this conventional backdrop, this Article argues that we can move beyond the present binary. Indeed, I argue that there is *another* model that is available for us and around which we can organize systems of constitutional rights adjudication. And this new model is importantly distinct from both proportionality and categorical reasoning. On the one hand, this new model combines key features of these existing models in surprising ways. On the other hand, this new model diverges from the existing models in several crucial respects, including in how it allocates decision making responsibility about rights between judicial and political elements, in the precise tools it supplies to judges for the task of solving rights disputes in the first place, and in the extent of rights protection this alternative new model provides when contrasted with proportionality and categorical reasoning.

Somewhat surprisingly, we need not go far to see this new model. Its basic contours are hiding in plain sight: just like categorical reasoning, this new model also originates from the US system. It is only that it operates in a corner of American public law we mostly ignore or tend to quickly gloss over when we talk about constitutional rights—the corner of administrative law. Accordingly, I will call this new model here the *administrative law model* of constitutional rights adjudication.[27] And my aim in this Article is to introduce this model for the first

23. Stavros Tsakyrakys, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468 (2009).

24. FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING (2017).

25. GRÉGOIRE WEBBER, THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS (2009); Grégoire Webber, *Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship*, 23 CAN. J. OF L. & JURIS. 179 (2010).

26. *See, e.g.*, Christopher Heath Wellman, *On Conflicts Between Rights*, 14 L. & PHIL. 271 (1995); John Oberdiek, *Lost in Moral Space: On the Infringing/Violating Distinction and Its Place in the Theory of Rights*, 23 L. & PHIL. 325 (2004); Basak Cali, *Balancing Human Rights? Methodological Problems with Weights, Scales, and Proportions*, 29 HUM. RTS. Q. 251 (2007).

27. This Article is not the first to label an approach to constitutional rights adjudication an administrative law model. Professor Cass Sunstein has once described the South African Constitutional Court decision in the well-known *Grootboom* case as reflecting an "administrative law model" for rights adjudication. *See* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 234 (2001). Professors Moshe Cohen-Eliya and Iddo Porat, in their important book and other work, also speak of elements in proportionality analysis that seem to resemble what they describe as an administrative law approach to constitutional rights. *See* COHEN-ELIYA & PORAT,

time, highlight its key attractions and drawbacks, and suggest where this new administrative law model would prove highly appealing and should already displace the existing models, either in whole or at least in part.

Part I begins by describing in more detail the present binary as well as the main characteristics of the categorical reasoning model and the proportionality model. It also discusses how these models are more connected than is sometimes recognized by existing scholarship and judicial practice, but why it is still appropriate and indeed important to think of them as distinct.

Part II introduces the new administrative law model. It begins with the threshold issue of explaining why it makes sense to even look to the field of administrative law as a template for constitutional rights adjudication. Some, especially in the United States, may find this move surprising. But I argue that this is based on a myopic, even misleading, perception of the field of administrative law that can more easily and systematically be connected to issues of constitutional rights. Next, I present the various components of the administrative law model. This model is based on (or inspired by) several central—indeed, foundational—principles of contemporary adjudication in US administrative law, which are undoubtedly familiar to anyone working in this field, but likely well beyond:

> First, the principle of deference to "reasonable" interpretations, associated today most prominently with the seminal *Chevron*[28] case in US administrative law;
> Second, the standard of review for "reasoned decision making," mostly associated now with another seminal administrative law case in the United States, *State Farm*;[29]
> Finally, the "highly deferential" and "extremely narrow" standard of review courts apply in the context of governmental inaction, stemming from the foundational US administrative law case, *Massachusetts v. EPA*,[30] as well as the principle of "anti-abdication."[31]

supra note 13, at 129–32. Finally, there is also literature that draws on administrative law principles from systems of the commonwealth, and especially those associated with a very famous case called *Wednesbury*, to the context of constitutional rights adjudication. *See, e.g.*, Michael Taggart, *Proportionality, Deference, Wednesbury*, 2008 N.Z. L. REV. 423.

The "administrative law model" I flesh-out and defend in this Article differs substantially from these other incarnations found in previous scholarship, however. Cass Sunstein's identification of an "administrative law approach" inspired by the South African case of *Grootboom* captures only *one* component of the full model outlined here, and even this only partially. Professors Cohen-Eliya and Porat's description of an administrative law approach to constitutional rights adjudication is based on mostly *continental* approaches to administrative law rather than on the domestic field of administrative law *in the United States* on which I draw here. And the United States derived administrative law model I articulate in this Article is moreover different from the commonwealth approach that is influenced by the *Wednesbury* case, among other things in the technology of review that the former supplies to courts.

28. Chevron U.S.A., Inc., v. Natural Resource Defense Fund, 467 U.S. 837 (1984).

29. Motor Vehicles Manufacturers Ass'n v. State Farm, 463 U.S. 29 (1983).

30. Massachusetts v. EPA, 549 U.S. 497 (2007).

31. *See infra* notes 100, 101 and accompanying text.

With the basic components of the administrative law model in hand, Part III highlights how exactly this model diverges from proportionality and categorical reasoning. There are four main differences that I will flag. First, the administrative law model institutionalizes deference to political decision-makers to a much greater extent than the existing models. Second, the administrative law model, especially given what we will see are the upstream and downstream interactions between its various components[32] creates a unique structure that would allow systems to dynamically negotiate their level of commitment to key features of the existing models: on one hand, expansive rights and context-specificness in rights adjudication (associated with the proportionality model) and, on the other hand, a narrower set of rights and a more rigid, rule-like structure of rights adjudication that often relies on more "legalistic" modes of reasoning (associated with the categorical model). As we will see, under the administrative law model, it is possible that systems would retain (or pick anew) a dominant commitment to only one of these. However, and importantly, this negotiation can also end up with systems combining and experimenting under the administrative law model with both types of commitments in ways not clearly possible under the existing models. Third, the administrative law model introduces a novel technology for reviewing rights' claims that diverges substantially from what is available for them under proportionality and categorical reasoning. That technology is the "reasoned decision making" standard, associated with the *State Farm* case, which, as we will see, is a unique form of review that limits judges to look at the "reasoning process"[33] or "internal thought process"[34] that led to the decision in matters of rights rather than directly to the merits of those decisions. Finally, whereas in proportionality and categorical reasoning the ability of courts to review claims directed against governmental inaction—what may be called "initiation claims"[35]—is limited in crucial ways, the administrative law model substantially expands the focus on exactly that.

Part IV is my normative discussion where I take each of the distinctive features of the administrative law model flagged in the previous Part and explain why and how they could be thought of as attractive compared to proportionality and categorical reasoning. So, for example, I will suggest that the greater degree of deference the administrative law model institutionalizes has much going on for it because it enhances the place of political constitutionalism in the rights adjudication context compared to the existing models. I will moreover claim that the administrative law model's unique structure of dynamic negotiation between, on the one hand, expansive rights and context-specificity, and, on the other hand, limited rights and rigidity or variability seems valuable, too. It creates a kind of a

32. *See also infra* Part II, diagram I.

33. Gary Lawson, *Outcome, Procedure, and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 318–19 (1996).

34. Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 530 (1985).

35. This is my adaptation of the term "initiation rights" in Cass R. Sunstein & Richard B. Stewart, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1202 (1981).

desirable meta structure of rights adjudication that could lead systems to optimally combine these elements rather than fall into the trap of excessively relying on only one of them. And it does so in a way that is attentive to, rather than ignores, important differences between rights' cultures in different jurisdictions and places.

I will furthermore argue in Part IV that the "reasoned decision-making" standard can prove an incredibly appealing technology for rights' protection that might be superior to what courts draw on today under the existing models. For one, it implies a sensible allocation of roles between courts and political decision-makers in matters of rights that are free of some conceptual and practical difficulties afflicting the existing models. For another, this standard's focus on the more process-based element of adequate reason-giving, rather than on substance, seems especially important today in an age where rights disputes become more "fact-y,"[36] among other things given the rise of administrative states, as well as in an age of increased distrust in government. Finally, I will suggest that the expansive focus on judicial review of governmental inaction that is a feature of the administrative law model also seems to have much to commend. It will provide better protection for rights that the existing models currently do not protect well enough, including liberty rights, a right to governmental protection from the risks of private power, as well as to a nascent constitutional right to "effective government."[37] And this feature also helps close the circle of political constitutionalism itself, so to speak—because the focus that the administrative law model brings with it to situations of governmental inaction would provide avenues for outsiders to press governments not only to exercise their powers under the existing understanding of rights but also to consider new interpretations of rights.

Part V switches the focus to discuss the concerns the administrative law model might legitimately raise. There are three primary concerns that I will flag. The first is the concern of faux deference—that is, that the model will fail to deliver on the goal of providing more political constitutionalism and deference to political institutions. The second is what I will call the "too little/too much problem"—namely, that the administrative law model might prove either under-protective of rights or over-protective of rights at the expense of other rights or values. A final concern that could be raised against the model is what I will call the "administrative law outside administrative law" concern. By this I mean that the tools that have been developed specifically in the administrative law context may prove unsuitable to the institutions regulated by constitutional law that differ in important respects from administrative agencies.

While these concerns are not to be dismissed, I will suggest in Part V that they are also far from prohibitive. For instance, I argue that some degree of "faux

36. Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. REV. 175, 182 (2018).

37. *See infra* notes 296, 297 and accompanying text.

deference" may be desirable and that the correct lens through which we should view the administrative law model is not necessarily as a form of reflexive judicial deference but rather as a form of unique "dialogue"[38] between courts and politics in matters of rights. And I moreover suggest that there are various doctrinal (and other) solutions that systems could adopt to mitigate many of the model's remaining concerns and costs.

Part VI concludes by suggesting where the administrative law model might prove suitable already today. I argue that this is most clearly the case in the jurisdiction from which this model originates—the United States. And I will even propose that realizing that the administrative law model exists can surprisingly increase the chances of achieving meaningful and desirable changes in the trajectory of American constitutional law, at least in the medium term. This is true, I argue, notwithstanding the current trend of "anti-administrativism"[39] in American courts and beyond under which central tenets of administrative law, including the ones I build on here (such as *Chevron*), are under fierce attack. As I will suggest, this trend might be transient rather than enduring and should not deter us from ambitiously seeking to expand administrative law's domain.

Saying with similar confidence that the administrative law model is immediately suitable outside the United States is more challenging though. While I provide reasons for thinking that the administrative law model is *generally* attractive, we should also be mindful that different systems or jurisdictions may have legal structures in place that would make embracing the model in full and right away tricky (including what comparative scholars refer to as "limitation clauses").[40] Nonetheless, even if the administrative law model cannot be adopted in other places in full under current legal conditions, there is nothing that should prevent various systems from considering embracing the model at least in part. And indeed, I will suggest that there are strong signs that they should, including a renewed criticism of "juristocracy"[41] in matters of constitutional rights in some places around the globe, the appearance of what has been called a "procedural turn"[42] in constitutional rights adjudication, and, finally, the increased constitutional attention– in large part because of the COVID-19 pandemic– to matters of governmental "underreach."[43]

Before diving into the argument, two clarifications are in order. First, my main goal in this Article is to introduce a genuinely new model for constitutional

38. *See infra* notes 316, 317 and accompanying text.

39. Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017).

40. *See infra* Part VI.B.

41. RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2009).

42. Oddný Mjöll Arnardóttir, *The 'Procedural Turn' Under the European Convention on Human Rights and Presumptions of Convention Compliance*, 15 INT'L J. CONST. L. 9 (2017).

43. David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AM. J. INT'L L. 608 (2020).

rights adjudication. The aim is to illustrate to US audiences how our own federal administrative law can be "exported" to the context of constitutional rights with great gains, and to introduce to audiences beyond the United States the potential appeal of this US administrative law-derived approach to rights adjudication. Because this task is substantial, the discussion in this Article is necessarily preliminary in nature and cannot incorporate all the issues that the introduction of this model may plausibly surface. My hope is that further refinements, complications, and challenges will stand at the center of future work that would be able to build on the foundation I lay here.

Second, this Article is about doctrinal structures in matters of rights. It focuses on what we can think of as the "meta"[44] level, or on doctrinal "architecture."[45] That does not mean that the readers should prepare themselves for a rather boring read that has no real-life stakes (as meta discussions sometimes seem to imply). And, indeed, the heated debates between proponents and opponents of either proportionality or categorical reasoning, which we will encounter very soon, strongly suggest this much. What this focus on meta or architecture does mean is that discussion in the Article will often gloss over many of the specific controversies including controversies about abortion rights, free speech, and antidiscrimination, that make the field of constitutional rights so crucial and exciting, both in general and especially today.

I. OUR PRESENT BINARY

It is hard to dispute that in the world of constitutional rights adjudication we are living in a binary. As things currently stand, only proportionality and categorical reasoning seem available to us as "models" around which we can organize systems for adjudicating rights. But what exactly do each of these models entail? To show that we can and should go beyond this binary, we first need to understand what the binary supplies to us. This Part tries to do just that.

A. Categorical Reasoning

I begin with the categorical reasoning model. Briefly speaking, several characteristics of this model seem important to capture how it works.

(*) Classifying and labeling. The first feature is that a key responsibility of judges operating on the basis of the categorical model is to perform a "job of classification and labeling," like any good "taxonomer" would do.[46] Indeed, to

44. Mark Tushnet, *The Coverage/Protection Distinction in the Law of Freedom of Speech—an Essay on Meta-Doctrine in Constitutional Law*, 25 WM. & MARY BILL RTS. J. 1073 (2017).

45. *See* Frederick Schauer, *Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND US CONSTITUTIONALISM 47 (George Nolte ed., 2005).

46. Kathleen M. Sullivan, *Categorization, Balancing, and Government Interests*, in PUBLIC VALUES IN CONSTITUTIONAL LAW 241, 241 (Stephen E. Gottlieb ed., 1993).

get any traction in the categorical reasoning model on issues of rights, judges initially face a series of "threshold"[47] questions on which it is very common to find them spending a lot of time. For instance, judges might ask themselves: how far exactly does a particular right reach? Or what is its precise substance, meaning, or scope? Judges may moreover ask: what are the right's manifestations that are generally more valuable or that would generally be more vulnerable to unjustified governmental infringement? And conversely: what manifestations of this right would be less valuable or vulnerable in this way? Alternatively, judges may approach the task of "classifying and labeling" from the side of the governmental act infringing the right. They might ask for example: which circumstances of a right's infringement would normally raise greater suspicion for impermissibility? And which would not raise such suspicion?

Under the categorical model, the responses to these various questions would then lead judges operating to either screen out claims from the domain of constitutional rights entirely, if they are found outside the scope of the right in question, or to sort rights claims into various "boxes" within that domain.

(*) Varied, bespoke, and often rigid and outcome-determinative standards of review. A second central characteristic of the categorical model is that the results of the previously discussed "classifying and labeling" stage, to the extent that a claim was found to be within the domain of constitutional rights, will trigger a series of varied tests or tiers of review that guide the judicial inquiry into claims involving rights. Sometimes these standards can be bespoke standards that simply limit judges' analysis to certain questions or elements that are involved in a particular dispute about rights, akin to creating a deliberate "tunnel vision" in this matter for the decision-maker. Examples here are tests about "time, place, and manner" restrictions or speech or the "undue burden" for abortion rights, now of course obsolete after the US Supreme Court's dramatic decision in *Dobbs*.[48]

In many cases, however, these standards are more general than that. They produce a series of well-known tiers of scrutiny. And what characterizes these tiers is that they are meant to be relatively "outcome determinative,"[49] very much in the way we think of rigid rules as opposed to standards.[50]

47. MÖLLER, *supra* note 8, at 74.

48. *Cf.* STEPHEN G. BREYER, BREAKING THE VICIOUS CYCLE: TOWARD EFFECTIVE RISK REGULATION 11–19 (1993). Prominent examples are the test that restricts judges to "time, place, and manner" restrictions in the context of First Amendment, *see, e.g.*, Hill v. Colorado, 530 U.S. 703 (2000), or the "undue burden" in the context of abortion rights, *see* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

49. Evelyn Douek, *Governing Online Speech: From Posts-As-Trumps to Proportionality and Probability*, 121 COLUM. L. REV. 759, 772 (2021).

50. The literature on the divergence of rules and standards is of course significant. Prominent contributions include Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Kathleen M. Sullivan, *The Supreme Court 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 65-6 (1982); Louis Kaplow, *Rules v. Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

On one end of the spectrum, and for rights (or manifestations of rights) that judges found at the initial "classifying" stage to fall into a category or box of "high value" or "high vulnerability," courts apply a standard that begins with a very strong presumption of unconstitutionality. In the United States, which is probably the only jurisdiction committed to the categorical model, this standard of review is famously known as strict scrutiny. It requires a showing that the governmental goal supporting the infringement of the right is "compelling"[51] and that the means it chose "minimally impair" the right in question, or are "narrowly tailored."[52] And indeed, strict scrutiny has a general reputation in the United States as a very robust standard that may be not only strict in theory but is potentially "fatal in fact."[53]

However, on the other end of the spectrum, for rights or manifestations of rights that fall under a category of "low value" or "low vulnerability," courts in the categorical reasoning model apply a standard of review that begins with a very strong presumption of *constitutionality*. In the United States, this standard is known as rational basis or minimum rationality.[54] And it is indeed usually very weak, not to say "meaningless."[55] Under it, infringement on rights is highly likely to be found constitutional unless wholly irrational; in other words, that it is not likely to achieve *any* legitimate governmental goal.[56]

In between those tiers, courts in the categorical reasoning model apply what public lawyers in the United States call "intermediate scrutiny."[57] This tier of review requires that governmental goals that may infringe on individual rights are "important"[58] and the means chosen to pursue them are "substantially related."[59] And while it is meant to be much less outcome-determinative than the previous tiers, in principle it is also meant to apply to a relatively minimal number of classes of rights disputes.[60]

* * *

51. *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995).

52. Grutter v. Bollinger, 509 U.S. 306, 326 (2003).

53. Gerald Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

54. *See generally* Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 Va. L. Rev. 1627 (2016).

55. Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 410 (2016).

56. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 487–88 (1955).

57. See Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298 (1998).

58. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

59. *See, e.g.*, Lehr v. Robertson, 463 U.S. 248, 266 (1983).

60. In the United States, intermediate scrutiny formally applies to relatively few categories, which include most conspicuously claims for discrimination based on gender and infringements on commercial speech. *But see infra* note 119 and accompanying text for why in practice that description may not be stable.

Combined, the two features I described capture much of what is distinct about the categorical reasoning model for adjudication rights. They also obviously help explain the name given to it. But this model has a few *other* important features worth highlighting separately.

(*) Rights are narrow and act as "trumps." One such additional feature is that rights under the categorical model tend to be narrow but strong.[61] This is first and foremost the result of the importance of the initial task of "classifying and labeling," which can quite naturally lead courts to narrow the meaning of rights and keep the domain of rights restricted rather than expansive.[62] However, this narrowness of rights is also the result of the stringency of the strict scrutiny standard that, by its nature and given the acceptance that rights today are not generally absolute, can only be preserved for relatively few rights or manifestations of rights. This means that there is a built-in incentive under the categorical model that most rights that have "survived" the initial stage of categories to be cordoned off to the weaker standards of review.[63]

This narrow domain of rights that can also come with very strong judicial protection in the form of strict scrutiny that might be "fatal in fact" is precisely what makes the categorical model closely associated with Ronald Dworkin's idea of rights as "trumps."[64]

(*) A prominent place for "distinctively juridical technologies." Another feature of the categorical model is that it is quite hospitable for reasoning about constitutional rights and solving rights disputes in what can be called "distinctive juridical technologies"[65] such as text, precedent, or history.[66] And indeed, in the United States, judges commonly rely on these kinds of "technologies" in rights disputes rather than on more instrumental, empirical, or explicitly moral features

61. *See* Greene, *supra* note 16 (arguing that the rights model in the United States leads to both a narrowing category of what is to be considered rights, and offers quite strong protections for rights).

62. The most salient example is "uncovered" speech in First Amendment law. *See, e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 382-86 (1992) (discussing the relevant categories of protected and unprotected speech).

63. I note, though, that this is not a conceptually necessary conclusion, but merely a tendency, a point illustrated in the United States by the claim of increased *Lochnerization* of the First Amendment. *See, e.g.*, Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

64. *See* Dworkin, *supra* note 11.

65. Greene, *supra* note 16, at 63.

66. These constitute only a portion of the well-known "modalities" of constitutional argument. On the modalities, *see* PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 9 (1991); Richard H. Fallon. Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

of rights and their infringement. These "legalistic,"[67] "conceptual,"[68] or "expository"[69] arguments can be the conclusive word in solving disputes in matters of rights, such as where they determine what comes within a right's scope in the first place. Alternatively, these legalistic, conceptual, or uniquely juridical technologies of reasoning can serve as the criteria that help courts decide to which box a specific claim of rights belongs and what test would then apply.[70]

(*) Deference in the categorical model. A final feature of the categorical reasoning model worth emphasizing here is its approach towards deference to political decision makers. For the most part, and certainly if one takes its cues from contemporary US law, the categorical model is not very open to deference, certainly not at the level of official doctrine. Indeed, the task of classifying and labeling rights into their respective categories or how to "interpret" the meaning or scope of constitutional rights is conceived in this model to be a purely judicial one that calls for no explicit deference.[71] In the United States, the famous slogan here comes from *Marbury v. Madison*: it is the judiciary's province to "say what the law is."[72]

Similarly, when courts employ strict scrutiny, intermediate scrutiny, or any of the relevant "bespoke" standards that operate in categorical reasoning, they are usually far from deferential as well. They engage in independent substantive evaluation of the dispute, including deciding themselves what would be considered a "compelling" interest or a sufficiently "narrowly tailored" means.[73] And courts do so quite freely, basing their evaluations on new facts and new arguments they receive in the process of litigation, often in the form of *amicus*

67. Mattias Kumm & Victor Ferrerz Comella, *What Is so Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Effect*, in THE CONSTITUTION IN PRIVATE RELATIONS: EXPANDING CONSTITUTIONALISM 241, 278 (Andras Sajo & Renata Uitz eds., 2005).

68. Adrienne Stone, *Introduction*, in THE OXFORD HANDBOOK OF FREE SPEECH xiii, xix (Adrienne Stone & Frederick Schauer eds., 2021).

69. For this term, *see* Randy J. Kozel & Jeffrey Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 141–46 (2011).

70. On the rise of historical categories in First Amendment law and a critique, *see, e.g.*, Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166 (2015). And for the increased use of historical and traditional sources in US constitutional law more broadly, and in the recent judgments by the Roberts Court, *see generally* Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. (2023).

71. Some describe this feature of the model as "juricentric." *See* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Powers*, 78 IND. L.J. 1 (2003).

72. Marbury v. Madison, 5 U.S. (I Cranch) 137, 177 (1803).

73. As Professor Peter Cane aptly describes the state of affairs: there is an "externally derived and judicially imposed benchmark of propriety" to which governmental decision makers must aim if they want to survive review. *See* PETER CANE, CONTROLLING ADMINISTRATIVE POWER: A HISTORICAL COMPARISON 255 (2016).

curiae briefs.[74] Finally, the remedy courts provide is a "heavy"[75] one—they strike down the decision. This means that governments are not normally allowed a redo under the categorical model.

Only under rational basis which, as we saw, is inherently weak, courts tend to exemplify high measures of deference under the categorical model. In fact, under rational basis, deference seems especially strong because courts are allowed to approve the constitutionality of a governmental action based on any "conceivable"[76] rationale, which means even a rationale that courts (or litigants) can "dream up" in the litigation process and which was not meaningfully articulated by the government itself (not to mention guided its actions). In other words, under rational basis, courts might even "shoulder"[77] governmental decision makers.

Even here, though, there is a limit to this deference. Indeed, in those cases where courts do intervene under rational basis, their remedy is again mostly the heavy one of a strike down. Thus, a redo is not normally allowed.[78]

B. Proportionality

Things are different in many respects under the proportionality model, the so-called "global model"[79] of constitutional rights adjudication.

(*) No labeling and classifying. For one, under the proportionality model there is no significant task of "classifying and labeling" of rights and fitting them to distinct boxes as we have seen under the categorical model. While judges in systems that embrace proportionality also nominally ask themselves "threshold" questions,[80] including what is included within the scope of the right, in the vast majority of cases this threshold question would be extremely thin and quickly glossed over.[81] Judges in the proportionality model certainly are not perceived as, or meant to be, spending time at this initial stage on creating categories and

74. Professors Yoav Dotan and Michael Asimow dub this practice one of *open* reasons and records. *See* Michael Asimow & Yoav Dotan, *Open and Closed Judicial Review of Agency Action: The Conflicting US and Israeli Approaches*, 64 AM. J. COMP. L. 521 (2016). For a general discussion of deference to facts in constitutional adjudication, and the relevant complexities and sometimes inconsistencies, *see* Larsen, *supra* note 36, 218–31.

75. Wheeler v. Montgomery, 397 U.S. 280, 283 (1970) (Burger, C.J., dissenting).

76. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 174 (1980); FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993).

77. Cooper Laboratories, Inc. v. Commissioner, 501 F.2d 772, 790 (D.C. Cir. 1974) (Leventhal, J., dissenting).

78. We will see later some exceptions to this general tendency in the case law. *See infra* note 118 and sources cited therein.

79. MÖLLER, *supra* note 8.

80. *See* Nelson Tebbe & Micah Schwartzman, *The Politics of Proportionality*, 120 MICH. L. REV. 1307, 1318 (2022).

81. *See, e.g.*, Stephen Gardbaum, *The Myth and Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 424 (2008).

deciding which manifestations of rights are more valuable or vulnerable, for example.[82] These types of considerations are relevant at a different stage, as we will soon see.[83]

(*) Single, flexible, non-outcome-determinative standard of review, with four components that include "balancing." Given this weak initial stage, much of the judicial work under the proportionality model is left to the stage of review itself rather than that of definition and scope. And here, precisely because judges in this model do not tend to linger on classifications and labels, there is in principle only one unified standard of review that applies across the board rather than a more complex structure of different bespoke standards of review or the tiers we see in categorical reasoning. Moreover, and for the same reason, that standard is not rigid or outcome-determinative. To the contrary: the standard is flexible and open to various applications and results—a kind of "intermediate-scrutiny-for-all."[84]

Famously, the unified standard courts utilize in the proportionality model is the well-known proportionality protocol. This protocol has, depending on the version, three or four key steps,[85] and some jurisdictions or systems tend to apply them sequentially[86] whereas others do so more flexibly and as a sort of a gestalt.[87] In the first step, courts must ask themselves if the goal the government is pursuing is legitimate or worthy, a usually very weak bar that is easily crossed in most cases.[88] In the second step, courts ask a question of "rationality" or "suitability," namely—whether the means chosen by the government can be said to fulfill the government's legitimate goal. Courts also almost always find this step satisfied. In the third step, courts ask a question of "necessity," namely whether there are means that can achieve the goal that are "less restrictive" on the right in question. Finally, the fourth step is "overall balance," proportionality "as such," or proportionality "in the strict sense" (*stricto sensu*), among other names. In this final step, courts engage in an openly normative act of balancing which evaluates

82. Tebbe & Schwartzman, *supra* note 80, at 1318.

83. *See infra* note 89 and accompanying text.

84. Greene, *supra* note 16, at 58. *See also* Edmonton Journal v. Alberta (Attorney General) [1989] 2 S.C.R. 1326, 1355–56 (Canada) (emphasizing, in the context of Canadian jurisprudence, that the outcome of each dispute is highly context dependent).

85. Scholarship is full of descriptions of the protocol and those exhibit minor variations. *Compare* Stone Sweet & Mathews, *supra* note 17, at 802–04 (presenting proportionality as a three-step protocol) with BARAK, *supra* note 13, at 131–33 (presenting proportionality as a four-step protocol). My presentation in the text brackets these nuances in ways that I think do not seriously compromise any important detail.

86. Canada and Germany are leading examples. *See, e.g.*, Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383 (2007).

87. South Africa is the leading example here. *See* S v. Manamela & Another 2000 (3) SA 388 (CC) [18] (S. Africa). For the distinction between "vertical proportionality," which applies the protocol sequentially, and "horizontal proportionality," which applies it flexibly and as a gestalt, *see* JONAS CHRISTOFFERSEN, FAIR BALANCE: PROPORTIONALITY, SUBSIDIARITY, AND PRIMARITY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS 69–76 (2009).

88. *See, e.g.*, NIELS PETERSEN, PROPORTIONALITY AND JUDICIAL ACTIVISM: FUNDAMENTAL RIGHTS ADJUDICATION IN CANADA, GERMANY AND SOUTH AFRICA 117–19 (2017).

whether the infringement on the rights is ultimately justified given the harm it causes and the value of the goals the government seeks to achieve. At this stage, courts can take under consideration a multitude of circumstances and features, free of categories that necessarily create a "tunnel vision" and leave some residue of considerations out of the picture, including the nature of the right in question (like how valuable or vulnerable it is), the circumstances of the infringement of the right or how it is enjoyed, and much more.[89]

* * *

While the lack of labeling and classifying on one hand, and the existence of a single, non-outcome-determinative, and highly flexible standard of review that draws on the four-step proportionality protocol and includes a last "balancing" step on the other hand, are undoubtedly much of what makes the proportionality model distinct, let me highlight a few other features of this model that would help to further emphasize how it differs from categorical analysis.

(*) Expansive, even "inflated" rights, and no trumps. First, in contrast to categorical reasoning and precisely because the task of labeling and classifying is not a strong feature of this model, rights tend to be much more expansive under proportionality even if—because the same standards apply to *all* rights claims—they do not behave as "trumps."[90] In fact, not only are rights expansive here, it is well-documented that under the proportionality model, rights tend to become "inflated."[91] Indeed, what may strike us as even marginal individual interests could be considered as rights and trigger serious judicial inquiry and ultimate protection (in the famous examples mentioned in the literature, the proportionality model might accept that there is a right to feed pigeons,[92] to ride horses in the woods,[93] and even a constitutional right to go to sleep).[94]

(*) Empirical, instrumental reasons rather than "distinctive juridical technologies." Second, in the proportionality model, the reliance on "distinctive juridical technologies" that we often see under the categorical reasoning model is extremely thin, even nonexistent.[95] Most of the focus is on the reasons that would matter for the application of the proportionality protocol, which are more

89. *See, e.g.*, Sujit Choudhry, *So What is the Real Legacy of* Oakes*? Two Decades of Proportionality Analysis Under the Canadian Charter's Section 1*, 34 S.C.L.R. 501, 503 (2006) (highlighting that the lesson of Oakes, which introduced the proportionality standard into Canadian jurisprudence and has been hugely influential comparatively, is the "need to tailor judicial review to the unique context of each case.").

90. *See* Greene, *supra* note 16, at 65.

91. *See* GEORGE LESTAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 126 (2007); Kai Möller, *Proportionality and Rights Inflation*, in PROPORTIONALITY AND THE RULE OF LAW 155 (Grant Huscroft et al. eds., 2014).

92. *See* MÖLLER, *supra* note 8, at 4.

93. *Id.*

94. *See* LESTAS, *supra* note 91, at 126.

95. *See* Greene, *supra* note 16, at 63.

instrumental or "prescriptive"[96] in nature and indeed straightforwardly political, moral, or empirical. Because of this more instrumental, and less "legalistic" or "conceptual" nature of the judicial inquiry when utilized, the proportionality model is often associated, in both scholarship and judicial practice, with ideas about the existence of a fundamental right to justification or, more broadly, a "culture of justification."[97] These are then contrasted with a "culture of authority"[98] that is substantially characterized by the resort to more legalistic modes of reasoning in rights' issues and which is precisely what the categorical model, as we have seen before,[99] allows.

(*) Deference in the proportionality model. Finally, the proportionality model's approach to deference to political decision-makers is less schizophrenic than what we see with the categorical reasoning model. In general, systems committed to proportionality tend to acknowledge that some measure of deference may be appropriate across the entire domain of constitutional rights adjudication, a fact that is captured in the domestic context by the development of terms like a "zone of proportionality,"[100] and in the international context by the development of the concept of the "margin of appreciation."[101] Nonetheless, there is much ambiguity about where and how deference would apply, and cross-jurisdictional practice also varies substantially.[102] The best description of the state of deference in the proportionality model across the world seems to be, crudely, that it exists to some extent but is not dominant and far from fully institutionalized. More often than not, courts in systems committed to the proportionality model engage in the independent interpretive and substantive application of rights claims, including especially in the final steps of the proportionality standard of "necessity" and proportionality "as such."[103] That is, courts decide for themselves what goals are permissible, what are the least restrictive means, and what is the appropriate overall balance between goals and means—as the proportionality protocol instructs. At most, courts give some weight to the government's view, the extent

96. Kozel & Pojanowski, *supra* note 69, at 141–46.

97. Leading expositions of this view are COHEN-ELIYA & PORAT, *supra* note 13; Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 L. & ETHIC. OF HUM. RTS. 141 (2010), and David Dyzenhaus, *Proportionality and Deference in a Culture of Justification*, in PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, REASONING, JUSTIFICATION 234 (Grant Hscroft et al. eds., 2014).

98. *See* COHEN-ELIYA & PORAT, *supra* note 13, at 4.

99. *See supra* notes 65–70 and accompanying text.

100. *See* BARAK, *supra* note 13, chapter 14.

101. *See generally* ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012).

102. *See, e.g.*, Cora Chan, *A Preliminary Framework for Measuring Deference in Rights Reasoning*, 14 INT'L J. CONST. L. 851, 661 (2016).

103. *See, e.g.*, Alison L. Young, *In Defence of Due Deference*, 72 MODERN L. REV. 554, 555 (2009).

of which is itself up to the court's discretion and is not guaranteed to be substantial.[104]

Finally, as to remedy, the proportionality model's key remedy is almost always a strike down. This means that aiming for a "redo" by the government, in the sense of *doing the exact same thing* after an adverse judicial order, is not normally open to decision-makers. To do so, governments in the proportionality model would have to draw on various mechanisms that would "override" the adverse judicial ruling (to the extent that those exist).[105]

C. Similarities, Instabilities, Infidelities, and Why the Models Matter

All these differences between the categorical reasoning model and proportionality described in the previous Section have served as fodder for many fierce debates in both the fields of domestic and comparative constitutional law, as well as in the community of international human rights.[106] We will see some of the arguments in more detail later in Part IV.[107] At this stage, however, it is important to note that the models are not necessarily as distinct as some might suggest.

(*) Similarities between the models. First, there are important similarities between these models in their various doctrinal components. Most obviously, there is a clear similarity between, on one hand, the requirement of "minimal impairment" or "narrow tailoring" that exists in the categorical reasoning model's strict scrutiny tier and, on the other hand, the "least restrictive means" requirement in proportionality. And the requirement of "suitability" in proportionality (the second step of the protocol) is also identical to the requirement that we see even in a rational basis for lack of irrationality.

Perhaps less obviously, though, the categorical reasoning model's function can at least in part be viewed as a case of "definitional," "principled," or even "meta" proportionality.[108] True, as I have emphasized, in their task of "classifying and labeling" in the categorical reasoning model courts sometimes draw on more legalistic forms of argumentation or on "distinctively juridical technologies."[109]

104. *See generally* Chan, *supra* note 102.

105. I return to this issue below, *see infra* note 348 and accompanying text.

106. *See infra* sources cited throughout Part IV.B. For some glimpse of how these debates have indeed been fierce and passionate, consider the title of one article that tries to summarize and contribute to these debates: Matthias Klatt & Mortiz Meister, *Proportionality—A Benefit to Human Rights? Remarks on the ICON Controversy*, 13 INT'L J. CONST. L. 354 (2015).

107. *See infra* Part IV.B.

108. For these terms, *see* Jochen von Bernstoff, *Proportionality without Balancing: Why Judicial Ad Hoc Balancing is Unnecessary and Potentially Detrimental to the Resolution of Individual and Collective Self-determination*, in REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 63, 76 (Liora Lazarus et al. eds., 2014); BARAK, *supra* note 13, at 12, 542; Melville Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 938 (1968).

109. *See infra* notes 65–70 and accompanying text.

But this is not always the case. As I have also highlighted, sometimes courts using the categorical reasoning model build these categories on elements such as the justifications for the right or their likely applications or consequences in the real world—including what is more valuable or vulnerable and what is less so. When courts reason in such a manner, they are essentially guided by the same ideas that are prominently featured in the proportionality model, and especially the final stage of the proportionality protocol of proportionality "as such" that requires balancing. The only difference is that they do so in a *more general, a priori way*, given this model's commitment to a more rule-like (rather than standard-like) structure of adjudicating rights.

(*) Convergence between the models. Second, one must also consider the possibility that proportionality and categorical reasoning will tend to converge with one another, both in style and results.[110] For example, the categorical model can become more like proportionality when courts introduce exceptions to their own created categories of rights and when these exceptions proliferate.[111] Such proliferation, after all, undermines the ability to speak sensibly of a robust category that is truly outcome-determinative. It also gives judges much flexibility to drive to the results they deem just in the specific cases at hand—a component of the model on the other side of the binary (and, of course, judges are moreover always free to create a new category that seems general but is in fact tailored to only the case at hand).

As to the proportionality inquiry: while it is certainly conceptualized and may in fact begin as highly context-specific—which some say is this model's defining feature[112]—proportionality too can transform into a more categorical framework, particularly as judges gain more experience with the relevant constitutional issues and can thus arrive at more concrete specifications of how they might structure their decisions.[113] In fact, there are now important discussions in systems committed to the proportionality model that encourage courts to do exactly that, by, for example, "calibrating" their intensity of review under proportionality or "systematizing" it to more defined categories, very much like how, as just discussed, categorical reasoning can be understood as "principled," "categorical," or "meta" proportionality.[114] What is more, it seems that courts committed to proportionality across various domestic jurisdictions and

110. On the general tendency of rules to become more like standards, and vice versa, *see* Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303.

111. On the proliferation of exceptions in First Amendment law, *see, e.g.*, Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 515 (1996). On the proliferation of exceptions in Fourth Amendment law, *see, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

112. Evelyn Douek, *All Out of Proportion: The Ongoing Disagreement about Structured Proportionality in Australia*, 47 FED. L. REV. 551, 553 (2019).

113. This is a hypothesis most prominently raised by Fred Schauer. *See* Schauer, *supra* note 45.

114. *See, e.g.*, Rosalind Dixon, *Calibrated Proportionality*, 48 FED. L. REV. 92 (2020); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 CAMBRIDGE L.J. 174 (2006).

at the international level already engage in this calibration approach in practice, though perhaps this calibration is "softer"[115] and less outcome-determinative than what we usually attribute to the tiers of scrutiny in the United States

(*) Infidelities in the models' operation. Finally, it is far from uncommon to observe, in particular jurisdictions that are ostensibly committed to either one of the models, a series of "anomalies" or "infidelities" that do not really square with those commitments.[116] For instance, in the United States, even though strict scrutiny is considered an almost "fatal" test, we know that it is not always so in practice.[117] Additionally, rational basis's regular weakness might occasionally and perhaps unexpectedly become more aggressive and have real "teeth" or "bite."[118] And the introduction of "intermediate scrutiny" in the United States as a goldilocks standard between strict scrutiny and rational basis also created significant instability within the categorical model—signified by the title of one important article that describes intermediate scrutiny as the "test that ate everything."[119]

Conversely, while the proportionality model is meant to be "heavy on the bottom" rather than "on the top,"[120] in the sense that most of the judicial work is to be performed not at the initial stage of defining the scope of rights or the "labels" into which rights fall but rather in applying the proportionality standard, it is not rare to see places where the proportionality model is "heavy on the top." Indeed, sometimes we see courts in jurisdictions committed to proportionality determine the outcome of cases based on questions of the rights' scope—partly because systems that adhere to the proportionality model also accept the existence of some absolute or "essential" rights.[121] Other times, courts employ the legitimate goal step of the proportionality protocol to strike down governmental

115. For the idea of "soft trumping," *see* MATTIAS KLATT & MORITZ MEISTER, THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY chapter 2 (2012).

116. Here I note as well that some pockets of US law do seem to explicitly rely on proportionality, both as principle but more clearly as doctrine. *See* Jackson, *supra* note 15, at 3096; E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW (2009); Stone Sweet & Mathews, *supra* note 17, at 814–24.

117. *See, e.g.*, Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006). On the various uses of the strict scrutiny tier, see the lucid discussion in Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267 (2007).

118. Gunther, *supra* note 53, at 21. *See also* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018) (illustrating many ways through which rational basis becomes more aggressive than the standard picture or "canon" of that test normally portrays).

119. Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783 (2007).

120. For these terms, *see* Denise G. Reaume, *Limitation on Constitutional Rights: The Logic of Proportionality*, 26 OXFROD LEG. STUD. RES. PAPER (2009).

121. *See, e.g.*, Sebastian Van Drooghenbroeck & Cecilia Rizcallah, *The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?*, 20 GERMAN L.J. 904 (2019). See also Article 19(2) of the German Basic Law which states "In no case may the essence of a basic right be affected."

actions as unconstitutional, much like how we expect the categorical model to work.[122]

(*) How to understand the differences. Despite all this, the differences between the models still seem to matter. They clearly represent distinctive jurisprudential commitments and "intellectual styles"[123] about how to adjudicate disputes regarding rights. And systems do seem to exemplify systematic adherence or preference to one of the models, and an aversion to the competitive model. In the United States, the idea of forgoing categories and engaging in the context-specific analysis associated with proportionality, and especially the final stage of the relatively free-form normative balancing, has been characterized as "startling and dangerous."[124] And in systems committed to the proportionality model, the idea of creating sharp categorical definitions for rights, while avoiding context-specific balancing, has been framed as nothing less than having your head in the sand and "avoiding an unavoidable choice."[125]

Consequently, the models might still have significant real-world effects. For one, they might impact how cases come out and which cases are litigated in the first place. Categorical reasoning will tend to defend fewer rights and usually do so more powerfully and predictably, whereas proportionality will tend to defend more rights and in a less predetermined and powerful way. For another, and perhaps more importantly, the models may help reflect, sustain, and construct a particular *culture and politics of rights* in a system that seems deeply committed to one of the models—including what is the social meaning of having rights in the first place, the political discourse we employ in matters of rights, and more. In categorical reasoning, rights are much more either/or and the domain of constitutionality is limited and restrictive. Moreover, rights are crucially determined based on arguments drawn from "modalities" that lawyers and judges uniquely employ and seem perhaps to possess unique expertise about—such as text, precedent, or history.[126] In proportionality, rights are seen as complex

122. For relevant discussion, *see* Iddo Porat, *The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law*, 27 CARDOZO L. REV. 1393, 1403–06 (2006); Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in LAW, RIGHTS, DISCOURSE: THEMES FROM THE LEGAL PHILOSOPHY OF ROBERT ALEXY 131, 142–48 (George Paulsen ed., 2007).

123. Daniel A. Farber, *The Categorical Approach to Protecting Speech in American Constitutional Law*, 84 IND. L.J. 917, 919 (2009).

124. Alvarez, 567 U.S. at 717. For important scholarship presenting a critique of balancing, *see* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711 (1994); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

125. HCJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel (11 December 2005), ¶ 46 (Israel).

126. And especially history of the kind lawyers, and originalist lawyers in particular, find relevant. On the tension between law office and originalist history, on one hand, and history as understood by historians, on the other hand, *see, e.g.*, Jack Balkin, *Lawyers and Historians Argue About the Constitution*, 35 CONST. COMMENT. 345 (2020).

bundles that can more easily be challenged by claims from the other side. We also come to the domain of rights more easily and quickly, including by getting courts to hear our claims. And judges and the political culture broadly draw more consistently on politics, empirics, and morality in matters of rights directly and openly rather than in a way intermediated by a lawyer's unique "craft" or tools.

II. THE NEW "ADMINISTRATIVE LAW MODEL"

My claim in this Article is that we can move beyond this binary that Part I sketched. Indeed, there is *another* available model around which we can structure systems for adjudicating rights that combines key elements of categorical reasoning and proportionality but is also distinct from them. And surprisingly, this other model is hiding in plain sight. It originates from—or is inspired by—a usually glossed over corner of American public law in this context: the corner of federal administrative law.

This Part presents the new model.

A. What's Constitutional Rights Got to Do with It?

Before proceeding to the important task of elaborating on the doctrinal features of this new model, let me first deal with a potential hurdle. The hurdle is captured by the title of this Section (with apologies to the late Tina Turner): what's constitutional rights got to do with… administrative law?

My reason for flagging this is that I would not be surprised if some readers, especially from the United States, may be puzzled by the suggestion that administrative law is an appropriate place to look at as a model for adjudicating constitutional rights. After all, US federal administrative law is not often considered to belong in the domain of *constitutional* rights. Rather, the much more common view is that the "task"[127] of administrative law is to regulate the behavior of specific institutions called administrative agencies,[128] that operate under delegated powers, and which formulate and execute "regular" policies.[129] Moreover, administrative law in the United States is not directly grounded in the so-called "big-C" Constitution.[130] Rather, it is based on "regular" statutes, the most important of which is of course the Administrative Procedure Act (APA)[131]

127. Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927).

128. My focus here is on federal administrative law in the United States rather than state or local administrative law. For some discussion of important differences, *see, e.g.*, Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 567 (2017).

129. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 307 (1927) (remarking that the fields of administrative law and constitutional law differ from one another in "the content of the materials [and] the nature of the interests.").

130. For the "big-C" v. "small-c" distinction, *see, e.g.*, Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1081 (2013).

131. 5 U.S.C. §§ 551, 553–559, 701–706 (2012).

and, more controversially, on what administrative lawyers call "administrative common law."[132]

Of course, this is not to say that administrative lawyers in the United States do not see any constitutional connections to their field. But the only ways that they do so today are, again, extremely limited. First, administrative law is often seen as connected to *structural* constitutional law, not constitutional rights, namely as a field whose goal is to "compensate" for (among other things) the lack of clear constitutional standing of administrative agencies in the text of the Constitution, which makes agencies known in the United States as the "headless" fourth branch.[133] If issues of constitutional rights are at all recognized to be involved in administrative law, it is only through the very narrow prism of constitutional procedural due process, which has to do with the decision processes that agencies must follow, rather than the substance of these decisions themselves (including especially if there is a requirement of a hearing).[134]

While deeply entrenched in the United States, this view of administrative law seems myopic, even misleading. The field of administrative law *can* be connected to constitutional rights much more widely than presently acknowledged. Most clearly for present purposes, administrative law can be seen as a field that consistently enforces constitutional rights that are simply "underenforced" today elsewhere in US constitutional law.[135]

The first example is substantive due process rights, or, as they are called outside the United States, rights to general liberty, autonomy, or to the "development of personality."[136] As is well-known, the US Supreme Court has rejected a more-than-toothless enforcement of these rights ever since the

132. *See, e.g.*, Jack M. Beermann, *Common Law and Statute Law in Administrative Law*, 63 ADMIN. L. REV. 1, 3 (2011).

133. *See, e.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

134. On the requirements of constitutional procedural due process, *see generally* Henry J. Friendly, "*Some Kind of Hearing*," 123 U. PA. L. REV. 1267 (1975). The qualification of "narrow" in the text is necessary because (1) this is the only constitutional right that is explicitly recognized as involved in administrative law consistently and (2) because constitutional procedural due process is itself highly limited in contemporary US law. For one, constitutional procedural due process doesn't apply to legislative and quasi-legislative processes. *Compare* Londoner v. City of Denver, 210 U.S. 373, 380–86 (1908); Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915). For another, constitutional procedural due process applies to what courts deem are "life, liberty, and property" interests under the Due Process Clause, which are now understood in importantly narrow ways. *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 599 (1972); Bd. of Regents of State Coll. v. Roth, 408 U.S. 564, 569–70 (1972).

135. The classic citation for the idea that constitutional law in the United States contains many areas of judicially underenforced constitutional norms is of course Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). *See also* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

136. *See* Article 2(1) of the German Basic Law (Germany).

repudiation of *Lochner*[137] and the consolidation of the equally well-known *Carolene Products*[138] "compromise"[139] or "settlement."[140]

Second, administrative law can be seen as a field that engages in consistent enforcement of socioeconomic rights, including a right to food, shelter, education, healthy environment, healthcare, safe working conditions, and more.[141] All of these are issues various administrative agencies consistently touch upon in their day-to-day operation. And as is well-known, the Supreme Court has so far rejected the place of meaningful judicial enforcement of socioeconomic rights as grounded directly in the US Constitution,[142] at least outside of some very narrow contexts.[143]

Finally, administrative law can be seen as a field that enforces an underenforced constitutional right for state or governmental protection against the "traps"[144] of private power, which, once more, can be seen as the consistent preoccupation of administrative agencies and which case law from the Supreme Court has emphatically dismissed from constitutional law "proper."[145]

To be sure once again: this specific link to constitutional rights is not obvious in the "hornbook" version of the doctrine in administrative law or the stories administrative lawyers tend to tell themselves. But it can be easily seen in its reality—namely, in the so-called libertarian and progressive strands of US administrative law that consistently pop up in case law and theory and even cycle between them with time. Today, we arguably live in the United States in an era of "libertarian administrative law"[146] that is focused more systematically on

137. Lochner v. New York, 198 U.S. 45 (1905).

138. U.S. v. Carolene Products, 304 U.S. 144 (1938).

139. LAURA WEINRIB, THE LIBERAL COMPROMISE: CIVIL LIBERTIES, LABOR, AND THE LIMITS OF STATE POWER, 1917–1940 (May 21, 2011).

140. Felix Gilman, *The Famous Footnote Four: A History of* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163, 164 (2004).

141. For a recent discussion, *see* Mila Versteeg, *Can Rights Combat Economic Inequality (Reviewing* SAMUEL MOYN, NOE ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018)), 133 HARV. L. REV. 2017 (2020).

142. *See, e.g.*, Dandrige v. Williams, 397 U.S. 471 (1970); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Maher v. Roe, 432 U.S. 464 (1977). In contrast to the federal level, states' constitutions do offer stronger protections of this kind. *See, e.g.*, EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013).

143. *See* Douglas v. California, 372 U.S. 353, 355 (1963); Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963); Bullock v. Carter, 405 U.S. 134 (1972); Lubin v. Panish, 415 U.S. 709 (1974); Griffin v. Illinois, 351 U.S. 12, 18–19 (1956).

144. JOHN OBERDIEK, IMPOSING RISK: A NORMATIVE FRAMEWORK 86 (2017).

145. DeShaney v. Winnebago County Dep't of Social Services, 489 U.S., 195–96 (1989). *See also* Harris v. McRae, 448 U.S. 297, 316 (1980). For a recent discussion of how the meaning of protection including within the scope of this rights ought to be expanded, *see* Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725 (2022).

146. Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393 (2015). For the rise of the major questions doctrine as a manifestation of this contemporary

protecting, via normal administrative law tools, substantive due process rights or a right to general liberty and is fearful of excessive governmental burdens on regulated entities. In the past, during the so-called "environmental era,"[147] the focus was on drawing on administrative law to protect socioeconomic rights and a right to governmental protection—that is, administrative law was keenly concerned with the wellbeing of regulatory beneficiaries.[148]

What these systematic tendencies of administrative law in the real world suggest, then, is that it is myopic to see the field of administrative law as merely a response to the problem of "delegated" power or as covering run-of-the-mill subconstitutional policymaking. Instead, administrative law is also a field that responds to the *substance* of governmental regulation itself and to the constitutional rights regularly involved in regulatory action (or inaction), which are precisely the kinds of rights I flagged before.[149] And while administrative agencies are certainly different institutions from those we commonly associate with constitutional law—such as Congress or the President[150]—it is also important to recall that in today's administrative state, both in the United States and elsewhere, administrative agencies are the "dynamo of modern government"[151] or how we "run a constitution."[152] That is, these agencies are more and more the bodies that do the work of governing in the modern State at the expense of the more "traditional" constitutional institutions. Consequently, looking at what agencies do and the field that regulates them, administrative law, may teach us much "about constitutional authority itself."[153]

Even if, however, one remains less convinced by these claims, there is still another reason why administrative law seems appropriate for constructing a model of constitutional rights review. This reason is less ambitious or

administrative law trend, *see* Oren Tamir, *Getting Right What's Wrong with the Major Questions Doctrine*, 62 COLUM. J. TRANS'L L. (forthcoming, 2024).

147. For important discussions of this "environmental era" in administrative law, *see* Alfred C. Aman, Jr., *Administrative Law in the Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101 (1988); Richard B. Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713 (1977); Robert Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986).

148. For the familiar distinction in administrative law between the perspective of regulated entities and regulatory beneficiaries, *see, e.g.*, Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397 (2007).

149. In the discussion below I will suggest *another* constitutional right that can be connected to the field of administrative law. *See infra* Part IV.D.

150. Though even here some caution is warranted. *See, e.g.*, Alan B. Morrison, *Administrative Agencies are Like Legislatures and Courts—Except When They're Not*, 59 ADMIN. L. REV. 1 (2007).

151. LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 33 (1965).

152. JOHN ROHR, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE (1986).

153. Daniel Halberstam, *The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies*, in COMPARATIVE ADMINISTRATIVE LAW 185, 193 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

controversial than implying, as I did now, that administrative law is already a field of "applied"[154] or "concretized"[155] protection of constitutional rights (though underenforced elsewhere). And the reason is this: the basic doctrines of administrative law conceptually fit to the domain of constitutional rights adjudication simply because courts ask on a high level of abstraction very similar, if not identical, questions. Indeed, in both fields, courts must ask themselves identical basic questions about interpretation of legal texts or the review of actions and decisions that go beyond mere interpretation by governmental institutions. We will see this immediately below in Sections B and C. And conceptually at least (I will talk about the legal aspects later),[156] there is nothing that should prevent us from "exporting" the tools that courts have developed in administrative law to the conceptually parallel domains of judicial activity in the field of constitutional law. In fact, in the United States (and increasingly elsewhere) there is literature on what is sometimes known as "administrative constitutionalism"[157] that substantiates exactly that. What this literature consistently shows is that issues of constitutional law—including constitutional rights but even issues like separation-of-powers or federalism—can easily be folded into the tools of "normal" administrative law and dissected through them. In the words of one leading scholar, administrative law can serve as an appropriate "vehicle"[158] for constitutional issues and constitutional law analysis.

In short, administrative law does seem like an appropriate site from which to construct a model for constitutional rights adjudication. With apologies to the late Tina Turner again, constitutional rights have everything to do with it. For one, the field of administrative law already deals with constitutional rights that are simply underenforced elsewhere, at least in the United States. Alternatively, the field of administrative law doctrinally and conceptually fits the basic task of constitutional rights adjudication.

* * *

Having highlighted this connection, I can now proceed to present my administrative law model. For ease of exposition I will begin, in Section B, by presenting the model "at home" in US administrative law and as if it applies to

154. This term is drawn from William D. Araiza, *In Praise of a Skeletal APA: Norton v. Southern Utah Wilderness Alliance, Judicial Remedies for Agency Inaction, and the Questionable Value of Amending the APA*, 56 ADMIN. L. REV. 979, 1002 (2004).

155. This term is drawn from a well-known phrase from German public law according to which administrative law is "concretized" constitutional law. FRITZ WERNER, VERWALTUNGSRECHT ALS KONKRETISIERTES VERFASSUNGSRECHT 527 (1959).

156. *See infra* Part VI.

157. The literature here is now vast, but two pioneering works are Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace*, 96 VA. L. REV. 799 (2010) and Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013).

158. Gillian E. Metzger, *Administrative Law as the New Federalism, 57* DUKE L.J. 2023, 2027 (2008).

administrative agencies. Then, in Section C, I will "translate" the model to the constitutional rights' context.[159]

B. The Model at Home

The administrative law model that I flesh-out in this Article does not look to the entire field of US administrative law. Rather, it takes its form from the way courts operate in three different sites of adjudication in US administrative law, and importantly, as we will see, from the interaction between these sites.

1. Interpretation: Chevron

The first site of focus is where courts confront issues of statutory interpretation. Here the guiding framework that courts presently employ in administrative law is outlined in a seminal case called *Chevron*[160] and its progeny (I will get to issues relating to Chevron's continued validity later, in Part V).

The inquiry under *Chevron* is traditionally described in US administrative law as a two-step process. In Step I, courts ask themselves whether, after "employing the traditional tools of statutory construction,"[161] it is evident that "Congress has directly spoken to the precise question at issue."[162] If so, the interpretive task is at an end, and courts must enforce clear congressional directives. However, if at the end of Step I the relevant statute is found ambiguous or vague, Step II kicks in. And in Step II, *Chevron* instructs courts to defer to

159. One final preliminary note: my proposed administrative law model is a kind of act of "exportation" from the field of US administrative law to the field of constitutional law on a global scale. I do not deny, however, that my presentation here of the model will diverge along some dimensions from the "official state," so to speak, of present-day hornbook US administrative law. Alternatively, I do not deny that my presentation extends some of these principles beyond their reach in contemporary administrative law.

I will highlight these extensions and tensions between my model and the "official" present-day state of administrative law in either the text or notes that accompany the text when they arise. I stress here however that nothing in this should stand as a barrier for my claims here. My ambitions in this Article are explicitly reconstructive and concern the organization of the field of constitutional law, which is not bound to the present-state of the field of federal administrative law in the United States, especially not if the model were to be applied outside the United States. Even if we embrace a US-focused perspective, however, it is important to remember that the field of administrative law is in constant "flux," and perhaps especially today. In other words, we cannot view the field of administrative law in too frigid terms. The "official state" of the field may be changing. And while, for reasons I will discuss in Part VI, it may not look like it is changing in the specific directions that I'm taking it here, we cannot rule out that the winds would be changing yet again soon. And, indeed, I will suggest below that they might.

160. Chevron U.S.A. Inc. v. Nat. Res. Def. Funds, Inc., 467 U.S. 837 (1984).

161. *Id.* at 843 n.9.

162. *Id.* at 842.

administrative agencies' proposed interpretations so long as they are "based on a permissible construction of the statute"[163] or when they are "reasonable."[164]

The pages of law journals and the various federal reporters are filled ad nauseam with analyses about how to implement this two-step framework. The basic idea underlying *Chevron* is nonetheless sufficiently clear: in administrative law, and contrary to other fields in American law and especially constitutional law where *Marbury* and the idea of judges emphatically pronouncing "what the law is"[165] reigns, *Chevron* creates significant room for interpretive deference to agencies.[166] In other words, in relation to the statutes agencies administer, it is not the province of courts to say what they mean but rather the province of agencies themselves.

Of course, this is not to say that *Chevron* does not preserve any role for courts in interpretive affairs in administrative law. *Chevron* explicitly does. It is only that what is left is supposed to be much narrower than de novo interpretation by judges. Synthesizing much of the judicial and scholarly discussion, we can identify two broad tasks that courts are entrusted with under *Chevron* in administrative law and on which my administrative law model will build: First, it is to make sure that some level of "fit" with the relevant legal materials is maintained and that agencies' proposed interpretations do not cross it, whether under Step I or Step II.[167] Second, cases at both the Supreme Court level and at the lower courts suggest an additional, even if more implicit, judicial task under *Chevron* that I will extend here:[168] to guarantee that the interpretive freedom agencies are granted under it is not abused—especially by too easily offering interpretations that are inconsistent compared with earlier ones.[169] And indeed, courts under *Chevron* are in practice much more hesitant in accepting inconsistent agency interpretations—or when they observe interpretive flip-flops or ping-pongs. They might reject such inconsistent interpretations primarily because of that.

163. *Id.* at 843.

164. *Id.* at 844.

165. Marbury v. Madison, 5 U.S. (I Cranch) 137, 177 (1803).

166. *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2583 (2006).

167. *See, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944). Of course, the idea of "fit" has become canonical following Ronald Dworkin's work. *See* RONALD DWORKIN, LAW'S EMPIRE 100–53 (1986).

168. *See infra* Part III.A.

169. For this judicial role under *Chevron*, *see, e.g.*, Cuozzo Speed Techs, LLC v. Lee. 136 S. Ct. 2131, 2145 (2016); Kent H. Barnett & Christopher J. Walker, Chevron *in the Circuit Courts*, 116 MICH. L. REV. 1, 64–66 (2017). The qualification of "implicit" is required because at the level of formal doctrine, the most recent Supreme Court pronouncement seems to reject the role of inconsistency under *Chevron*. *See, e.g.*, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Serv., 545 U.S. 967, 981 (2005).

2. *Review of decisions and actions: State Farm and "reasoned decision-making"*

The second site on which my administrative law model draws is where courts confront in US administrative law the need to review decisions or actions *beyond interpretation as such*. Here the relevant framework courts employ is associated with another seminal case in administrative law known as *State Farm*.[170] This case now provides the central "gloss" on the requirement, grounded in the text of the Administrative Procedure Act, that agencies do not act in an "arbitrary" or "capricious" way.[171]

Under the framework that this *State Farm* case is now affiliated with, courts engage in a unique form of review, which has both a substantive and process-based component. Substantively, the judicial task under the *State Farm* framework is very minimal. Indeed, courts are emphatically not allowed under it to "substitute their judgment for that of the agency."[172] The only thing courts can do substantively is to make sure that an agency's decision is not wholly irrational and that there is a "rational connection between the facts found and the choices made"[173] by the agency. As should be clear, this is a very high benchmark that is rarely crossed.

This of course means that most of the meaningful work courts do under the *State Farm* framework has a more process-looking cast. First and foremost, courts require from agencies under the *State Farm* framework reasons for their decisions and some form of record to support them.[174] Then, based on these reasons and records and—in the normal course of affairs at least—only them and without the ability of ex post supplementation or "shouldering" from outsiders (including amicus curiae),[175] the *State Farm* framework licenses courts to engage in what has been aptly called a "reasoning process review"[176] or "internal thought process review"[177] to secure a standard of reasoned decision-making.[178] This standard is

170. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983).

171. 5 U.S.C. § 706(2)(A) (2012).

172. State Farm, 463 U.S. at 43. *See also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

173. State Farm, 463 U.S. at 43.

174. On the requirement of a record, *see* Overton Park, 401 U.S. at 420 (elaborating the record requirement); Sierra Club v. Costle, 657 F.2d 298, 407-08 (D.C. Cir. 1981) (same).

175. In Professors Dotan and Asimow's terminology, administrative law operates based on *closed* reasons and records. *See* Dotan & Asimow, *supra* note 74. For a discussion of the principle of closed records and reasons in US administrative law, which stems primarily from a seminal case known as *Chenery I*, *see* Sidney A. Shapiro & Richard W. Murphy, *Arbitrariness Review Made Reasonable: Structural and Conceptual Reform of the "Hard Look*," 92 NOTRE DAME L. REV. 331 (2016).

176. Lawson, *supra* note 33, at 318–19.

177. Garland, *supra* note 34, at 530.

178. *See*, *e.g.*, Allentown Mack Sales & Service, Inc. v. NLRB, 522 U.S. 359, 374 (1998). *See also* State Farm, 463 U.S. at 43 (highlighting that the agency must "articulate a satisfactory explanation for its action.").

highly contextual and varies in its intensity (a point to which I will return below in Part V).[179] However, the following elements are likely to stand at the core of the judicial inquiry in each and every case:

(*) That in making the decision or taking its action, the agency considered the "relevant factors"[180] and that it did not consider irrelevant ones;
(*) That the agency's action or decision was in fact supported by those "relevant factors" and by the facts and evidence before it (including that the agency invested sufficient resources in gathering the relevant data and based its determinations on acceptable methodologies);[181]
(*) That the agency did not ignore an "important aspect of the problem"[182] and that it considered "significant and viable"[183] alternatives to its chosen course of action and explained why it rejected those alternatives;
(*) And, finally, that the agency considered reliance interests that might be affected by its action or decision[184] and, to the extent relevant, that it acknowledged inconsistencies between its current decision or action and previous ones and explained why it thinks the new decision is in fact a "good one."[185]

Finally, if a court ends up finding the agency's reasoning to be lacking in any or all these components, the "ordinary"[186] remedy courts give here is not a heavy remedy of a strike down. Rather, the remedy is a remand. As a result, an agency that so chooses can emphatically aim for a "redo"—that is, to return to courts and convince them (likely with further explanations and, if appropriate, data) that its original decision is in fact a reasoned one.[187]

3. Review of initiation claims: Massachusetts v. EPA + the "anti-abdication" principle

The third and final site on which my administrative law model draws on is the site where courts are asked to review what might be called "initiation claims,"[188] where litigants come to courts to claim that agencies must act or decide on something that they have not done or refused to do. For my purposes, there are two central principles of present-day US administrative law that operate

179. For discussion of the variability of the *State Farm* framework, including the differences between "hard look" and "soft glance," *see infra* notes 398–402 and accompanying text.

180. Citizens to Preserve Overton Park, 401 U.S. at 416.

181. State Farm, 463 U.S. at 43.

182. *Id.*

183. City of Brookings Municipal Tel. Co. v. FCC, 822 F.2d 1153, 1169 (D.C. Cir. 1987).

184. *See*, most recently, DHS v. Regents of the University of California, 140 S. Ct. 1891, 1913 (2020).

185. *See* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2120 (2016).

186. *See, e.g.*, Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 GEO. WASH. L. REV. 1553 (2014).

187. *See generally* Emily Hammond Meazell, *Deference and Dialogue in Administrative Law*, 111 COLUM. L. REV. 1722 (2011); Walker, *supra* note 187. I speak more to the nature of "dialogue" in the administrative law below. *See infra* notes 347–354 and accompanying text.

188. Again, this is my adaptation of a term from Sunstein & Stewart, *supra* note 35.

in this site and on which I will build in constructing my new model of constitutional rights adjudication.

First, in the landmark case of *Massachusetts v. EPA*[189], the Supreme Court held that claims that try to initiate agencies to engage in what is surely the most consequential "policymaking form"[190] administrative agencies employ today—the issuance of rules or what administrative lawyers call "informal rulemaking" or notice-and-comment rulemaking—are reviewable and courts would also look to the reasons agencies have for refusing to act or decide. At the same time, the Court has also made clear that this review would be "extremely limited" and "highly deferential"[191] and thus different from the kind of reasoning process review courts apply to agencies' actions and decisions under the "normal" *State Farm* framework in the second site discussed before.[192] As a result, agencies today have a firm obligation in administrative law to offer at least "some reasonable explanation"[193] for their decision not to issue rules, are subject for what we can think of as "super-weak"[194] review of these reasons, and may encounter a judicial remand if they fail to do so.[195]

Second, courts, including most importantly the Supreme Court, have suggested in a related corner of US administrative law that there is another scenario where they would intervene to compel agencies to act or decide even if there are "some reasonable explanations" for their inaction. This can happen, courts have said, when agencies "abdicate"[196] their statutory responsibilities—for instance, if agencies deliberately and consciously adopt a general policy of ignoring their responsibilities[197] or if there is a consistent pattern signaling that agencies are essentially dodging these responsibilities.[198]

189. 459 U.S. 497 (2007).

190. M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004).

191. Massachusetts v. EPA, 459 U.S. at 527.

192. Many believe, though, that the review that was actually performed by the Court in the *Massachusetts v. EPA* case was far from highly deferential. *See, e.g.*, Jody Freeman & Adrian Vermeule, Massachusetts v. EPA*: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 97.

193. Massachusetts v. EPA, 459 U.S. at 533.

194. For this term, *see* Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435, 452–53 (2002).

195. *Id.* at 534–35.

196. Heckler v. Chaney, 470 U.S. 821, 833 at n.4 (1985) (quoting Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (*en banc*)).

197. *Id.*

198. Friends of the Cowlitz v. Fed. Energy Regulatory Comm'n, 253 F.3d 1161, 1167 (9th Cir. 2001). For explication of the "anti-abdication" principle in U.S. administrative law, on which I draw here, *see* Cass R. Sunstein & Adrian Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO. L.J. 157 (2014).

4. Upstream/downstream interactions

My proposed administrative law model builds on *all* these principles described above—*Chevron* with its requirement of deference on interpretive questions, *State Farm* with its license for reasoning process review of agencies, and *Massachusetts v. EPA*'s "highly deferential" review of agencies' reasons not to act or initiate action and the principle of "anti-abdication." But before moving to "translate" the model from its home in administrative law "proper" into explicit constitutional rights' terms, let me emphasize something that would prove important soon: the principles that I have described in each of the sites I mentioned interact with each other in crucial ways.

One sort of interaction is that the conclusions from *Chevron* (the first site) significantly shape the way the analysis under the reasoned decision-making standard is performed (the second site). As we saw, one component of the reasoned decision-making requirement is that courts review whether agencies reasoned based on the "relevant factors."[199] But these "factors" do not come from nowhere. They importantly come from the interpretation of the statute that authorizes the agency to act, which in US administrative law is first and foremost a *Chevron* inquiry.[200] This means, then, that the scope and basic form of the reasoning that agencies are expected to perform, and that courts would review under *State Farm* and its requirement of reasoned decision-making, are crucially determined by the *Chevron* stage.

Moreover, and importantly, experience in administrative law shows that there are two general ways that *Chevron* can shape the requirement for agencies to reason based on the "relevant factors." One option is when agencies reasonably interpret statutes (or courts enforce interpretation of statutes under *Chevron*'s requirement of "fit") as "priority" statutes.[201] In this case, the statute is interpreted in a rather categorical or restrictive way, very much like how courts adjudicate constitutional rights disputes under the categorical reasoning model. For example, the statute can be reasonably interpreted to elevate one or only a handful considerations or "factors" that agencies must consider in their decision above everything else, or give them a special weight.[202] Alternatively, a statute can be reasonably interpreted to exclude certain considerations that may interfere with what the statute deems as its elevated and focal priorities. When this is the case,

199. *See supra* note II.B.2 and accompanying text.

200. *See, e.g.*, Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67.

201. For this term, *see* Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1505 (1983).

202. A first example of this is the famous *Benzene* case from the administrative law where the court said that agencies must identify in their reasoning that a "significant risk" exists that would justify the regulation. *See* Indus. Union Dep't v. Am. Petroleum Inst. (Benzene), 448 U.S. 607, 639 (1980). In addition, in *Overton Park*, the Court moreover interpreted a statute to essentially mean that the goal of park preservation trumps other goals and especially the goal of building a highway and improving metropolitan transportation. *See* Overton Park, 401 U.S. at 412–13.

agencies' reasoning will obviously have to be categorical and limited as well to satisfy the requirement of "relevant factors" under *State Farm* and the standard of reasoned decision-making. And courts, in their review, would have to make sure that this is appropriately done.

By contrast, another option is that agencies reasonably interpret statutes (or courts enforce such an interpretation under *Chevron*'s "fit" threshold) that leads to seeing statutes not as restricted, categorical, or "priority" statutes, as before, but rather as what has been called "lottery" statutes.[203] In this case, no specific consideration is elevated or excluded from being part of the "relevant factors." And agencies' reasoning that leads to their decisions, and which later courts would review under *State Farm* and the requirement of reasoned decision-making, can be much more capacious and unrestricted. They can consider any factor that seems "logically relevant"[204] for their decision. Under this scenario, agencies' reasoning would look very much like what we see in constitutional rights adjudication in systems committed to the proportionality model.

So far, I have highlighted how *Chevron* significantly impacts the shape of the inquiry of reasoned decision-making under *State Farm*. But a second kind of interaction in fact goes in the *opposite direction* and relates to how the *State Farm* framework and the standard of reasoned decision-making might influence the inquiry at the *Chevron* stage. As we know from the real life of administrative law, sometimes the *Chevron* stage can be conclusive and not even reach the *State Farm* and the reasoned decision-making inquiry. This occurs most clearly when agencies' "reasonable" interpretations (or the courts' enforcement of a "fit" threshold) rely on what can be called, to draw on the term I used before, "distinctive juridical technologies" such as text, precedents, or history.[205] If the text is clear, after all, then this is the end of the matter under *Chevron*. And distinctive juridical technologies or other legal "craft" methods or lawyerly "canons" can also fill much of a statute's meaning in a way that restricts the domain of "reasonable interpretations" or "permissible constructions."[206]

However, as we also know from practice in administrative law, even if that is the case and the *State Farm* inquiry into reasoned decision-making doesn't formally come into view, this doesn't mean that this would be forever so. Indeed, the *State Farm* framework can climb up, so to speak, to the *Chevron* stage (usually through Step II). In this way, the *State Farm* framework can operate to put pressure on agencies that "reasonably" interpreted statutes relying on these juridical technologies in the past (or on courts that enforced a formalistic

203. Shapiro, *supra* note 201, at 1505.

204. For an argument that this should occur more regularly in administrative law, *see generally* Pierce, *supra* note 200; Sharon B. Jacobs, *The Administrative State's Passive Virtues*, 66 ADMIN. L. REV. 565 (2014).

205. *See supra* note 66 and accompanying text.

206. For an argument that illustrates and calls for more of this filling up of statutory meaning through lawyerly craft moves in present-day administrative law, *see* Jeffrey Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852 (2020).

interpretation of the statute through a "fit" threshold) to at least consider relaxing the commitment to "distinctive juridical technologies" and replacing it with the more instrumental and empirical frame that *State Farm* brings with it.[207]

Finally, there's also an important interaction between the *Chevron* stage and the super-weak review of claims that agencies must issue rules under *Massachusetts v. EPA* as well as the principle of anti-abdication (third site). More specifically, these will be triggered *only if* the *Chevron* stage is crossed, that is—if the initiation claim directed toward the agency squares with how it "reasonably" interprets the statute. When such a claim is based on something that is not within the agencies' powers, as reasonably interpreted by them, it is moot and would not even advance to the stage of review.

To summarize: we end up with two kinds of interactions in administrative law between the three sites of judicial activity on which I focused. First, there is what we can think of as an *upstream-downstream interaction*, where *Chevron* influences the inquiry under the reasoned decision-making standard and *State Farm*. As we saw, *Chevron* determines the scope of "relevant factors" that agencies must consider (and courts must review), specifically whether those factors are limited or elevated and the reasoning is thus categorical (akin to what we see in the model of categorical reasoning on rights), or rather whether it is broad and flexible and the reasoning is thus highly context specific (akin to what we see under the proportionality model). In this type of interaction, we can also include the way *Chevron* influences the super-weak review of initiation claims under *Massachusetts v. EPA* and the anti-abdication principle. Second, there's also what we can think of as a *downstream-upstream interaction* where the requirement of reasoned decision-making and *State Farm* penetrates the *Chevron* inquiry to put pressure on decision-makers (or courts) to relax their commitment to "distinctive juridical technologies," opening up the possibility for more instrumental types of reasons.

To be sure, there's a tricky question in administrative law about how much and when exactly can courts or agencies insist that the *State Farm* inquiry would be more like a "priority" or a "lottery," and thus more categorical or flexible.[208] Moreover, there's a tricky question in administrative law concerning when exactly *State Farm* and the requirement of reasoned decision-making can and should put pressure on *Chevron*.[209] I will get to these issues in a later stage of the discussion.[210] For now, however, the main point is merely to note the possibility—indeed often inevitability—of these interactions.

207. For a recent discussion of this pressure that *State Farm* can put on *Chevron*, *see* Catherine M. Sharkey, *Cutting in on the* Chevron *Two Step*, 86 FORDHAM L. REV. 2359 (2018).

208. For relevant discussion in the literature, *see generally* Pierce, *supra* note 200; Jacobs, *supra* note 204.

209. For a permissive view, *see* Sharkey, *supra* note 207; Daniel J. Hemel & Aaron L. Nielson, Chevron *Step One-and-a-Half*, 84 U. CHI. L. REV. 757 (2017). For a more restrictive view, *see* Matthew Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

210. *See infra* Part V.A.

C. Constitutional "Translation" of the Model

Now that I have described the administrative law model at home, I can more easily "translate" it to the constitutional rights context. Suppose someone claims her or his constitutional right has been adversely affected. How will courts consider this claim under a jurisdiction or system that embraces the administrative law model? Just like they would if the dispute was a "standard" administrative law dispute!

(*) First, courts will review whether the government's interpretation of the right in question is "reasonable." This review would be based on a kind of constitutional *Chevron*, which, as we have seen before,[211] requires that the interpretation does not cross a threshold of "fit" with the relevant legal materials and is not an excessive case of interpretive flip-flop.
(*) Then, if the claim is directed against an action or decision the government has actively taken and that is said to adversely affect a constitutional right, courts will review whether the decision satisfies a reasoned decision-making standard under a kind of a constitutional *State Farm*. This includes all the components mentioned above,[212] including the need to consider the "relevant factors," to gather data, to examine any important aspect of the problem, significant and viable alternatives, and, if relevant, reliance interests and inconsistencies, as well as to give adequate explanations for all these choices. If the decision or action is not reasoned in this way, a remand will be issued.
(*) If, however, the relevant infringement of a right is said to occur because the government has failed to act—that is, an "initiation claim"—courts will review in a "super-weak" form whether the government has some "reasonable explanation" for not initiating action, inspired by a kind of constitutional *Massachusetts v. EPA*.[213] So long as there is such an explanation, courts will refrain from remanding the issue. However, a remand might be issued nonetheless if the point of "abdication" has been crossed, including when something that is within the government's constitutional powers has been constantly put to the end of the queue or when there are other signs that the government is dodging its responsibilities.

This is the simple structure of the administrative law model of constitutional rights adjudication. But, as explained above, the administrative law model is more complex than that since there are important upstream/downstream interactions between these stages. So, this basic sketch of the administrative law model requires some additions to reflect these interactions:

(*) First, the *Chevron* stage can face some downstream pressures from *State Farm* to move to a more prescriptive take on the issue of rights rather than rely singularly on distinctive juridical technologies as the crucial, even decisive, reasoning style.
(*) Second, the entire reasoned decision-making analysis under this constitutional version of *State Farm* is deeply influenced by the *Chevron* step, upstream, which

211. *See supra* Part II.B.1.

212. *See supra* Part II.B.2.

213. Here my presentation of the administrative law model importantly diverges from the "official state" of administrative law, which currently recognizes some key exceptions to the reviewability of initiation claims, the most important of which are that the agency action under review must be "discrete" (*see* Norton v. S. Utah Wilderness All., 542 U.S. 55, 62 (2004)) and unrelated to what is known in US administrative law as "enforcement decisions" (*see* Heckler, 470 U.S. at 821, 835 (quoting 5 U.S.C. § 701(a)(2) (2012)).

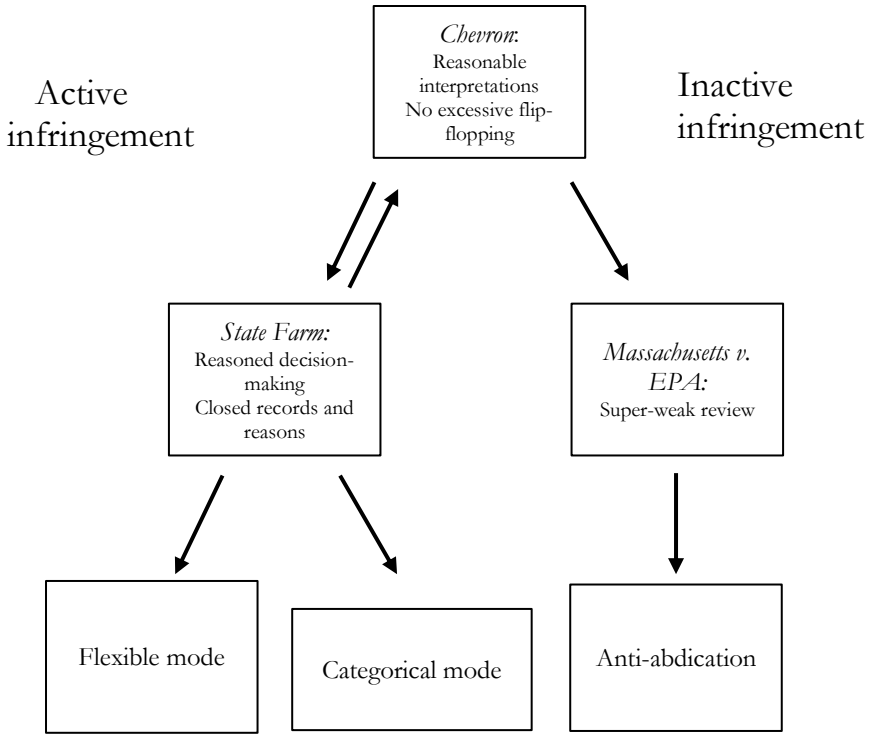
can in turn either be limited and categorical (as when in administrative law agencies or courts interpret "priority" statutes and limit the scope of "relevant factors") or flexible and open ended (as when in administrative law agencies or courts interpret "lottery" statutes that expand the scope of "relevant factors"). And it is also possible that the reasoned decision-making stage of *State Farm* would not be reached if the *Chevron* inquiry is conclusive.

(*) Finally, the review of initiation claims under the super-weak standard of *Massachusetts v. EPA* as well as the enforcement of the anti-abdication principle will be triggered only if these claims square with the "reasonable" interpretation of the relevant decision-maker, also determined by the *Chevron* step.

* * *

The following diagram attempts to capture the operation of the administrative law model in a more graphic form:

Diagram 1: The Administrative Law Model of Constitutional Rights



III. WHAT'S DIFFERENT?

We now hopefully have a solid view of the administrative law model and its various components (as well as interactions), at least in the abstract. Thus, it is time to get to the heart of the matter: first, explaining how the administrative law model is distinct from the existing models and thus goes beyond the binary. Second, identifying what reasons we may have to think that the administrative law model is superior to the dominant models, or in what conditions that would be so.

The remainder of the Article is devoted to fleshing this out. In this Part, I begin by clarifying the precise differences between the new administrative law model and the previously existing models for adjudicating rights. I will then build on this foundation in the rest of this piece to show why the administrative law model is attractive, what are its costs, and where it should be implemented already today or in the future (and whether in whole or in part).

So, what is exactly different?

A. Institutionalizing Deference

The first difference is the most obvious one to point out: the administrative law model institutionalizes deference to political decision-makers to a much greater degree than either of the existing models. This is so first and foremost because of the way the administrative law injects *Chevron* to the constitutional rights adjudication context. As we saw, a constitutional *Chevron* would instruct courts to defer to any "reasonable" interpretation of the scope and meaning of rights rather than make interpretive determinations themselves. Under the existing models, this task is conceived as almost exclusively judicial—as previously discussed, judges rather than decision-makers in politics "say what the law is."

But this institutionalization of increased deference in the administrative law model is also the result of insertion of the reasoned decision-making standard associated with *State Farm*. As highlighted in Part II, this standard limits courts to intervene primarily if the "reasoning process" or "internal thought process" of decision-makers is defective. Courts do not themselves engage in the task of substantive evaluation, including determining which governmental goals are sufficiently important ones and which means are suitable to pursue them. In categorical reasoning and proportionality, as emphasized in Part I, they often and regularly do. Substantively, the reasoned decision-making is at most like the rational basis tier we find under the categorical model or like the requirement of "suitability" we find in the proportionality model.

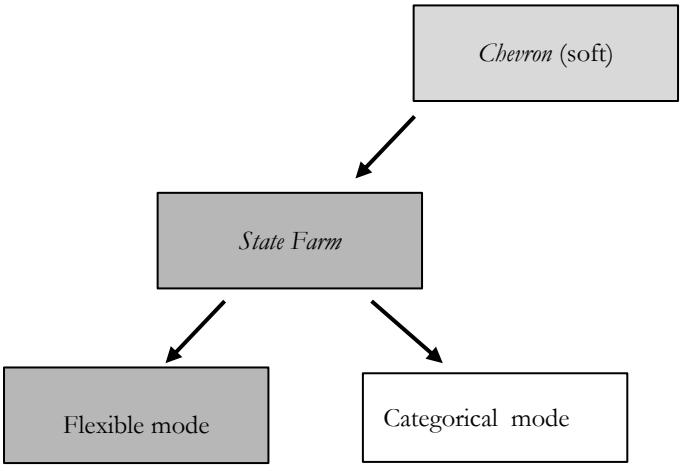
B. Inter-Model Negotiation

A second difference is more complex and subtle: the administrative law model creates a unique structure that would allow systems to *negotiate* between

key commitments that characterize both existing models. On one hand, systems would be able to draw on proportionality's commitment to expansive rights, instrumental or prudential reasoning in matters of rights, and context-specificity. On the other hand, under the new administrative law model, systems would also be able to draw on categorical reasoning's commitment to narrower rights, reasoning on rights based on lawyerly "craft" tools or "distinctive juridical technologies," and a more rule-like method for resolution of rights disputes. This is so given the various upstream/downstream interactions the *Chevron* stage and *State Farm*'s reasoned decision-making stage discussed at the end of the previous Part.

One possibility is that, under the administrative law model, systems would *retain* a dominant commitment to only one of those styles of rights' reasoning. So, for instance, a system that would be drawn to preserve a commitment to proportionality's key features would be able to do so within the confines of the administrative law model, simply by easily skipping the *Chevron* requirement or employing it softly to enable the kind of flexible, lottery-like analysis that can occur, as we saw, at the reasoned decision-making stage when *Chevron* does not restrict the "relevant factors" requirement. There would then be just one *State Farm* and a reasoned decision-making standard for any and all rights claims. This is illustrated in the following diagram by the highlighted boxes:

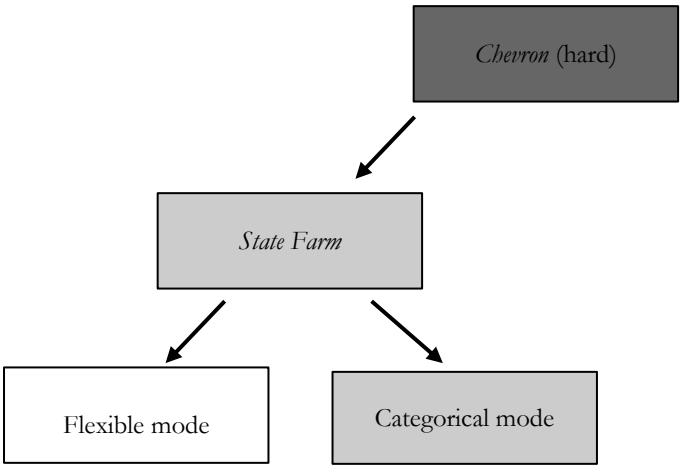
Diagram 2: The Administrative Law Model–Flexible Mode



Conversely, a system that would be drawn to preserve a commitment to categorical reasoning's key features would linger more on the *Chevron* stage, both to screen out rights from the constitutional domain altogether or to consecutively structure the analysis under reasoned decision-making to become more categorical in nature—by, for instance, elevating one or a few elements above the others or excluding elements from consideration altogether (much like what

happens when agencies reasonably interpret statutes as "priority" statutes). In that way, something identical to the tiers of scrutiny can easily be created by, for instance, requiring decision-makers to illustrate the existence of a very important goal and narrowly tailored means or creating bespoke tests that limits the considerations judges are allowed to consider or weigh. Furthermore, the *Chevron* stage also fully preserves the ability to rely on "distinctively juridical technologies" for both of these tasks. Indeed, the *Chevron* inquiry is entirely hospitable to these kinds of lawyerly "modalities" of legal reasoning, as we have seen before. This is illustrated in the following diagram again by the highlighted boxes:

Diagram 3: The Administrative Law Model–Categorical Mode



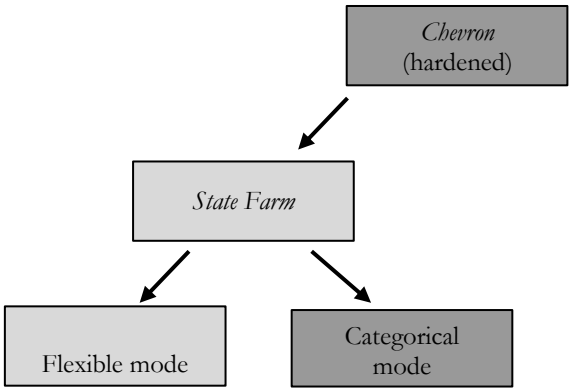
However, and crucially, because of the upstream/downstream interactions that are inherent to this model, the administrative law model also opens-up possibilities for change and dynamism. Systems that embrace a dominant commitment to features of mostly one of the models would be able to experiment with injecting the features of the competing model instead of what it has today or in combination with its existing commitments.

So, for instance, in a system that begins with a strong commitment to broad rights, mostly instrumental reasoning in issues of rights, and context-specificity (as in the proportionality model), the *Chevron* stage of the model is always there in the background and must be confronted. Both decision-makers in politics and judges after all are required to ask, as a condition to moving along with the inquiry, if the decision "fits" the relevant legal materials. And this component, which again originates from *Chevron* and is now elevated to a key element of an administrative law model of rights adjudication, institutionalizes the possibility of backtracking from context-specificity to more rule-like thinking about rights. It also institutionalizes the possibility to retreat from more prescriptive reasoning in matters of rights to reliance on "distinctive juridical technologies."

In fact, the existence of a permanent "fit" stage under the administrative law model might be considered as a move that to some extent encourages systems to do so, akin to what we can think of as a "rule in favor of rulification."[214] This is so because it focuses the attention of both decision-makers in politics as well as judges on questions of "fit" with legal materials—which can be understood as either an encouragement to look to the past pool of cases and think about whether the experience a system has gained can lead to more precise rules and specifications in rights adjudication. We can think of it as a "speeding up" mechanism[215] that tries to quicken the process of induction from experience to the creation of doctrinal rules or categories. Alternatively, this "fit" step can lead decision-makers to think about rights adjudication in more rule-of-law ways that are associated with the need of giving future audiences better guidance and predictability.[216]

This dynamic is illustrated in the next diagram where the darker boxes are the additions that occur as a result of the employment of the model:

Diagram 4: The Administrative Law Model–Flexible Mode Combining Categorical Features



Alternatively, a system that starts with a more categorical frame can also change within the administrative law model, or experiment with such a change. It can convert itself to something more flexible and which resembles

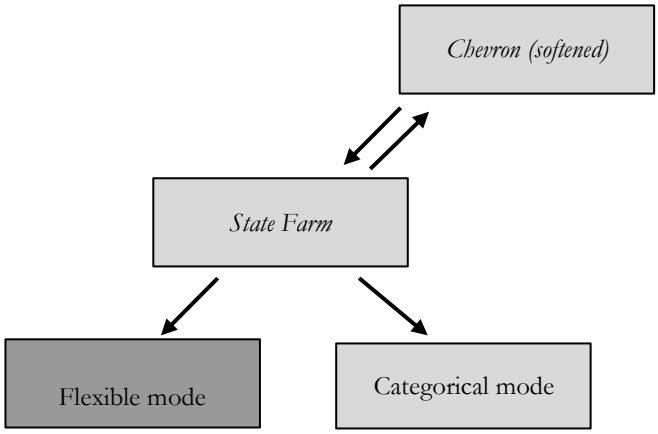
214. This is a play on Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644 (2014).

215. On speeding-up constitutional mechanisms, *see* Jon Elster, *Comments on a Paper by Ferejohn and Pasquino*, 2 INT'L J. CONST. L. 240 (2004).

216. There's in fact another administrative law analogy here: to the debate between whether it's preferable that agencies will proceed by general rules or rather by specific adjudications. Under present-day administrative law, agencies are quite free to choose. *See* SEC v. Chenery Corp., 332 U.S. 194 (1947) (*Chenery II*). However, scholars have for a long time tried to shape administrative law in ways that would at least gently incentivize administrative agencies to draw on rules when they can. *See, e.g.*, Lisa Schultz-Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003).

proportionality. After all, the possibility of introducing a more lottery-like, flexible, context-specific *State Farm* and reasoned decision-making analysis is always there and built into the model. And, in fact, because the *State Farm* analysis can climb-up and penetrate the *Chevron* stage upstream, as we previously saw,[217] it provides opportunities for both decision-makers in politics and judges to also consider the need for change, and specifically displacing both rigidity and reliance on distinctive juridical technologies as the dominant tools to dissect and resolve rights claims.

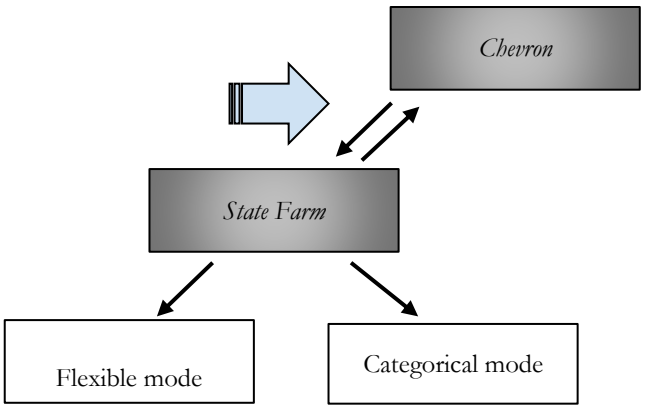
Diagram 5: The Administrative Law Model–Categorical Mode Combining Flexible Features



And, of course, this process is not static. Systems can backtrack from previous experimentations. A system that moved from a flexible rights adjudication structure to a more categorical one, can go back to the previous state. And a system that moved from more categorical thinking in matters of rights to more flexibility in these matters can also go back. The model leaves the possibility of moving back and forth freely by making these options fully and entirely available all the time.

217. *See supra* Part II.B.4.

Diagram 6: The Administrative Law Model–Categorical Mode Combining Flexible Features



To summarize: under the administrative law model, we therefore end up with a potentially much more complex and diverse spectrum of choices about how to organize systems for adjudicating rights with respect to adhering to central features of categorical reasoning and proportionality. What is more, this change can be accomplished *throughout the process of adjudication itself* and without the need for amending the relevant constitutional texts (at least, of course, so long as the "reasonable" interpretation of these texts does not prevent this form of experimentation).

C. Judicial Technique

A third difference between the administrative law model, on one hand, and proportionality and categorical reasoning, on the other, relates to the technique used to protect rights. That technique is what comes with the *State Farm* framework and the standard of reasoned decision-making associated with the administrative law model. To be sure, this *State Farm* framework can also be understood as a means/ends inquiry, very much like what we see with the tiers of review in categorical analysis and the famous proportionality protocol. But it is different first and foremost because the analysis under the reasoned decision-making is importantly proceduralized. As we saw, under this standard, courts are not allowed to opine directly on, for instance, whether the goals that governments pursue are compelling and the means minimally impair a given right, but only on whether the reasoning offered by governmental decision-makers are adequate to support such a conclusion.

Relatedly, there's also a difference in terms of the remedy supplied. As we saw, the "ordinary" remedy offered by the *State Farm* framework and the standard of reasoned decision-making attaching to it is a remand. It explicitly invites a redo or, in a language paraphrased from a famous case from the Canadian Supreme

Court, it welcomes the possibility for the government to "try, try again."[218] Under proportionality and categorical reasoning, and precisely because the *modus operandi* there is regularly substantive rather than procedural, the remedy provided is regularly a strike down. Thus, the primary way for decision-makers to overcome an adverse judicial ruling and do the exact same thing is to override what the courts have said–to the extent that something like this is at all permitted.[219]

But there is actually more to the difference here. Recall that in the administrative law model, the inquiry under *State Farm* and the application of the reasoned decision-making standard can come in two modes. One is categorical and the other is more flexible.[220] When *State Farm* comes in the first variant, there is not much of a difference between the administrative law model and categorical reasoning. The "proceduralization" and a remand remedy pretty much summarize the extent of the divergence in techniques. However, when *State Farm* has not been shaped by *Chevron* to become more categorical and is in fact employed in a flexible and open-ended way, allowing decision-makers to consider any "logically relevant" consideration, the reasoned decision-making standard injects into the constitutional rights context a unique technology of review that importantly diverges from what courts today do under the proportionality test in several respects. First, as we saw, there is no explicit requirement of "minimal impairment" or "least restrictive means" nor an explicit separate requirement of balancing or proportionality "as such." The only "formal" doctrinal requirement that comes with the standard of reasoned decision-making is that, as we saw above, the decision-maker must address any "important aspect of the problem" and illustrate that it considered "significant and viable" alternatives to its chosen course of action and explained why it rejected those alternatives. Second, the standard of reasoned decision-making, as we also saw, includes a requirement, which does not clearly exist in the proportionality model, to explain inconsistencies and consider reliance interests.

Another way to emphasize the differences between proportionality and the administrative law model in this context is that the latter conducts the analysis of rights not very differently from how "regular" policymaking is evaluated by policy analysts.[221] Decision-makers need to define the relevant policy problem depending on the "relevant factors," which would now emphatically include consideration of rights. They then follow the rest of the path in the same way as

218. Sauve v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 [Sauve II] (Canada).

219. Another way to put this is that "second look" cases are rarely ever those that the government can clearly come to courts and justify the *same* action that was disqualified before. For this use of the term "second look," *see* Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235, 240 (2009).

220. *See supra* Part II.B.4.

221. For a discussion on the divergence between proportionality and regular "policy analysis," *see* Mordechai Kremnitzer & Raanan Sulitzeanu-Kenan, *Protecting Rights in the Policy Process: Integrating Legal Proportionality and Policy Analysis*, 3 INT'L REV. PUB. POL'Y 51 (2021).

how they would normally make any other policy decision. We will see later that this transformation has much to be said for.

D. Focus on (& Scope of) Initiation Claims

A fourth and final difference between the administrative law model and the existing models has been mostly implicit in the discussion so far. The difference is that the administrative law model significantly expands the potential focus on (and scope of) constitutional review of initiation claims–or infringements on rights as a result of governmental inaction–compared to what the existing models allow.

In categorical reasoning, there is rarely any focus on initiation claims in the context of constitutional rights' review. We have seen hints of this before, when I highlighted in Part II that in the contemporary United States—which is the clearest example of a system consistently committed to reasoning-by-category in matters of rights—the Supreme Court emphatically denied the place for socioeconomic rights and a right to government protection.[222] After all, these rights systematically speak to incidents when governments fail to act or do not do "enough,"[223] and can thus be accurately cast as rights that almost always come in the form of initiation claims.

There are many potential explanations for why the US Supreme Court did just that.[224] But part of the reason and what matters for my purposes here is very likely that the categorical reasoning model to which the United States seems committed is simply ill-fitting to provide responsible judicial treatment to initiation claims. The more stringent standard of "strict scrutiny" appears generally inappropriate for situations of real governmental inaction, which involve complex issues of priority-setting in conditions of limited budgets and limited attention spans. What we are left with are largely the more toothless options—and especially rational basis—which does not seriously get the courts into the business of meaningful review, especially if courts can rely on any "conceivable" rationale to reject the need to intervene (and as we have seen, courts in the United States are currently able to do just that).

The only exception that we see for this, and where the categorical reasoning model does seem to provide some response to constitutionally inflected initiation claims, is outside the United States, in places committed to protection of socioeconomic rights under a "minimum core" concept. Under this concept, either courts or legal documents define some baseline of subsistence that is then supposed to be enforced categorically.[225] But, of course, this is only a limited

222. *See supra* Part II.A.

223. This is of course a reference to SAMUEL MOYN, NOE ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

224. For sources discussing these reasons more broadly, *see supra* Part II.A.

225. *See, e.g.*, Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE INT'L L.J. 113, 115 (2008) (emphasizing how the "minimum

exception that does not apply in the United States which, again, is the primary representative of a system devoted to reasoning-by-categories in matters of rights. What is more, there is reason to be cautious in drawing too much on the concept of a "minimum core." As of today, it is highly controversial when used, for instance for being insufficiently ambitious as a tool for protecting socioeconomic rights (because of its emphasis only on guaranteeing minimal conditions) or because courts and other enforcement bodies have found a way to dodge its categorical nature.[226]

With the proportionality model, a focus on governmental inaction and providing constitutional review for initiation claims is possible and more consistently supplied. Indeed, as I also alluded to in Part II,[227] in systems that are committed to the proportionality model, we can see this openness in the context of socioeconomic rights or a right to governmental protection. But the administrative law model still differs from the proportionality model. Most clearly, the techniques of review are different. Rather than employ the full-blown proportionality protocol, either sequentially or as a gestalt, *Massachusetts v. EPA* outlines a super-weak form of review of the reasoning of governmental actors and especially the need to offer "some reasonable explanation" for the inaction. So long as this applies, a court is unable to intervene. And if the court does intervene, the remedy is at most a remand. Moreover, the administrative law model adds to the mix the somewhat categorical principle of "anti-abdication" as a backstop for continued deference to governmental inaction. Nothing like this exists, certainly not in any explicit form, under the proportionality model.

A final difference between the administrative law model and proportionality is however not about technique but about potential coverage. In a nutshell, the administrative law goes farther than proportionality in covering initiation claims in two distinctive respects:

core" concept of giving protection to socioeconomic rights was envisioned when it originated as a "nonderogable obligation, and an obligation of strict liability.").

226. *See*, *e.g.*, Kevin Iles, *Limiting Socio-Economic Rights: Beyond the Internal Limitation Clause*, 20 S. AFR. J. HUM. RTS. 448 (2004) (illustrating how in practice courts implement the "minimum core" standard much less categorically). For a position in support of a "minimum core" concept, at least in the context of austerity measures, *see* David Bilchitz, *Socio-economic Rights, Economic Crisis, and Legal Doctrine*, 12 INT'L J. CONST. L. 710 (2014).

227. *See supra* Part II.A. I bracket here for present purposes the claim, noted in scholarship, that systems committed to proportionality tend to in fact *not* draw on the protocol of proportionality itself when it comes to the review of claims that engage socioeconomic rights or rights to governmental protection. *See* Stephen Gardbaum, *Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge too Far?*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 221 (Vicki Jackson & Mark Tushnet eds., 2017); Kari H. Ragnarsson, *The Counter-Majoritarian Difficulty in a Neoliberal World: Socio-Economic Rights and Deference in Post 2008 Austerity Cases*, 8 GLOB. CONST. 605 (2019). *But see* Xenophon Contiades & Alkmene Fotiadou, *Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation*, 10 INT'L J. CONST. L. 660 (2012). I will return to the kinds of forms of review that might have emerged instead of proportionality later in Part V. *See infra* notes 379, 380 and accompanying text.

First, the reviewability of initiation claims under the administrative law model is not necessarily contingent on the existence of specific textual grounding of socioeconomic rights or a right to governmental protection, as it seems to be in systems committed to the proportionality model. Rather, in the administrative law model, initiation claims could be raised and trigger the super-weak review inspired by *Massachusetts v. EPA* and the anti-abdication principle with respect to *anything that governments are constitutionally empowered to do*. In other words, the domain of constitutional law becomes, under the administrative law model, coexistent with the domain of the sub-constitutional powers governments possess. The only requirement is, as we have seen, that the claim squares with how governments "reasonably" interpret their powers under the *Chevron* step of the model.

Second, precisely because of this expansive domain of the administrative law model, this also means that initiation claims that would trigger the super-weak review of *Massachusetts v. EPA* and the principle of "anti-abdication" could be raised not only in the direction of demanding that government would do more, which is what the context of socioeconomic rights and a right to governmental protection are all about. Rather, the administrative law model opens the door for initiation claims, and constitutional review by courts, of a different kind: those which aim to make governments *do less*. In particular, the review envisioned by the administrative law model might also be directed toward compelling governments to perform a kind of a "lookback"[228] into previous laws it had enacted in the past to make sure that they are still justified and that it is not the case that they should be announced as having reached their "shelf life."[229] Alternatively, the review would be conducted to find out whether it's not time to insert important revisions in these past laws.

Indeed, we see this possibility of initiation claims that are akin to "lookbacks" in US administrative law where courts can review, for instance, petitions for rules to not only create new rules but also to repeal or amend existing rules.[230] What the administrative law model does in this context is simply to bring the "lookback" function of judicial review from the regular context where it occurs in administrative law to that of constitutional law. Contemporary practice, under proportionality, suggests that this form of review rarely occurs.[231]

228. For this term, *see* Cary Coglianese, *Moving Forward with the Regulatory Lookback*, 30 YALE J. ON REG. ONLINE 57 (2013); Cass R. Sunstein, *Regulatory Lookback*, 94 B.U. L. REV. 579 (2014).

229. Allison Orr Larsen, *Do Laws Have A Constitutional Shelf Life?*, 94 TEX. L. REV. 59 (2015).

230. This focus on repeal and amendment are grounded in the text of the APA, *see* 5 U.S.C. §§ 553(a), and has been exercised in administrative law case law. *See, e.g.*, Nw. Envtl. Advocs. v. U.S. E.P.A., 537 F.3d 1006, 1013 (9th Cir. 2008).

231. The only exception that I am aware of is Germany, whose courts have at least partly recognized the constitutional requirement of "post-legislative scrutiny." *See* A. Daniel Oliver-Lalana, *Due Post-Legislative Process? On the Lawmakers' Constitutional Duties of Monitoring and Revision*, in RATIONAL LAWMAKING UNDER REVIEW: LEGISPRUDENCE ACCORDING TO THE GERMAN CONSTITUTIONAL COURT 257 (Klaus Messerschimdt & A. Daniel Oliver-Lalana eds., 2016). In the

We will see later how this form of expansive constitutional review can be and is connected to the context of constitutional rights.

IV. THE NEW MODEL'S APPEAL

We now have the basic contours of a new model of constitutional rights in hand (Part II). We also know how precisely this model differs from the existing models of proportionality and categorical reasoning (Part III). It is time to turn to explicit normative evaluation: what reasons are there to think that the administrative law model, given all these differences and interactions, might in fact be desirable and preferable to proportionality and categorical reasoning?

In this Part, I suggest the answers, taking each difference or interaction discussed in the previous Part in turn.

A. Political Constitutionalism

As emphasized previously,[232] a key feature of the administrative law model is that it institutionalizes deference to a much greater degree than proportionality and categorical reasoning. This means that one important potential strength of the administrative law model must surely be that it injects more forcefully political constitutionalism into the context of rights' adjudication.

Political constitutionalism is of course a complex family of views.[233] But what unites all these views is the position that in many things constitutional, including especially perhaps in matters of constitutional rights, is the belief that politics should have the primary say, not courts. Rights provisions are after all usually drafted in constitutional documents in a highly abstract way. They are ambiguous or vague and thus are open to a multitude of potential interpretations and applications. And since there are likely to be reasonable disputes about which of those to choose, and because political institutions are regularly more democratic than courts as well as possess higher epistemic credentials compared to them, political constitutionalism insists that there is no reason why the judicial view ought to be preferred. To the contrary: investing courts with the chief task of interpreting and implementing constitutional rights' provisions can distort the

U.S., as Professor Larsen's cited work suggests, there's also some discussion and basis of this. However, the idea of constitutionally required "lookback" review is far from an institutionalized idea that applies across the board as the administrative law model would potentially make it. And, of course, the primary case where the Court has used this concept, and on which Professor Larsen's work zeros-in, seems like a deeply unattractive context to apply these ideas. For relevant discussion, *see* Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111.

232. *See supra* Part III.A.

233. Among the leading works here are LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); TUSHNET, *supra* note 5; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006); RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY, WHICH PAGE? (2007).

desirable and indeed important incentives of political institutions to do so responsibly themselves.[234]

Proportionality and categorical reasoning both occasionally recognize the strong claims of political constitutionalism in matters of rights. After all, we have seen that there is some place for deference to politics in both, and more consistently so under proportionality.[235] But the administrative law model takes the claims that originate from political constitutionalism much more seriously and systematically. For one, the model takes from the courts the responsibility to independently interpret rights provisions and "say what the law is"—a constitutional *Chevron*. For another, the administrative law model takes from courts the responsibility to independently and substantively assess the merits of rights claims—especially via a constitutional *State Farm* and the standard of reasoned decision-making. Given the powerful claims of political constitutionalism, deeply familiar by now to scholarship, there is no reason to overrule, as the present binary does, something more ambitious like this.

Of course, the administrative law model is not akin to "taking [constitutional rights completely] away from the court[s]."[236] It is also different from the more familiar Thayerian view that courts should abstain from intervening in cases of "clear error" or when manifest unreasonableness is present.[237] Indeed, both *Chevron* and *State Farm* leave in the hands of courts something potentially much more significant. But that role seems potentially attractive as well. It would help achieve what seems like a kind of highly plausible "mix" between political and judicial constitutionalism.

I defer discussion of the judicial role under the *State Farm* framework and the reasoned decision-making requirement of the administrative law model to later in this Part.[238] Here I emphasize that the role courts would retain under the *Chevron* component of the administrative law model seems on its face to have much to commend in the context of constitutional rights. First, the requirement of "fit" under *Chevron* is a way for courts to guarantee that political institutions' interpretive choices of rights demonstrate respect and connection to the textual provisions of rights and to the (likely wide range of) acceptable technologies that have been developed in a particular system or context to interpret those provisions. Indeed, something that cannot be reasonably squared with the relevant text or is "off the wall"[239] in terms of these acceptable technologies of interpretation, raises flags that courts might have a reasonable place to weed out.

234. This is of course the claim that judicial review creates an undesirable "judicial overhang" or "moral hazard." *See, e.g.*, TUSHNET, *supra* note 5, at 57–65.

235. *See supra* Parts I.A & I.B.

236. TUSHNET, *supra* note 5.

237. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 155–56 (1893).

238. *See infra* Part IV.C.

239. Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC, June 4th, 2012,

Second, the ability of courts to be more cautious in deferring to inconsistent interpretations, and reject excessive flip-flopping, also seems to be a powerful judicial function in the context of rights adjudication. After all, the concerns that have arisen in in administrative law from interpretive flip-flopping and which have pushed courts to be more skeptical about these instances—including bad faith, short-termism, endangering reliance interests, and more[240]—would apply to the constitutional rights context as well once it has been injected with political constitutionalism more forcefully (as the administrative law model aims to do). In fact, some might think that these concerns would be more pronounced in this new constitutional law context, for instance due to the increased need for stability or the high importance of constitutional norms about rights, more so than regular sub-constitutional legal norms, and the need to "settle" them.[241]

B. The Model as a Desirable Rights Meta Structure

An important additional feature of the administrative law model, I have shown in Part III,[242] is that it lets systems negotiate in a rather unobstructed way, dynamically, and along the process of ongoing interpretation and litigation (rather than via means of amendments of legal texts), between some of the key commitments of proportionality and categorical reasoning. One option is that systems under the administrative law model would retain (or pick anew) a dominant commitment to key features of the categorical reasoning model (*i.e.*, narrow rights, reliance on distinctive lawyerly craft tools, and rule-like adjudication structure) or to those of the proportionality model (*i.e.*, expansive rights, reliance on more prescriptive reasoning in matters of rights, and more open-ended and context specific structure of adjudication). Alternatively, however, the administrative law model also lets systems combine between these elements and to some extent pushes them to do so, given the various upstream/downstream interactions within the model.

What might be said in support of this specific feature of the administrative law model? To see the potential appeal, let me begin by providing a qualified defense of key features of the categorical reasoning model which, again, the administrative law model allows systems to retain.

(*) A (qualified) defense of the categorical reasoning model. Some fierce proponents of the proportionality model would be quite frustrated with this possibility under the administrative law model. They believe the categorical

https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040/.

240. For a lucid discussion and exploration of the values served by consistency in administrative law, *see* Yoav Dotan, *Making Consistency Consistent*, 57 ADMIN. L. REV. 995 (2005).

241. For an account that emphasizes the increased importance of stability in constitutional law, *see* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

242. *See supra* Part III.B.

reasoning's commitment to a relatively narrow domain of rights is unfortunate.[243] That relying on "distinctive juridical technologies" is inappropriate when reasoning about rights because these technologies are not sufficiently empirical or moral or political and even offend the demands of "public reason."[244] And that it blocks the need for more granular and context-specific analysis and for case-by-case "balancing."[245]

But these claims seem too quick, especially if taken to the extreme. There are entirely sensible, indeed powerful, reasons that support these commitments of the categorical reasoning model. First, not all rights included in the relevant legal documents have the same structure. Some rights seem more specific rather than general and expansive, and thus more naturally call for more categorical and legalistic analysis.[246] Specific histories of countries can furthermore lead them to make more deliberate rights' codification choices which a more legalistic reasoning style, and the categorical reasoning model, will tend to respect.[247]

Second, it is not necessarily the case that "distinctively juridical technologies" offend the demands for "public reason" or are not sufficiently empirical or prescriptive in nature, as some supporters of proportionality suggest. Some "legalistic" styles of reasoning have respectable instrumental support. The only difference is that this support operates on the second-order level rather than on the first-order level that adherents to proportionality too quickly expect.[248] So, for example, reliance on texts can advance coordination, encourage settlement, and supply a plausible, and to some extent inescapable, means of communication between drafters and courts.[249] Reliance on history or tradition is not necessarily following dogma but may be justified by the need to incorporate valuable conventions and norms or supply epistemically valuable "gloss."[250] And stare decisis—a potentially distinctive lawyerly technology as well—may have respectable instrumental credentials, too, including achieving stability, consistency, and guaranteeing that "like cases are decided alike."[251]

Third, the categorical reasoning model is often defended by its own proponents, and in response to the critique from proportionality adherents, as a

243. *See, e.g.*, Möller, *supra* note 91.

244. *See, e.g.*, Kumm, *supra* note 97; Wojciech Sadurski, *Judicial Review and Public Reason*, in COMPARATIVE JUDICIAL REVIEW 337 (Erin F. Delaney & Rosalind Dixon eds., 2018).

245. *See, e.g.*, Douek, *supra* note 49.

246. Jackson, *supra* note 15, at 3168–70.

247. I discuss later, in Part VI *infra*, the role of specific and general limitation clauses.

248. For this distinction, *see* JOSEPH RAZ, PRACTICAL REASONS AND NORMS 39–40, 46–47 (1990).

249. *See generally* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

250. *See, e.g.*, Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U. L. REV. 701 (2019).

251. *See, e.g.*, Alexander & Schauer, supra note 242. *Cf.* Vlad Perju, *Proportionality and Stare Decisis: Proposal for a New Structure*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 197 (Vicki C. Jackson & Mark Tushnet eds., 2017). For the claim that stare decisis exists and is in fact pervasive in politics too, *see* Oren Tamir, *Political Stare Decisis*, 22 CHI. J. INT'L L. 441 (2022).

way for achieving judicial constraint. This is largely associated with the traditional claims that the literature on the rules/standards distinction elaborates.[252] That seems true to some extent. However, a better defense of the categorical reasoning model might be more systemic and wholesale rather than retail. On this view, the value of the categorical reasoning model is that it helps systems to fulfill the legitimate need they have in what can be called optimal doctrinal complexity.[253] After all, it seems important to save both judges and decision-makers in politics who are expected to follow higher courts' rulings from doing unnecessary "work" if we can limit and specify more clearly and accurately their inquiry or giving them signals or presumptions about where they are supposed to land. And, given the prospect of mistakes and the potential "pathologies"[254] of both lower courts judges and decision-makers in politics more broadly, in general but perhaps especially in matters of rights, we want to minimize the costs of errors as well.[255] The categorical reasoning model, by creating a more rule-like structure of decision-making, seems like a sensible, some might say indispensable, reaction to the need of systems for retaining as much as possible a structure of optimal doctrinal complexity and to minimize both decision costs and error costs in the context of constitutional rights adjudication.

Fourth, the previous point emphasized the perspective of judges and political decision-makers. But the categorical reasoning model also seems important if we add the perspective of the *public* as well. And in addition to the kind of familiar rule-of-law and guidance values that categories or bright-line rules supply,[256] which are clearly relevant here, we might note another thing: categories can have important expressive value that some systems might plausibly want to retain. Indeed, categories can signal for example that the government is in fact limited rather than that it is allowed to "do everything subject to the principle of proportionality."[257] The structure of rights protection might serve as a kind of "billboard"[258] for how the State sees its relations with citizens. And systems could

252. *See, e.g.*, Scalia, *supra* note 50; Sullivan, *supra* note 50.

253. *See, e.g.*, Richard H. Fallon, Jr., *The Fragmentation of Standing*, 93 TEX. L. REV. 1061, 1063 (2015); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clauses *Principle*, 110 YALE L.J. 1 (2000).

254. *Cf.* Vincent A. Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

255. For the concept of decision costs and error costs, intimately related to the need for optimal doctrinal complexity, *see, e.g.*, Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 ETHICS 5 (1999); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 193 (1988).

256. Again, a point that is pervasively made in the rules/standards literature. *See* sources cited *supra* note 50.

257. *Cf.* Webber, *supra* note 25, at 4.

258. For this term, *see* Tom Ginsburg & Alberto Simpser, *Introduction: Constitutions in Authoritarian Regimes*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 1, 6 (Tom Ginsburg & Alberto Simpser eds., 2014) (although the authors use the term in the context of authoritarian regimes, they highlight that it applies to stable constitutional democracies as well).

have sensible reasons to want to achieve that by drawing on a more categorical structure of rights.

Fifth, Karl Llewellyn's discussion of a legal cycle between periods of "grand style" and "formal style"[259] suggests another strength of categorical reasoning that proportionality supporters may be discounting: first-order practical reasoning of the kind these supporters prefer in matters of rights might be a systematically limited good. Law responds to changes in constitutional politics and, importantly, may need to occasionally retreat to the "formal style"—captured by rigid rules and distinctive juridical technologies when pressures on law from politics creep. Indeed, John Hart Ely for example spoke of rules as a form of "refuge."[260] Others have similarly emphasized the necessity for rules in matters of rights especially in politically "stressful"[261] times.

Moreover, the efficacy of features of categorical thinking as a place for occasional retreat is general, as Llewelyn's cyclical term suggests. But the argument of the need to retain categorical thinking as a permanent place for retreat, as the administrative law model does, seems perhaps to have special "bite" today, given the phenomenon of recent growing pressures on courts.[262] Indeed, even recent supporters of proportionality of late seem to have reconsidered their commitments precisely because of these global trends.[263]

Finally, supporters of proportionality may be discounting the costs of expansive constitutional rights and especially "rights inflation,"[264] which, as we have seen, is a feature of this model. The key challenge here is that the more rights are inflated, especially beyond the domain of "special" or "preferred" rights, the inevitable consequence of this is that more and more political judgments would be subject to the demands of rationality and judicial review. But the reality of pluralist politics, bargaining, and inevitable line drawing makes this subjection quite costly. Hans Linde famously described the legislative process, in the US context but arguably more broadly, as "irrational" because of the recognition that modern democracies today rely, crucially, on pluralistic mechanisms of bargaining.[265] And for Linde, and others as well, a system may have a reasonable interest in allowing this pluralist dynamic to largely exist free of heavy

259. KARL LLEWELLYN, THE COMMON LAW TRADITION 35–45 (1960).

260. JOHN HART ELY, DEMOCRACY AND DISTRUST 109–16 (1980).

261. Geoffrey R. Stone, *Limitations on Fundamental Freedoms: The Respective Roles of Courts and Legislatures in American Constitutional Law*, in THE LIMITATION OF HUMAN RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 182 (Armand de Mestral et al. eds., 1986). A potential example for the efficaciousness of rules in the context of rights adjudication may be the flag burning cases in the U.S. *See* Texas v. Johnson, 491 U.S. 397 (1989).

262. For discussion of recent threats to courts around the world, *see* Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 125–27 (2018).

263. *See* Moshe Cohen-Eliya & Iddo Porat, *Proportionality in the Age of Populism*, AM. J. COMP. L. (2022).

264. *See* MÖLLER, *supra* note 8.

265. Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 212 (1976).

constraints, including especially those that would flow from a highly expansive take on the scope of rights and rights inflation.[266]

All this suggests that the categorical reasoning model, or, more accurately, key features of that model, such as narrow rights, legalistic modes of reasoning, and more rule-like structure of rights dispute resolution, certainly have a respectable place in the context of constitutional rights adjudication. They should not be rejected as some proponents of proportionality often imply when they insist for example that it "is all and only about proportionality";[267] or that proportionality is a "universal criterion of constitutionality"[268] and the "ultimate rule of law."[269] The fact that the administrative law model preserves these features therefore seems valuable, indeed important.

In fact, all this also suggests that systems committed to proportionality would also benefit from the administrative law model. After all, the various justifications I have highlighted above for the features of the categorical model are general in nature. They would apply anywhere. And the critiques that are heard against proportionality from those embedded in systems committed to it[270] suggest in an important sense that they might indeed have real "bite." True, as we have seen in Part II, when I discussed the connections between the models, proportionality can for example become more "systematized" or "calibrated" and thus transition to resemble the categorical model.[271] But as suggested in Part III,[272] the administrative law model—by institutionalizing a "fit" requirement via *Chevron*—can speed-up the likelihood that this would in fact occur, by establishing a kind of rule in favor of rulification.

(*) The problem of excess. So far, I have defended the administrative law model as preserving elements of the categorical reasoning model that are valuable across-the-board. As I noted at the outset, though, this defense is ultimately a qualified one. More specifically, it is quite easy to see how a system can retain categorical thinking in rights' matters in excess of what this defense sensibly and plausibly implies. For example, a particular jurisdiction would rely on categorical thinking, textual formalism, and other distinctively juridical technologies in ways that cannot be reasonably squared with the second-order consequentialist justifications of formalism or specific rights' codification styles. Or a system would retain categories beyond what can be sensibly justified given the legitimate need of preserving optimal doctrinal complexity. And, while the costs of

266. For a recent "skeptical" discussion of proportionality in this vein, *see* Mark Tushnet, *Making Easy Cases Harder*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 303 (Vicki C. Jackson & Mark Tushnet eds., 2017).

267. BEATTY, *supra* note 13, at 170.

268. Stone Sweet & Mathews, *supra* note 17, at 160.

269. BEATTY, *supra* note 13.

270. *See* sources cited *supra* notes 23–26 and throughout.

271. *See supra* note 114 and accompanying text.

272. *See supra* Part III.B.

expanding and "inflating" rights might be significant in a system that values (even ambivalently) pluralist politics, it is also possible that the benefits of expansion and inflation would outweigh these costs—perhaps if there is a sufficiently gentle technology that would make judicial review not too burdening on pluralist politics.

Indeed, the best defenses of the proportionality model highlight exactly *that* as the problem with the categorical reasoning model. That reasoning-by-category might be in excess of what is sensible;[273] that it is applied too "mechanically,"[274] perhaps merely for the fear of making tough but nonetheless required judgment calls in matters of rights.[275]

(*) Challenges in remedying excess. Of course, all this suggests that it makes sense to think about solutions to the problem of excessive reasoning-by-category. After all, constitutional law need not be static and only "codify" what exists today; it can aspire to "transform"[276] as well. But here, there are two challenges. The first is uncertainty and complexity in knowing that there is indeed excess. Consider for instance whether a commitment to categorical reasoning represents, in a particular context, an excessive reaction to the problem of optimal doctrinal complexity. It's quite hard to know if that is really the case. The answer depends on the variance of decision-makers in lower courts and in politics in terms of their qualities, abilities, and tendencies, and many other factors.[277] And, as always, this issue of whether something is indeed excessive would be subject to reasonable disagreement in the specific context.

The second challenge is that the excess may not be a result of what we can think of as purely "rationalistic" reasons. Rather, it may be a component of a culture of rights in a particular place. So, for example, in the relevant system the excessive reliance on formalistic or legalistic reasons in matters of rights or "distinctively juridical technologies" does not necessarily raise what has been called recently a "resonance gap."[278] These forms of reasoning do in fact resonate with the culture in place. Additionally, it is also possible that a given system is culturally committed to pluralistic politics and it is the culture that is not open for the possibility of more expansive and inflated take on constitutional rights (for

273. Another way to put this point, suggested by Professor Vicki Jackson, is that the best defenses of the proportionality model are those that take proportionality proportionally. *See* Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803 (2004).

274. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 847 (Breyer, J., dissenting).

275. *See* Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEG. ANAL. 103, 104–05 (2012) (suggesting this in the context of First Amendment law in the U.S.).

276. *Cf.* Karl Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. IN HUM. RTS. 146 (1998).

277. For a relevant list of factors in the context of political decision-makers, *see* Dawn E. Johnson, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, 67 L. & CONTEMP. PROBS. 105, 109–10 (2004).

278. David E. Pozen & Adam Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729 (2021).

instance because it "cheapens" rights).[279] Finally, a culture may have an especially high regard of specific rights that would encourage thinking of it in rigid, uncompromising terms, and beyond what seems justified on purely rationalistic terms.[280]

(*) The "right" strategy. To be sure, these problems do not suggest that we should be indifferent to the concerns from excessiveness. Cultures of rights are again not static. And we can validly consider working to change them if that seems necessary. Moreover, uncertainty, complexity, and reasonable disagreement do not imply and should not be taken to imply paralysis.

What these challenges do seem to suggest, however, is that change should likely be pursued with caution rather than in a form of a blunderbuss. To allow for incremental evolution[281] such that systems would be able to settle on a what would be the optimal "package" of elements from both categorical reasoning and proportionality. And that would also not bring to situations where law on constitutional rights would be "disharmonious"[282] with a given culture of rights.

But the administrative law model seems to suggest exactly this kind of strategy of careful, incremental change. On one hand, as we have seen, it allows to open the door for the kinds of elements that are characteristic of proportionality, especially through *State Farm* and the requirement of reasoned decision-making. And because of *State Farm*'s ability to climb up to the *Chevron* step, the administrative law model also provides some pressure and a kind of "nudge" in the direction of opening the doors to these kinds of claims in matters of rights. Litigants, judges, and decision-makers can introduce rights' arguments in this direction. At the same time, the administrative law model retains the full strength and possibility to reject the attempt to open this door when a culture is not ready or when such opening the door is not justified for more rationalistic reasons. Alternatively, the administrative law model retains the ability to go back to a more categorical frame once a period of experimentation has run out. The way that the administrative law model does that is through retaining the full place of *Chevron*—with its requirement of "fit"—which is always hospitable to the key features of the categorical frame.

(*) Excessive proportionality. My presentation up to this point has been mostly from the point of view of excessive categorical thinking. But the problem of excess can also exist in contexts committed to the proportionality model. Like excessive categorical thinking, reliance on proportionality may also be a cultural

279. This of course has connections to what Professor Richard Fallon has described as "sociological legitimacy." *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

280. For this claim, *see* Frederick Schauer, *The Exceptional First Amendment*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29 (Michael Ignatieff ed., 2005).

281. On the need for incremental constitutional change speaking from a different, though not entirely unrelated context, *see* HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011).

282. I draw this term from GARY JEFFREY JACOBSOHN, CONSTITUTIONAL IDENTITY 15 (2010).

phenomenon that is not reducible to clear rationalistic reasons. And there would likely be complexity, uncertainty, and reasonable disagreement about the right mix between elements of categorical thinking and proportionality. The same analysis of how the administrative law model can affect incremental change would therefore be relevant in this case of excessive proportionality as well. The only difference is that here the model would work upstream, not downstream—from *Chevron* and the requirement of "fit." On the one hand, *Chevron* opens the door for experimenting with some reasoning-by-category in matters of rights and, as I have suggested, may even help speed up and encourage it. On the other hand, *State Farm* and the reasoned decision-making standard in ways that reflect the features of proportionality is always retained and can be easily re-introduced. The choice between the two features of the distinctive models is always available.

(*) Summary. I am now able to more generally suggest why the administrative law model seems desirable. In a nutshell, the administrative law model appears to establish what we can think of as an attractive meta structure for rights adjudication. That structure would allow systems of rights adjudication to figure out the optimal "mix" between key elements of proportionality and categorical reasoning, both of which have potential merits. But given the complexity and uncertainty around what that optimal package would be in a specific setting and given moreover that reasoning about rights reflects cultural, not-necessarily-rationalistic commitments, the administrative law model does not assume a blunderbuss strategy. It retains the features of the two models as fully valid rather than being biased in one direction. And it then lets systems figure out, muddle through, incrementally, in the process of adjudication and as disputes arise, what is right for them given the cultural and other conditions in which they operate.

(*) Political constitutionalism, redux. My discussion so far implicitly assumed that this process of negotiation within the meta structure of rights would be a judicial one. That, for instance, courts would be able to relax categorical thinking by introducing *State Farm* on the expense of *Chevron* (when pressed by litigants), or that courts would be able to move more quickly upstream and categorize a system, via *Chevron*, whose commitment is to proportionality's features. But that is not how the administrative law model is meant to work. As we have seen before,[283] the administrative law model comes with a substantial measure of deference to political decision-makers. It is enhancing political constitutionalism. This means that, when rights-based texts are open to various reasonable interpretations, most of the navigation within the administrative law model is intentionally political, not judicial.

This feature of the administrative law model also has relevant merits. For one, it is certainly possible that political institutions could be better than courts in navigating the kinds of choices about doctrinal structure that the administrative law model opens up. In current scholarship and judicial practice, discussions of

283. *See supra* Part III.A.

whether "calibration" or "rational systematization" in a proportionality system is desirable, or, conversely, how much to expand rights and relax categories in categorical reasoning systems are presently conceived in exclusively judicial terms.[284] But it is at best unclear why politics should not have a more meaningful role here. All the "regular" political constitutionalist claims, discussed above in Section A, suggest that politics might be superior to courts in the task of structuring rights adjudication at this meta level, too. After all, political institutions might have a more systemic outlook on the structure of doctrine.[285] And politics may moreover be a better "regulator," so to speak, of cultures of rights.

In fact, giving politics this leading role in navigating choices about how rights are structured might increase the prospects that a culture of rights would change and move away from the problem of excess. After all, one plausible reason why systems may be in "excess" of reasoning-by-category is the enhanced role of judges in constitutional adjudication. In other words, excessive judicialization of constitutional politics might be pushing systems to rely on more and more juridical technologies as tools for adjudicating rights disputes.[286] Conversely, it is possible that the excessive reliance in jurisdictions committed to proportionality is driven by lawyers and judges who have incorporated, mistakenly, an overly idealized picture of rationalized politics that can be readily administered by judges and lawyers.[287] By instructing courts to defer to politics, within the confines of *Chevron* and the requirement of "fit" that comes with the administrative law model, we might weaken the hold of the "legal complex"[288] on the process of change. As a result, we might potentially even quicken it.

C. The Benefits of the New Technique

A third distinctive feature of the administrative law model stems, I have suggested, from the way it introduces a new technique for the adjudication of rights, one that differs importantly from the existing models. This technique is captured by the form of review implied by the *State Farm* framework and the requirement of reasoned decision-making in US administrative law. What might support such a switch in technology?

284. For a sense of this strong judicial focus, *see generally* Dixon, *supra* note 114; Jackson, *supra* note 15; Greene, *supra* note 16.

285. The structural and panoramic advantages of political institutions compared to courts have led various scholars to advance deference to them in other contexts of, for example, US constitutional law. *See, e.g.*, Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039 (2016).

286. On the phenomenon of "juristocracy," *see generally* HIRSCHL, *supra* note 41.

287. For such a suggestion, mostly in relation to Germany, *see* Ernst-Wolfgang Böckenförde, *Constitutional and Political Theory*, in SELECTED WRITINGS 259 (2017).

288. For the term, *see* Lucien Karpik & Terence C. Halliday, *The Legal Complex*, 7 ANN. REV. L. & SOC. SCI. 217 (2011).

Obviously, an important part of the answer relates to the political constitutionalist claims discussed earlier.[289] After all, the *State Farm* framework, contrary to the regular operation of reasoning-by-category and proportionality, entirely denies judges the ability to directly evaluate the substance of rights claims. The only explicit substantive cause for intervention is irrationality, an extremely narrow ground that should be rarely met.

But the *State Farm* framework and the reasoned decision-making requirement still leave something potentially meaningful in the hands of courts. First, they empower them to insist that governmental institutions supply reasons and some form of record.[290] Second, these tenets of the administrative law model empower courts to review these reasons and records for being "reasoned," and to issue remands.[291]

To see the appeal of this technology of review that comes with the administrative law model it is necessary to distinguish between two different modes that, as discussed before, it can come to us in this model: one that is categorical and the other more flexible.

(*) Categorical mode: When *State Farm* and the requirement of reasoned decision-making are implemented in the categorical way the difference between the administrative law model and the categorical reasoning model is mostly the proceduraliztion of the judicial inquiry. And, while this particular difference may seem modest, it is important nonetheless. This proceduralization not only injects a dose of political constitutionalism; it also strengthens the incentives of decision-makers to make sensible rights' decisions. Indeed, in many cases today, decision-makers in politics can rely on the adjudication process to "shoulder[]"[292] them (for example when more reasons in support of government decisions that infringe on rights are presented at the litigation stage and facts might also be adjudicated anew). But the administrative law model would block this possibility. It operates, as we have seen, based on closed records and reasons.[293] Thus, the administrative law model encourages governments to be the most responsible decision-makers they can when rights are on the line. This proceduralization moreover encourages interested parties to reach out to the government and present their case rather than to "hold out" on it.[294] It also pushes governments to seek this input on their own initiative in advance.

(*) Flexible mode: The differences become starker, however, when the *State Farm* framework and the requirement of reasoned decision-making doesn't

289. *See supra* Part III.A.

290. *See supra* Part III.C.

291. *Id.*

292. Cooper Laboratories, Inc. v. Commissioner, 501 F.2d 772, 790 (D.C. Cir. 1974) (Leventhal, J., dissenting).

293. *See supra* Part III.C.

294. On the various process-benefits of the closed records and reasons rule, *see* Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169 (2013).

operate in a categorical mode but rather in a flexible one. When, in other words, constitutional rights are interpreted in a way that decision-makers can consider a variety of considerations and give them weight, without limitations.[295] Here, the divergence is stronger when the administrative law model is compared to proportionality, which is supposed to be similarly flexible. As we have seen, the *State Farm* framework doesn't include a requirement of minimal impairment or a separate stage of balancing. And it instructs decision-makers to think about rights not very far from any policymaking. But this has potentially important virtues.

Note first that the kind of review supplied by the reasoned decision-making requirement, while it applies to "regular" policymaking, seems entirely suitable for rights claims. For one, through the requirement of "relevant factors" that comes with the reasoned decision-making standard, courts make sure that the governmental decision-makers have internalized considerations of rights (or any authoritative previous interpretations of rights' scope) into their decision-making process. In that way, the reasoned decision-making requirement seems to satisfy what we can think of as the minimal demands of constitutionalism—that decision-makers move based on awareness of constitutional considerations.[296]

For another, the benefits of this form of review in the administrative law context, and as applied to standard, run-of-the-mill policymaking, are also relevant in the constitutional rights domain. These benefits include avoiding arbitrariness, securing transparency and accountability, and making sure that decisions are the best they could potentially be.[297] The way that the *State Farm* framework and the requirement of reasoned decision-making achieve these benefits in US administrative law and would achieve them in the constitutional rights context as well, is first and foremost because they outline a broad standard of what a reasoned decision is (or at least how it looks like). This includes, in addition to considering the "relevant factors," also the various elements we have seen in Part II, including the need to gather data, explore "viable and substantial" alternatives, and explain inconsistencies and effect on reliance interests.[298] Then, we can reasonably expect this *State Farm* framework to have two potential desirable effects. The first is an ex-ante effect—that this form of review might

295. *See supra* Part III.C.

296. For writing that associates constitutionalism with appropriate attention to constitutional values in decision-making, *see, e.g.*, Jennifer Nedelski, *Legislative Judgment and the Enlarged Mentality*, in THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE 95 (Richard W. Bauman & Tsvi Kahana eds., 2006); Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499 (2009).

297. For a recent discussion, *see* Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2021).

298. *See supra* Part II.B.2.

create a kind of "in terrorem,"[299] "second-look,"[300] or "observer effect"[301] and might prevent the need for judicial intervention in the first place. Decision-makers will have to "show [their reasoned] work" when deciding in matters of rights.[302] The second effect is an ex-post one: that talented judges with the help of capable litigants will be able to identify areas where a decision seems to falter in achieving any of the benefits previously discussed (non-arbitrariness, transparency, optimal decision-making, etc.). Finally, if judicial intervention is needed, the remedy is light and in the form of a remand. Failures of reasoned decision-making can be corrected with appropriate explanations. They are not and should not be fatal.

The *State Farm* framework therefore seems entirely suitable and a potentially attractive technology for evaluation of rights notwithstanding its administrative law and "standard" policy origins. It helps achieve what seems like a highly attractive mix between political and judicial constitutionalism. Political decision-makers possess the primary responsibility to determine substance. And courts intervene only when these decisions are not reasoned, to make sure that rights have been appropriately internalized into decision processes according to the minimum requirement of constitutionalism, and to secure the other benefits of this form of review —including avoiding arbitrariness, transparency, accountability, and responsible, optimal decision-making.

All the above is important. But as discussed, the *State Farm* framework also differs from proportionality in dropping the "formal" requirement of least restrictive means as well as the separate stage of balancing. Rather, all it requires is that decision-makers identify "viable and significant" alternatives and explain their chosen course of affairs.

This, too, seems potentially powerful. By doing so, the evaluation of rights claims might be conceived of as more simple and more integrated with the world of policymaking. Today, under proportionality, rights and policy seem much more bifurcated—they are analyzed under different protocols of decision-making.[303] The unification brought by the administrative law model will end this bifurcation. And that might in itself have beneficial effects. For example, it can enhance the possibility of better attention and acceptance of rights in policy processes. And it might increase input from non-lawyers and non-judges into issues of rights,

299. Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 527 (1989).

300. Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Inter-branch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001).

301. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827 (2013).

302. David L. Markell & Emily Hammond, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVT'L. L. REV. 313, 324 (2013).

303. *See* Kremnitzer & Sulitzeanu-Kenan, *supra* note 221.

something that political constitutionalism encourages (and present-day US administrative law, too).[304]

Furthermore, it is not clear that anything significant in terms of appropriate protection for constitutional rights would be lost by dropping the explicit requirement for least-restrictive-means and balancing. To be sure, a key strategy through which courts defend rights is by looking at alternative courses of action to what governments are trying to achieve. In this way, courts can "smoke out" illicit governmental motivation and ensure that choices regarding rights are made in a responsible way.[305] All this remains central under the administrative law model and the requirement of reasoned decision-making. What is less clear is why the analysis of alternatives should be accompanied by an additional and separate stage of balancing rather than incorporate both in a single step. And, indeed, systems applying proportionality, especially in a sequential, step-by-step form, struggle with coming up with convincing responses.[306]

One response seems to be that the additional step guarantees that an alternative of "no action" is also considered. But this can easily be folded into the previous step of evaluating alternatives (simply as a "zero action alternative"). Another response is that by separating the stages, courts might avoid balancing altogether or maintain more crisp normative guidance in a separate stage. But as many recognize,[307] balancing must also take place at the stage of evaluating alternatives, at least when the requirement of effectiveness of means relative to the goals is interpreted to require similar effectiveness. There is no escape from balancing. And at least in a system of political constitutionalism, there is no need to guarantee a separate step for this normative analysis.

As to the explicit requirement of least restrictive means that the reasoned decision-making requirement also formally drops, this is also potentially powerful, at least outside the context of more "preferred" rights. As recent scholarship has emphasized, the requirement of least restrictive means can lead to *overprotection* of rights at the expense of other important rights or interests. More specifically, by searching for least restrictive means judges may too quickly discount issues of administrative costs (which may themselves have an impact on rights).[308] And, they may also too quickly overlook the practical difficulties of

304. *Cf.* Elizabeth Magill & Adrian Vermeule, *Allocating Power within Agencies*, 120 YALE L.J. 1032 (2011).

305. For a valuable discussion, *see* Fallon, *supra* note 117.

306. For one, in my view unsuccessful, attempt to explain the need for distinction, *see* David Bilchitz, *Necessity and Proportionality: Towards a Balanced Approach*, in REASONING RIGHTS: COMPARATIVE JUDICIAL ENGAGEMENT 123 (Liora Lazarus et al. eds., 2014).

307. *Id.*, at 127.

308. *See, e.g.*, STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (2000); Jeff R. King, *The Pervasiveness of Polycentricity*, 2008 PUBLIC LAW 101.

getting governmental action off the ground (especially perhaps because of bottlenecks and veto-gates that usually characterize the legislative process).[309]

The *State Farm* framework and the requirement of reasoned decision-making suggest what seems like a more elegant solution that is potentially free of these immediate concerns. As we have seen, it instructs decision-makers to identify "significant and viable alternatives," without the requirement that they be the least restrictive means. This means that decision-makers in politics frame what is viable and substantial given current amounts of funding, costs, and the limits of political feasibility. And, of course, to the extent that judges nonetheless reasonably think that other viable and significant alternatives ought to be explored, they can always remand the issue.

(*) Other virtues: age of facts, policy states, and governmental distrust. Finally, the move to the *State Farm* framework and the reasoned decision-making requirement as a technique of rights' evaluation has additional virtues that apply to both modes in which it might operate—the categorical and the flexible. First, the technique seems especially important due to the modern rise of global administrative and policy states, and the increased bureaucratization of politics.[310] Indeed, one consequence of this has been the transformation of constitutional litigation to become more "fact-y"[311] and complex in the United States and elsewhere. Courts and decision-makers address and consume more facts and more complex facts than they did before. The *State Farm* framework and the reasoned decision-making technology, with its factual and process-based focus, including the requirement that decision-makers collect data and use adequate methodologies in their decision, thus seem more apt to capture this transition than the more substantive nature of inquiries under the existing models of proportionality and categorical reasoning.

Second, the intense focus on reason-giving that comes with the reasoned decision-making standard might be important for another reason as well. Many have noticed a trend of growing governmental distrust, both in the United States and globally. Less people believe in what governments are doing and more people tend to either respond aggressively or disengage.[312] The solution to the problem of increased governmental distrust is likely complex and varied. But one possible way to give more attention to this and governmental trust might be suggested by the reasoned decision-making standard and its intense attention to the quality of

309. For this claim, *see* Vicki C. Jackson, *Pockets of Proportionality: Choice and Necessity, Doctrine and Principle*, in COMPARATIVE JUDICIAL REVIEW 357, 368–76 (Erin F. Delaney & Rosalind Dixon eds., 2018).

310. KAREN ORREN & STEPHEN SKOWRONEK, THE POLICY STATE: AN AMERICAN PREDICAMENT (2017); Thomas Christiansen et al., *National Parliaments in the Post-Lisbon European Union: Bureaucratization Rather than Democratization?*, available at https://orbilu.uni.lu/bitstream/10993/16908/1/ChristiansenHogenauerNeuholdOPAL.pdf.

311. I draw this term from Larsen, *supra* note 36.

312. *See, e.g.*, Richard H. Pildes, *Political Fragmentation and the Decline of Effective Government*, J. OF DEMOCRACY, October, 2021.

reason-giving by governments. Indeed, it is not farfetched to believe that governments that reason more extensively and transparently, and with more attention to complexities and counter arguments, will gain more trust. And, to the extent that the administrative law model helps encourage this approach, this might be an additional important strength of the model.[313]

D. The Benefits of Expanding the Scope & Focus on Initiation Claims

The final distinctive feature of the administrative law model, as we have seen in Part III, is that it substantially expands the potential scope and focus of initiation claims compared to the existing models. This is so particularly when compared to categorical reasoning, which rarely acknowledges initiation claims.[314] But this is also true when compared to the proportionality model, which, as we have seen, does not equate the domain of initiation claims with the full scope of governmental powers,[315] nor does it recognize the possibility of initiation claims in the direction of "lookbacks."

What can be said in support of this specific move that would be brought by endorsing the administrative law model?

(*) The generality of the problem of governmental inaction. To see the potential appeal of the model in this context, it is useful to begin by discussing why the field of administrative law itself has regularly opened the door to initiation claims.[316] The reason seems largely the following: administrative agencies are often given broad mandates in their authorizing statutes to accomplish various goals. And while these agencies should largely enjoy broad discretion to prioritize what they pursue, especially in a world of finite and limited resources, there are nonetheless risks or concerns that can accompany this type of discretion. Indeed, agencies may face bottlenecks, "blind spots", and suffer from tunnel vision.[317] They can exemplify "arteriosclerosis,"[318] work on "autopilot,"[319] and generally be exposed to "inertia and torpor."[320] And, they might even be "captured"[321] in ways that prevent them from moving even though

313. Stephen Griffin, *How Can Biden Govern? Think "Zero-Based" Government*, BALKINIZATION, December 4th, 2020, available at https://balkin.blogspot.com/2020/12/how-can-biden-govern-think-zero-based.html.

314. *See supra* Part III.D.

315. *Id.*

316. Though I highlight here again, as I did before, that contemporary US administrative law includes important limits on the reviewability of initiation claims. *See supra* note 214 and sources cited there.

317. I draw these terms from Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST'L. L. 391 (2007).

318. JAFFE, *supra* note 151, at 12.

319. Philip J. Weiser, *Entrepreneurital Administration*, 97 B.U. L. REV. 2011, 2029 (2017).

320. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2263 (2001).

321. *See* Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013).

movement and action might be desirable—perhaps also from the point of view of agencies themselves.

By making instances of agencies' inaction and indecision, or "initiation claims," reviewable in courts—and not only cases where the government is actively pursuing something or has decided to move on an issue—the field of administrative law can essentially shift the burden of inertia away from those who may be harmed by agency inaction to the agencies themselves. As a result, judicial review of initiation claims might jump-start agency decision-making processes in ways that might have not been without accepting initiation claims. This may open up possibilities for some "prods and pleads"[322] to combat the risks or concerns that statutes are not fully pursued by agencies, and, finally, provide outsiders from the public an opportunity to participate in agency priority-setting rather than leave issues like these to be an impenetrable "black box."[323]

But all this does not seem unique to the administrative law context. These rationales that support the recognition of initiation claims and their potential reviewability by courts apply just the same to the constitutional law context as well. After all, all constitutions provide broad powers for all the institutions that operate under them, and not only to administrative agencies (which constitutions empower either directly or through delegations).[324] And while these institutions should certainly have substantial discretion to prioritize their actions, given the reality of scarce resources, they are just as vulnerable to the problem of potentially unjustifiable inaction that the field of administrative law has recognized. Indeed, very much like administrative agencies, all the institutions regulated directly by constitutional law can suffer from inertia, torpor, tunnel vision, "paralysis,"[325] and ore. And just as in administrative law, acknowledging the reviewability of initiation claims on these institutions, would have the exact same potential effect of jump-starting the political process, supplying opportunities for "prods and pleas," and opening the black box of governmental priority setting to the public.

(*) A better, fuller protection of certain constitutional rights (or manifestations of rights). This description highlights that reviewability of initiation claims might have *general appeal* beyond administrative law "proper." But the discussion still seems disconnected from the relevant context here. More specifically, some might suggest that the concerns from governmental inaction just discussed and which reviewability of initiation claims might solve are "normal" governmental issues, not ones that relate to constitutional rights in particular.

322. Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350 (2011).

323. *See* Livermore & Revesz, *supra* note 321, at 1356.

324. For the uncertainty about the constitutionality of delegation under present US law, *see infra* Part VI.A.

325. On the phenomenon of "legislative paralysis," *see* Henry J. Friendly, *The Gap in Lawmaking—Judges Who Cannot and Legislators Who Won't*, 63 COLUM. L. REV. 787, 797 (1963).

This suggestion would be wrong, though. The problems that initiation claims are meant to resolve can sensibly be connected to issues of constitutional rights. Which right exactly would depend on the nature of the initiation claim being presented. When an initiation claim asks for governments to do more—including introducing more regulation or supplying further services—it is very likely that the initiation claim would fall well within the acceptable domain of socioeconomic rights or an expansive right to governmental protection. In contrast, when an initiation claim is presented to courts to ask them to alleviate previous burdens, including by announcing that certain laws have reached their "shelf life" or should at least be amended, the initiation claims are well within the scope of what we can describe as a general right to liberty or autonomy or, in US jargon, substantive due process rights. Today, some scholars would group these manifestations of rights together under a banner of a right to "effective government," which in important respects combines these positive and negative elements of liberty.[326] By making sure, through reviewability of initiation claims in both possible directions that governments are effective, the administrative law model therefore helps protect this novel right that more and more discussions on constitutionalism have started addressing, as a kind of, borrowing from Hannah Arendt, "right to have rights."

What this suggests is that the administrative law model's expansive focus on initiation claims has the potential to more fully protect rights that the existing models do not robustly protect. In categorical reasoning, this under-protection is almost complete, at least as measured by current practice in the United States Under the proportionality model, the protection exists, but may not go far enough as presently practiced. Or, in other words, to the extent that in the proportionality model the domain of constitutional rights does not fully track the domain of governmental powers, the proportionality model does not seem to allow the possibility that rights would be inflated enough.

(*) Completing the circle of political constitutionalism. So far, I have suggested that the administrative law model has the potential to protect more rights (or manifestations of rights) compared to the existing models. But there is in fact another advantage in this expansive focus on initiation claims that the administrative law brings with it. After all, initiation claims of this kind need not necessarily require governments to exercise their powers under existing authorities. Initiation claims can moreover be directed toward the need to *consider new understandings of their powers, including new interpretations of rights provisions*.

In that way, the administrative law model could serve another potentially valuable function: it could help close the circle of political constitutionalism itself by establishing a mechanism to "prod and plea" political institutions to re-engage

326. For an edited volume that includes important discussions about the issue, *see* CONSTITUTIONALISM AND A RIGHT TO EFFECTIVE GOVERNMENT? (Vicki C. Jackson & Yasmin Dawood eds., 2022).

and renew the domain of constitutional rights. Something like this does not naturally exist under the existing models, perhaps unsurprisingly given the way that they both retain a major place for courts in the development of constitutional meaning. But under the administrative law model, where courts would be normally limited in their ability to offer de novo interpretations of rights (under a constitutional *Chevron*) or to evaluate the substance of rights (under a constitutional *State Farm* and the requirement of reasoned decision-making), such function seems important, indeed indispensable.

(*) The attractiveness of the technique. I close this Section by highlighting that the precise technology of review supplied by the administrative law to the review of initiation claims also seems generally attractive.

First, the claim that governments should initiate actions is filtered through *Chevron*, which means only those initiation claims that fall within the "reasonable" interpretations of political institutions of the relevant constitutional documents can continue. Given the commitment of the administrative law model to political constitutionalism, this sort of screener seems sensible. It is at the reasonable discretion of politics whether and how to expand the domain of initiation claims.[327] The administrative law model, in other words, provides an *option* to expand initiation claims, it does not mandate it.

Second, the review under the administrative law model, inspired by *Massachusetts v. EPA*, is supposed to be super-weak. All that it asks is that there would be "some reasonable explanation"[328] for the decision not to proceed. But that seems generally sensible, too. After all, the context of initiation claims does seem at least presumptively different from when governmental institutions do in fact already choose to act or decide. In a world of limited resources and broad constitutional powers that can be taken in many different directions and aim to accomplish "utopian goals,"[329]a too aggressive form of review carries with it a genuine risk of substantially hindering the ability of governments to act.[330] It would cause them to divert too many resources from what they *actually do* to deal with what they *could have done*.[331] And governmental institutions—for the same political constitutionalist reasons that justify recognizing that they, rather than courts, act as the primary vehicle for carrying forward the meaning and

327. In this sense, the administrative law model takes more seriously the political constitutionalist claims compared to a variant of political constitutionalism that asks courts to be more attentive to social movements.

328. *See supra* Part III.B.3.

329. R. Shep Melnik, *The Political Roots of the Judicial Dilemma*, 49 ADMIN. L. REV. 585, 586 (1997).

330. The best articulation of this defense of the super weak standard in administrative law is Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1 (2008); Eric Biber, *Two Sides of the Same Coin: Judicial Review of Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461 (2008). *See also* Sunstein & Vermeule, *supra* note 198.

331. For the idea of "diversion costs," *see* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1124 (2017).

application of rights, also deserve a kind of presumption that they prioritize within their limited resources reasonably, which is exactly what *Massachusetts v. EPA* sensibly does.

Finally, if applied faithfully, the "super-weak" standard of review should mean that governmental institutions would mostly win initiation claims even if these claims are potentially meritorious. After all, many issues on which initiation claims can be raised take time and leeway should be provided, perhaps especially when these claims ask for a new normative regulation of an entire field rather than more focused decisions by governments. Nonetheless, there also seems to be a sensible limit to how much courts should sit on the fence. When governmental institutions consistently put something that is reasonably within their powers or mandates at the end of the queue, the lingering on ceases to be something that credibly signals reasonable discretion in a space where resources are tight, and priorities must be set. Rather, they signal complete abdication. And judicial intervention drawing on a somewhat categorical principle of "anti-abdication" developed in administrative law seems to have power.[332] It will be a kind of final backstop or "nuclear option" when governments consistently drag their feet.

V. CHALLENGES & RESPONSES

The administrative law model, I have suggested, has much going for it. It injects political constitutionalism, provides a desirable meta structure for rights, introduces a new powerful technique for rights adjudication, and gives an option for a very expansive focus on initiation claims, either to better protect some rights or to close the circle of political constitutionalism itself.

No doctrinal framework comes without costs or concerns, however. And the administrative law model is certainly no exception. This Part highlights what precisely these concerns and costs are and offers ways to address them. As we will see, while the relevant challenges associated with the administrative law model are not to be dismissed, they are also far from prohibitive. Sometimes the challenges that could be raised in relation to the model help highlight its unique features rather than undermine it. Other times, there are potential doctrinal (and other) solutions to these challenges that systems considering adopting the administrative law model would be able to introduce. As a result, some of the sting out of these concerns is taken away.

A. Faux Deference

(*) The concern—generally. One of the administrative law model's key attractions, I have argued in the previous Part, stems from the way it injects into systems of constitutional rights adjudication a substantial measure of political

332. For the claim that the remedy for anti-abdication is, at least as a general matter, to compel decision, *see* Sunstein & Vermeule, *supra* note 198. This seems to also be the view that is taken by the Supreme Court as well in a related context. *See* Norton, 542 U.S. at 65.

constitutionalism.[333] But while the administrative law model is certainly built in a way that aims to achieve all this, it is quite easy to imagine how it might fail to do so in fact. The basic reason is this: judges can use the doctrinal resources that the administrative law model leaves in their hands in a way that would ultimately *frustrate* political constitutionalism, not fulfill it. In other words, while under the administrative law model doctrine is explicitly geared to prevent it, strong judicial constitutionalism in matters of rights might nonetheless enter the scene through the "backdoor."[334]

To see this, begin with *Chevron*. While *Chevron* instructs courts to defer to reasonable interpretations, which means, as I have constructed it here,[335] to interpretations that do not cross a certain threshold of "fit" with the relevant legal materials or interpretations that do not constitute a case of unacceptable or excessive interpretive flip-flopping or ping-ponging, it is judges who ultimately remain responsible for deciding where that deference will occur and where it won't. Indeed, in US administrative law, *Chevron* explicitly leaves this responsibility in their hands when it licenses them to draw on any "traditional tools"[336] of statutory interpretation to decide whether the requirement of "fit" has been crossed. And in the practice of *Chevron*, judges are also the ones who get to decide what is an excessive interpretive flip-flop that they will reject.

If that is the case, though, it is easy to realize that there is a real risk that judges will implement a constitutional *Chevron* in a way that would be too aggressive and would not leave ample space for political constitutionalism to emerge and develop. They will do so based on their own preferred interpretive methodology (*i.e.*, which "traditional tools of construction" they believe are appropriate and which are inappropriate), on their own level of confidence and temperament (*i.e.*, when they think the text is "clear" or not and how much self-confidence and shoot-for-the-moon temperament they generally possess),[337] on their own views about the desirable degree of constitutional experimentation with constitutional norms (including what amount of flip-flopping should be considered excessive), or on their own more directly and overtly political views and ideologies. And to be sure, this possibility is far from theoretical. We have already seen it happen in contemporary administrative law in the United States. Indeed, US courts have increasingly shown a tendency to deny deference to agencies under *Chevron*. So much so, that some suggest that under present

333. *See supra* Part IV.A.

334. I draw this term from William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992).

335. *See supra* Part IV.A.

336. Chevron, 467 U.S. at 843 n.9.

337. Some argue that judges who adhere to certain interpretive philosophies are systematically more likely to feel more confidence. For this claim in the context of textualism, *see* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U.L.Q. 351 (1994).

practice, a regime with *Chevron* and a regime without it might be very similar (I return to this subject in the final Part of this Article).[338]

A similar concern will also arise under the frameworks of review outlined by *State Farm* and *Massachusetts v. EPA*. As I have discussed, these doctrinal tenets do not allow judges to make explicit substantive determinations about what goals to pursue or the means fitting to achieve them and thus infringe rights. Judges are limited to a reasoning process or internal thought process review to secure a standard of reasoned decision-making, which, in the case of *Massachusetts v. EPA*, is also supposed to be super-weak.[339] We should not be too naïve, though. Reasoning process review is not truly divorced from substance. It cannot be. Even if it is possible to identify the broad contours of the components of a "reasoned decision" (or what such decision looks like), making determinations about when specific instances satisfy that requirement will inevitably call for some measure of substantive judgment. How else do judges decide for example whether a certain alternative course of action is sufficiently meaningful that the fact that it has not been explored by a decision-maker renders a decision unreasoned under *State Farm*? Or how else do judges decide, under *Massachusetts v. EPA*, whether the reasons that a decision-maker has put forward for why an "initiation claim" should not be prioritized is similarly defective? These judgments will inevitably involve some evaluation of the merits of the issue or the substantive reasonableness of the decision (or indecision)—including how important or valuable it is and how much effort should be invested in exploring it further before proceeding.

Consequently, a more accurate description for the *State Farm* framework and *Massachusetts v. EPA* is not as "pure" reasoning process or internal thought process review. It is rather a form of "proceduralized substantive review"[340] or "quasi-procedural review."[341] It allows judges to have substantive input without being totally frank about it. Given this, the administrative law model quite clearly opens-up the possibility that the ultimate decision-makers will be judges, not political institutions. Borrowing a phrase from courts in New Zealand, we can say

338. *See, e.g.*, Jeffrey Pojanowski, *Without Deference*, 81 MO. L. REV. 1075 (2016). There is also an important body of empirical work that shows that patterns of deference to agencies change considerably by the ideological composition of judicial panels. *See, e.g.*, Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823 (2006). *But see* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463 (2018) (arguing that *Chevron* reduces political dynamics in administrative law).

339. *See supra* Part IV.D.

340. Jerry Mashaw & David Harfst, *Proceduralized Substantive Review and "Technology Forcing" Regulation*, 4 YALE J. ON REG. 257 (1987).

341. Garland, *supra* note 34. *See also* Martin Shapiro, *The Giving Reasons Requirement*, 1992 U. CHI. LEGAL F. 179, 187 ("Giving reasons review is an ideal cover."); Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427, 454 ("There is no bright line between a judicial challenge to an agency's reasoning… and a court's "sub[stitution of] its judgment for that agency.").

that the review under *State Farm* and *Massachusetts v. EPA* can quickly become nothing more than "merits in [procedural] drag."[342]

Finally, while under both *State Farm* and *Massachusetts v. EPA* the "ordinary" remedy is only a remand, rather than strike-downs, we should not think that remands are necessarily always so light. A remand can be light in theory but "fatal in fact."[343] For one, because a remand can ask the decision-maker to "obtain[] the unobtainable."[344] In such circumstances, a remand may only superficially look light and open to response even though in reality it is anything but. For another, the timing when decision-makers act is often crucial to the ability to succeed. Delay can itself put an end to the achievability of a decision—for example if a certain coalition was necessary to advance something in politics, and that coalition is fragile and can unravel when it has lost its momentum.[345] It is far from unthinkable that sophisticated judges who wish to prevent governmental decision-making from occurring might aim for precisely that.

(*) The concern—as applied to the model's meta structure. So far, I have described all the ways by which judges, employing the tools that the administrative law model provides for them, can prevent decision-makers from leading the way on the interpretation and substance of rights disputes. But recall that part of what is attractive under the administrative law model, I have argued, is also that it lets politics decide how to structure rights adjudication: and specifically, whether to opt for a commitment to features of the categorical model or to proportionality or rather to combine the two. My discussion above assumed of course that these advances within the model would occur when rights documents could reasonably be interpreted in ways that political institutions would suggest. When they do not, courts would justly be able to block politics from doing that. But the discussion above about the ability of courts to deny deference suggests that courts might do so more aggressively than that. For example, even if rights can be reasonably interpreted categorically, courts might nonetheless insist on applying a more flexible version of *State Farm*. Or when politics seeks to rely on "distinctive juridical technologies" as a mode of decision in matters of rights, and stop at the *Chevron* stage, judges might nonetheless insist on bringing *State Farm* downstream. As a result, all the virtues I have flagged

342. *See* Mark Aronson, *The Growth of Substantive Review: The Changes, their Causes, and their Consequences*, in PUBLIC LAW ADJUDICATION IN COMMON LAW SYSTEMS 113, 114 (John Bell et al. eds., 2016). I note that there's also ample empirical research that indicates how courts in the United States are deeply influenced by ideology in applying *State Farm* and the requirement of reasoned decision-making. *See, e.g.*, Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997); Miles & Sunstein, *supra* note 338; Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Court of Appeal*, 107 YALE L.J. 2155, 2162–76 (1998).

343. *Cf.* Gunther, *supra* note 53, at 8.

344. FCC v. Fox Television Stations, Inc., 556 U.S. 502, 519 (2009).

345. For a more extensive analysis of this and related points, *see* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2793–97 (2003).

above about providing politics with the primary responsibility for structuring rights would disappear, too.

(*) Response: refocusing the model—a new kind of dialogue. The concern of "faux deference" under the administrative law model, just discussed, is without doubt a substantial one. If political constitutionalism will not be achieved under it, much of the force of the model goes away. At the same time, we should not consider any possibility of more robust judicial intervention under the administrative law model as necessarily unwelcome. Rather, another way to understand the administrative law model is that, under the right conditions, it can provide for a new and attractive form of what comparative constitutional law scholars would describe as "dialogue"[346] between politics and courts.

At the *Chevron* step, at least when the effect of judicial interventions under it is not "strong" but rather "weak,"[347] that is—when politics can override the judicial intervention on how to interpret rights or structure them without too many substantial hurdles, the correct way to understand the judicial intervention is as reflecting the views of the judiciary about these issues. That view might be different than the view of political institutions and ultimately wrong or unattractive. But so long as politics has a way to respond, this intervention may not be necessarily troubling. The whole point of "dialogue" is to have some kind of judicial input rather than suffice with "pure" political constitutionalism alone, partly to guarantee with surety that non-judicial institutions take constitutionalism seriously enough.

When we move to the other components of the administrative law model, beyond *Chevron*, the "dialogue" metaphor becomes even clearer. This is so because under *State Farm* and *Massachusetts v. EPA* the review is always weak rather than strong. After all, the "ordinary" remedy under these tenets is a remand which can, by definition, be overridden and displaced by politics.

The only difference is that contrary to the kind of dialogue that might exist under the proportionality and categorical reasoning models, in the administrative law model the dialogue is procedural, not substantive. It is only about the existence of reasoned decision-making. Alternatively, now that we have seen that the review under *State Farm* is a form of "proceduralized substantive review," we can say that the dialogue under the administrative law model, contrary to the other models, is one that gags the ability of judges to rely directly on substance but limits their interventions to be in process-like terms and especially the adequacy of the reasons given. The substantive dialogue is implicit rather than direct.

For some, this process-based form of dialogue might strike as problematic. One fear might be that this more procedural interaction lacks transparency, even

346. *See, e.g.*, CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS (Geoffrey Sigalet et al. eds., 2019).

347. On this distinction, *see* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003).

candidness, which are often touted as important virtues.[348] It hides the ball. Another fear, by contrast, might be that by this process-based dialogue we may be losing the value of direct substantive judicial input, which some believe is important.[349]

There is certainly some power to these points. But here, too, there may be good responses. To begin, this process-based dialogue rather than a more substantive one might be attractive in places that are more skeptical about overt judicial balancing or especially weary of counter-majoritarianism.[350] This might be because of a more cultural aversion coupled with the fact that in some systems, judicial review was never introduced for explicitly normative reasons as it perhaps was in other places.[351] Moreover, this "gag" on substance and focus on reasoning-process might have important virtues. One virtue is that it might encourage judicial modesty and restraint. While talented judges would likely find it easy to intervene under the reasoned decision-making standard to pursue their own view of substantive reasonableness in matters of rights, it is likely going to prove more difficult to do so under the administrative law model. In a system committed to political constitutionalism, this seems desirable.

Another virtue, however, is that this form of process-based dialogue can encourage a sense of political ownership in matters of constitutional rights. After all, we know from other contexts that have employed the "dialogue" metaphor between courts and politics that something like a true back-and-forth does not always and even regularly occur. Rather, dialogues tend to become more like a "monologue," and one in which courts ultimately are the ones that are doing most of the speaking and deciding. Indeed, evidence often shows that politics fails to come back to courts and stand their ground even if they can and should.[352] With a more process-based interface, which the administrative law model supplies, this problem might manifest itself much less. When courts are only able to intervene for inadequate reasoning, it is quite clear that the ultimate decision is in political hands. And non-judicial institutions might be encouraged therefore to utilize this responsibility more and consistently respond to judicial interventions. In other words, the administrative law model, precisely because of its procedural posture, might be better at creating a culture of complementarity between courts and

348. For a recent discussion of the role of judicial candor in comparative perspective, see Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016).

349. In some contexts, it might be argued that this model is too weak—given that a remand can be overcome without jumping more hoops, such as in a system with an override clause that sometimes required a more robust majority.

350. For the claim that the United States is such a system, *see generally* COHEN-ELIYA & PORAT, *supra* note 13.

351. For the related concept of a "postwar paradigm" of constitutional rights adjudication, *see infra* note 445 and accompanying text.

352. *See, e.g.*, Aileen Kavanagh, *What's So Weak about "Weak-Form Review"? The Case for the UK Human Rights Act 1998*, 13 INT'L J. CONST. L. 1008 (2015).

politics than the existing, more substantive, "dialogue" that is meant to occur under the present models of proportionality and categorical reasoning.[353]

(*) The limits of "dialogue" under the administrative law model, and the need for doctrinal and other responses. Of course, all this still does not eliminate legitimate concerns. I have explicitly said above that it makes sense to identify the administrative law model as a new form of dialogue in systems where interventions under *Chevron* would be weak rather than strong, that is—when politics would be able to overcome them without too many hurdles. But this might not necessarily be the case. Most clearly, interventions under *Chevron* in the United States, at least following current constitutional understandings, would be definitive and would not allow for a kind of dialogue that I have been describing. The only way to overcome an adverse judicial interpretation of rights in the United States, under a constitutional *Chevron*, would either be through a process of constitutional amendment or by convincing courts to change their minds.

In addition, there are no guarantees, even in the context where the administrative law model would clearly be weak rather than strong, that the weakness would be achieved in fact. While I have speculated above that the administrative law model might encourage better than existing models a real "culture of complementarity" between courts and politics, I cannot rule out that this would prove to be false in reality. My speculation is a hypothesis, which I think is plausible, but nothing more.

This means that the administrative law model does sensibly call for all kinds of potential responses to the concern of faux deference. At one level, part of the response must in the end be political, social, and cultural rather than purely legal or doctrinal. After all, there is simply a limit to what a doctrinal framework can do on its own. To get the administrative law model working as it is supposed to, we need judges with the right "mental attitude"[354] or "psychology of office"[355] to make the underlying dynamic of this model work "fair[ly]."[356] And we moreover need a culture (and a legal profession) that has an interest in making this arrangement work and that would also monitor judges' products for not going too far.

353. For this term, *see* Rosalind Dixon, *The Forms, Functions, and Varieties of Weak(ened) Judicial Review*, 17 INT'L J. CONST. L. 904 (2019). I acknowledge two complications in the mechanics of dialogue that the text assumes. First, the substantive gag of the model is not perfect because judges can always opine in the judgment itself on the substantive issue even if the formal cause of intervention is procedural. Second, there's a problem of esotericism. For this sense of ownership to develop, everyone needs to believe that the intervention is mostly procedural. But if we know that interventions under the model are substantive in nature, even if they speak the language of process, this won't work.

354. JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 84 (1999).

355. Peter L. Strauss, *Foreword: Overseer, or the "Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 704 (2007).

356. Universal Camera Corp. v. NLRB, 340 U.S. 474, 489 (1951).

On another level, however, some doctrinal responses do seem to make sense. In my discussion below,[357] I will point out various ways that systems might tinker with the requirements of reasoned decision-making and the review under *Massachusetts v. EPA* and the principle of "anti-abdication" in ways that would weaken them. Let me suggest that there are ways to tinker with *Chevron* that would limit judicial discretion under it, especially in systems such as the United States where *Chevron* interventions would indeed have a strong effect. More specifically, discussions in US administrative law have highlighted various ways to institutionalize or formalize what administrative lawyers call the "*Chevron* space"[358] or "zone of ambiguity"[359] within which courts should defer. Some have suggested for example to make *Chevron* almost symbolic and make the requirement of "fit" underenforced, at least in relation to old statutes.[360] Others have suggested that courts should defer reflexively to any reasonable interpretation under any plausible on-the-wall theory of constitutional interpretation.[361] Still others have even offered that *Chevron* will transform into a supermajority vote.[362]

All these certainly seem plausible as candidates to cabin a constitutional *Chevron*, and perhaps there are other options as well not yet discussed in the literature. My point here is not to definitively endorse any one of those solutions, but to point out that adopting any of these would appear to leave ample room for the administrative law model to work even in systems where intervention under *Chevron* is strong rather than weak.

B. Too Little/Too Much

Another important concern from buying into the administrative law model of rights adjudication, and which would exist even if judges operated faithfully to fulfill the kind of dialogue and deference this model is meant to provide, relates to a "too little/too much problem." In other words, the administrative law model might prove either under-protective of rights or over-protective of them. This is so especially given the technology of review the model introduces with the *State Farm* framework and the requirement of reasoned decision-making, on one hand and *Massachusetts v. EPA* and the principle of "anti-abdication" on the other hand.

357. *See infra* Part V.B.

358. I draw this term from Peter L. Strauss, *"Deference" Is Too Confusing: Let's Call them "*Chevron *Space" and "*Skidmore *Weight*," 112 COLUM. L. REV. 1143 (2012).

359. I draw this term from Matthew Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597 (2009).

360. Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1 (2014).

361. For this view, *see* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

362. For this view, *see* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007).

I will begin by introducing the "too little" side of the problem and then offering responses. Next, I will move to address and respond to the "too much" side of the problem.

(*) Too little—the concern. There are several ways that the administrative law model might prove under-protective toward rights and as supplying less than what we might sensibly think is desirable. Begin with the *State Farm* framework and the requirement of reasoned decision-making. While the idea of limiting courts to review reasoning adequacy, rather than substance, has the various attractions that I have flagged before,[363] it is possible that in some domains of constitutional rights adjudication, and even within a framework of strong commitment to political constitutionalism, we may want judges to perform direct substantive review rather than suffice with reviewing the adequacy of reasons. After all, in some circumstances we may have sensible reasons to think that politics would generally and systematically not perform well in protecting rights themselves, for example because politics is likely to be biased against rights or would tend to under-value them. Discussions in comparative constitutional law have emphasized the contexts of "law of democracy" rights and free speech rights in connection with "classic" sedition laws (that involve, of course, censorship laws against governmental criticism), as potential examples.[364] But there may be other relevant examples as well.[365] To the extent that the administrative law model prevents this type of protection when reasonably needed, this seems like a substantial drawback.

In addition, the reasoning process review outlined by the *State Farm* framework and the requirement of reasoned decision-making blocks not only the ability of judges to opine on substance but also their ability to make factual determinations anew. As we saw, a key component of these features of the model is that both reasons and records are closed rather than open. Judges conduct their review based on the reasons and records provided to them by governments. That has several important advantages, as I have pointed out before.[366] But here again there are potential limits. Indeed, sometimes we may have entirely valid and powerful reasons to want courts to adjudicate facts anew. This can happen in precisely these contexts where we want a more substantive input from courts, discussed just now,[367] given the way that facts and substance are often intermingled.[368] But it can also occur in other instances. For example, the kind of

363. *See supra* Part IV.C.

364. *See, e.g.*, Mark Tushnet, *The Relationship Between Political Constitutionalism and Weak-Form Judicial Review*, 14 GERMAN L.J. 2249, 2262 (2013).

365. Of course, this intuitively leads to the kind of process-based justifications for review associated with John Hart Ely's "democracy-reniforcing" theory. *See generally* ELY, *supra* note 260.

366. *See supra* Part IV.C.

367. *See supra* notes 365–366 and accompanying text.

368. So, for example, if we conclude that courts should make substantive decisions about the constitutionality of sedition laws and decide when censorship might be justified, it will also make sense to let courts adjudicate the relevant facts that are required to make these substantive

factual work that courts do might be especially valuable when institutions like administrative agencies do not exist in the background and there is no alternative institution that is vested with responsibility of doing the relevant factual work that bears on constitutional rights' claims.[369] And even if such institutions do exist, it is also possible that either for reasons of limited institutional capacity of these other institutions or because of the advantages of relatively detached courts that moreover operate on the basis of an adversarial process, we may nonetheless prefer vesting courts with primary responsibility for making factual determinations.[370] Again, to the extent that the administrative law model prevents that, it seems like an important drawback.

I have also suggested above that the form of reasoning process review outlined by the *State Farm* framework and the requirement of reasoned decision-making has advantages over proportionality in that it eliminates the requirement of minimal impairment or least restrictive means. As we saw,[371] there are general difficulties with this requirement both on its own and especially in relation to separating it from the last sub-test of proportionality of balancing or proportionality "as such." At the same time, we should also acknowledge the plausibility that some jurisdictions may resist dropping off the least restrictive means for sensible reasons. For one, as I suggested before,[372] the argument in favor of dropping the least restrictive means may not work, or not work as well, in relation to more important or "preferred" rights. In such instances, we may want to insist on the least restrictive means and to weaken the weight given to considerations like administrative costs or governmental inertia. For another, some systems may want to retain the requirement for expressive reasons as well—perhaps to signal that in matters of rights, these systems take pain to minimal impairment on them. I have discussed this expressive function in relation to the categorical reasoning model,[373] but the argument seems to apply to the least restrictive means component that comes with proportionality as well.

Up to this point, I have addressed the "too little problem" as applied to the *State Farm* framework and the requirement of reasoned decision-making. But the same applies to the standard of review captured by *Massachusetts v. EPA* and the "anti-abdication" principle. They, too, can prove under-protective. For example,

determinations, rather than relying on governmental institutions' credibility and responsibility in adjudicating these facts themselves.

369. *Cf.* Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CAL. L. REV. 613 (1999) (emphasizing the important service federal courts serve vis-à-vis states that often lack similar institutions as federal administrative agencies).

370. For a general argument about the superiority of courts in the context of factual determinations, especially in an age of "alternative facts," *see* Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 Harv. L. Rev. 2348 (2017). For an emphasis on one type of judicial deficiency in this context, *see* Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CAL. L. REV. 1185 (2013).

371. *See supra* notes 309–310 and accompanying text.

372. *Id.*

373. *See supra* notes 258–259 and accompanying text.

we cannot rule out that governmental inaction and indecision may justify a more aggressive judicial stance than what would be supplied by both these components. Indeed, though I have suggested that institutions in politics, like agencies in US administrative law, should enjoy a presumption that they allocate resources and prioritize reasonably,[374] we cannot dismiss the possibility that sometimes this presumption ought to be challenged. Certain institutions behave in a way that would justify a more rigorous and less deferential judicial review for initiation claims directed toward them (perhaps because they are "failed" institutions).[375] If so, insisting on a rigid application of *Massachusetts v. EPA* and the anti-abdication principle in their highly deferential, super-weak, and "last resort" form might be reasonably thought as under-protective.

Furthermore, we also cannot rule out that a system might have sensible reasons to opt to supply a more robust form of review for initiation claims (or rights that trigger initiation claims) than what is implied by the framework of review that comes with the administrative law model. For example, we have seen before that some places may be drawn to the concept of a "minimum core" in matters of socioeconomic rights.[376] And while, as I suggested, this concept might be criticized and is exposed to myriad problems,[377] it is certainly not the case that we can say with confidence that this concept ought to be entirely rejected. Moreover, there are other available standards of review for rights that involve initiation claims, including socioeconomic rights that are different from the "minimum core" concept. These standards seem to give judges a more robust role in their enforcement than would be provided for under the administrative law model. One example is the standard of securing "progressive realization"[378] of rights (within available resources) that we sometimes see in contexts that provide protection for socioeconomic rights. Another example, which originates from South Africa, is a form of more robust "reasonableness review" that is inflected with proportionality concerns.[379]

374. *See supra* Part IV.D.

375. There is in fact now a suggestion in administrative law, partly as a response from recent years and experience with deregulation, that calls for the elevation of the standard of review that applies to agencies' inaction. *See* DANIEL A. FARBER, LISA HEINZERLING & PETER M. SHANE, REFORMING "REGULATORY REFORM": A PROGRESSIVE FRAMEWORK FOR AGENCY RULEMAKING IN THE PUBLIC INTEREST 13 (Oct. 2018), available at: https://www.acslaw.org/issue_brief/briefs-landing/reforming-regulatory-reform-a-progressive-framework-for-agency-rulemaking-in-the-public-interest/. *See also* Sidney A. Shapiro, *Rulemaking Inaction and the Failure of Administrative Law*, 68 DUKE L.J. ONLINE 1805 (2019) (criticizing the fecklessness of the present standards of review in administrative law for regulatory inaction).

376. *See supra* note 226 and accompanying text.

377. *See supra* note 227 and accompanying text.

378. This language of course appears in the International Covenant on Economic, Social, and Cultural Rights, art, 2(1), New York, 16 December 1966, in force 3 January 1976.

379. For a recent discussion, *see* Katherine G. Young, *Proportionality, Reasonableness, and Economic and Socioeconomic Rights*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 248 (Vicki C. Jackson & Mark Tushnet eds., 2017).

I need not go to the details of these various standards here. What matters for present purposes is that they exist. And that, like in the context of the "minimum core," there is no reason to assume that these are inappropriate. To the extent that the administrative law model would require us to forgo them, and rigidly endorse the super-weak framework that it specifically outlines, that might be a sensible reason for concern.

(*) Too little—responses. All these certainly expose potential drawbacks in the administrative law model. But there seem to be appropriate solutions to them. Most clearly, much of this concern can be resolved if we treat the administrative law model as a *default model*, rather than a hard blueprint. That is, if we allow for the possibility of giving the courts to *do more* in all these contexts specified above, including evaluating the substance of rights dispute directly when that seems justified, adjudicating facts anew, retaining the least restrictive means component, and accepting more aggressive forms of review for initiation claims. In that way we retain the basic features of the administrative law model but allow courts to diverge from it in appropriate places where this divergence seems sensibly called for.

Conceptualizing the administrative law model as a default model rather than a strict blueprint should not be surprising or novel. Administrative law as a field is itself normally conceived, in the United States and elsewhere, as only a default or generic kind of law that operates in "the shadow of political choice."[380] And retaining this feature of administrative law even when it is exported to the constitutional law context therefore makes complete sense.[381]

It is important to emphasize however that by opening this possibility of treating the administrative law model as a default rather than a rigid blueprint, my intention is not necessarily to endorse that it should often or regularly be used in this way. For example, it is not entirely clear if the reasons for retaining the least restrictive means requirement, outside of the context of some highly prized rights, is necessary or powerful. In literature on proportionality, there is often a distinction between two possible conceptions of proportionality: a more State-limiting and a more optimizing conception.[382] One might argue that by dropping

380. Daniel B. Rodriguez, *Jaffe's Law: An Essay on the Intellectual Underpinnings of Modern Administrative Law*, 72 CHI.-KENT L. REV. 1159, 1175 (1997).

381. To achieve this default nature, systems that would endorse the administrative law model would obviously be able to include relevant provisions to that effect in the relevant constitutional (or subconstitutional) texts that serve as the foundation for constitutional rights adjudication in those systems. But the administrative law model opens up the possibility of achieving this default nature *within the process of litigation itself*, through the *Chevron* step and to the extent that this move represents a "reasonable" construction of the right in question.

382. *See, e.g.*, Rivers, *supra* note 114. For a somewhat different conception, between State-limiting and autonomy based conception, *see* Kai Möller, *Luth and the 'Objective System of Values': From 'Limited Government' Towards an Autonomy-Based Conception of Constitutional Rights*, in GLOBAL CANONS IN AN AGE OF UNCERTAINTY: DEBATING FOUNDATIONAL TEXTS OF CONSTITUTIONAL DEMOCRACY AND HUMAN RIGHTS (Sujit Choudhry et al. eds., 2022), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4062206.

the least restrictive means requirement systems would get closer to the optimizing conception. It would encourage systems to develop a potentially less libertarian, more communitarian, system of rights protection. And that, I believe, may be good overall.

(*) Too much—the concern. Up to this point I have suggested ways that the administrative law model might prove under-protective of rights and responded to this specific concern. But as I said at the outset, the administrative law model might raise concerns in exactly the opposite direction. That is, that it would be too aggressive and thus would supply over-protection rights.

To see the possibility for this, start again with the *State Farm* framework and the requirement of reasoned decision-making. Experience from US administrative law suggests that this framework entails serious costs. For example, we know from administrative law in the United States about the problem of "ossification" and slowing down that might be the result of reasoning process review and *State Farm*.[383] We know as well from US administrative law that judges can make serious mistakes in identifying reasoning blunders under this framework.[384] They might incorrectly identify what are "viable and significant alternatives." Or they might insist on transparency and accountability in situations where doing so might be costly—for example, in contexts when some opacity in governmental decision-making might be socially beneficial (e.g., in situations of "tragic choices").[385]

Moving to *Massachusetts v. EPA* and the principle of anti-abdication for reviewing initiation claims, these may have substantial costs as well and prove to be overly protective of rights. First, even if the review is super-weak, it will still entail some "diversion costs"[386] from governments. And those diversion costs can be meaningful and may substantially interfere with pursuing priorities. Second, we are also familiar from US administrative law that review for initiation claims can be manipulated or used by the "shrewd and the powerful"[387] (who tend to submit more petitions, "sham"[388] petitions, use tactics of "informational

383. The literature on the so-called "ossification" of rulemaking because of the *State Farm* framework of arbitrariness review is quite substantial. Two representative pieces are Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385 (1997) and Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Resources*, 49 ADMIN. L. REV. 61 (1997).

384. *See, e.g.*, Frank B. Cross, *Shattering the Fragile Case for Judicial Review of Rulemaking*, 85 VA. L. REV. 1243, 1307 (1999).

385. For a general claim to this extent, *see* GUIDO CALABRESI & PHILIP BOBBIT, TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARCE RESOURCES (1978). *See also* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1132 (2009) (discussing the benefits of legal facades).

386. For this term, *see* David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1124 (2017).

387. Morton J. Horwitz, Book Review, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L.J. 561, 566 (1977).

388. *See, e.g.*, Lars Noah, *Sham Petitioning as a Threat to the Integrity of the Regulatory Process*, 74 N.C. L. REV. 1 (1995).

overload,"[389] and more). To the extent that this would in fact be the case, many of the benefits of the administrative law model's expansion of the scope of initiation claims seems to fade away. Third, the ability of judges to evaluate whether reasons for inaction are adequate, as expected under *Massachusetts v. EPA*, or to decide when the point of *abdication* has been reached, probably has a significant risk of error as well. Judges might be operating, both in the United States but also more generally, under a private law frame[390] that looks to the specific incident before courts rather than to more systemic facts and context. But these systemic facts and context seem crucial to understand whether more resources can be diverted to an issue not currently on the government's radar, or when that can be done or expected from governments to do and in what time frames. Finally, the vast expansion of the scope and focus to initiation claims brought by the administrative law model seems to make constitutional law truly "total."[391] It creates a "right to everything,"[392] so to speak. But that move might be quite costly as well. It is not the case that everything that could possibly be included in an initiation claim should merit serious attention by governments and courts. And there are likely limits on judicial capacity to deal with a right to everything.

This concern of unjustified "totality" might have special weight in systems that are committed to what is known as direct or indirect horizontal effect.[393] In those systems, courts themselves enforce constitutional provisions through "background laws" without the need for governments to initiate action or regulate. Consequently, it might be thought that courts are doing a reasonably good job in ways that would make the expansion and potential totality of the administrative law model redundant and unnecessary.

(*) Too much—responses. Again, all these concerns certainly merit caution. But there are also ways to respond to them. One kind of response is to highlight again that the administrative law model is not a model of full-blown political constitutionalism. It deliberately leaves some measure of judicial involvement as well. As a result, some potential error and decision costs from judicial intervention are to be expected. The hope under the administrative law model is not to eliminate these costs from judicial review entirely, but that they would ultimately

389. Wendy E. Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1339 (2010). On the use of mass postcard or email campaigns during notice-and-comment rulemaking to "explode" agencies, *see* Steven J. Bella et al., *Where's the Spam? Interest Groups and Mass Comment Campaigns in Agency Rulemaking*, 11 POL'Y & INTERNET 460 (2019).

390. *See, e.g.*, RICHRAD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 73–76 (7th ed. 2015). *See also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

391. Mattias Kumm, *Who Is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law*, 7 GERMAN L.J. 341 (2006).

392. I draw this term from OCTAVIO L.M. FERRAZ, HEALTH AS A HUMAN RIGHT: THE POLITICS AND JUDICIALISATION OF HEALTH IN BRAZIL (2020).

393. For the concept, *see* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387 (2003).

be worthwhile, because they counter the costs of full-blown political constitutionalism.

Another response to the concerns of "too much" is to point out that some of them may be overblown. So, for example, it is not entirely clear if the problems associated with the *State Farm* framework of "ossification" are always true. Some evidence suggests that agencies in the United States at least, and in the context of US administrative law, are not severely ossified from pursuing their goals.[394] As to the review of initiation claims under *Massachusetts v. EPA*: here too it is easy to exaggerate. For example, while courts endorsing a private law perspective might be problematic, we should not necessarily assume that this is how courts would always behave. We are familiar with the possibility that courts would endorse a more public law or institutional reform lens.[395]

Moreover, the claim that horizontal effect (either direct or indirect) is sufficient and makes the expanded focus on initiation claims redundant or unnecessary is not entirely convincing. For one, not all systems are committed to direct or indirect horizontal effect, partly for reasons connected to federalism and complexity. The United States is an obvious example here. For these systems, the expanded potential of reviewing initiation claims expansively may be especially important. It leaves them within a frame of "state action" but gives bite to the idea that state action is ultimately a "residual category"[396] that can be eliminated the more governments regulate.

But even in systems that are already committed to indirect or direct horizontal effect, the administrative law model might be valuable. The development of the administrative state suggests limits on courts working under horizontal effect. In a nutshell, what the development of the administrative state taught us is that regulation and legislation might be better ways to address societal problems than common law lawmaking. That same rationale might be appropriate for the constitutional rights context as well. Even if some are still skeptical and believe that legislation and regulation are not always to be preferred over common-law judging, the administrative law model might still be worthwhile. At a minimum, it diversifies the tools that governments possess to address constitutional concerns. Horizontal effect and initiation claims could be viewed as supplementary or complementary. And governments might be able to consider which of these mechanisms would be better and when.

A final response to the concern of "too much" is to point out that the administrative law model might have resources to deal with the costs associated with it. That is, there are ways to potentially make sure that the administrative law

394. *See, e.g.*, Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016).

395. The common cite here is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

396. MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 207–10 (2009).

model does not overprotect rights. As to the concerns related to the operation of the *State Farm* framework and the reasoned decision-making requirement, we know from practice in the United States that these can come in multiple varieties. On one hand, there's a "hard look" version of this framework which instructs judges to be highly suspicious of governments and encourages them to robustly review their reasoning processes.[397] At the same time, however, *State Farm* and the reasoned decision-making framework can also come in a much more toned-down version, colloquially known as "soft glance,"[398] "light touch,"[399] or "thin rationality review."[400] In this version, courts operate from a much less suspicious position and even let decision-makers enjoy the benefit of "every reasonable doubt."[401] What this potentially variability of intensity of the *State Farm* framework and the reasoned decision-making requirement suggests is that systems might deliberately determine in what contexts it makes sense to see one of these varieties or another. In this way, systems would be able to control the costs associated with this framework or distribute these costs along the domain of cases. So, for example, systems can opt to institutionalize either "soft look" or "hard look" across the board if that is what seems to them desirable within the administrative law model. Alternatively, systems might be more deliberate and decide in advance which rights (or manifestations of rights) should be regularly exposed to "hard look" and which to "soft look." In fact, they might even experiment and dynamically change the frameworks with time. All of this can of course be achieved either through amending the relevant texts that are the foundation of rights adjudication or through the *Chevron* stage of the administrative law model, to the extent that such move would represent a "reasonable" interpretation of the right in question.

As to the "too much" concern as it applies to the review of initiation claims under *Massachusetts v. EPA* and the "anti-abdication" principle, here, too, there may be doctrinal responses. First, there's nothing that prevents both politics and courts from creating "screeners" for the kinds of initiation claims that they would allow to be heard to address concerns of overboard and extreme "totality." Such screeners can look at features like the quality of the initiation claim, its substance, or even its popular support (for example, if there's been a public petition with a lot of signatories).[402] Second, practice in administrative law also suggests that the review for initiation claims can change with context, very much like how we have

397. *See* Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970); Harold Leventhal, *Environmental Decisionmaking and the Role of Courts*, 122 U. PA. L. REV. 509, 511 (1974).

398. Grant v. Shalala, 989 F.2d 1332, 1345, 1359 (5th Cir. 1993) (Higginbotham, J., dissenting).

399. Sharkey, *supra* note 207, at 2383.

400. *See* Gersen & Vermeule, *supra* note 394.

401. Cass R. Sunstein, *The Arithmetic of Arsenic*, 90 GEO L.J. 2255, 2293 (2002).

402. *Cf.* Macon Phillips, *We the People: Announcing White House Petitions & How They Work*, WHITE HOUSE BLOG, Sept. 1, 2011.

seen before with *State Farm*'s "hard look" and "soft glance" versions.[403] This means that systems once again would be able to structure more responsibly when more robust and less robust review of initiation claims would occur, in large part to address the costs of unnecessary "totality."

C. Administrative Law Outside Administrative Law

(*) The concern. A final concern that administrative law raises is what can be called the "administrative law outside administrative law" concern. After all, the model calls for the application of doctrines that originate from administrative law, and particularly federal US administrative law, to institutions that substantially differ from those regulated directly by that field of law. As a result, the tools of administrative law might be thought of as unsuitable in this context and in fact extremely costly.

Consider, for example, legislative bodies that the administrative law model would emphatically regulate in systems that embrace it. These bodies obviously diverge from administrative agencies in various respects. In the United States, Congress operates within a system based on bicameralism and presentment.[404] It contains many legislators, committees, and other legislative officeholders that do not have clear parallels in administrative agencies.[405] And this enormity and complexity of legislative bodies exists elsewhere, too.[406] Moreover, the costs of judicial intervention and supplying remedies with respect to legislative products might be much higher when compared to the costs associated with intervention with agencies' decision-making. For one, separation-of-powers' concerns are more emphasized in this context given the nature and status of legislative bodies compared to administrative agencies. For another, legislatures might be much slower to respond to judicial interventions compared to executive bodies precisely because of their unique features.

Though the gap is probably starkest between agencies and legislative bodies, differences also exist between agencies and other executive bodies that would also be regulated by the administrative law model if systems would indeed opt for it to construct their constitutional rights adjudication. For instance, not all executive bodies have processes in place for producing reasons and building records, which the model would now require them to do (especially because of the *State Farm* framework and the requirement of reasoned decision-making). And, these executive bodies also may not have "petitioning" procedures in place, which might be reasonably thought of as needed to address the expansion in focus and

403. *See, e.g.*, Sunstein & Vermeule, *supra* note 198.

404. U.S. CONST. art. I § 7, cl. 2.

405. For the differences and how agencies are in fact often involved in writing congressional statutes, *see generally* Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377 (2017).

406. For a survey of different legislative processes across systems, *see* Ulrich Karpen, *Comparative Law: Perspectives of Legislation*, 6 LEGISPRUDENCE 149 (2015).

scope of initiation claims that the administrative law model would potentially bring with it (because of *Massachusetts v. EPA* and the "anti-abdication" principle). This is true for the United States where there are now important divergences between how federal, state, and local administrative agencies tend to work. But there are very likely to be similar differences in other systems as well.

What is more, and more importantly, the laws that currently apply to different executive bodies may also differ from what would be required of them under the administrative law model. So, for example, in the United States, there are now important divergences in the legal requirements that apply to *federal* agencies and those that apply to state and local agencies. This is so partly because of the current narrow scope of constitutional procedural due process law.[407] But it is also a result of some important differences that exist between the federal APA and state, and, to the extent they exist, local APAs.[408] If we move beyond the United States this mismatch between the administrative law model and current legal conditions might even be more intense. Indeed, it is far from clear if other systems' administrative law at all requires reason giving and allows initiation claims to the same extent as US law does. In fact, at least with respect to some jurisdictions, there is a reason to think that such a requirement does not fully exist (for example, some common law systems still do not recognize a general reason-giving duty by agencies in their own administrative law;[409] and some systems do not draw on rulemaking processes to the same extent as the United States.)

(*) Responses. The concern arising from extending administrative law outside of administrative law, both in the United States and outside the United States, surely seems compelling. But like all the other concerns I have addressed before, it should not be taken as prohibitive. There are valid responses to the concerns.

To begin, the fact that some revisions and changes in decision-making practices would have to occur because of the administrative law model does not in itself tell us that the changes are undesirable. Maybe they are. So, for example, if, as I have suggested, the reasoned decision-making requirement is beneficial both in general and given the rise of administrative and policy states, then requiring institutions, such as legislatures and executive bodies, to create more and better records and supply more and better reasons than they are used to do now, or that current law requires of them to supply, may be an overall improvement. Indeed, we should not take present law as a hard benchmark of normativity, both in the United States and elsewhere. And to the extent that some

407. As mentioned above, *supra* note 134, at present constitutional procedural due process doesn't apply to quasi legislative procedures.

408. *See, e.g.*, Arthur Earl Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297 (1986); Casey Adams, *Note—Home Rules: The Case for Local Administrative Procedure*, 87 FORDHAM L. REV. 629 (2018).

409. For such indication in the context of the United Kingdom, *see* Mark Elliott, *Has the Common Law Duty to Give Reasons Come of Age Yet?* (2012) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2041362.

period of adjustment would be required to allow the change to occur more smoothly rather than abruptly, this seems like something that could be provided for in a form of transitional arrangements.

Having said that, it is hard to deny that some differences do raise more significant concerns and would not be sufficiently addressed by transitional arrangements alone. For example, while the idea of enhancing reasoning and gathering of facts by legislatures may be in principle worthwhile, it is at best unclear how much judicial review can truly encourage it at a reasonable cost. Scholarship in the United States in response to the tightening of regulation over congressional process by courts as part of the "new federalism" case law has raised serious concerns about whether it is responsible for courts to look at legislatures like they look at administrative agencies.[410] The key idea is that it is really hard to regulate how legislatures reason and the attempt to do so may prove futile (e.g., legislators will simply insert reasons into the record without actually being motivated by what is being inserted). Moreover, the costs of faulty intervention with legislative products are quite serious, given the already mentioned separation-of-powers concerns and the difficulties of legislative work (including assembly of a coalition). These costs are perhaps worthwhile when really important, "preferred" rights are at question, but perhaps not so more generally. Or, conversely, and to connect this point to previous discussions about rights' cultures in Part IV, these costs might be worthwhile for systems that end up being less concerned about rights inflation and the need to leave ample room for pluralist politics.[411]

As for other institutions beyond legislatures: here, too, transitional arrangements probably cannot solve everything. There may be budgetary and other capacity issues that might reasonably prevent institutions from being ideal reasoners and fact gatherers as the administrative law model might be thought to expect of them. And these institutions might also work more informally and have other elements that "compensate" for the lack of process rigorousness. For example, in the United States some executive officials at the state and local level are elected and work more directly with constituents than the standard picture

410. *See, e.g.*, Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New 'On the Record' Constitutional Review of Statutes*, 86 CORNELL L. REV. 328 (2001); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 Stan. L. Rev. 87 (2001); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707 (2002).

411. Indeed, in Europe, and especially in continental Europe, there is now an important trend that walks under the banner of "Legisprudence" and which exemplifies a move to more pervasive legalization of normal parliamentary processes even outside the context of infringement with highly important right. In my view, this precisely illustrates the commitment that exists in proportionality systems to less pluralistic perception of politics. *See, e.g.*, LEGISPRUDENCE: PRACTICAL REASON IN LEGISLATION (Luc J. Witgens ed., 2016). For one scholar who is puzzled about the American resistance to review of legislative procedure, partly inspired by European-style "legisprudence," *see* Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915 (2011).

under federal administrative law in the United States. And it is very likely that similar differences exist elsewhere.

All this suggests that extending administrative law outside administrative law does in fact raise sensible concerns. But, yet again, there are ways to manage these concerns within the confines of the administrative law model. As to legislatures: it seems that at least in systems that are resistant to rationalizing pluralist politics and outside the context of highly important rights—and because of the aforementioned costs and potential futility of dealing directly with legislative process—it would not be attractive to regulate reasoning process of legislatures directly and at the retail level. A more sensible way to apply the administrative law model is to focus in these cases on the reasoning of the executive that is defending the statute (or the legislative omission) itself (so long as this reasoning corresponds with a reasonable interpretation of the statute). This seems natural in many parliamentary systems, in which there is "fusion" between the legislature and the executive.[412] But it seems also sensible—at least absent specific legislative or constitutional guidance—in presidential systems.[413]

Of course, this might raise an objection that this leaves the value of "due process of lawmaking"[414] at legislatures unaddressed under the administrative law model. But this is not necessarily the case. The concern of protecting "due process of lawmaking" can be addressed more responsibly and systematically, and without the attendant concerns discussed before, in a different way. More specifically, systems might consider establishing a legislative bureaucracy[415] inside legislatures that would oversee this issue. The actions or recommendations by this new bureaucracy could then be reviewed under the administrative law model like any other executive body and without the unique concerns that arise from reviewing legislative products themselves.

Moving along to other institutions beyond legislatures: the concerns from extending the administrative law model here can be solved by some form of institutional calibration of the intensity of the review. So, for example, for executive bodies with more limited budgets and more democratic credentials, courts might relax the intensity of their review and expectations for how much their reasoning should be the "model" of the perfect reasoning institution. Conversely, for executive bodies that are more resource-rich and lacking features that compensate for the lack of procedural rigorousness, the review would be more

412. On the practice of legislative representation by the executive in Canada, *see* Kent Roach, *Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law*, 31 QUEEN'S L.J. 598 (2006).

413. For useful discussion in this context, *see* Amanda Frost, *Congress in Courts*, 59 UCLA L. REV. 914 (2012); Vicki C. Jackson, *Congressional Standing to Sue: The Role of Courts and Congress in U.S. Constitutional Law*, 93 IND. L.J. 845 (2018).

414. Linde, *supra* note 265, at 241. For a recent discussion in a comparative context, *see* Stephen Gardbaum, *Due Process of Lawmaking Revisited*, 21 U. PA. J. CONST. L. 1 (2018).

415. *Cf.* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

intense. (And, of course, all this would have to be calibrated as well in relation to the importance of the rights in question or how valuable or vulnerable they may be).

As to the institutional form through which this calibration would take place, there are two possible options worth flagging here briefly. The first is that the calibration would be done judicially. And indeed, in the United States at least, discussions about extending federal administrative law principles to local and state bodies assume exactly this form of judicial calibration.[416] The second option is, by contrast, one of political calibration, which can be supplied either by more-direct legislative guidance or by creating an administrative agency that would itself oversee or give instruction to courts about how to conduct this form of calibration.[417]

VI. WHERE IS THE MODEL DESIRABLE (AND FEASIBLE)?

If I was able to convince readers that the administrative law model is not only distinct from proportionality and categorical reasoning but also has much to be said for it, despite legitimate concerns and costs, I will have achieved much of my goal for this Article. But the discussion need not necessarily be entirely theoretical. To provide further motivation for this new administrative law model, it would be valuable to know where it is likely to prove attractive and achievable under existing legal conditions.

And as I suggest in this Part, it is certainly possible to say something meaningful about that.

A. The United States

Most clearly, the administrative law model of constitutional rights adjudication seems well-suited for the country from which this model originates—the United States. Indeed, all the advantages of the administrative law model flagged in Part IV look particularly powerful in the American context.

For one, the contemporary United States would benefit greatly from a strong dose of political constitutionalism injected into its constitutional rights adjudication structure. After all, the United States Constitution is old and extremely difficult to amend.[418] Many of its rights' provisions are ambiguous or vague.[419] Entrusting political decision-makers with the primary responsibility of

416. *See, e.g.*, Davidson, *supra* note 128; Maria Ponomarenko, *Substance and Procedure in Local Administrative Law*, U. PA. L. REV. (2022).

417. On the proposal that was raised, at the time of the process that led to the legislation of the APA in the United States., to establish an "Office of Administrative Procedure," *see* Jeremy Rabkin, *The Origins of the APA: Misremembered and Forgotten Views*, 28 GEO. MASON L. REV. 547 (2021).

418. *See* U.S. Const. art. V. For a recent discussion, and provocation, *see* David E. Pozen & Thomas P. Schmidt, *The Puzzles and Possibilities of Article V*, 121 COLUM. L. REV. 2317 (2021).

419. *See, e.g.*, Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639 (2016).

determining their meaning, scope, and applications, is highly promising for all the reasons political constitutionalists have consistently flagged and which the administrative law model, as we saw, embodies to a great extent.[420]

Furthermore, the American system would also benefit from the meta-structure of rights that the administrative law model establishes. On one hand, many of the completely sensible, even powerful reasons supporting a commitment to categorical thinking in matters of rights seem applicable in the United States. To name just one example: given how this system is large, complex, and includes extremely high variance of decision-makers (inside and outside the courts), some substantial measure of categorical thinking looks valuable as a means of maintaining an optimal degree of doctrinal complexity in matters of rights.

At the same time, it is hard to object to the claim, voiced by proponents of proportionality,[421] that categorical thinking in the United States has become excessive and is much more than what is required by the sensible reasons that support reasoning-by-category. And it is hard to object as well that this has entailed significant costs, including the loss of possibilities to protect more rights and to protect some rights, or manifestations of rights, less powerfully.

On this backdrop, the administrative law model paves a desirable path forward. On one hand, as we have seen in Parts III & IV, it would provide the American system with opportunities to unleash its hold from excessive categorical thinking and to navigate in the direction of a more optimal package between such thinking and context-specificity, instrumental reasoning, and more expansive rights (which drive the critique from proportionality's supporters). And it would do so in a careful and cautious way that is more attentive to, first, the serious, legitimate need for categorical thinking in the United States and, second, to what seems like the present-day powerful cultural commitment for reasoning on rights in categorical ways.

Bringing the reasoned decision-making technology of review from administrative law to constitutional law seems highly desirable in the United States, too. It will continue the trend of getting courts out of the way in matters of substance in rights, in line with the political constitutionalist claim, while retaining a potentially valuable judicial role for looking at governmental reasoning processes. This, in turn, will supply important process incentives for political decision-makers to make the best, most responsible decisions possible in matters of rights. And, in those contexts where the standard of reasoned decision-making would apply more flexibly rather than categorically, the administrative model would also bring all the other benefits that it has compared to proportionality, including simplicity, proximity to thinking of rights like other policy issues, attentiveness to the consistent "fact-y" nature of rights and disputes today, and the strengthening of trust in government. The kind of unique,

420. *See supra* Part IV.A.

421. *See* Jackson, *supra* note 15; Greene, *supra* note 16; STONE SWEET & MATHEWS, *supra* note 13; ALEXANDER TSESIS, FREE SPEECH IN THE BALANCE (2020).

procedural "dialogue" the reasoned decision-making standard achieves also seems powerful in the specific conditions of the United States, both given the current aversiveness to explicit judicial balancing there and because of how the United States has become accustomed to judicial supremacy (and would thus benefit from a doctrinal structure that encourages an increased sense of political ownership on matters of constitutional rights).

Finally, increasing the potential scope for and focus on initiation claims, which is another prominent feature of the administrative law model, also seems beneficial for the United States. It would enhance possibilities for decision-makers to protect more constitutional rights that have a plausible claim for coverage and expression under the US Constitution, including liberty rights, socioeconomic rights, a right to governmental protection, and, most broadly, a right to effective government. It will also help close, for the reasons we have seen, the circle of political constitutionalism itself by retaining a mechanism to push governments to consider new meanings and interpretations of rights. And the administrative law model promises a route to do all that responsibly and in forms that are attentive to the meaningful challenges, and real costs, of getting courts involved in initiation claims. As we have also seen, the review in this context is meant to be super-weak and only includes a rather extreme principle of "anti-abdication" as a backstop. Moreover, the administrative law model will not interrupt the United States' current commitment to a "state action" doctrine,[422] which seems at least partially sensible in a complicated federal system. Rather, the administrative law model's potential invigoration of judicial review for initiation claims works within the paradigm of "state action" by directing the focus to regulatory action by governments themselves and expanding (or decreasing) its scope.

Speaking from a strictly legal perspective, there is nothing that prevents the United States from embracing the administrative law model right away. Indeed, the Constitution is famously silent on the issue of judicial review. History on the subject (assuming for present purposes that it is in some sense dispositive)[423] also does not "walk a straight line."[424] *Chevron,* with its requirement of deference to reasonable interpretations limited by a requirement of "fit" with the written Constitution, seems to be the only requirement of its text.[425] Though, of course, to get the administrative law model truly running in the conditions of extremely difficult amendability that exist in the United States, the version of *Chevron* adopted at this constitutional level must strictly limit the ability of courts to rigidly

422. *See supra* notes 397 and accompanying text.

423. *See generally* DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010).

424. John F. Manning, *The Supreme Court 2013 Term—Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 2, 52 (2014).

425. *Cf.* Manning, *id*, 33–47; Thomas W. Merrill, Marbury v. Madison *as the First Great Administrative Law Decision*, 37 J. MARSHALL L. REV. 481, 521–22 (2004). And for the claim that legality itself is completely compatible with deference style *Chevron*, *see* Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983).

"fix" interpretations of rights compared to what judges are able to do and should do under the sub-constitutional version of *Chevron* (including in line with the suggestions I have alluded to before in Part V).[426]

A more serious question, in my view, is not whether this move to "administrativize" constitutional rights adjudication is legally permissible but whether it is politically feasible in the conditions that exist in the contemporary United States. As things currently stand, the answer seems to be no, and emphatically so. Present-day administrative law is now under fierce attack in the United States, both in the courts and beyond.[427] And there are strong, more than plausible speculations that the days of some crucial tenets of contemporary administrative law, including ones I build on here, and especially *Chevron*, are numbered.[428] The entire domain of administrative law may also shrink if the non-delegation doctrine, which is in many ways the entrance gate to the field itself, is about to make a comeback, as some credibly estimate.[429]

In these conditions, my proposal to administrativize constitutional rights adjudication by introducing the administrative law model would justly strike readers as fanciful. Some would say it should be pronounced dead before it is even born.

But that may be too quick. While this present "anti-administrativism"[430] is certainly strong today, it is unclear whether it is truly here to stay. Another valid possibility is that the anti-administrativism seen today is transient rather than enduring. It is merely a last move by a dying or decaying constitutional order or regime (or cycle) that might be replaced by a new order instead.[431] And this new

426. *See supra* note 357 Part V.B.

427. *See* Metzger, *supra* note 39, 8–33.

428. *See* Kisor v. Wilkie, 139 S.Ct. 2400, 2437 (2019) (Gorsuch J., concurring). For a recent survey of the debate around *Chevron* and its potential demise, *see* Christopher J. Walker, *Attacking* Auer *and* Chevron *Deference: A Literature Review*, 16 GEO. J. L. & PUB. POL'Y. 103 (2018); Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 933–40 (2021). And as this Article was in preparation for press, the Supreme Court has decided to grant cert in a case that puts the continued validity of Chevron directly on the Court's agenda. *See* Loper Bright Enterprises v. Raimondo, 22–451 (May 2023). Just as this Article was in final preparation to print, the Supreme Court was set to hear arguments in two cases that squarely present the question of Chevron continued validity, *Loper Bright* and *Relenetless*. For my own views on where the issue should lead, in the context of administrative law rather than constitutional law on which I focus on this paper, *see* Oren Tamir, *Our Parochial Administrative Law*, 97 S. CAL. L. REV. (forthcoming, 2024) especially Part IV.B.

429. *See* Gundy v. U.S., 139 S. Ct. 2116, 2136, 2144 (2019) (Gorsuch J., dissenting); Daniel Walters, *Decoding Nondelegation After* Gundy*: What the Experience in State Courts Tells Us About What to Expect When We're Expecting*, 71 EMORY L.J. 417 (2022). On the recent emergence of the Major Questions Doctrine which seems to reinforce some of the ideas underlying the non-delegation doctrine, *see* Tamir, *supra* note 146.

430. Metzger, *supra* note 39, at 4.

431. For these suggestions, *see generally* MARK TUSHNET, TAKING BACK THE CONSTITUTION: ACTIVIST JUDGES AND THE NEXT AGE OF AMERICAN LAW (2020); JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME (2020).

constitutional order might be not only much more hospitable to the present tenets of administrative law on which the model of constitutional rights adjudication fleshed-out here crucially builds, but it could also bring these tenets "all the way up"[432] to constitutional law.[433]

Of course, it is far too soon to tell whether this new constitutional order or regime will crystalize. There are some reassuring indications in this direction, including the calls for "court reform" that have been circulating of late, gaining steam, and even leading to the establishment of a presidential commission to explore the issue (which has recently concluded its work).[434] However, there are contradictory indications as well. The important point for my purposes, though, is the existence of the possibility itself. It should not be readily assumed that the United States is doomed to live with anti-administrativism for the long term or, for that matter, with the present state of constitutional rights adjudication.

In fact, to the extent that I am right in suggesting that the administrative law model has all these virtues suggested throughout this Article, and that it can be achieved immediately without the need to resort to constitutional amendment, there are reasons to think that realizing that the administrative law model exists would in fact increase the likelihood of this positive, beneficial change, if not immediately then at least in the medium term. More specifically, the discussion above emphasizes that the administrative law model can gain support from multiple audiences and thus may serve as a kind of "fierce compromise"[435] and a place where opposing forces can "come to rest,"[436] very much like administrative law itself used to be perceived.

For example, because the administrative law model respects categorical thinking about rights and context-specificity and is hospitable to both legalistic modes of reasoning and more prescriptive modes, both sides in these debates could potentially coalesce around this model. Moreover, because the administrative law model injects a substantial dose of political constitutionalism into the context of rights adjudication while retaining a potentially meaningful place, albeit secondary and mostly procedural, for courts, the administrative law

432. I draw this from Mila Sohoni, *Administrative Law all the Way Up*, JOTWELL, November 6th, 2020, https://adlaw.jotwell.com/administrative-law-all-the-way-up/.

433. Of course, my presentation here glosses over many important details about how constitutional orders transpire and reflect through the courts but is nonetheless compatible with the basic contours of this "regime" perspective on constitutionalism. For general discussions, *see supra* note 432.

434. For an optimistic take on the consequences of the Commission's report for the future of the reform movement, *see* Ryan D. Doerfler & Samuel Moyn, *Court Reform is Dead! Long Live Court Reform!*, THE ATLANTIC, December 12, 2021, available at https://www.theatlantic.com/ideas/archive/2021/12/commission-supreme-court-may-revive-reform/620969/.

435. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996).

436. Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950).

model might also draw in both those who have more Thayerian sympathies[437] and those who seek a more robust judicial role.[438] And since the opening of the gates for reviewing initiation claims under the administrative law model can be done, as we have seen in Parts III & IV, in ways that not only enhance governmental regulation but also reduces it (specifically, because of the possibility of a constitutional obligation to "look-back" and the enforcement of a nascent right to effective government)—it can potentially draw in again multiple coalitions of support from both libertarians and progressives.[439]

As is always the case with these things, only time will tell if all this is indeed possible. But there is no reason to assume or behave as though it is not. Doing so may itself have an undesirable Pygmalion effect.[440]

B. Elsewhere

All of this is about the desirability and feasibility of the administrative law model in the United States under current legal conditions. But what about outside the United States? After all, I have suggested that the administrative law model might be a truly global model of constitutional rights adjudication. More ambitiously, the model may displace the reliance on existing models, especially proportionality, given its pervasiveness in this global context.

Unfortunately, here it is harder to say with similar confidence that the administrative law model might be accomplished in full under existing legal conditions. While I have given reasons that support its normative appeal generally, not only in the United States, one point suggests caution in extending the administrative law model globally too quickly. The point is that constitutional rights adjudication in other systems, both domestic and international, operate based on a different legal foundation than that which exists in the United States, making the immediate implementation of the administrative law model tricky.

More specifically, most jurisdictions beyond the United States have general or specific limitations clauses in their relevant legal documents that substantiate their rights adjudication structures.[441] And today, these limitation clauses are understood by many to substantially limit the ability of judges to reason about rights in a categorical and legalistic ways. They require, in the relevant jargon

437. On the left, *see* Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CAL. L. REV. 1703 (2021). On the right, *see* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

438. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398 (2021).

439. On the libertarian sympathy for "lookback," *see* Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEG. ANAL. 121 (2016). For a progressive endorsement of "minimalism and experimentalism," including the value of lookbacks, *see* Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53 (2011).

440. *Cf.* Vicki C. Jackson, *The (Myth of un) amendability of the U.S. Constitution and the Democratic Component of Constitutionalism*, 13 INT'L J. CONST. L. 575 (2015).

441. On limitation clauses generally, *see* Grimm, *supra* note 86, at 384–86.

often used in discussing these clauses, that limitations on rights come from "external" sources rather than "internal" ones.[442] These external sources are the more-explicitly moral, political, and empirical reasons the proportionality model draws on more systematically.

To the extent that this is indeed the prevailing legal understanding about limitation clauses that are in force today in most jurisdictions outside the United States, or the expectation that these limitation clauses have generated around them, it would clearly be difficult to implement the administrative law model fully there. As we saw, a central feature of this model is that it enables both judges and decision-makers in politics to move quite freely, and in an un-tilted or unbiased way, from adjudicating rights in more categorical and legalistic ways to adjudicating rights in more flexible and prescriptive ways (or, again in the relevant jargon, from internal to external limitations on rights).

This suggests therefore that the possibility of considering the embrace of the administrative law model in full in other places outside the United States would likely need to await an amendment in the legal documents—constitutional or otherwise—that are the foundation for these places' structures of constitutional rights adjudication.[443] And, indeed, to the extent that the administrative law model does have general appeal, as I have claimed, an important question that this model puts on the agenda of both comparative constitutional law scholars and constitutional drafters is whether, going forward, limitation clauses (either general or specific) and perhaps contrary to what many believe has become a staple of modern constitutionalism and part of the so-called "postwar paradigm" of constitutional rights,[444] are at all needed and desirable. Maybe the perception that the lack of a general limitation clause in the US Constitution is a bug rather than a feature should be flipped on its head. Alternatively, a fruitful path for scholars and drafters to consider in the future, given the recognition of the administrative law model and its existence beyond the binary, is how to phrase limitation clauses in a way that would guarantee that no tilt between "internal" and "external" reasoning about rights would develop, as the administrative law model suggests is potentially important for a healthy legal system and culture of rights, certainly in the long term.

But while relevant amendments might be a condition for adopting the administrative law model in full outside the United States, there's nothing that should prevent systems from considering immediately adopting the administrative law model at least in part. Indeed, there seems to be nothing that holds systems from immediately considering displacing the proportionality protocol with the standard of reasoned decision-making as a tool for evaluating rights disputes.

442. For this distinction, *see, e.g.*, Gardbaum, *supra* note 81, at 426.

443. Or at least a substantial political movement in this direction in a way that would more clearly change the equilibrium of expectation from the kind of work that limitation clauses require.

444. *See* Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 84 (Sujit Choudhry ed., 2006).

Moreover, there is nothing that should prevent systems from considering incorporating the super-weak standard of review for initiation claims as well as the principle of "anti-abdication." All are prominent features of the administrative law model. All have strong potential normative support, or so I have suggested before. And all of those do not seem to be in any obvious way blocked by the existence of limitation clauses.[445]

In fact, looking at conversations going on globally about the state of constitutional rights adjudication, one might find signs that this sort of move to partially embrace the administrative law might be exactly what the doctor ordered, certainly in some places or contexts. For example, there is now renewed discussion in jurisdictions like Israel[446] and the United Kingdom[447] about the appropriate place of the judiciary in adjudicating constitutional rights, partly because of a sense of growing and illegitimate "juristocracy."[448] Bringing in the standard of reasoned decision-making to displace proportionality and creating a more procedurally focused dialogue between courts might responsibly address the concerns voiced by both sides in these debates.

In addition, international human rights and comparative constitutional law scholars have noticed of late the rise of what has been dubbed a "procedural turn"[449] in rights adjudication, most prominently perhaps in the European Court of Human Rights but also beyond.[450] This is again partly in response to a recent concern of judicial overreach in matters of rights that has encouraged courts to move to more procedural, rather than substantive, elements in their review processes. However, it is also partly the result of the trend, noted above and related to the rise of global administrative or policy states, of increased "fact-y-ness" in

445. A qualification here may be that some constitutional texts specifically refer to proportionality. *Cf.* Grimm, *supra* note 86, 388. However, it seems that for the reasons mentioned in Part IV, the reasoned decision-making standard *can* be squared with these textual provisions, though I forgo elaborating the precise analysis here.

446. *See, e.g.*, Yonah Jeremy Bob, *Sa'ar Rolls Out Push for Separation of Powers in Israel Gov't*, The Jerusalem Post, June 23, 2021, https://www.jpost.com/israel-news/politics-and-diplomacy/saar-rolls-out-push-for-separation-of-powers-in-israels-govt-671840

447. There are currently processes for discussing reforms to the key rights instrument in the United Kingdom, the Human Rights Act 1998. *See* HUMAN RIGHTS ACT REFORM: A MODERN BILL OF RIGHTS, A CONSULTATION TO REFORM THE HUMAN RIGHTS ACT 1998, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1040409/human-rights-reform-consultation.pdf. For recent surveys of the developments, from scholars who are generally inhospitable to them or weary about them, *see* Stephen Gardbaum, *Does the UK Need a Modern Bill of Rights?*, CONSTITUTIONAL LAW MATTERS, March 17th, 2022, https://constitutionallawmatters.org/2022/03/does-the-uk-need-a-modern-bill-of-rights-by-stephen-gardbaum/; Tom Hickman, *A UK Bill of Rights?*, 44 LONDON REV. OF BOOKS, March 24th, 2022, https://www.lrb.co.uk/the-paper/v44/n06/tom-hickman/a-uk-bill-of-rights?fbclid=IwAR2rA_YcCMLJ-UDSSzc2yiwjszc7qa9gPcA0M0PQJv8fSJz08dgcwvVnzWs.

448. HIRSCHL, *supra* note 41.

449. Arnardóttir, *supra* note 42.

450. For a compilation of essays focusing on this development in European international human rights law and (to a lesser extent) domestically, *see* PROCEDURAL REVIEW IN EUROPEAN FUNDAMENTAL RIGHTS CASES (Janneke Gerards & Eva Brems eds., 2017).

constitutional rights adjudication.[451] The reasoned decision-making standard might have something important to contribute to ongoing discussions about how to extend this "procedural turn," for instance by supplying more doctrinal structure to the way courts have so far carried it out (including what to look for in a well-supported and adequate governmental reasoning process). My more skeptical notes about the possibility of applying process review to legislative bodies and the suggestion for establishing a legislative bureaucracy in charge of "legislative due process," discussed in Part V,[452] might moreover contribute to ongoing debates in this context.

Finally, the COVID-19 pandemic has put on the radar of constitutional courts, scholars, and practitioners around the world the problems of governmental "underreach"[453] and not only overreach. That is, that a deep contemporary constitutional concern is not only and even primarily a concern with putting limitations on governments—which is, of course, the classic constitutional obsession—but rather one about making sure that governments effectively operate to address the issues of the day. The potential for the expanded focus that comes with the administrative law model to initiation claims, which, as we have seen, is absent from present models, could provide lawyers and courts with responsible tools to address precisely these concerns.

CONCLUSION

Administrative law is sometimes regarded as "the poor relation of public law; the hard-working, unglamorous cousin laboring in the shadow of constitutional law."[454] Other US scholars have described administrative law as "boring,"[455] as a field not fitting "for sissies,"[456] and which students tend to "dislike,"[457] even extremely so. Administrative law has a similarly awful reputation well beyond the United States also.[458]

451. *See, e.g.*, Alberto Alemanno, *The Emergence of the Evidence-Based Reflex: A Response to Bar-Siman-Tov's Semiprocedural Review*, 1 THEORY & PRAC. OF LEGIS. 327 (2015).

452. *See supra* Part V.C.

453. *See* Pozen & Scheppele, *supra* note 43.

454. Tom Ginsburg, *Written Constitutions and the Administrative State: On the Constitutional Character of Administrative Law*, in COMPARATIVE ADMINISTRATIVE LAW 60, 60 (Susan Rose Ackerman, Peter L. Lindseth & Blake Emerson eds., 2018).

455. William Funk, *My Ideal 'Casebook' or What's Wrong with Administrative Law Education and How to Fix It*, 38 BRANDEIS L.J. 247 (2000).

456. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 511.

457. Sidney A. Shapiro, *The Top Ten Reasons that Law Students Dislike Administrative Law and What Can (and Should) Be Done About Them?*, 38 BRANDEIS L.J. 351 (2000).

458. *See, e.g.*, David Dyzenhaus, *Dignity in Administrative Law: Judicial Deference in a Culture of Justification*, 17 REV. CONST. STUD. 87, 88 (2012) (describing the pervasive belief that Canadian administrative law is "boring").

In a way, my claim in this Article has been that there's nothing further than the truth than that. Administrative law is far from boring or marginal. And it is not only a shadowy law marching behind constitutional law. Properly calibrated and adapted, the field of US administrative law's "province"[459] or "empire"[460] can be extremely wide. As I argued here, this field can stretch all the way up to constitutional law and help inspire a new model of constitutional rights adjudication that substantially diverges from the present hegemonic models of proportionality and categorical reasoning.

My goal here was largely to introduce this new administrative law model for the first time. I also highlighted this model's key strengths and weaknesses as well as suggested where it might be appropriate and feasible already today, whether in full (the United States) or more piecemeal (beyond the United States). Given the novelty of this model, the discussion here, while high on word count, was still preliminary in nature. Operationalizing the administrative law model and giving more nuance and content to its various components generally and in specific settings would require further work, which I hope this Article will inspire both within the United States and more globally. For now, though, what does seem clear is that going forward, the administrative law model certainly deserves a permanent place in the constitutional toolkit. Whereas in the past the world of constitutional rights adjudication could have been accurately described as stuck in a binary, we have now hopefully moved beyond.

459. THE PROVINCE OF ADMINISTRATIVE LAW (Michael Taggart ed., 1997).

460. Jacob E. Gersen, *Foreword—Administrative Law's Shadow*, 88 GEO. WASH. L. REV. 1071 (2020).

Collective Countermeasures Upon Request: Renewing the debate in view of the rise of cyberthreats

Marc Schack

INTRODUCTION

The emergence of new technologies can make us look at old problems in a new light. This at least seems true as it applies to the rise of cyberspace as a major battleground for States and the question of the legality of "collective countermeasures."[1] In recent years, both States and legal scholars have shown more interest in this concept than ever before—and with good reason. The logic of collective countermeasures fits exceptionally well with the challenges posed by the cyber domain. This is particularly true for States that fear becoming the target of serious cyberattacks that they alone cannot effectively counter. Many cyberattacks fall below the threshold that allows States to ask allies for assistance through the doctrine of collective self-defense. In such cases, an attractive option could be to instead ask allies for assistance in countering such attacks through the employment of collective countermeasures.

Indeed, it is likely concerns about these types of scenarios have pushed the question of the legality of collective countermeasures to the forefront of the cyber-specific debate, and several States have engaged proactively and publicly with this problem in recent years. Namely, in May 2019, Estonian President Kersti Kaljulaid, started the conversation by expressing support for the notion that States that "are not directly injured may apply countermeasures to support [a] state directly affected by [a] malicious cyber operation."[2] Only a few months later, in September 2019, the French Ministère Des Armées entered the debate with the opposite claim, noting that "[c]ollective counter-measures are not authorised,

DOI: https://doi.org/10.15779/Z38BK16Q9T

1. This concept is borrowed from James Crawford, the fifth and final special rapporteur on State Responsibility. It should be noted, however, that alternative terms are often used. For more on terminology, *see* MARTIN DAWIDOWICZ, THIRD-PARTY COUNTERMEASURES IN INTERNATIONAL LAW 33–34 (2017).

2. NATO CCDCOE, *Keynote address by H.E. Kersti Kaljulaid, President of the Republic of Estonia - CyCon 2019*, YOUTUBE (May 29, 2019), https://www.youtube.com/watch?v=tdWPjEKARVA.

which rules out the possibility of France taking such measures in response to an infringement of another State's rights."[3] In December 2020, New Zealand's Ministry of Foreign Affairs and Trade issued a statement in which it seemingly supported the Estonian view, noting that it was "open to the proposition that victim states, in limited circumstances, may request assistance from other states in applying proportionate countermeasures to induce compliance by the state acting in breach of international law."[4] Conversely, in April 2022, the Government of Canada issued a statement arguing that it "does not, to date, see sufficient State practice or *opinio juris* to conclude that [collective cyber countermeasures] are permitted under international law."[5] In a May 2022-speech, while discussing options for responses to hostile cyber activity, the UK Attorney General noted that, since some States do not have the capacity to respond effectively to infringements, "[i]t is open to States to consider how the international law framework accommodates, or could accommodate, calls by an injured State for assistance in responding collectively."[6] Finally, in their respective 2023-position papers on the application of international law in cyberspace, Denmark, Ireland, and Costa Rica all expressed support for the view that at least some collective countermeasures are legal. Though it noted that "[t]he question of collective countermeasures does not seem to have been fully settled." Denmark found that "there may be instances where one State suffers a violation of an obligation owed to the international community as a whole, and where the victim State may request the assistance of other States in applying proportionate and necessary countermeasures in collective response hereto."[7] Ireland, similarly, noted that State practice since 2001 "indicates" that collective countermeasures "are permissible in limited circumstances, in particular in the context of violations of peremptory norms."[8] Costa Rica argued that not only specifically injured States but also third States may employ countermeasures "in response to violations of obligations of an *erga omnes* nature or upon request by the injured State."[9] As

3. Ministère Des Armées [Ministry of Armed Forces], *International Law Applied to Operations in Cyberspace, 7* (2019) (Fr.).

4. Ministry of Foreign Aff. & Trade, *The Application of International Law to State Activity in Cyberspace* ¶ 22 (2020) (N.Z.).

5. GOVERNMENT OF CANADA, *International Law Applicable in Cyberspace ¶ 37* (2022), https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/peace_security-paix_securite/cyberspace_law-cyberespace_droit.aspx?lang=eng#a9.

6. Suella Braverman, Attorney General of the United Kingdom, *International Law in Future Frontiers* (May 19, 2022), https://www.gov.uk/government/speeches/international-law-in-future-frontiers.

7. Denmark's Position Paper on the Application of International Law in Cyberspace, NORDIC J. INT'L L. 9 (2023).

8. IRELAND DEPARTMENT OF FOREIGN AFFAIRS, Position Paper on the Application of International Law in Cyberspace ¶ 6 (2023), https://dfa.ie/media/dfa/ourrolepolicies/internationallaw/Ireland—-National-Position-Paper.pdf.

9. Costa Rica's Position on the Application of International Law in Cyberspace ¶ 5 (2023), https://docs-library.unoda.org/Open-

such, State opinion on the matter varies wildly, although the most recent statements tilt clearly in favor of the legality of at least some collective countermeasures.

Along with the increase in State-attention, we see a similar re-emergence of scholarly attention on the topic of collective countermeasures in the context of the cyber-domain.[10] Indeed, over a relatively short time period, opinions have changed quite dramatically on this matter among key participants of the debate – from a standpoint of denying the right to take collective countermeasures *per se* to a standpoint of not only supporting but endorsing the idea.[11] It is too early to say whether this is a reflection of a general trajectory, but the winds certainly seems to be blowing in that direction.

If we look at this specific legal conundrum, the problem can broadly be understood in the following way: A State that is injured by another State's unlawful conduct is allowed to employ countermeasures. Countermeasures are defined as acts (or omissions) that would normally be considered internationally wrongful but are justified because they are undertaken in response to unlawful conduct with the aim of inducing the infringing State to cease such unlawful conduct and/or pay reparations. There can be little doubt that these measures are legal. *Collective* countermeasures involve variations to this scenario, where non-injured States take part in the defensive effort. The legality of such measures has been a fraught question for decades. The legal debate on the issue peaked during the later stages of the work of the International Law Commission (ILC) and the United Nations General Assembly's Sixth Committee on the *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA). However, while agreements on the legality of collective countermeasures remained difficult to obtain, ARSIWA was finalized and adopted in late 2001 without a solution to the problem. Since then, only a few scholars have examined the question in depth, and the issue was only seriously re-invigorated recently, as the perils of cyber-conflict became apparent.

The recent resurgence of focus on this issue, therefore, essentially adds to a discourse that has been ongoing for some time—although at relatively low intensities since 2001. However, contrary to most of the earlier contributions, the statements referred to above focus solely on those collective countermeasures that can be characterized as "collective countermeasures upon request." These are

Ended_Working_Group_on_Information_and_Communication_Technologies_-_(2021)/Costa_Rica_-_Position_Paper_-_International_Law_in_Cyberspace.pdf.

10. *See* Samuli Haataja, *Cyber Operations and Collective Countermeasures under International Law*, 25 JC&SL 33 (2020); Przemyslaw Roguski, *Collective Countermeasures in Cyberspace* – LEX LATA, *Progressive Development or a Bad Idea?*, *in* 12TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT - 20/20 VISION: THE NEXT DECADE, 25 (Tatiana Jančárková et al. eds., 2020); Jeff Kosseff, *Collective Countermeasures in Cyberspace*, 10 NOTRE DAME J. INT'L & COMP. LAW 18, 25 (2020); Michael N. Schmitt & Sean Watts, *Collective Cyber Countermeasures?*, 12 HARV. NAT'L. SEC. J. 373 (2021). *See also* TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS, 131–32 (Michael N. Schmitt, gen. ed., 2017).

11. *See* the author's note for Michael N. Schmitt in *Schmitt & Watts*, *supra* note 10, at 373.

countermeasures undertaken by non-injured States at the request of an injured State in contexts where there is no right of collective self-defense, because the requisite threshold has not been met, or in situations where a potential right of self-defense has simply not been asserted.

This focus is narrower than the traditional "collective countermeasures" debate. In this broader debate, these kinds of countermeasures—which are based on requests from injured States—are usually conflated with another type of collective countermeasure—one in which States react to another State infringing upon the fundamental rights of its own citizens in efforts that can resemble "humanitarian interventions."[12] In these situations, a State has not been the victim of an infringement of its rights at the hands of another State, and thus there is no request.

While both kinds of intervention merit serious consideration, the former is more limited in scope and has, I believe, a stronger foundation than the latter. Therefore, it is beneficial to separate these two issues analytically and decide on the strength of arguments for and against each one individually. In this Article, I shall focus my attention on the question of a potential right to take "collective countermeasures upon request."

Because the idea of collective countermeasures is considered controversial, this Article will examine the arguments that are commonly made against the legality of collective countermeasures and assess their validity in the context of collective countermeasures upon request. These arguments are: 1) that the International Court of Justice (ICJ) held collective countermeasures to be unlawful in the *Nicaragua*-case;[13] 2) that State practice is too limited to support the development of a customary norm; and 3) that available expressions of *opinio juris* on the matter are mainly negative. I shall go through each of these arguments below in Parts III-V. Before I do so, however, it is necessary in Part I to detail the core of the legal debate, and in Part II to establish some key assumptions. Finally, I conclude in Part VI by summarizing the findings of Parts III-V and assessing the collective weight of the arguments in regards to collective countermeasures upon request.

I. STATUS QUO IN THE DEBATE ON COLLECTIVE COUNTERMEASURES

When the UN General Assembly adopted its resolution by a vote of 56/83 on December 12, 2001, it marked the end of one of the longest and most complex legal processes in UN history: the creation of ARSIWA. This process, which formally began in 1956, would require the work of no less than five special

12. On the separation of these questions, *see* Ashley Deeks, *Defend Forward and Cyber Countermeasures*, Aegis Series Paper No. 2004, 3 (2020).

13. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶¶ 211, 249 (Jun. 27) [hereinafter Nicaragua judgment].

rapporteurs, who produced 33 reports between them.[14] Although the finish line was initially the adoption of a treaty, that could not be accomplished, and, instead, 59 Draft Articles and commentary on the responsibility of States were adopted. Irrespective of the non-binding nature of this document, it is hard to overstate the importance of ARSIWA. Lawyers, judges, diplomats, and academics all over the world rely on it for insights into a range of issues, including questions concerning countermeasures. Indeed, ARSIWA contains a full chapter on countermeasures that remains the starting point for most analyses of the concept today. However, one question that the chapter does not answer is whether *collective* countermeasures are legal. As such, the chapter ends with a statement in Article 54, which essentially says that nothing was decided on the matter. This article constitutes the center of the current debate on collective countermeasures. It reads as follows:

> This chapter does not prejudice the right of any State, entitled under article 48, paragraph 1, to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

The article is hardly a model in clarity,[15] and it does not help that it discusses "lawful measures" rather than "countermeasures" *ad verbatim*, which causes confusion because countermeasures are, per definition, *prima facie* unlawful.[16] Nevertheless, there can be little doubt that the focus of the article is countermeasures, and that it aims to make clear that while ARSIWA does not contain rules on collective countermeasures, it should not be read as prejudicing the potential right of States to enact such measures.

We can be certain that Article 54 deals (implicitly) with collective countermeasures because of its backstory. A previous version of the article would have allowed for collective countermeasures but was amended to the above form because of skepticism among States. This was done in an effort to table the discussion and move the ARSIWA-process forward.[17] This backstory, as explored further below, is key to understanding the current situation.

One of the consequences of the situation reflected in Article 54 is that most international lawyers seem highly skeptical of collective countermeasures, or

14. In chronological order: Francisco V. García-Amador (six reports); Roberto Ago (eight reports); Willem Riphagen (seven reports); Gaetano Arangio-Ruiz (eight reports); James Crawford (four reports); *see* James Crawford, Articles on Responsibility of States for Internationally Wrongful Acts, 1 (2001).

15. *See also* Linos-Alexandre Sicilianos, *Chapter 80: Countermeasures in Response to Grave Violations of Obligations Owed to the International Community*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 1137, 1144 (JAMES CRAWFORD, ALAIN PELLET & SIMON OLLESON eds., 2010).

16. *See also* Christian J. Tams, *All's Well that Ends Well? Comments on the ILC's Articles on State Responsibility*, 62 ZAÖRV 759, 789 (2002).

17. James Crawford (Special Rapporteur on State Responsibility), *Fourth Rep. on State Responsibility*, para. 74, U.N. Doc A/CN.4/517 and Add. 1–4 (Apr. 2, 2001) [hereinafter Crawford's Fourth Report].

simply disregard the issue when discussing countermeasures in general. This is what Jeff Kosseff frames as a "general sentiment against collective countermeasures."[18] While this sentiment may be slowly changing, the skeptical stance was prominently expressed within the cyber-specific debate by the "majority of the Experts" involved in the Tallinn Manual 2.0.[19] These experts concluded that "purported countermeasures taken on behalf of another State are unlawful."[20] In support of this claim, the majority pointed to the *Nicaragua* judgment and the work of the ILC in connection with ARSIWA. Other scholars simply refer to the majority in *Tallinn* when discussing collective countermeasures in the cyber-domain.[21] Similarly, in works that predate the Tallinn Manual 2.0, scholars often simply note that countermeasures are tools available to injured States.[22]

However, a growing set of studies, which mostly predate the Tallinn Manual 2.0, challenge the main arguments put forward by those skeptical of the legality of collective countermeasures. They do this largely by presenting detailed analyses of State practice and *opinio juris*.[23] The existence of these studies is also beginning to affect cyber-specific scholarship,[24] although this is hardly a universal development.[25] Indeed, if we look closer at cyber-specific scholarships, it becomes clear that participants in this debate remain hesitant on the matter, irrespective of a common sentiment that collective countermeasures endow many benefits in the sphere of cyberconflict. Jeff Kosseff, for example, argues that the Estonian call for allowing collective countermeasures within the cyber domain "is the correct normative approach" and that the traditional skeptical stance against collective countermeasures should be reconsidered.[26] He does not base his views on the mentioned studies, but rather on normative considerations, such as the idea that the global interconnectedness of cyberspace makes taking a reluctant stance towards collective countermeasures more tenuous, and that the persistent nature of the cyber threat makes it desirable to allow States to collaborate and pool resources.[27]

18. Kosseff, *supra* note 10, at 19.

19. TALLINN MANUAL 2.0, *supra* note 10, at 132.

20. *Id*.

21. *See, e.g.*, Erik Talbot Jensen & Sean Watts, *A Cyber Duty of Due Diligence: Gentle Civilizer or Crude Destabilizer?* 95 TEX L. REV. 1555, 1564 (2017).

22. *See, e.g.*, Anders Henriksen, *Lawful State Responses to Low-Level Cyber-Attacks*, 84 NORDIC J. INT'L L. 323 (2015); Katharine Hinkle, *Countermeasures in the Cyber Context: One More Thing to Worry About* 37 YALE J. INT'L L. ONLINE 11 (2011).

23. *See* CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW, 309–11 (2005); ELENA KATSELLI PROUKAKI, THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY, 113 (2010); DAWIDOWICZ, *supra* note 1.

24. *See* Haataja, *supra* note 10; Roguski, *supra* note 10.

25. *But see generally* Kosseff, *supra* note 10.

26. *Id*. at 19.

27. Kosseff, *supra* note 10, at 29–31.

Similarly, Samuli Haataja argues that "a limited right of collective countermeasures should be recognized in the cyber context."[28] While he stops short of claiming that such a legal right exists under current international law, he does argue the point as "essentially an extension of the idea of collective self-defense"[29] and refers in passing to the studies mentioned. He nevertheless focuses on the "strong policy reasons" for allowing collective countermeasures in response to cyber operations.[30] One of the limits he imposes in this respect is that collective countermeasures should only be employed if the injured State "specifically requests assistance."[31]

Going further still is Przemyslaw Roguski, who argues that international law has evolved since 2001 to allow collective countermeasures in cases involving violations of collective obligations.[32] He argues this point, for example, through references to some of the studies mentioned, though he does not deal with some of the most prominent arguments usually presented against legality, such as concerns based on the *Nicaragua*-case. Roguski also does not consider questions concerning requests for assistance.

In general, the cyber-specific studies do not go into much detail in their discussions of the status quo of State practice, *opinio juris,* or case law relating to collective countermeasures upon request—although they do add valuable considerations aimed specifically at the cyber domain. Notably, it seems that two key problems permeate the cyber-specific literature on collective countermeasures, including the Tallinn Manual 2.0. The first problem is that the available, detailed studies on State practice and *opinio juris* have not been sufficiently incorporated into the debate. This absence leaves us with an outdated and under-argued *status quo*. The second problem is that we often fail to appreciate that the focus of the cyber-specific debate is narrower than the general debate about collective countermeasures. As such, what we almost exclusively discuss is the legality of collective countermeasures *upon request*, but this narrowed focus has not significantly influenced assessments of the available case law or evidence of practice and *opinio juris*. I believe that this narrowed focus is key to understanding the problem, and this will be the guiding insight of this Article. Indeed, if we look more closely at the most commonly presented arguments against the legality of collective countermeasures, they are often less problematic when we focus on collective countermeasures upon request.

28. Haataja, *supra* note 10, at 1.

29. *Id*.

30. Haataja, *supra* note 10, at 17–18.

31. *Id*. at 19.

32. Roguski, *supra* note 10, at 25.

II. KEY LEGAL ASSUMPTIONS

To conduct a broad review of the legal status of collective countermeasures upon request, it is necessary to clarify some key legal assumptions that underpin my analysis, as doing so will reduce the necessary detail needed in the case analysis below. I shall define the concept of "countermeasure" and explain when countermeasures are considered "collective." The first element involves determining when certain acts (or omissions) are *prima facie* unlawful, while the second element involves defining the concept of an "injured State." After providing these definitions, I shall briefly touch upon the requirements for identifying customary norms in international law.

A. When does an act (or omission) qualify as a "countermeasure"?

While no authoritative definition of a "countermeasure" exists in international law, the concept includes non-forcible acts of self-help by States that are 1) "not in conformity with an international obligation towards another State"[33] and 2) taken in response to another State's initial, unlawful act. Under Article 22 of ARSIWA, the wrongfulness of such a response is precluded if and to the extent it is taken in accordance with the rules laid down in ARSIWA. A key question, therefore, becomes whether the relevant reaction was *prima facie* unlawful. If this is not the case, the reaction would generally be considered a lawful act of retortion, which does not need legal justification. For the purposes of this Article, it is worth focusing on the most common reactions discussed under the auspices of countermeasures: the freezing of State assets and the breach of international agreements, including trade agreements.

1. Freezing State assets

As the fifth and final Special Rapporteur on State responsibility, James Crawford conducted one of the key studies on State practice on collective countermeasures.[34] This study was included in the ILC-comments to Article 54 of ARSIWA. Accordingly, his choice of cases is illustrative of what key experts and States consider to be *prima facie* breaches of international law. It should be noted that Crawford included cases in which third States introduced asset freezes

33. Articles on Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83 annex, Art. 22, U.N. Doc. A/RES/56/83 (Dec. 12, 2001) [hereinafter ARSIWA].

34. James Crawford (Special Rapporteur on State Responsibility), *Third Rep. on State Responsibility*, at paras. 391–93, U.N. Doc A/CN.4/507 and Add. 1–4 (Mar. 15, 2000) [hereinafter Crawford's Third Report].

against the infringing State.[35] Similarly, the ILC commentary on Article 52(2) made clear that such freezes are *prima facie* unlawful.[36]

While there can be little doubt that the ILC presumed that State asset freezes were *prima facie* unlawful, neither Crawford nor the ILC explained exactly why. This presumptive approach has largely been adopted in later scholarship as well.[37] For example, Christian Tams' 2005-study simply noted that "the freezing of foreign assets […] constitutes a coercive interference with another State's property, and requires justification."[38] Similarly, in his 2017-study, Martin Dawidowicz notes that "[t]he assets of the responsible State, including those belonging to high-ranking officials such as Heads of State and Prime Ministers, as well as central banks, have also regularly been frozen in prima facie violation of general international law."[39] Dawidowicz does not explain this analysis in detail, but he does refer to the ICJ's *Arrest Warrant* case,[40] which found that high-ranking officials enjoy jurisdictional immunity. Dawidowicz also refers to the yet to be activated *UN Convention on Jurisdictional Immunities of States and Their Property*, which prohibits the freezing of assets belonging to central banks. Dawidowicz refers specifically to Article 21(1)(c) of this convention, which lists the property of central banks and other monetary authorities belonging to the categories protected in relation to post-judgment measures of constraint. Whether these rules reflect a broader principle is not considered explicitly by Dawidowicz, but one must assume that this is essentially the argument. However, key elements of his brief argument remain implicit. Accordingly, broad agreement exists on this matter, though specifics about the assumption and the underlying logic would benefit from further bolstering.

2. Breaking (trade) agreements

States violating their international agreements generally involve a *prima facie* breach of international law. But given that countermeasures often involve questions of trade, we need to look specifically at the rules under the WTO-regime, and the 'national security exceptions' to the underlying agreements in particular, to determine questions about *prima facie* legality.[41]

35. Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10 (2001) [hereinafter Commentary to ARSIWA], commentary to art. 54, para. 3.

36. *Id.*, at para. 6 in commentary to art. 52.

37. *See* Jarna Petman, *Resort to Economic Sanctions by Not Directly Affected States*, *in* ECONOMIC SANCTIONS IN INTERNATIONAL LAW, 309, 361, 365, 375 (LAURA POCCHIO FORLATI & LINOS-ALEXANDER SICILIANOS eds., 2004); TAMS, *supra* note 23; PROUKAKI, *supra* note 23; DAWIDOWICZ, *supra* note 1, at 113.

38. TAMS, *supra* note 23.

39. DAWIDOWICZ, *supra* note 1, at 113.

40. Arrest Warrant of 11 April 2000 (D.R.C. v. Belgium), 2002 I.C.J. Rep. 3.

41. Under the WTO-system, the three major agreements on trade in goods, services, and trade-related aspects of intellectual property rights (GATT, GATS, and TRIPS) all contain very similar

What is important to understand about these agreements is that they allow States a broad margin of appreciation where their essential national security interests collide with issues of trade. This includes, most prominently, the General Agreement on Tariffs and Trade (GATT),[42] which obliges members not to introduce general restrictions or quotas against other members without a basis for doing so in the agreement. However, Article XXI of GATT contains a broad national security exception, which creates legal space to lawfully employ measures in response to a national security crisis. Thus, in cases where Article XXI justifies measures, these actions cannot be considered countermeasures because they would not be *prima facie* unlawful. Rather, they would be considered retortions. The same is true for the General Agreement on Trade in Services (GATS)[43] and Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[44] As discussed below, case law suggests that we should treat these national security exceptions similarly. Accordingly, the points made here about GATT are also apply to the other agreements.

The national security exception in GATT holds that nothing in the agreement "shall be construed" to "prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests," including actions that are "taken in time of war or other emergency in international relations."[45] This language leaves the Members ample room for interpretation. Seemingly, the Members get to decide if their essential security interests are threatened—and if they need to employ measures. On that basis, academics have often debated 1). whether States are essentially "self-judging," in the sense that, once the exception is evoked, no external entity can adjudicate the matter; and 2). whether the provision is essentially "non-justiciable," implying that the article contains no legal criteria upon which a Member can be challenged. In other words, it has been suggested that States can simply claim "national security" considerations and automatically be in conformity with GATT. Yet several recent decisions from WTO dispute settlement panels have made clear that this is not the case.

national security exceptions. Case law suggests that these rules should be interpreted similarly. *See* Panel Report, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*, ¶¶ 7.241–42, WTO Doc. WT/DS567/R (adopted Jun. 16, 2020) [hereinafter Qatar v. Saudi Arabia-report].

42. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 33 I.L.M. 1153, 1867 U.N.T.S. 187 (1994) [hereinafter GATT].

43. *See* General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 33 I.L.M. 1167, 1869 U.N.T.S. 183 (1994) [hereinafter GATS].

44. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 1197, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS].

45. *See* GATT, *supra* note 42, at arts. XXI(b) and XXI(b)(iii).

In an April 2019 decision in the case of *Russia – Measures Concerning Traffic in Transit*,[46] a WTO dispute settlement panel made clear that States are not self-judging,[47] and that while the national security exception does create a wide margin of appreciation, it also includes objective elements that set firm legal limits to its use. Importantly, the analytical framework developed in this decision, and its transferability to other parts of the WTO-regime, was confirmed in a June 2020 Panel report in the case of *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*.[48] The core conclusions of both cases emphasized that the national security exception does not provide members with full and unbridled autonomy to decide when and where to enact trade measures based on claims of national security considerations. Such conclusions were confirmed in a group of recent decisions ruling that the United States was not justified in relying on the national security exception to introduce certain steel and aluminum tariffs.[49]

In *Russia – Measures Concerning Traffic in Transit*, the Panel concluded that it is for the member itself to determine what it considers "necessary" under the rule,[50] and that it is "in general" left up to each member to define "what it considers to be its essential security interests."[51] However, the Panel also noted that this latter concept, "which is evidently a narrower concept than 'security interests,' may generally be understood to refer to those interests relating to the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally."[52] As such, even though it is generally up to the States to define such interests, they cannot go beyond what constitutes a good faith-interpretation of the concept, which has to fit plausibly within the definition put forward by the Panel.[53]

The Panel's finding that it is "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity"[54] is of particular importance. In other words, the measures taken must meet "a minimum

46. Panel Report, *Russia – Measures Concerning Traffic in Transit*, WTO. Doc. WT/DS512/R (adopted Apr. 5, 2019) [hereinafter Ukraine v. Russia-report].

47. *Id.* at para. 7.56.

48. Qatar v. Saudi Arabia-report, *supra* note 41.

49. *See* Panel Reports, United States – Certain Measures on Steel and Aluminium Products, WTO. Docs. WT/DS544/R, WT/DS552/R, WT/DS556, WT/DS564 (adopted Dec. 9, 2022). The United States has appealed the panel reports, but given ongoing lack of agreement among WTO members regarding the filling of Appellate Body vacancies, there is no Appellate Body Division available to handle the case.

50. Ukraine v. Russia-report, *supra* note 46, at para. 7.146.

51. *Id.* at para. 7.131.

52. *Id.* at para. 7.130.

53. *Id.* at para. 7.132.

54. *Id*. at para. 7.134.

requirement of plausibility."[55] Contrary to what some scholars have previously suggested, this seems to only require that a national security consideration is articulated. It is thus not a requirement that the invoking State explicitly rely upon the national security exception.[56] Nevertheless, a lack of notification would seem to weaken a State's case for lawfulness, especially given that the GATT Council of representatives decided in 1982 that "contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI."[57] Therefore, while a lack of notification is not considered sufficient in itself to find a *prima facie* breach of the WTO-regime in this article, it is an important element. What *is* considered detrimental, however, is if *prima facie* unlawful measures are not accompanied by prominent justification put in terms of the intervening States' essential security interests.

In addition to this question of interests, the Panel also determined that the concept of "time of war or other emergency in international relations" constitutes an objective standard not left to the Members themselves to decide.[58] Rather, this concept "qualif[ies] and limit[s] the exercise of the discretion accorded to Members."[59] In defining the concept of an "emergency in international relations" the Panel noted that "political or economic differences between Members are not sufficient,"[60] and that such conflicts will not rise to the relevant level "unless they give rise to defence and military interests, or maintenance of law and public order interests."[61] For an emergency in international relations, the Panel presented the following definition:

> [A] situation of armed conflict, or of latent armed conflict, or of heightened tension or crisis, or of general instability *engulfing or surrounding a state*. Such situations give rise to particular types of interests *for the Member in question*, *i.e.*, defence or military interests, or maintenance of law and public order interests.[62]

As the italicized phrases above imply, the definition assumes the presence of a certain kind and level of tension that involves a member State, and it is assumed that this tension gives rise to certain interests for that State. Conversely, it does not imply that other members' interests are necessarily affected under such circumstances. Therefore, it remains unclear if the presence of an emergency for one member can be used by others to employ the national security exception. If that is not the case, action taken under such circumstances could be considered

55. *Id.* at para. 7.138.

56. DAWIDOWICZ, *supra* note 1, at 116.

57. GATT Council of Representatives, *Decision Concerning Article XXI of the General Agreement*, WTO Doc. L/5426 (Dec. 2, 1982).

58. Ukraine v. Russia-report, *supra* note 46, at paras. 7.82. and 7.101; *See also* Panel Report, *United States – Certain Measures on Steel and Aluminium Products*, WTO. Doc. WT/DS544/R (adopted Dec. 9, 2022), at para. 7.122 [hereinafter China v. USA-report].

59. Ukraine v. Russia-report, *supra* note 46, at para. 7.65.

60. *Id.* at para. 7.75.

61. *Id.*

62. *Id.* at para. 7.76 (emphasis added).

countermeasures rather than retortions. In this context, the newer decisions on the United States' steel and aluminum tariffs are of interest, because they emphasize that the national security exception is articulated in relation to the essential security interests of the invoking State. As stated by the Panel, "the relevant 'security interests' are those of the Member taking action under Article XXI(b)."[63] Immediately above this statement, the Panel defined the concepts of "interest" and "security" as "the relation of being involved or concerned as regards potential detriment or (esp.) advantage" and "the condition of being protected from or not exposed to danger," respectively.[64] Plainly put, the member State that invokes the national security exception must do so in relation to its own essential security interests, defined as its own concerns about or involvement in a situation that includes a relevant kind of danger.

The issue of direct versus indirect involvement in a national security situation can be illustrated through the 1979 Iranian Hostage Crisis. It is reasonable to conclude that an emergency in international relations existed between the United States and Iran during this crisis. Conversely, it is not reasonable to conclude that the emergency encompassed the many US-allies that got involved in the conflict—especially given that so many of them hesitated to get involved in the first place, despite strong American appeals to do so.[65] Similarly, during a debate in the GATT Council of Representatives in relation to the Falklands War of 1982—in which the European Community (EC), Canada, and Australia had taken measures against Argentina on the basis of a request from the United Kingdom—several representatives seemingly acknowledged the right of the United Kingdom to invoke the national security exception under the circumstances but rejected the right of others to do the same.[66] Therefore, the national security exception cannot generally be invoked by non-injured States in situations that do not directly threaten their essential security interests.

B. When is a countermeasure "collective"?

Once a countermeasure has been employed, it is necessary to determine if its author was an injured State or a third State in relation to the original, unlawful act. Only in the latter case can the countermeasure qualify as "collective." Under ARSIWA the definition of "injured States" is used to delimit which States are covered by the rules found in ARSIWA's chapter on countermeasures. Article 42 of ARSIWA notes that:

A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to:

63. *See* China v. USA-report, *supra* note 58, at para. 7.110.

64. *Id.*

65. See infra IV.b.44. Western States' measures against Iran (1980)

66. GATT Council of Representatives, *Minutes of Meeting Held in the Centre William Rappard on 7 May 1982*, WTO Doc. C/M/157 (Jun. 22, 1982), at 5–6 (esp. statements from Brazil and Spain) [hereinafter GATT meeting C/M/157].

(a) That State individually; or

(b) A group of States including that State, or the international community as a whole, and the breach of the obligation:

i. Specifically affects that State; or

ii. Is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.

Detailed interpretations of this rule will not be hereby discussed, but simply note that this definition must be considered when deciding if a State should be treated as an injured State or a third State—and, thus, if a countermeasure can be considered "collective." ARSIWA also specifically highlights the rights of States "other than an injured State" to invoke the responsibility of the infringing State more broadly—essentially delineating situations in which such States are not considered "injured" *per se*. This is the case where the obligations breached are "owed to a group of States" and when the relevant obligation "is established for the protection of a collective interest of the group," or in cases where the obligation is "owed to the international community as a whole."[67] As such, these situations involve obligations *erga omnes (partes)*.

C. Identifying customary international law

The essential goal of this Article is to (re)consider key arguments often made against the legality of collective countermeasures upon request. In the process, I shall also argue that we are at a stage where a preliminary assessment can be made about the presence of a customary norm. To do that, we need to consider the available State practice and expressions of *opinio juris*, and we need to determine if sufficient support can be found in these materials for the plausible identification of a customary norm. The question of exactly how much State practice and *opinio juris* is needed for this purpose remains unclear, although the ILC's 2018 Draft Conclusions on Identification of Customary International Law provides a useful starting point.[68] What we seek to identify is the elusive presence of a "general practice accepted as law."[69] "General" in this regard means practice that is "sufficiently widespread and representative, as well as consistent."[70] In regard to the evidence of practice accepted as law, the ILC argues that *opinio juris* can be reflected in "a wide variety of forms."[71] In general, the ILC simply explains that

67. ARSIWA, art. 48(1)(1)(a) and (b).

68. Int'l Law Comm'n, Draft conclusions on identification of customary international law, with commentaries, U.N. Doc. A/73/10 (2018) [hereinafter ILC-customary international law].

69. Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

70. ILC-customary international law, *supra* note 68, at 135.

71. *Id.* at 140.

"one must look at what States actually do and seek to determine whether they recognize an obligation or a right to act in that way."[72]

Having introduced the relevant background, I shall analyze the arguments commonly made against the legality of collective countermeasures. The first of these is the argument that the *Nicaragua*-judgment rejected such legality.

III. "COLLECTIVE COUNTERMEASURES" IN THE *NICARAGUA*-JUDGEMENT

A widely asserted argument against the legality of collective countermeasures is the claim that the ICJ rejected such legality in its 1986 *Nicaragua*-judgment. Within the cyber-specific debate this argument was most prominently put forward by the "majority of the Experts" in the Tallinn Manual 2.0.[73] These Experts referred specifically to paragraph 249 of this judgment, which includes the following statement:

> The acts of which Nicaragua is accused . . . could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.[74]

This statement is often read as an outright prohibition against collective countermeasures. While citing this paragraph, the majority of Experts simply "took the position that, as set forth in the Nicaragua judgment, purported countermeasures taken on behalf of another State are unlawful."[75] This approach is too simplistic. Although the statement does, on its face, imply that non-injured States cannot take countermeasures in response to unlawful acts by another State, there are several reasons to be hesitant about reading too much into the paragraph.

It should be taken into consideration that the *Nicaragua*-case involved a range of interferences by the United States into the affairs of Nicaragua; the most serious of which was the use of force. The use of force played an outsized role in the deliberations and focus of the Court, specifically as it related to assistance provided to the Contra forces by the United States.[76] Significantly, the Court preceded the excerpted paragraph above with an analysis of the most important facts relating to the principle of non-use of force. In so doing, the Court found *prima facie* evidence of violations at the hands of the United States and discussed whether such violations could be justified (as the United States claimed) as an exercise of collective self-defense. Accordingly, the Court went through a range of factors to determine if, firstly, an armed attack had occurred, and secondly, if

72. *Id.* at 125.

73. TALLINN MANUAL 2.0, *supra* note 10, at 132.

74. Nicaragua judgment, *supra* note 13, at para. 249.

75. TALLINN MANUAL 2.0, *supra* note 10, at 132.

76. Nicaragua judgment, *supra* note 13, at para. 292(3).

the justification could plausibly be maintained. The Court answered both questions in the negative. It did so while identifying several detrimental factors, including the fact that none of the victim-States asked the United States for help at the relevant times. This was a major legal stumbling block for the United States, as the Court made clear that "there is no rule permitting the exercise of collective self-defense in the absence of a request by the State which regards itself as the victim of an armed attack."[77] Given the inability of the collective self-defense justification to withstand scrutiny, the Court began to look for reasons not put forward by the United States that could explain why these actions "may nevertheless be justified on some legal ground."[78] In so doing, the Court noted that initial uses of force that do not rise to the level of an armed attack "cannot . . . produce any entitlement to take collective counter-measures involving the use of force."[79] It was only upon making this statement that the Court eventually produced the text quoted above. In other words, the focus of the Court was clearly on the use of force and the specific context of the actions of the United States. The logic applied was therefore hard to divorce from the circumstances of the case—which is also reflected in an oft-missed statement in the judgment on this subject.

In paragraph 210 of the judgment, the Court notes the following question: "if one State acts towards another State in breach of the principle of non-intervention, may a third State lawfully take such action by way of counter-measures against the first State as would otherwise constitute an intervention in its internal affairs?"[80] This would, according to the Court, potentially be a right "analogous to the right of collective self-defence."[81] The Court explicitly chose not to deal with this question in the abstract and instead limited itself to the problem at hand. It noted the following:

> [S]ince the Court is bound to confine its decision to those points of law which are essential to the settlement of the dispute before it, it is not for the Court here to determine what direct reactions are lawfully open to a State which considers itself the victim of another State's acts of intervention, possibly involving the use of force. Hence it has not to determine whether, in the event of Nicaragua's having committed any such acts against El Salvador, the latter was lawfully entitled to take any particular counter-measure. *It might however be suggested that, in such a situation, the United States might have been permitted to intervene in Nicaragua in the exercise of some right analogous to the right of collective self-defence, one which might be resorted to in a case of intervention short of armed attack.*[82]

Given this context, I find it hard to agree with the majority of the Experts in Tallinn Manual 2.0 that the *Nicaragua*-judgment can be read as an abstract rejection of collective countermeasures *per se*. In particular, it remains unclear whether the statement found in paragraph 249 presupposes the factual situation in

77. *Id*. at para. 199.

78. *Id*. at para. 246.

79. *Id*. at para. 249.

80. *Id.* at para. 210.

81. *Id.*

82. *Id*. (emphasis added).

the case, where namely no requests for assistance had been made, and where use of force had been applied.

Upon reviewing the Court's decision in 1989, Jonathan Charney also found that the Court's discussion of collective countermeasures resulted essentially in a "dicta that . . . forbid third state counter-measures in the absence of a request from the victim state when another state provides support short of armed force for revolutionary groups operating in the victim state."[83] Charney went on to say that he believed that the Court "did not foreclose third state counter-measures in other situations not involving the use of force."[84] Similarly, James Crawford, in his 2013 book on State responsibility, explained that "[t]he Court did not address what the position would be if the victim had requested that other states assist it in taking collective (non-forcible) countermeasures against Nicaragua."[85] Crawford continued by saying that it "seems reasonable to conclude, by analogy with collective self-defense, that the position would be different."[86] Suggesting that the *Nicaragua*-judgment does not clearly outlaw collective countermeasures is therefore not a novel idea, especially in regards to measures taken on the basis of a request from the victim-State. Indeed, most scholars that have subsequently analyzed the legality of collective countermeasures have not found the *Nicaragua*-judgment detrimental.[87] Especially pertinent is perhaps that two key contributors to the debate on international law in cyberspace, Michael N. Schmitt and Sean Watts,[88] expressed essentially the same view in 2021. They argued that "[t]he best reading of the judgment restricts the court's observations on collective countermeasures to instances involving the use of force and lacking a request from [sic] victim states."[89] On that basis, Schmitt and Watts concluded that the judgment cannot be read as an unequivocal rejection of collective countermeasures upon request,[90] and indeed, that "collective cyber countermeasures on behalf of injured states, and by extension support to countermeasures of the injured state, are lawful."[91] This view represents a change

83. Jonathan I. Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57, 74 75 (1989).

84. *Id.* at 75.

85. JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 704 (2013).

86. *Id.*

87. *See, e.g.*, TAMS, *supra* note 23, at 205–07; DAWIDOWICZ, *supra* note 1, at 6470; PROUKAKI, *supra* note 23, at 48, 15256.

88. Michael N. Schmitt is the general editor of the *Tallinn Manual,* and Sean Watts is one of the legal experts in the *Group of Experts* whose views are reproduced in the manual.

89. Schmitt & Watts, *supra* note 10, at 194.

90. *Id.*

91. *Id.* at 213.

in opinion for both authors, who had both previously made the case for the opposite conclusion.[92]

IV. STATE PRACTICE ON COLLECTIVE COUNTERMEASURES UPON REQUEST

Another key issue in the debate about the legality of collective countermeasures—with or without requests—is whether sufficient State practice exists to support the construction of a legal right. Usually, this debate takes place against the backdrop of the review of practice included in the ILC-commentary to ARSIWA. I believe, however, that this review suffers from challenges that undermine its significance. These challenges include the difficulty of discerning the logic applied and the fact that newer studies have superseded the review by finding much more State practice than is identified by the ILC.

A. The problematic ILC-review

In the commentary to Article 54 of ARSIWA, the ILC included a brief study of State practice on collective countermeasures. The study concluded that practice was "limited and rather embryonic"[93] and that it had therefore demonstrated uncertainty about the law on collective countermeasures. On that basis, the ILC expressed the view that "no clearly recognized entitlement" exists to employ collective countermeasures.[94] Without delving into this specific conclusion, however, I contend—as have others before me—that the logic employed to reach this conclusion is flawed.[95] To explain this conclusion, it is easiest to go through the ILC's reasoning.

In the commentary, the ILC opens its analysis with the conclusion that State practice is too limited to create a right to take collective countermeasures. From here, the ILC sets out to prove this claim. First, it notes that in "a number of instances, States have reacted against what were alleged to be breaches of obligations referred to in article 48 without claiming to be individually injured."[96] The obligations referred to here are essentially obligations *erga omnes (partes)*. Specifically, the ILC mentions six such cases, to which it refers simply as "examples"[97]:

1. The United States' prohibition in 1978 of certain imports from and exports to Uganda because of its purported genocidal policies.

92. *See* Michael N. Schmitt, *"Below the Threshold" Cyber Operations: The Countermeasures Response Option and International Law*, 54 VA. J. INT'L L. 697, 731 (2014); Jensen & Watts, *supra* note 21, at 1564.

93. Commentary to ARSIWA, *supra* note 35, at para. 3 in commentary to art. 54.

94. *Id.* at para. 6 in commentary to art. 54.

95. *See, e.g.*, Sicilianos, *supra* note 15, at 1145–46.

96. Commentary to ARSIWA, *supra* note 35, at para. 3 in commentary to art. 54.

97. *Id.*

2. The measures taken by the United States and other Western States in 1981 against Poland and the Soviet Union because of these countries' suppression of demonstrations and detainment of dissidents in Poland.
3. The measures taken by the European Community, Australia, Canada, and New Zealand in 1982 against Argentina because of its attack on the Falkland Islands.
4. The United States' adoption of the Comprehensive Anti-Apartheid Act in 1986 in an effort to end Apartheid in South Africa.
5. The measures taken by the European Community and the United States in 1990 on the basis of Iraq's invasion of Kuwait.
6. The measures taken by the European Community in 1998 in response to the humanitarian crisis in Kosovo.

In addition to these examples, the ILC also identifies cases where "certain States similarly suspended treaty rights in order to exercise pressure on States violating collective obligations." The ILC explained, while providing two examples, that these States did not rely on a right to take countermeasures.[98]

Finally, the ILC notes that in "some cases, there has been an apparent willingness on the part of some States to respond to violations of obligations involving some general interest, where those States could not be considered 'injured States' in the sense of article 42."[99] On that basis, the ILC explains that, "[a]s this review demonstrates, the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of cases."[100]

This is, essentially, the case put forth by the ILC. As far as I can tell, the ILC does not actually argue its position. Indeed, it simply mentions a range of cases that seem to support the notion that a right to collective countermeasures exists, while making clear that these cases are merely "examples" and not the result of an exhaustive search. It does not include any explicit evidence of, say, widespread contemporaneous criticism or rejections of such a right, or other elements that could serve as a linchpin for a negative conclusion. As such, it is difficult to understand how the review is able to sustain a negative conclusion unless we assume that the ILC believed that there was virtually no more practice available and thus that the study was actually comprehensive. While this situation can seem puzzling, there is a good reason the analysis seems at odds with its conclusion: The study is essentially a reworked version of the original analysis developed by Special Rapporteur, James Crawford, in his *Third Report on State Responsibility*, which drew a very different conclusion.[101]

98. *Id.* at para. 4 in commentary to art. 54.
99. *Id.* at para. 5 in commentary to art. 54.
100. *Id.* at para. 6 in commentary to art. 54.
101. Crawford's Third Report, *supra* note 34, at paras. 39192.

Crawford's original study reviews "some examples of recent experience concerned with collective countermeasures" and "attempt[s] an assessment of that practice."[102] His material review is essentially the same as the one described above. However, Crawford concludes that "a considerable number of instances" can be identified in which non-injured States took measures in response to unlawful acts, and that "in some cases at least" the measures taken would be deemed illegal if they could not be conceived as collective countermeasures.[103] According to Crawford, this "seems to suggest that a right to resort to countermeasures cannot be restricted to the victims of the breach in question, but can also derive from violations of collective obligation."[104] Crawford's conclusion is very different from the one discussed in the commentary to ARSIWA, though the two were reached on the basis of a nearly identical analysis. This dimension seems to go a long way in explaining the weaknesses of the ILC-analysis.

If we look closer at the specifics of how the argument shifted, it seems obvious that the ILC essentially chose to focus on the caveats included in Crawford's analysis, rather than the conclusion—such as the admission that practice was "dominated by a particular group of States (*i.e.*, Western States)."[105] On that basis, Crawford admitted that the practice was, indeed, "rather sparse and involves a limited number of States." But he continued by saying that "[n]onetheless there is support for the view that a State injured by a breach of a multilateral obligation should not be left alone to seek redress for the breach. If other States are entitled to invoke responsibility on account of such breaches . . . it does not seem inconsistent with principle that they be recognized as entitled to take countermeasures with the consent of that State."[106] Indeed, it was on that basis that Crawford proposed that ARSIWA include the right to take collective countermeasures.

In light of the above, I believe it is prudent to treat the ILC-review as an important but limited first step in the quest to understand State practice on this issue. Since the work was put forward in 20002001, several newer studies have shown that the ILC's approach was too limited. Of the handful of key studies discussed in this Article, only one comes down on the side of the ILC, while the rest reject the ILC's approach and conclusions.

From here, I shall look closely at these later studies with a critical eye on State practice specifically supporting (or rejecting) the legality of collective countermeasures upon request. It is important to note that while these later studies are thorough, they tend to ignore or underplay the issue of requests. That is the lacuna I shall try to fill in this Article. For now, I shall present these key studies

102. *Id*. at para. 390.

103. *Id.* at para. 395.

104. *Id.*

105. *Id.* at para. 396.

106. *Id*. at para. 401.

and use them as a point of departure for my review of State practice specifically related to collective countermeasures upon request.

B. State practice on collective countermeasures upon request

My analysis of State practice takes its point of departure in the work of a handful of legal scholars, who have, admittedly, done most of the hard work of identifying and analyzing cases involving collective countermeasures. My contribution will be to look collectively at their efforts and focus on the issue of requests for assistance.

Looking at the landscape of scholarship that has added significantly to the debate on State practice over the last few decades, key insights can be drawn particularly from the work of James Crawford (2000),[107] Jarna Petman (2004),[108] Christian J. Tams (2005),[109] Elena Katselli Proukaki (2010),[110] and Martin Dawidowicz (2017).[111] These scholars have very different approaches, however, which I will briefly highlight.

Crawford qualified his study by explaining that he only "briefly" reviewed "examples" of "recent experience" with collective countermeasures, with an eye on considering "what provisions ought to be made in the draft articles" that he was responsible for at that moment.[112] Accordingly, we need to take into account this limited and specific purpose of the study, which is conducted over the span of only about four pages, and which makes reference to ten cases in total, some only in passing.

Petman's review identifies "example[s] of cases"[113] in which some kind of community was taken seemingly on the basis of breaches of community norms. These cases are grouped into different types of situations. After reviewing such cases, Petman notes that they are "clearly not exhaustive."[114] As such, while her review is systematized in genre, there is no real attempt to delimit the study in time or scope. In total, Petman's study includes fourteen cases that are analyzed over the span of about seventeen pages.

Tams' focus is on situations involving responses to breaches of *erga omnes* obligations,[115] and he divides such practice into 1) situations of "actual violations," 2) situations involving "statements implying a right to take countermeasures," and 3) situations of "actual non-compliance justified

107. Crawford's Third Report, *supra* note 34.

108. Petman, *supra* note 37.

109. TAMS, *supra* note 23.

110. PROUKAKI, *supra* note 23.

111. DAWIDOWICZ, *supra* note 1, at 111238.

112. Crawford's Third Report, *supra* note 34, at para. 390.

113. Petman, *supra* note 37, at 361.

114. *Id.* at. 376.

115. TAMS, *supra* note 23, at 207.

differently." Tams is not completely clear about his scope, but he does say that he identifies "a considerable number of instances since 1970" and that such instances are "cited as examples."[116] In total, Tams conducts a review of seventeen cases, which takes up about thirty-five pages.

Proukaki's review divides cases between situations in which State actions did not amount to countermeasures but were nonetheless illustrative of a determination to exert pressure on the basis of "serious violations of fundamental community and collective interests,"[117] and instances in which non-injured States actually took collective countermeasures. She notes that her study consists of "various examples" and aims to "provide evidence that countermeasures in the collective interest have frequently been used by states and that they are well established in international law."[118] Proukaki does not set a clear temporal scope and goes all the way back to 1853 to find her first case. In total, Proukaki reviews thirty-seven cases over the span of about 116 pages.

Finally, Dawidowicz presents a thorough review of State practice, which is more limited in scope than the others because he includes only "instances in which States have adopted *prima facie* unlawful unilateral coercive measures in response to breaches of obligations *erga omnes (partes)*."[119] Nevertheless, Dawidowicz manages to identify and discuss twenty-one cases in total, covering the material in about 126 pages. On the temporal scope, Dawidowicz finds that the entry into force of the UN Charter in 1945 provides a "useful starting point"[120] for his analysis. Ultimately, Dawidowicz, like the others, refers to his case selection as mere "examples" of the conduct studied.[121]

In total, these five scholars identify forty-four cases relating to State practice on collective countermeasures. Irrespective of their different approaches and focus, twenty-two of these cases are included in at least two of the studies, while seventeen cases are included in at least three. It should be noted, however, that some of the cases could arguably be split up into several different cases or combined. Therefore, the specific numbers are of limited importance. What is important is the overall picture. For our purposes, within these studies we can identify at least nine examples of situations where collective countermeasures were plausibly taken on the basis of a request from an injured State. In the following sections, I shall review these nine cases as well as the newest prominent case on the matter: Russia's invasion of Ukraine in 2022 and the international response thereto. It should be emphasized that I am discussing only a subset of practice, which should not be read as an indication that the rest of the material is not highly important.

116. *Id*. at 209.

117. PROUKAKI, *supra* note 23, at 102.

118. PROUKAKI, *supra* note 23, at 110.

119. DAWIDOWICZ, *supra* note 1, at 111.

120. *Id*.

121. *Id*. at 113.

1. United States' measures against Japan (1940-1941)

The second Sino-Japanese war, which is often thought of as the initiation of the Second World War in the Pacific theater, started in a confused and messy manner in July of 1937. Despite initial uncertainties, there can be no doubt that the conflict escalated on the basis of Japanese aggression constituting an unlawful use of force. Indeed, as noted by Oona A. Hathaway and Scott J. Shapiro, "it was clear that Japan had engaged in gross violations of the Pact and Covenant" of the League of Nations.[122] Despite such breaches, the League and its members neglected to implement collective sanctions in response,[123] and as a consequence, China stood alone in its conflict with Japan. Caught in this situation, China initiated a policy of public diplomacy aimed especially at the United States in an effort to secure sanctions against Japan. This effort included both formal requests for sanctions and indirect propaganda aimed at molding the views of American elites.[124] The activities of the American Committee for Non-Participation in Japanese Aggression provide a key example of the unofficial effort. The group lobbied with the express goal of "helping China by pushing for a ban on the export of munitions to Japan."[125] Thus, according to Tsuchida Akio, the Committee "tried to use a US embargo against Japan to deter Japan's aggression."[126] While the Committee was officially American, it was heavily influenced by China, which had its own propaganda agents placed in the Committee and provided much of the financing.[127]

An example of the more formal approach is described in the pages of the *The New York Times*, which reported on June 30, 1940, that the governor of the Bank of China (and brother-in-law of Chiang Kai-shek, the head of the Nationalist government of China), T. V. Soong, met with American officials in an effort to "try to bring about an embargo on shipments of American raw materials to Japan."[128]

These efforts seemingly bore fruit, as the United States decided in the following months to initiate major economic sanctions against Japan—an effort that was "greeted with enthusiasm" in China.[129] These sanctions would come to include a complete embargo and the freezing of Japanese assets on June 25,

122. OONA A. HATHAWAY & SCOTT J. SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 174 (2017).

123. *Id.*

124. *See* Tsuchida Akio, *China's "Public Diplomacy" Towards the United States Before Pearl Harbor*, 17 J. AM.-E. ASIAN REL. 35 (2010).

125. *Id*. at 44.

126. *Id.*

127. *Id*. at 46–47.

128. *Embargo Plea Expected*, N.Y. TIMES (Jul. 1, 1940).

129. Frank Tillman Durdin, *U.S. Export Curbs Hailed by Chinese*, N.Y. TIMES (Jul. 28, 1940).

1941,[130] which dealt a serious blow to the Japanese and led Japan and the United States on a collision course.

There can be some doubts about the legality of the various sanctions applied during this incident, but at least the freezing of Japanese State assets would *prima facie* seem to violate the rights of Japan under international law. Accordingly, the case constitutes an example of a situation where one State (Japan) violated an *erga omnes* norm affecting another State (China), which then requested assistance from an uninjured State (United States), leading to the adoption of *prima facie* unlawful sanctions.

2. Organization of American States' measures against the Dominican Republic (1960)

On August 17, 1960, *The New York Times* reported that Venezuela "formally asked" the Organization of American States (OAS) "to adopt sanctions against the Dominican Republic because of aggression."[131] Specifically, the Venezuelan foreign minister, Ignacio Luis Arcaya, charged the Trujillo-regime of the Dominican Republic with "fomenting rebellion and plotting the murder" of the Venezuelan president.[132] On that basis, he asked that OAS respond through "the adoption of all sanctions provided by the Inter-American Treaty of Mutual Assistance of 1947, except for military action."[133] The OAS heeded the call on August 20, when it unanimously voted to impose sanctions.[134]

The decision formed the culmination of a process initiated by Venezuela on June 4, 1960, when it asked the Chairman of the Council of the OAS for the immediate convening of the OAS Organ of Consultation to make the case that the Dominican Republic had infringed upon its sovereignty.[135] A series of meetings were held, during which the OAS decided to look into the matter and make an assessment. The assessment led the OAS to adopt its so-called *Resolution I*, which concluded that the actions of the Dominican Republic "constitute[d] acts of intervention and aggression"[136] and argued that "collective action [was] justified."[137]

130. Executive Orders: Foreign Exchange Transactions, Transfers of Credit, Export of Coin and Currency (China and Japan), 6 Fed. Reg. 146, 3715 (Jul. 29, 1941).

131. Tad Szulc, *Venezuela asks O.A.S. Sanctions*, N.Y. TIMES (Aug. 18, 1960).

132. *Id.*

133. *Id.*

134. Org. of Am. States, *Sixth Meeting of Consultation of Ministers of Foreign Affairs as the Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance*, O.A.S.T.S. Doc. OEA/Ser.C/11.6 (Aug. 1621, 1960) [hereinafter OAS-meeting 1960].

135. Lloyd Brown-John, *Economic Sanctions: The Case of the O.A.S. and the Dominican Republic, 1960-1962*, 15 CARIBBEAN STUDIES 73, 76 (1975).

136. OAS-meeting 1960, *supra* note 134, at 45.

137. *Id*. at 5.

On that basis, the Member States decided to take action in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance.[138] Specifically, the OAS decided to impose sanctions on the Dominican Republic, including breakingdiplomatic relations, suspending trade in war-related materials, and promising to consider further sanctions.[139] Some States, including the United States, chose to impose broader sanctions, subsequently on January 4, 1961, the OAS also extended its list of sanctions.[140]

Although the sanctions were in line with treaty regimes created for the purpose, at least some of the sanctions violated the GATT-agreement, to which both the Dominican Republic and several other members of the OAS were parties.[141] These States were bound by the most-favored-nation principle, and thus, arguably, were in breach of their treaty obligations under GATT in relation to at least some of the sanctions against the Dominican Republic.[142] This case demonstrates a situation involving 1) a clear violation of an *erga omnes* norm, 2) a request by the injured State for assistance in responding to the violation, and 3) the initiation of *prima facie* illegal acts by a large number of non-injured States in response to the original violation.

3. Arab States' measures against Israeli allies (1973)

The 1973 Oil Crisis commenced when members of the Organization of Arab Petroleum Exporting Countries (OAPEC) decided to engage in a collective embargo against Israeli allies. The backdrop to this decision was the Six-Day War of June 1967 between Israel and the neighboring States of Egypt, Jordan, and Syria. During the war, Israel invaded and occupied parts of its neighboring territories, including East Jerusalem, the Sinai Peninsula, the West Bank, and the Golan Heights. The Six-Day War created an unstable situation that led to war once again in 1973 when Egypt and Syria attacked Israel in what became the Yom Kippur War. It was in this context that OAPEC launched the oil embargo, which targeted several countries seen as complicit in the Israeli occupation policy—including, namely, the United States.

This situation is relevant to the practice of collective countermeasures to the extent that one agrees with the premise that 1) at least some of the Arab States were injured by a breach of an *erga omnes* norm at the hands of at least some of the targeted States, and that 2) the chosen response—the oil embargo—constituted a *prima facie* unlawful act. In relation to the original breach, the argument goes that Israel's 1967 attack on its neighbors and occupation of their territory constituted a breach of an *erga omnes* norm. This question is obviously highly

138. Inter-American Treaty of Reciprocal Assistance, Sept. 2, 1947, 62 Stat. 1681, 21 U.N.T.S. 77.

139. OAS-meeting 1960, *supra* note 134, at 56.

140. Brown-John, *supra* note 135, at 80.

141. PROUKAKI, *supra* note 23, at 11516.

142. *See id.*

fraught and controversial. Indeed, there is hardly a subject of international law that has been more thoroughly discussed than the various actions taken by Israel and its neighboring countries during this broader conflict. Thus, in order to avoid getting bogged down, I will merely note here that, for the purposes of this Article, a reasonable case can be made that Israel breached several rules of international law of an *erga omnes* character during and following this military offensive, including the *jus cogens* prohibition on the use of force. Several States, including the United States, assisted Israel in achieving its goals—including those relating to Israel's ability to hold occupied territories.[143] This assistance can be understood as a violation of the principle articulated in Article 41(2) of ARSIWA, which, read in combination with Article 40(1), notes that no State shall "render aid or assistance in maintaining" a "situation created by" a "serious breach by a State of an obligation arising under a peremptory norm of general international law." It is plausible that Egypt and Syria had a right to employ countermeasures because the United States' actions had injured them in this way.

On the question of the illegality of the oil embargo, it seems plausible, for example, that the efforts of Kuwait and Saudi Arabia against the United States constituted a *prima facie* breach of their international obligations. Kuwait was a party to GATT at the time, and without a valid defense under Article XXI—which was never raised—Kuwait was arguably acting in violation of the most-favored-nation principle, while Saudi Arabia was arguably acting in violation of bilateral agreements with the United States.[144] If Egypt and Syria were indeed injured by a breach of an *erga omnes* norm at the hands of the United States, and non-injured States such as Kuwait and Saudi Arabia responded by taking *prima facie* unlawful actions against the United States, the situation could be seen as a case of collective countermeasures. On that basis, it is necessary to consider whether Egypt and Syria requested such assistance.

The key meeting in Kuwait on October 17, during which a number of oil-producing States in the Arab world activated the "oil weapon," was preceded by many months of pressure on the Arab world, King Faisal of Saudi Arabia in particular, by the Egyptian President Anwar Sadat to use this weapon.[145] Sadat had called for the use of this weapon in 1972, and "[b]y the spring of 1973," according to Daniel Yergin, "Sadat was strongly pressing Faisal to consider using the oil weapon to support Egypt in a confrontation with Israel and, perhaps, the West."[146] The pressure worked, and a few months before Sadat's initiation of the Yom Kippur War, he secured a pledge from Faisal that the oil weapon would, indeed, be used during such a conflict.[147] Both Egypt and Syria took part in the

143. In particular, American delivery of critical military supplies. *See* DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY AND POWER 77782 (2012).

144. *See* PROUKAKI, *supra* note 23, at 124.

145. *See* a comprehensive discussion in YERGIN, *supra* note 143, at ch. 29.

146. *Id*. at 766.

147. *Id*. at 770.

October 17 meeting, and thus took part in the decision to initiate the oil embargo. Accordingly, there can be little doubt that the embargo came at the strong urging of the injured States. Indeed, the wording of the Resolution imposing sanctions made clear that this was a direct response to the conflict between Egypt and Syria and Israel. Indeed, the sanctions targeted the United States specifically because it was "supplying Israel with all sources of strength which increase its arrogance and enable it to defy the legitimate rights and the principles of general international law."[148]

4. Western States' measures against Iran (1980)

After decades of royal rule under the Shah of Iran, Mohammed Reza Pahlavi, a revolution in 1979 upturned Iranian society and established the State we know today as the Islamic Republic of Iran. In early 1978, millions of protesters took to the streets expressing their frustration with the Shah and his regime, in many cases inspired by the messages of then exiled Ayatollah Khomeini. By 1979, these protests became a full-fledged revolution. The Shah fled Iran, Khomeini returned from exile, and Iran became an Islamic republic.

The turmoil in Iran had many violent consequences. When the ousted Shah visited the United States in late 1979 to receive medical treatment, it created a furor and popular demands in Iran for the United States to hand him over. This episode set the Iran Hostage Crisis in motion, during which a mass of young Iranians stormed the United States' embassy in Tehran, took Americans hostages, and held most of them for 444 days. In a case initiated by the United States on the matter, the ICJ concluded that the government of Iran was legally responsible for the situation because it had failed to oppose the attack on the embassy, almost immediately endorsed the attack, and maintained the situation through the use of armed militants "acting on behalf of the State."[149] Indeed, the Court did not mince words. It strongly underlined the seriousness of the situation. In particular, the Court recalled "the extreme importance" of the principles of law governing diplomatic and consular relations, which were being undercut. The Court felt that it was "its duty to draw the attention of the entire international community … to the irreparable harm that may be caused by events" of this kind.[150] Indeed, the Iranian actions were widely condemned,[151] and the UN Security Council called upon Iran "to release immediately" the embassy staff and "to allow them to leave the country."[152] It is reasonable to argue that Iran infringed upon the rights of the

148. *See* OAPEC Ministerial Council Statement on Production Cutbacks (Oct. 17, 1973).

149. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. Rep. 3, ¶ 91 (May 24) [hereinafter Hostages judgment].

150. *Id.* at para. 92.

151. *See* Keesing's Contemporary Archives, Record of National and International Current Affairs with Continually Updated Indexes (Volume XXVI 1980) at 30207–08 [hereinafter Keesing's 1980 XXVI].

152. S.C. Res. 457 (Dec. 4, 1979).

United States and that these rights could be considered of an *erga omnes* character because of their broader effects.

The United States responded quickly and issued an order on November 12, 1979, to end all oil imports from Iran, and on November 14, 1979, to order a freeze on Iranian assets.[153] More importantly, the United States campaigned to get its allies to join these sanctions. This effort began with calls for EC members to reduce their diplomatic presence in the country,[154] and later, the complete closure of embassies.[155]

These calls for action escalated in December 1979. On December 11, 1979, US Secretary of Defense Harold Brown said at a press conference in connection with a NATO meeting that it is "now appropriate for the Allies, our friends, and the world community to reflect their disapproval [of the Iranian actions] through concrete diplomatic and economic steps."[156] In a parallel effort, the US Secretary of State Cyrus Vance held talks with several Western European leaders between December 10 and 11, 1979, to secure their help.[157] During these meetings, Vance sought to persuade his European allies to impose a range of economic sanctions against Iran, including freezing Iranian assets.[158] The Europeans were reluctant initially not because of concerns about their international legal obligations, but because of a range of other considerations. For example, Secretary Vance met with the UK Prime Minister on December 10, 1979, at 10 Downing Street to secure UK cooperation on the matter. Vance made clear his wish for "collective action" to be taken by the United States and its allies, and that "it would be extremely helpful if America's allies could freeze Iranian assets in the way that the Americans had done."[159] The Prime Minister was initially worried about the consequences and the effectiveness of the measure.[160] The question was left somewhat open, and Secretary Vance made clear that he was on his way to have similar talks with other heads of governments.[161] The American pressure was felt by several other US-allies.

Over a period of some months, the United States "increased its pressure on Western allies, in particular the nine members of the European Community, to take measures against Iran in line with the draft UN Security Council resolution

153. Keesing's 1980 XXVI, *supra* note 151, at 3020607.

154. *See, e.g.*, LUMAN ALI, BRITISH DIPLOMACY AND THE IRANIAN REVOLUTION, 1978-1981 187 (2018).

155. *Id*. at 19091.

156. Keesing's 1980 XXVI, *supra* note 151, at 30208.

157. *Id*.

158. ALI, *supra* note 154, at 191.

159. Prime Minister's Office files, PREM19/76, IRAN (Internal Situation), Record of a Discussion Between the Prime Minister and the United States Secretary of State, Mr. Cyrus Vance, at 10 Downing Street, on Monday, 10 Dec., 1979, at 1030 Hours (Dec. 10, 1979), at 2.

160. *Id.* at 3.

161. *Id*. at 4.

of January 1980 which had been vetoed by the Soviet Union."[162] This included the instigation of a near total embargo of Iran. On April 8, President Carter sent messages to Canada, Japan, Australia, New Zealand, and Western European countries asking for the instigation of such measures.[163] The US went to great lengths to persuade its allies to take tough measures against Iran.

The US-allies were hesitant to get involved,[164] and in an April 13 interview with foreign correspondents, President Carter stated that the United States needed "the full and aggressive support"[165] of its allies, particularly in relation to sanctions.[166] A little more than a week later, on April 22, the EC finally relented. First, they took diplomatic and economic sanctions, including a ban on most exports to Iran and oil imports from Iran, which were "strongly welcomed" by the United States.[167] Additionally, Japan announced that it would join the EC's action. In the following days, several Western countries followed suit, including Canada, Australia, Portugal and Norway—the latter deciding on a total trade boycott.[168] On May 18, the EC decided to expand its sanctions, including by suspending all contracts between the EC and Iran signed after the hostage crisis started on November 4, 1979.

This case clearly involves unlawful Iranian actions against the United States, and persistent US requests for assistance from their allies around the world. However, the question of whether the actions eventually taken by the Europeans were in fact *prima facie* unlawful is a point of disagreement. Christian Tams found that the EC actions "remained intrinsically lawful,"[169] and James Crawford similarly found that they "arguably remained mere retorsions."[170] Both noted, however, that the Europeans made statements suggesting that they were prepared to take countermeasures.[171] Dawidowicz excluded the case from his review, likely because he did not believe that the case involved *prima facie* unlawful measures. Petman, on the other hand, suggested that the legality of the EC actions were "doubtful,"[172] while Proukaki found that at least the EC decision to suspend EC-Iranian contracts "seems to fall within the category of third-state countermeasures as implying their intention to take action that may be in violation of specific commitments under international law."[173] Additionally, Jochen

162. Keesing's 1980 XXVI, *supra* note 151, at 30530.
163. *Id.*
164. *Id.*
165. 80 DEP'T ST. BULL. [i] (1980), 12.
166. *Id*.
167. Keesing's 1980 XXVI, *supra* note 151, at 30530.
168. *Id*. at 30531.
169. TAMS, *supra* note 23, at 226.
170. Crawford's Third Report, *supra* note 34, at para. 394.
171. *Id.*; TAMS, *supra* note 23, at. 22627.
172. Petman, *supra* note 37, at 361.
173. PROUKAKI, *supra* note 23, at 144.

Frowein and Linos-Alexandre Sicilianos, who conducted a series of earlier studies, both suggested that at least the decision to suspend contracts was likely *prima facie* unlawful.[174]

On this basis, it seems reasonable to conclude that while legitimate disagreement exists about the *prima facie* legality of the EC actions, it is at least arguable that the imposition of a near total embargo on Iran would likely entail the breach of contracts like those already on the books between the EC and Iran. The case therefore plausibly involves collective countermeasures upon request. Indeed, it is also an example of how the issue of requests is usually ignored in the literature. Of the works cited, only Crawford really made the American requests a part of the narrative, while all the others either ignored or downplayed this key element of the story.

5. Western States' measures against Argentina (1982)

On April 2, 1982, Argentina invaded the Falkland Islands. This territory formed part of the United Kingdom, and the invasion was a clear breach of both sovereignty and the prohibition on the use of force: two central *erga omnes* norms. Indeed, the UN Security Council in its Resolution 502 (1982) harshly condemned Argentina the following day, calling the action a "breach of the peace" and demanding an "immediate withdrawal."[175] The United Kingdom responded by sending an armada towards the islands to fight off the Argentinians. The United Kingdom also adopted sanctions against Argentina, including the freezing of Argentine assets.[176]

In support of their British allies, EC members also adopted a range of sanctions against Argentina, including the prohibition of "all imports of Argentine origin into the Community."[177] This import embargo constituted a *prima facie* violation of the EC member's obligations under GATT and a violation of specific EC-Argentina agreements.[178] Notably, the latter agreements were not subject to the national security exception under GATT, so no obvious legal defense exists for this action.[179] However, as discussed in Part II above, there is good reason to believe that the national security exception does not cover a situation like this one, and thus that the broad import prohibition was *prima facie* unlawful in its totality.

174. *See* Jochen A. Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 HAGUE ACAD. INT. L. COLLECTED COURSES 345, 41617 (1994); LINOS-ALEXANDRE SICILIANOS, LES REACTIONS DECENTRALISEES A L'ILLICITE: DES CONTRE-MESURES A LA LEGITIME DEFENSE 160 (1990).

175. S.C. Res. 502 (Apr. 3, 1982).

176. *See* Geoffrey Marston (ed.), *United Kingdom Materials on International Law 1982*, 53 BYIL 337 (1982).

177. Letter dated 13 April 1982 from the Permanent Rep. of Belgium to the United Nations addressed to the President of the Security Council, U.N. Doc. S/14976 (Apr. 14, 1982).

178. *See* DAWIDOWICZ, *supra* note 1, at 141.

179. *Id.* at 14142.

It is noteworthy that the EC and other States did try to defend their actions with reference to the national security exception. However, in doing so, these States hinted at a legal theory that went beyond Article XXI. The official justification put forward by the EC, Australia, and Canada was that the measures were taken "on the basis of their inherent rights of which Article XXI of the General Agreement is a reflection."[180] These "inherent rights" were mentioned several times during debates in the GATT Council,[181] but this did little to clarify what the States meant.

Nevertheless, as recorded in Keesings Contemporary Archives from 1982, the actions taken by the EC members happened "[f]ollowing representations from Britain,"[182] as was the case for Commonwealth countries. For example, it is noted in *Keesings* that "New Zealand on April 5 broke off diplomatic relations with Argentina and imposed a ban on imports from and exports to Argentina on April 13 in response to a formal British request."[183] This action was arguably a *prima facie* violation of New Zealand's international legal obligations.[184]

At the time, there were major disagreements about the legality of the actions taken by the sanctioning States. As such, this is one of the relatively rare cases in which several States went on record to reject the legality of such sanctions. However, this disagreement generally followed allied "party" lines,[185] and therefore it seems reasonable to assume that at least part of the motivation is to be found in the relevant States' political views and alliances, rather than a strictly legal analysis.

6. Western States' measures against the Soviet Union (1983)

On August 31, 1983, a Korean Airlines Boeing 747 carrying 269 passengers and crew of various nationalities was shot down by the USSR, killing all on board. This downing of an unarmed, civilian aircraft animated "an explosion of condemnation," as US President Reagan put it in a televised address on September 5, 1983.[186] In response, several Western States took measures against the USSR, some of which seem to be in *prima facie* violation of international law, including breaches of aviation agreements.[187] While some of the States were responding to

180. Trade Restrictions Affecting Argentina Applied for Non-Economic Reasons: Communication to the Members of the GATT Council, WTO Doc. L/5319, ¶ 1(b) (May 5, 1982).

181. GATT meeting C/M/157, *supra* note 66, at 7, 910 and 12.

182. Keesing's Contemporary Archives, Record of National and International Current Affairs with Continually Updated Indexes (Volume XXVIII 1982) at 31532 [hereinafter Keesing's 1982 XXVIII].

183. *Id.* at 31533.

184. *See* similarly DAWIDOWICZ, *supra* note 1, at 142.

185. *Id.* at 14348.

186. See Transcript of President Reagan's Address on Downing of Korean Airline, N.Y. TIMES, (Sep. 6, 1983). [hereinafter Reagan Transcript]; 83 DEP'T ST. BULL. [i] (Nov. 1983), at 67.

187. TAMS, *supra* note 23, at 217.

their nationals being killed under such circumstances, taking action in their capacity as States specifically affected by the breach of both specific rules on civilian aviation and communitarian norms on the use of force, others, like Switzerland, did so on the basis of something resembling collective countermeasures.[188] And when NATO foreign ministers met in Madrid on September 7, 1983, they agreed on the need for an allied response to the incident.[189]

This case contains interesting examples of encouragement of a collective response. The United States, for example, having lost nationals in the incident, made statements to that effect. In President Reagan's televised address, he noted that the United States was "cooperating with other countries to . . . join us in not accepting Aeroflot [(the State-run Soviet airline company)] as a normal member of the international civil air community unless and until the Soviets satisfy the cries of humanity for justice."[190] In a subsequent radio address on September 17, 1983, President Reagan repeated that the United States was "asking" other States to "join" the United States in its efforts.[191] Notably, President Reagan expressed his appreciation of a range of sanctions taken by US allies against Russia. These included Canadian sanctions taken against Aeroflot,[192] Scandinavian Airlines' suspension of flights within Soviet airspace, several NATO States' suspension of civilian air traffic between these States and the USSR, and Swiss, Finnish, Australian, and New Zealand boycotts.[193] The United States was, in other words, clearly asking its allies to join it in sanctioning the Soviet behavior, and several allies responded by seemingly taking collective countermeasures.

7. United States' measures against Libya (1985)

During the 1970s and 1980s, it was semi-official policy for Libya to support international terrorism.[194] One example of this policy was Libya's support of attacks on civilians at the Rome and Vienna airports on December 27, 1985.[195]

In relaying these events, *The New York Times* described how terrorists "hurled grenades and fired submachine guns at crowds of holiday travelers . . . in

188. *Id.*

189. 83 DEP'T ST. BULL. [i] (Nov. 1983), *supra* note 186, at 67.

190. Reagan Transcript, supra note 186.

191. 83 DEP'T ST. BULL. [i] (Nov. 1983), *supra* note 186, at 45.

192. Reagan Transcript, supra note 186.

193. 83 DEP'T ST. BULL. [i] (Nov. 1983), *supra* note 186, at 45.

194. See Corri Zoli, Sahar Azar & Shani Ross, Patterns of Conduct: Libyan Regime Support for and Involvement in Acts of Terrorism, INSTITUTE FOR NATIONAL SECURITY AND COUNTERTERRORISM (2010); U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSLIAD-87-133FS, TERRORISM: LAWS CITED IMPOSING SANCTIONS ON NATIONS SUPPORTING TERRORISM (1987), at 7 and 10.

195. U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSLIAD-87-133FS, TERRORISM: LAWS CITED IMPOSING SANCTIONS ON NATIONS SUPPORTING TERRORISM (1987), at 7 and 10.

attacks on check-in counters of El Al Israel Airlines."[196] While these attacks were seemingly directed at Israel, they killed more Americans—five Americans were killed, while one Israeli died. In total, 20 people died in these attacks, and more than 110 people were wounded.[197] Such attacks, if attributed to a State, would certainly involve the breach of several *erga omnes* norms, including the use of force. And while the territorial States of Italy and Austria would be the directly injured parties in this regard, Israel and the United States could plausibly claim to be specifically affected by such a breach of a communitarian norm. In this particular case, the actions were quickly tied to Libya and widespread condemnation followed.

Israel took several steps in response to the attack, including making calls for "international economic and political sanctions against Libya."[198] Simultaneously, the United States employed various sanctions against Libya, such as President Reagan's order to block "all property and interests in property" of Libya in the United States or in American possession or control.[199] As these actions interfered with the property rights of Libya, they appear to be *prima facie* unlawful.

Following these efforts, American officials asked European allies to join in. President Reagan held a news conference on January 7, 1986, during which he announced US sanctions and urged allies to follow the US example. President Reagan noted that the U.S. "urged repeatedly that the world community act decisively and in concert to exact from Qadhafi a high price for his support and encouragement of terrorism."[200] He also stated that the "United States ha[d] already taken a series of steps to curtail most direct trade between our two countries, while encouraging our friends to do likewise."[201]

The American and Israeli efforts did not bring about the application of major sanctions, however, and it was widely reported that "[m]any European allies ha[d] refused to join American efforts to punish Libya."[202] Various US allies

196. John Tagliabue, Airport Terrorists Kill 13 and Wound 113 at Israeli Counters in Rome and Vienna, N.Y. TIMES, (Dec. 28, 1985).

197. *See* Leslie H. Gelb, Italy Now Linking Syrians to Attack at Rome Airport, N.Y. TIMES, (May 21, 1986).

198. Norman Kempster, Israeli Policy on Retaliation Told by Peres: Premier Bars Attack on Libya but Not on Terrorist Bases There, L.A. TIMES, (Jan. 6, 1986).

199. Exec. Order No. 12544, 51 Fed. Reg. 1235 (Jan. 8, 1986).

200. The President's News Conference (Jan. 7, 1986), https://www.reaganlibrary.gov/research/speeches/10786e.

201. *Id.*

202. Bernard Weinraub, President Breaks All Economic Ties with the Libyans, N.Y. TIMES, (Jan. 8, 1986).

"expressed doubts about the merits of economic sanctions,"[203] and expressed concerns about isolating Gaddafi.[204]

Nonetheless, the US and Israel did clearly try to ensure a collective response to this breach of an *erga omnes* norm, namely by asking their allies to join them in sanctioning Libya. While not much came of these efforts, this seems to have been the result of political calculation rather than legal deliberation.

8. Various States' measures against Iraq (1990)

The first major test of the Post-Cold War international security system occurred when the then president of Iraq, Saddam Hussein, launched a sudden invasion of Iraq's much smaller, but oil-rich, neighbor Kuwait on August 2, 1990. Sandwiched in time between the fall of the Berlin Wall and the dissolution of the Soviet Union, the unsteadiness of the times made it far from certain how the international community would respond. As it turned out, a strong response came almost immediately. On the day of the attack, the UN Security Council assembled to condemn the invasion and demanded an immediate and unconditional withdrawal.[205] On the same day and in the days following, a range of countries decided to employ unilateral economic sanctions in response. This included the decisions of the United States on August 2, 1990,[206] the EC on August 4, 1990,[207] Japan on August 5, 1990,[208] Australia on August 6, 1990,[209] and Switzerland on August 7, 1990[210] to enact a range of measures including trade embargoes and the freezing of State assets.[211] These actions were taken either previous to or outside of the legal authority provided by Resolution 661 (1990), adopted by the Security Council on August 6, 1990, which authorized various economic measures.[212] Consequently, several of the measures imposed had to be justified through other legal rationales. It is interesting to note, as Martin Dawidowicz did,

203. Gerald Boyd, President Freezes All Libyan Assets Held in the U.S., N.Y. TIMES, (Jan. 9, 1986); Allies Are Cool to Reagan's Sanctions, N.Y. TIMES, (Jan. 9, 1986).

204. *Id.*

205. *See* S.C. Res. 660 (Aug. 2, 1990).

206. *See* Exec. Order No. 12722 – Blocking Iraqi Government Property and Prohibiting Transactions with Iraq (Aug. 2, 1990).

207. *See* Chargé d'affaires a.i. of Italy to the U.N., Letter dated 6 august 1990 from the Chargé d'affaires a.i. of the Permanent Mission of Italy to the United Nations addressed to the Secretary-General, U.N. Doc. S/21444 (Aug. 6, 1990).

208. *See* Letter dated 5 August 1990 from the Permanent Rep. of Japan to the United Nations addressed to the Secretary-General, U.N. Doc. S/21449 (Aug. 6, 1990).

209. *See* Note Verbale dated 14 August 1990 from the Permanent Rep. of Australia to the United Nations addressed to the Secretary-General, U.N. Doc. S/21520 (Aug. 14, 1990).

210. *See* Note Verbale dated 22 August 1990 from the Chargé d'affaires a.i. of the Permanent Observer Mission of Switzerland to the United Nations addressed to the Secretary-General, U.N. Doc. S/21585 (Aug. 22, 1990).

211. *See also* DAWIDOWICZ, supra note 1, at 159–60.

212. *See* S.C. Res. 661 (Aug. 6, 1990).

that the Security Council authorization was thought of at the time as additional to the actual decisions on sanctions made by many States,[213] and that these States referred neither to any right related to collective self-defense, or to rights under Article XXI of GATT to justify their actions. Since an unwarranted invasion of another country is a clear violation of the prohibition on the use of force, and since several of the sanctions put in place in response involved *prima facie* unlawful acts, the remaining plausible justification would be the right to take collective countermeasures. The question thus becomes what role the Kuwaiti government played in these decisions.

Keesing's Contemporary Archives summarizes the actions of the ousted Kuwaiti government at the time, stating that "the Amir and his ministers spent much of their time traveling the world to bolster opposition to the invasion."[214] This illustrates the intense efforts of the Kuwaitis. A report from *The New York Times* on August 5, 1990 described that the Kuwaiti Embassy in Washington D.C. was in full advocacy-mode; the Ambassador was quoted as saying that he had made appeals to President Bush and that "he was grateful for the economic sanctions that the Bush Administration imposed on Iraq."[215]

Indeed, a wide range of communications and coordination happened between the exiled government of Kuwait, including the Amir of Kuwait, and the assisting countries, especially the United States. Statements made by White House Deputy Press Secretary Roman Popadiuk made clear that during the early hours of the invasion, the Security Council was called together "[at] the urging of Kuwait and the United States,"[216] and President Bush noted in remarks to reporters on August 5, 1990 that he had talked to the Amir the day before and "gave him certain assurances."[217] Finally, in his Message to the Congress on the Declaration of a National Emergency With Respect to Iraq, President Bush stated that efforts to block Kuwaiti assets under US control were made "with the approval of the Kuwaiti government."[218] As such, there can be no doubt that States, in enacting various measures—including economic sanctions—against Iraq in response to the invasion of Kuwait, did so with the clear support and consent of the government of Kuwait.

213. *See* DAWIDOWICZ, *supra* note 1, at 161–62.

214. Keesing's Records of World Events (Volume 36, no. 1, 1990) at 37633.

215. *See Kuwaiti Washington Embassy Embattled Too*, N.Y. TIMES, (Aug. 6, 1990).

216. Statement by the Deputy Press Secretary Popadiuk on the Iraqi Invasion of Kuwait (Aug. 2, 1990), https://bush41library.tamu.edu/archives/public-papers/2122; *see also* Statement by the Deputy Press Secretary Popadiuk on the Iraqi Invasion of Kuwait (Aug. 1, 1990), https://bush41library.tamu.edu/archives/public-papers/2121.

217. Remarks and an Exchange With Reporters on the Iraqi Invasion of Kuwait (Aug. 5, 1990), https://bush41library.tamu.edu/archives/public-papers/2138.

218. Message to the Congress on the Declaration of a National Emergency With Respect to Iraq (Aug. 3, 1990), https://bush41library.tamu.edu/archives/public-papers/2131.

9. Western States' measures against Russia (2014-2021)

During the winter of 2013, a conflict escalated in Ukraine when its Pro-Russian president, Viktor Yanukovych, rejected an EU association agreement. This led to widespread demonstrations in Kyiv, which morphed into a full-fledged constitutional crisis, and eventually a revolution, during which President Yanukovych was ousted and a new government formed. During this historic political shift in Ukraine, Russia became heavily involved in trying to shape the future of Ukraine through various forms of interference.

The first major instance of Russian interference came shortly after the ouster of President Yanukovych, when Russian soldiers wearing unmarked uniforms arrived at key facilities, buildings, and checkpoints on the Crimean Peninsula, in what would prove to be the beginnings of an unlawful Russian occupation and annexation. Shortly thereafter, Russian armed forces began to supply and fight alongside groups of Ukrainian separatists, who were trying to fight their way towards the establishment of an independent, pro-Russian republic in Eastern Ukraine. These policies constituted unlawful interference in the internal affairs of Ukraine, including through the use of force.

Ukraine responded with force, and was supported by the West through the delivery of both military and economic aid.[219] In addition to this assistance, Ukraine was also aided by the West through the adoption of a range of sanctions against Russia.[220] Most significant were the coordinated EU and US sanctions. For simplicity's sake, I will focus on the efforts of the EU and simply note here that similar considerations are relevant for the US-sanctions as well.[221]

The financial and trade sanctions put in place by the EU are the most relevant for this analysis because these sanctions limited Russian access to and benefits from European capital markets and placed restraints on the export of certain technologies. Such sanctions could plausibly be in *prima facie* violation of obligations under GATS and GATT because they constitute *prima facie* violations of core rules under these agreements, including the most-favored-nation principle.[222]

The main issue of relevance in assessing the *prima facie* legality of these sanctions is whether they could plausibly be justified under the national security exceptions of GATS and GATT. This question is best answered through an analysis of the situation under the framework developed by the WTO dispute

219. *See* Iain King, *Not Contributing Enough? A Summary of European Military and Development Assistance to Ukraine Since 2014,* CENTER FOR STRATEGIC & INTERNATIONAL STUDIES (Sep. 26, 2019), https://www.csis.org/analysis/not-contributing-enough-summary-european-military-and-development-assistance-ukraine-2014.

220. *See EU restrictive measures in response to the crisis in Ukraine*, EUROPEAN COUNCIL/COUNCIL OF THE EUROPEAN UNION (Oct. 5, 2020), https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/.

221. *See also* DAWIDOWICZ, *supra* note 1, at 236.

222. Dawidowicz finds the sanctions to be contrary to GATS and GATT. *See id* at 235.

settlement panel in *Russia – Measures Concerning Traffic in Transit*. Before going through such an analysis, it is necessary to address one major issue: In late 2020, the European Court of Justice (ECJ) concluded that the EU-sanctions could be justified by the national security exception of GATT, at least in relation to certain measures imposed on Russian oil companies.[223] However, the way the ECJ (and before it, the General Court of the European Union (EGC)) approached the problem left a lot to be desired. In its analysis, the EGC simply reproduced the text of Article XXI of GATT, and without any substantive discussion or analysis concluded that:

> "[I]n the light of the broad discretion which the Council has in this area, it must be held that the Council was entitled to consider that the actions of the Russian Federation undermining or threatening Ukraine's territorial integrity, sovereignty and independence could amount to a case of an 'other emergency in international relations' and that the restrictive measures at issue were 'necessary for the protection of [the] essential security interests [of the Member States of the European Union]', within the meaning of Article XXI of GATT."[224]

This analysis, I believe, is too restricted to be considered decisive. The EGC treated the question as one that required minimal substantive discussion although, as shown above in Part II, such an approach cannot be sustained. This insufficiency may be remedied by using the WTO dispute settlement panel framework and WTO-documents to provide a closer examination of the case.

A key consideration under this framework is the Panel's statement that it is "incumbent on the invoking Member to articulate the essential security interests said to arise from the emergency in international relations sufficiently enough to demonstrate their veracity."[225] In this case, however, the EU and its Members failed to clearly justify their actions in terms that reflected their own essential national security interests. Rather, they referenced mostly the interests of Ukraine and certain generic security considerations. For example, the European Union initially reacted to this crisis in early March 2014 by condemning Russian aggression, reiterating the severity of the threat to Ukraine, and threatening to impose sanctions against Russia. At no point did the EU members expressly articulate a threat to the EU or its members as a motivating factor for their actions.[226] Indeed, many of the members were hesitant to get too involved in the conflict in the first place.[227]

Such hesitancy is difficult to square with the notion that these States believed that their "essential security interests" were at stake. The only comments that

223. Case C-732/18 P, PAO Rosneft Oil Company and Others v. Council (Sep. 17, 2020).

224. *See* Case T-715/14, Rosneft and Others v Council (Sep. 13, 2018), ¶ 182; the approach was approved in *id* at para. 132.

225. Ukraine v. Russia-report, *supra* note 46, at para. 7.134.

226. For a timeline of the events, *see Timeline – EU restrictive measures in response to the crisis in Ukraine*, EUROPEAN COUNCIL/COUNCIL OF THE EUROPEAN UNION (Dec. 16, 2020), https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/history-ukraine-crisis/.

227. *Putin and the West* (BBC documentary 2023), part 1.

slightly resembled such a sentiment were generic statements about ensuring the "peace, stability and prosperity in Europe."[228] Similarly, the EU explained that it introduced measures "with a view to increasing the costs of Russia's actions to undermine Ukraine's territorial integrity, sovereignty and independence and to promoting a peaceful settlement of the crisis."[229] While there is no doubt that the situation did constitute an "emergency in international relations" in relation to Ukraine and Russia (indeed, the Panel in the case made that clear), [230] it cannot simply be assumed that this automatically translates into an emergency also in the wider context of the EU.[231] Accordingly, as no prominent attempt was made by the EU members to explain their particular national security concerns, it seems hard to give much credence to this idea.

An additional consideration, which can be drawn from the GATT Council of Representatives' 1982 decision, is that "contracting parties should be informed to the fullest extent possible of trade measures taken under Article XXI."[232] As explained in Part II above, neglecting to issue such a notification should be treated as a strike against *prima facie* legality, though it cannot be considered detrimental. In the case of Russia's aggression towards Ukraine, as noted by Dawidowicz, the EU members did not expressly invoke the national security exception.[233] It is because of these problems, that I believe we can consider several of the sanctions put in place by the EU members as *prima facie* unlawful.

In light of the dissatisfactory explanations offered by EU members, the question becomes whether the members implemented sanctions upon Ukraine's direct request. The answer is clearly yes because Ukraine clearly and repeatedly encouraged sanctions against their aggressor. Indeed, the first threats of sanctions made by the EU Heads of State and Government came at a meeting on March 6, 2014, with the then Ukrainian Prime Minister, Arseny Yasenyuk, in attendance.[234] While Yasenyuk said very little about the push for sanctions in public, he later expressed that he had been "very tough" on this point behind closed doors.[235] It was similarly reported in June 2014 that the then Ukrainian President Petro Poroshenko also urged the European Union to employ sanctions

228. EUROPEAN COUNCIL, *Statement of the Heads of State or Government on Ukraine* (Mar. 6, 2014) ¶ 3, https://www.consilium.europa.eu/media/29285/141372.pdf.

229. *See, e.g.*, Council Regulation 833/2014, preambular para. 2, 2014 O.J. (L 229/1); Council Regulation 269/2014, preambular para. 4, 2014 O.J. (L 78/6).

230. Ukraine v. Russia-report, *supra* note 46, at para. 7.123.

231. *See id*.

232. GATT Council of Representatives, *supra* note 57.

233. DAWIDOWICZ, *supra* note 1, at 235.

234. *See Extraordinary meeting of EU Heads of State or Government on Ukraine*, 6 March 2014, EUROPEAN COUNCIL/COUNCIL OF THE EUROPEAN UNION (Apr. 1, 2019), https://www.consilium.europa.eu/en/meetings/european-council/2014/03/06/.

235. *Putin and the West*, *supra* note 227.

against Russia,[236] and further sanctions were expressly welcomed on June 30, 2014 in a statement by Deputy Head of the Presidential Administration of Ukraine, Valeriy Chaly.[237] On September 25, 2014 Prime Minister Yasenyuk, from the podium of the General Assembly of the United Nations, implored States to continue imposing sanctions "until Ukraine takes control of its entire territory."[238] As such, the case plausibly fits the mold of a situation involving collective countermeasures upon request.

10. (Mainly) Western States' measures against Russia (2022-)

The conflict in Ukraine escalated dramatically on February 24, 2022, when Russia launched a massive military offensive against Ukraine. The preceding months of threats and aggressive behavior from Russia had led the Ukrainian government to call for the imposition of further sanctions against Russia, including, for example, on February 23, 2022, when Ukrainian foreign minister, Dmytro Kuleba, addressed the UN General Assembly and "urge[d] member states to use all available means to protect Ukraine and deter Russia."[239] This included a call for "tough economic sanctions".[240] This message was repeated again and again, especially in the early days of the war, and Ukraine's calls for sanctions were heeded by many States, which quickly activated one sanctions package after another. A World Economic Forum-report noted that "[t]he Russian invasion of Ukraine has been met with unprecedented trade and other economic sanctions."[241] The report referred to "a total of 87 trade and other sanctions" imposed against Russia within six weeks of the invasion.[242] These sanctions were mainly imposed by members of the EU and/or NATO-countries, but other States, including Japan, Taiwan, South Korea, and Singapore, also imposed significant sanctions in reaction to the Russian aggression.[243]

236. Ralph Ellis & Ray Sanchez, *Day of Mourning Declared After Ukrainian Military Plane Shot Down*, CNN (Jun. 15, 2014), https://edition.cnn.com/2014/06/15/world/europe/ukraine-crisis/index.html.

237. Andrew Roth & Neil MacFarquhar, *Russia Scorns Sanctions; Ukraine Army Forges On*, N.Y. TIMES (Jul. 30, 2014).

238. *Ukraine warns West Against Lifting Russia Sanctions*, BBC (Sep. 25, 2014), https://www.bbc.com/news/world-europe-29357105.

239. MINISTRY OF FOREIGN AFFAIRS OF UKRAINE, Statement by H.E. Dmytro Kuleba, Minister of Foreign Affairs of Ukraine, at the UN General Assembly debate on the situation in the temporarily occupied territories of Ukraine, kmu.gov.ua (Feb. 23, 2022), https://www.kmu.gov.ua/en/news/vistup-ministra-zakordonnih-sprav-ukrayini-dmitra-kuleba-na-debatah-generalnoyi-asambleyi-oon-situaciya-na-timchasovo-okupovanih-teritoriyah-ukrayini-23022022.

240. *Id.*

241. World Economic Forum, *Conflict, Sanctions and the Future of World Trade: White Paper* (2022), 3.

242. *Id*. at 4.

243. Minami Funakoshi, Hugh Lawson & Kannaki Deka, *Tracking Sanctions Against Russia*, REUTERS GRAPHICS, (Jul. 7, 2022), https://www.reuters.com/graphics/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/.

Many of these sanctions *prima facie* violated trade obligations under the WTO-regime, but unlike the situation in 2014, at this point there were a number of factors in the conflict that made the sanctions easier to justify under the national security exception. Namely, the sheer scale of the Russian attack, the blatancy of Russia's violation of *jus ad bellum*, and the fact that its major global repercussions were on an entirely different level. These factors make it easier to argue that the sanctioning States' essential security interests were at stake, which was exactly what several States and international organizations, like the EU, did.

An illustrative statement was made by Josep Borrell Fontelles, the EU High Representative for Foreign Affairs and Security Policy, who emphasized that EU-sanctions were put in place because "[t]he behaviour of the Russian leadership constitutes a major threat to international peace and security."[244] Additionally, the EU and G7-nations expressly revoked Russia's Most-Favored-Nation status in response to its aggression, a step these nations had been unwilling to take earlier in the conflict.[245] As such, the violent escalation in Ukraine made it easier for States to accept the use of the national security exception and consider sanctions conforming to this exception as mere retorts. However, while some sanctions could be plausibly justified on the basis of the national security exception, other sanctions were put in place that are not covered by the WTO-regime, and which seem to constitute *prima facie* unlawful acts. Most notably, this included the EU's decision on February 25, 2022 to freeze the assets of Russian President Vladimir Putin and Russia's foreign minister, Sergey Lavrov.[246] If it is accepted, as discussed in Part II above, that freezing the assets of such high-ranking officials constitutes a *prima facie* violation of general international law,[247] such sanctions would require justification. One such justification could be a right to employ collective countermeasures; and, here, collective countermeasures upon request.

It should be noted that many of the States that employed sanctions against Russia also provided Ukraine with significant military assistance. This assistance could be justified under the right of collective self-defense in support of Ukraine, which muddies the legal picture. Namely, the question becomes whether this right of collective self-defense offers legal justification for the sanctions employed. None of the assisting States have made their views on the matter clear, and none of the assisting States have seemingly reported their support to the UN Security

244. Press Release, COUNCIL OF THE EUROPEAN UNION, Russia's Military Aggression Against Ukraine: EU Imposes Sanctions Against President Putin and Foreign Minister Lavrov and Adopts Wide Ranging Individual and Economic Sanctions (Feb. 25, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/02/25/russia-s-military-aggression-against-ukraine-eu-imposes-sanctions-against-president-putin-and-foreign-minister-lavrov-and-adopts-wide-ranging-individual-and-economic-sanctions/.

245. *See, e.g.*, THE WHITE HOUSE, FACT SHEET: United States, European Union, and G7 to Announce Further Economic Costs on Russia (Mar. 11, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/.

246. Council of the European Union, *supra* note 244

247. I.C.J., *supra* note 69, at para. 51.

Council in accordance with Article 51 of the UN Charter. Accordingly, while some States have made generic references to their rights under Article 51 elsewhere, the extent and reach of this justification remains unclear.[248]

11.. Summing up

History offers several examples of situations involving collective countermeasures upon request. Among the considered cases, a few common traits can be identified. First, and perhaps most important, is that every case involves a response to serious violations of collective obligations.[249] Second, the intervening States usually act on the basis of specific requests, and often in situations of hypothetical causality. This supports Crawford's observation that "the victim State's reaction seems to have been treated as legally relevant, if not decisive, for all other States."[250] Finally, while I noted a few examples of protests against the actions taken, Tams and Dawidowicz each find an "astonishing" and "striking" lack of diplomatic protests against the taking of collective countermeasures, including in several of the situations discussed in this Article.[251] This is significant for our understanding of the events and for the potential development of customary international law. As such, significant practice on collective countermeasures upon request exists, which would point towards a finding that such measures could be lawful, at least in certain scenarios.

V. *OPINIO JURIS* ON COLLECTIVE COUNTERMEASURES UPON REQUEST

In the above review of practice, I provide an overview of key instances in history where States have taken (or threatened to take) countermeasures, despite not being a directly injured party. This regularly occurs upon receiving requests from States that are directly injured. However, it is rare that the intervening States make their legal reasoning clear in this regard. Therefore, it is useful to complement this review of practice with a separate review of expressions of legal opinion on this topic.

The best source for such expressions of legal opinion is the ARSIWA debate. During this process, States debated different draft versions of the text, which would have expressly allowed for collective countermeasures, removing the

248. *See* MINISTRY OF FOREIGN AFFAIRS OF DENMARK, URU Alm.del – endeligt svar på spørgsmål 185 (Jun. 14, 2022); MINISTRY OF FOREIGN AFFAIRS OF NORWAY, Norsk våbenstøtte til Ukraina og folkeretten (May 10, 2022), https://www.regjeringen.no/no/aktuelt/vaapen_folkerett/id2903706/.

249. *See similarly* TAMS, *supra* note 23, at 230; Crawford's Third Report, *supra* note 34, at para. 399.

250. Crawford's Third Report, *supra* note 34, at para. 400.

251. TAMS, *supra* note 23, at 236–37; DAWIDOWICZ, *supra* note 1, at 244–45.

option of silence and forcing States to provide justification. States' responses during these debates are a helpful addition to the above review of practice.

A. The 1996-draft

While the ARSIWA-process, in principle, reached all the way back to the 1950's, the first key debate on collective countermeasures took place when a 1996-version of the Draft Articles was being put together. This draft would have allowed States to take collective countermeasures through a legal structure in which lesser breaches of international law ("international delicts") were treated as legally distinct from more serious breaches ("international crimes").[252] One consequence of this distinction would be that in cases involving "international crimes," *all* States would be defined as injured States and therefore allowed to take countermeasures irrespective of their actual closeness to the damage done.[253] Though this construct was rejected when it went up for debate among States, it is important to understand that most States that expressed criticism were focused on the legal structure itself rather than its specific consequences. While the implication of this criticism was to reject the proposed system, only a few States explicitly opposed the idea of collective countermeasures.

Most States that remarked on the draft thus stopped short of criticizing the idea of collective countermeasures and, according to Christian J. Tams, only three States (Japan, France, and the Czech Republic) "specifically warned against recognizing a right of all States to adopt countermeasures in response to international crimes."[254] "In contrast," Tams explains, "a considerable number of other States, either directly or in a general way, endorsed the rules on countermeasures."[255] On that basis, Tams concluded that "the majority of governments seemed prepared to recognise a right of all States to take countermeasures in response to those serious breaches of obligations *erga omnes* that amounted to international crime."[256]

While I broadly agree with Tams' analysis, it is necessary to discuss some more specific findings. In particular, it seems useful to look closer at James Crawford's understanding of this matter, as expressed in his *Third Report on State Responsibility*. Here, Crawford explains that most States expressed serious concerns about the wording of Article 40, mainly because it provided rights for multiple States at the same time. Accordingly, some States found disconcerting

252. INT'L L. COMM'N, Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading, in Rep. on the Work of its Forty-eighth Session, U.N. Doc. A/51/10 and Corr. 1 (1996) [hereinafter 1996-version of ARSIWA], Article 19.

253. *See* 1996-version of ARSIWA, Articles 40(3) and 47; TAMS, *supra* note 23, at 774; Crawford's Third Report, *supra* note 34, at para. 94.

254. TAMS, *supra* note 23, at 244.

255. *Id.*

256. *Id.*

the idea that States would have, in the words of an Austrian representative, "a competitive or cumulative competence … to invoke legal consequences of a violation."[257] Similarly, a United States representative warned that creating a system where all States could be considered individually injured could give rise to several claims over the same infringement.[258]

This criticism often focused on the problem of having a broad set of States considered "injured," without also having tools to differentiate between them and their individual rights. Some skeptical States, like Austria and France, therefore focused on the idea of creating rules that treated different kinds of injured States differently. In discussing the right of reparations, for example, representatives from Austria and France pointed out that a State should be "directly affected" or have "suffered special material or moral damage" to get reparations.[259] In relation to the potential for multiparty disputes, the United Kingdom noted that it would "be helpful for the Commission to consider whether there are any circumstances in which the right of States to consider themselves 'injured,' and hence entitled to exercise the powers of 'injured States,' should be modified if the State principally injured has indicated that it has decided freely to waive its rights arising from the breach or if the State consents to the 'breach.'"[260] Similarly, when commenting on Article 47, the United Kingdom noted that it was concerned about the rights of States "principally affected" in cases where other States might want to use their status as an "injured State" to take countermeasures, while the State principally affected would prefer for none to be taken.[261] The main concern was to ensure that States not directly affected by a breach should not be able to trample on the rights of States that *were* directly affected.

As such, the few States that were critical of the unitary concept of an "injured State" were mostly focused on ensuring that the proposed system would not infringe upon the rights of directly or principally affected States but did not question the collective construct. This is a useful consideration to have in mind, because it is precisely these kinds of concerns that are addressed through the articulation of a right to take collective countermeasures upon request. Consequently, the main line of criticism regarding the 1996-draft is simply not relevant for the kinds of collective countermeasures discussed in this Article.

B. The 2000-draft

The next big step in the discussion, related to the 2000-draft version of ARSIWA, prompted much more debate about collective countermeasures. This was because of the inclusion of a new Article 54 in the draft that dealt with this

257. *Comments and Observations Received by Governments*, 1998 Y.B. Int'l L Comm'n No. 2, at 81, U.N. Doc. A/CN.4/488 and Add. 1–3, at 141 (Austria) [hereinafter 1998-written comments].

258. *Id*. at 144 (USA).

259. *Id*. at 138–39 (Austria and France).

260. *Id*. at 141 (United Kingdom).

261. *Id*. at 154 (United Kingdom).

issue explicitly. While this draft article was also eventually rejected, it would have expressly allowed for collective countermeasures. The article's first paragraph explained that third-party States could, in situations involving essentially breaches of *erga omnes (partes)* norms, "take countermeasures at the request and on behalf of any State injured by the breach."[262] This was an explicit articulation of a right to take collective countermeasures upon request. Accordingly, the reactions of States to Article 54(1) are key for our purposes.

The second paragraph of the article, read in conjunction with draft Article 41, explained that in cases involving a "serious breach" of "an obligation owed to the international community as a whole and essential for the protection of its fundamental interests," "any State may take countermeasures … in the interest of the beneficiaries of the obligation breached." This rule did not require the consent of an injured State and contained the right to take humanitarian intervention-style collective countermeasures.

Accordingly, the 2000-draft contained a much clearer articulation of the idea of collective countermeasures than the 1996-draft, and Crawford noted that this was the "most controversial change" made to the chapter on countermeasures, which seemed to surprise him.[263] The reason was that the effect of replacing the proposed 1996-system with the new 2000-system was "to reduce the extent to which countermeasures [could] be taken in a community interest,"[264] which narrowed the right to take countermeasures. Crawford speculated that critics had "not appreciated" that the 1996-version "went much further" than the 2000-version, [265] and that the "convoluted character" of the 1996-draft likely "prevented Governments from focusing on the problem."[266] However, as Crawford later noted in 2001, this was "no longer the case."[267]

If we look closer at various States' reactions to the new draft Article 54, we get a better sense of *opinio juris* at the time. This material has led scholars to very different conclusions. Crawford explained in his *Fourth Report on State Responsibility* that the "thrust of Government comments is that article 54, and especially paragraph 2, has no basis in international law and would be destabilizing."[268] Christian J. Tams, however, found that governments showed "a surprisingly nuanced spectre of views," at least "[c]ompared to the Special

262. INT'L L. COMM'N, Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading, in Rep. on the Work of its Fifty-Second Session, U.N. Doc. A/55/10 (2000) [hereinafter 2000-version of ARSIWA], 139.

263. Crawford's Fourth Report, *supra* note 17, at para. 59.

264. *Id.*

265. James Crawford, Jacqueline Peel, Simon Olleson, *The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, 12 EUR. J. INT'L L. 963, 981 (2001).

266. Crawford's Fourth Report, *supra* note 17, at para. 59.

267. *Id.*

268. *Id*. at para 72.

Rapporteur's clear-cut assessment."[269] Indeed, upon analyzing these statements, Tams concludes that Article 54 "was by no means generally rejected" and that Crawford's understanding seemed "rather difficult to sustain."[270] I believe that this latter view is the most balanced reading of the State comments. Indeed, I believe that the case becomes even clearer when we focus our attention specifically on the issue of collective countermeasures upon request, as articulated in Article 54(1), rather than the broader idea of collective countermeasures *per se*.

Indeed, a closer examination of the expressions of State opinion during this debate makes it possible to divide the views on Article 54 into three rough groups: first, the majority of State representatives, who mostly expressed support for the ideas contained in Article 54[271]; second, another large group, who criticized Article 54, or elements thereof, but did not unequivocally reject it[272]; and, finally, a smaller group that rejected the article.[273]

269. TAMS, *supra* note 23, at 246.

270. *Id.* at 247.

271. This group includes Argentina in Sixth Committee of the General Assembly, *summary records of the 15th meeting*, U.N. Doc. A/C.6/55/SR.15 (2000), para. 66 [hereinafter A/C.6/55/SR.15]; Australia in Sixth Committee of the General Assembly, *summary records of the 16th meeting*, U.N. Doc. A/C.6/55/SR.16 (2000), para. 41 [hereinafter A/C.6/55/SR.16]; Austria in Sixth Committee of the General Assembly, *summary records of the 17th meeting*, U.N. Doc. A/C.6/55/SR.17 (2000), para. 76–80 [hereinafter A/C.6/55/SR.17]; Bahrain in Sixth Committee of the General Assembly, *summary records of the 19th meeting*, U.N. Doc. A/C.6/55/SR.19 (2000), para. 87 [hereinafter A/C.6/55/SR.19]; Chile in A/C.6/55/SR.17, para 48; Costa Rica in A/C.6/55/SR.17, para. 63; Denmark (for the Nordic Countries) in *Comments and observations received by Governments*, 2001 Y.B. Int'l L Comm'n No. 2, at 42, U.N. Doc. A/CN.4/515 and Add. 1–3, at 83 [hereinafter 2001-written comments]; France in 2001-written comments, at 15–16, 18; Germany in Sixth Committee of the General Assembly, *summary records of the 14th meeting*, U.N. Doc. A/C.6/55/SR.14 (2000), para. 54 [hereinafter A/C.6/55/SR.14]; Greece in A/C.6/55/SR.17, para 85; Italy in A/C.6/55/SR.16, para 28; Mongolia in A/C.6/55/SR.14, para 56; Netherlands in 2001-written comments, at 87; New Zealand in Sixth Committee of the General Assembly, *summary records of the 11th meeting*, U.N. Doc. A/C.6/56/SR.11 (2001), para. 46 [hereinafter A/C.6/56/SR.11]; A/C.6/55/SR.16, para. 7; Slovenia in Sixth Committee of the General Assembly, *summary records of the 18th meeting*, U.N. Doc. A/C.6/55/SR.18 (2000), para. 27 [hereinafter A/C.6/55/SR.18]; South Africa (for the SADC members) in A/C.6/55/SR.14, para 24–25; Spain in A/C.6/55/SR.16, paras. 13 and 16; Switzerland in A/C.6/55/SR.18, para. 81; and the United States in 2001-written comments, at 84; A/C.6/55/SR.18, para. 69–70.

272. This group includes Algeria in A/C.6/55/SR.18, *supra* note 271, at para. 5; Botswana in A/C.6/55/SR.15, *supra* note 271, at para. 62–63; Brazil in A/C.6/55/SR.18, *supra* note 271, at para 65; Cameroon in Sixth Committee of the General Assembly, *summary records of the 24th meeting*, U.N. Doc. A/C.6/55/SR.24 (2000), para. 60–64; Columbia (for the Rio Group) in Sixth Committee of the General Assembly, *summary records of the 23rd meeting*, U.N. Doc. A/C.6/55/SR.23 (2000), para. 4; India in A/C.6/55/SR.15, *supra* note 271, at para. 29–35; Iran in A/C.6/55/SR.15, *supra* note 271, at para. 13–18; Poland in A/C.6/55/SR.18, *supra* note 271, at para. 48–49; Tanzania in A/C.6/55/SR.14, *supra* note 271, at para 50, and the United Kingdom in A/C.6/55/SR.14, *supra* note 271, at para. 31–32.

273. This group includes China in A/C.6/55/SR.14, *supra* note 271, at para. 40–41; Cuba in A/C.6/55/SR.18, *supra* note 271, at para. 59–61; Israel in A/C.6/55/SR.15, *supra* note 271, at para. 25–26; Japan in A/C.6/55/SR.14, *supra* note 271, at para. 61; 2001-written comments, *supra* note 271, at 93–94; Libya in Sixth Committee of the General Assembly, *summary records of the 22nd meeting*, U.N. Doc. A/C.6/55/SR.22 (2000), para. 52; Mexico in Sixth Committee of the General Assembly,

While this grouping is a simplification, it is aimed at providing a useful outline of the situation. Several caveats should be made, as it can be difficult to discern if the States considered the issue a codification of international law or an expression of progressive development.[274] It is also unclear to what extent they based their views on the ILC-review of State practice, which, as discussed above, seems wanting.[275] Irrespective of such caveats, a few points can be made about the general approach of the States.

Firstly, in relation to the supportive States, their expressions of support generally included statements such as Argentina's simple recognition that Article 54 was "acceptable,"[276] Spain's "generally positive" attitude towards the article,[277] Austria's implicit support expressed through efforts to improve the article,[278] and the Nordic approach, which was expressly supportive.[279] When the 2000-version of Article 54 was eventually dropped, some States, such as Mongolia, "regretted" this change because, "[a]s a small State, Mongolia believed that the option of collective action […] should have been preserved in the draft articles."[280] Almost all of the supportive States are defined as such because they accepted Article 54 in its entirety, though a few did express some skepticism about letting the right to take countermeasures be dependent on a request.[281] What is more interesting is the specific strands of skepticism expressed by States that were not so supportive of Article 54. Notably, their criticism was far more focused on countermeasures without requests, as expressed in Article 54(2), than countermeasures made upon request, as expressed in Article 54(1).

The views expressed by the United Kingdom reflect a common line of criticism. In their written comments, the U.K. explained that it had concerns about the Draft Articles relating to countermeasures, including "the role of the injured State in deciding whether or not countermeasures are to be taken 'on its behalf.'"[282] Specifically, the U.K. argued that, in relation to Article 54(2), the proposed system would be "highly destabilizing" because it "would enable any State to take countermeasures even when an injured State itself chose not to do

summary records of the 20th meeting, U.N. Doc. A/C.6/55/SR.20 (2000), para. 35–37; Russia in A/C.6/55/SR.18, *supra* note 271, at para. 51.

274. *See* phrasing of the Nordic Countries in A/C.6/56/SR.11, *supra* note 271, at para. 30–33.

275. *See* representative of South Africa in Sixth Committee of the General Assembly, *Summary Records of the 12th Meeting*, U.N. Doc. A/C.6/56/SR.12 (2001), para. 23.

276. A/C.6/55/SR.15, *supra* note 271, at para. 23.

277. A/C.6/55/SR.16, *supra* note 271, at para. 16.

278. A/C.6/55/SR.17, *supra* note 271, at para. 76–78; 2001-written comments, *supra* note 271, at 93.

279. *See, e.g.*, Bahrain, in A/C.6/55/SR.19, *supra* note 271, at para. 87.

280. A/C.6/55/SR.14, *supra* note 271, at para. 56.

281. 2001-written comments, *supra* note 271, at 91 (France) and 93 (Netherlands).

282. 2001-written comments, *supra* note 271, at 84.

so."[283] The problem pointed out by the U.K. was the risk of undermining the injured State. The U.K. didn't express such concerns about Article 54(1).

Along similar lines, Jordan argued that "[w]hile it was acceptable to take collective countermeasures in the context of an initiative undertaken at the request of or on behalf of an 'injured State,' the issue of whether to authorize 'any' State to take countermeasures against the author of a serious breach of the essential obligations owed to the international community needed to be studied further."[284] A similar sentiment can be identified in statements from Botswana, Iran, and Poland, for example.[285] A large portion of the skepticism was thus really about collective countermeasures without request, not collective countermeasures upon request.

Finally, if we move to the States that essentially rejected Article 54, a similar approach was prominent. Although these States did reject the article in its entirety, they were clearly more critical of Article 54(2) than 54(1). Japan, for example, was much more explicit about calling for the deletion of Article 54(2) than Article 54(1),[286] and argued that the former went "far beyond the progressive development of international law."[287] Similarly, Cuba called for the deletion of Article 54 in its entirety but was far more critical of article 54(2), which "went well beyond the progressive development of international law."[288]

On this basis, we can draw the following conclusions: First, it seems that most States accepted Article 54 in its entirety; second, many of the States that expressed skepticism were primarily skeptical about Article 54(2) and not 54(1); third, even among the States that rejected Article 54 in its entirety, the critical focus was mostly on Article 54(2). Nevertheless, Crawford and the ILC felt that they did not have enough support to justify keeping the 2000-version of Article 54 alive, and they therefore opted to replace it with a savings clause. In this regard, it is worth noting Crawford's argument against simply deleting the article:

> …the mere deletion of article 54 will carry the implication that countermeasures can only be taken by injured States, narrowly defined. The current state of international law on measures taken in the general or common interest is no doubt uncertain. But it cannot be the case, in the Special Rapporteur's view, that countermeasures in aid of compliance with international law are limited to breaches affecting the individual interests of powerful States or their allies.[289]

Accordingly, the main point of including a savings clause was to prevent the formation of an overly narrow understanding of the law.

283. *Id*. at 94.

284. A/C.6/55/SR.18, *supra* note 271, at para. 17.

285. *See* A/C.6/55/SR.15, *supra* note 271, at paras. 63 (Botswana) and 17 (Iran); *Id*. at para. 48 (Poland); 2001-written comments, *supra* note 271, at 94 (Poland).

286. 2001-written comments, *supra* note 271, at 93.

287. *Id*. at 94.

288. A/C.6/55/SR.18, *supra* note 271, at para. 59–61.

289. Crawford's Fourth Report, *supra* note 17, at para. 74.

VI. CONCLUSION

This Article has analyzed three common arguments made against the legality of collective countermeasures and assessed their validity in relation to collective countermeasures taken "upon request" from an injured State. The first argument, that the *Nicaragua*-judgment renders such measures unlawful, was found unpersuasive because of a lack of clarity in the judgment, and because the Court's findings are fact-specific. Indeed, it seems likely that the Court might have come to another conclusion if the underlying factual situation had been different. The second argument, that State practice is too limited to support a right to collective countermeasures, was also found unpersuasive because of the availability of evidence of State practice on collective countermeasures, including on collective countermeasures upon request. The third argument, that the available expressions of *opinio juris* on the matter are mainly negative, was also considered unpersuasive given, firstly, that previous scholarship on expressions of *opinio juris* during the ARSIWA-process found that conclusion questionable in general, and secondly, because a more focused analysis revealed that most States accepted the idea of collective countermeasures and that skeptics focused mostly on collective countermeasures enacted without a request. To those expressions of *opinio juris*, we can add the specific statements relating to the cyber domain referenced in the beginning of this Article.

The goal of this Article has been to determine if the usual arguments made against the legality of collective countermeasures seem valid in relation to measures taken "upon request." This Article argues that they do not. Reaching this conclusion involves identifying evidence of State practice and *opinio juris* that can potentially carry the pronouncement of a customary international norm. This leads to the tricky question of whether *enough* practice and expressions of *opinio juris* exist to suggest that we have a "general practice that is accepted as law."[290] While this Article does not provide a definitive answer to that question, it does show that we are much closer to finding a customary international norm on this matter than what is commonly understood.

290. ILC-customary international law, *supra* note 68, at 124.

Tripping up Intellectual Property: From waiver to a more flexible interpretation of compulsory licensing

Bryan Mercurio* & Pratyush Nath Upreti**

INTRODUCTION

The innovative biopharmaceutical industry reacted with remarkable pace in responding to the COVID-19 pandemic by producing vaccines and treatments in an unprecedented period of time. During development, and despite early progress, India and South Africa proposed that the World Trade Organization (WTO) waive the core rights contained in the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)[1] to allow other Members and their companies to use, produce, and sell the COVID-19 related products and processes that would otherwise be protected as the intellectual property rights (IPRs) of innovator companies. The so-called IP waiver circulated at the TRIPS Council in October 2020, was proposed on the assumption that unlocking IP would increase the global supply of vaccines and treatments by allowing more companies in more locations to manufacture and produce such products.[2] While accepted by NGOs and other

DOI: https://doi.org/10.15779/Z38GB1XJ2X

* Simon F.S. Li Professor of Law, The Chinese University of Hong Kong; RGC Senior Research Fellow (2023–27). This research is supported by the Hong Kong RGC Senior Research Fellow Scheme 2022/23 for a project entitled: Access to Vaccines in a Post-COVID-19 World: Sustainable Legal and Policy Options (Project No. SRFS2223-4H01). The views expressed in this publication do not necessarily represent the views of others involved in the project.

** Senior Lecturer in Law, School of Law, Queen's University Belfast, United Kingdom.

Both authors contributed equally to this article and are listed alphabetically.

1. Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, April 1994, 1869 U.N.T.S. 3; 33 ILM. 1197 (1994).

2. Communication from India and South Africa, WTO Doc. IP/C/W/669, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19* (October 2, 2020).. See also the revised version of the proposal dated 25 May 2021: Communication from the African Group, Bolivia, Egypt, Eswatini, Fiji, India, Indonesia, Kenya, LDC Group, Maldives, Mozambique, Mongolia, Namibia, Pakistan, South Africa, Vanuatu, Venezuela and Zimbabwe, WTO Doc. IP/C/W/669/Rev.1, WTO, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19* (May 21, 2021).

commentators,[3] this assumption was challenged by innovators and scientists.[4] Unsurprisingly, governments were also divided on the waiver's necessity as well as on the contours of the proposed waiver.

Ultimately, while a majority of Members supported the original IP waiver proposal, it did not garner consensus among the WTO membership.[5] With the strong support and encouragement of WTO Director-General, Ngozi Okonjo-Iweala, Members were able to reach a compromise and agree to the Ministerial Decision on the TRIPS Agreement (Ministerial Decision).[6] The Decision bears little resemblance to the original IP waiver proposal and is a mere temporary waiver of some of the requirements set out in Article 31 and Article 31b of the TRIPS Agreement.[7]

The move away from an IP waiver and towards a solution based on existing WTO disciplines and flexibilities is more practical and avoids most of the complicating issues relating to a waiver. This is not to say that the Ministerial Decision is a perfect solution to issues of access to vaccines; it is not. There is a growing amount of literature analyzing the Ministerial Decision.[8] The purpose of this article is not to rehash the political debate, but to argue that the move away

3. See generally Siva Thambisetty *et al*., *Addressing Vaccine Inequity During the COVID-19 Pandemic: The TRIPS Intellectual Property Waiver Proposal and Beyond*, 81 CANBRIDGE L.J. 384–416 (2022).

4. For a detailed discussion on the proposal, see Bryan Mercurio, *WTO Waiver from Intellectual Property Protection for COVID-19 Vaccines and Treatments: A Critical Review*, 62 VA. J. INT'L L. 10 (2021),10–32; Reto M. Hilty et al., Covid-19 and the Role of Intellectual Property (Position Statement of the Max Planck Institute for Innovation and Competition of May 7, 2021), https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/2021_05_25_Position_statement_Covid_IP_waiver.pdf (last visited June 20, 2022); James Bacchus, *An Unnecessary Proposal: A WTO Waiver of Intellectual Property Rights for COVID-19 Vaccines*, Free Trade Bulletin No. 78, CATO INSTITUTE (Dec. 16, 2020) https://www.cato.org/free-trade-bulletin/unnecessary-proposal-wto-waiver-intellectual-property-rights-covid-19-vaccines (last visited June 20, 2022). See also Christoph Ann *et al*., *The waiving of intellectual property: a poor response to a real problem*, THE STANISLAS DE BOUFFLERS INSTITUTE (May 19, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3850550 (last visited June 20, 2022).

5. WTO is a consensus-based organization, see footnote 1 to the Marrakesh Agreement; 'The [WTO] body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision'. See *Marrakesh Agreement Establishing the World Trade Organization*, https://www.wto.org/english/docs_e/legal_e/04-wto_e.h (last visited June 20, 2022).

6. WTO, Draft Ministerial Decision on the TRIPS Agreement, Ministerial Conference, 12th Session, WT/MIN(22)/W/15/Rev.2 (June 17, 2022).

7. *Id.*, paras 2–3. For more discussion on compulsory licensing and public health, *see* VAN ANH LE, COMPULSORY PATENT LICENSING AND ACCESS TO MEDICINES: A SILVER BULLET APPROACH TO PUBLIC HEALTH? (Palgrave Macmillan, 2021); Monica Thomas, *To Waive or not to Waive: International Patent Protection and the COVID-19 Pandemic*, 49 L. ISSUES ECON. INTEGRATION 7 (2022).

8. *See* generally, James Love, *The June 17, 2022 WTO Ministerial Decision on the TRIPS Agreement*, *KEI ONLINE*, (June 17, 2022), https://www.keionline.org/37830 (last visited June 20, 2022); Dalindyebo Shabalala, *Here Again?! – The WTO COVID19 Waiver Ministerial Decision – June 2022* (June 17, 2022), https://dalishabalala.wordpress.com/2022/06/17/here-again-the-wto-covid19-waiver-ministerial-decision-june-2022/ (last visited June 20, 2022).

from an IP waiver was appropriate, and collective efforts to improve production capabilities, licensing, and distribution, and reduce bottlenecks should be co-ordinated and institutionalized.[9] There are growing voices against the final outcome of negotiations, therefore there is no doubt that waiver is likely to emerge in the future, with the only uncertainty being whether it occurs with a mutation of the COVID-19 virus or a future pandemic. Much has been written on the topic since the Ministerial Decision, however, highlighting the fundamental issues with an IP waiver is important to inform and engage in future debate and ensure time is not wasted in addressing the next crisis or pandemic. This is not to argue that the current IP system is perfect, in fact there is much to do to ensure that IP facilitates access to public health, but it is equally important to remember the possible consequences of waiving IPRs in addressing future crises.[10]

Part II provides context by reviewing the background of the negotiations, the various proposals, and the Ministerial Decision. Part III argues that an IP waiver is not a suitable means to achieve a sustainable increase in access to vaccines, and focuses on three reasons for this conclusion: (1) problems associated with forcing the transfer of trade secrets; (2) negative impact on the incentive to research; and (3) doubts about the ability of a waiver to deliver cheaper or increase sustainable access to vaccines.

I. THE BACKGROUND TO THE IP WAIVER PROPOSAL, NEGOTIATIONS AND DECISION

In October 2020, India and South Africa proposed a waiver from the implementation, application, and enforcement of Sections 1, 4, 5 and 7 of Part II of the TRIPS Agreement, which respectively address copyright, industrial designs, patents and trade secrets.[11] Arguing that IPRs are a barrier to accessing

9. For discussion and analysis of the Ministerial Decision, *see* Bryan Mercurio & Pratyush Nath Upreti, *From Necessity to Flexibility: A Reflection on the Negotiations for a TRIPS Waiver for Covid-19 Vaccines and Treatments*, 21 WORLD TRADE REV. 633 (2022); Reto M. Hilty et al., *Position Statement of the Decision of the WTO Ministerial Conference on the TRIPS* Agreement, MAX PLANCK INSTITUTE FOR INNOVATION AND COMPETITION, https://www.ip.mpg.de/en/research/research-news/position-statement-on-the-decision-of-the-wto-ministerial-conference-on-the-trips-agreement.html (last visited August 10, 2022).

10. More recent literature discusses on improving IP, see generally SUSY FRANKEL ET AL., IMPROVING INTELLECTUAL PROPERTY: A GLOBAL PROJECT (2023); TAINA PIHLAJARINNE, JUKKA MÄHÖNEN & PRATYUSH NATH UPRETI, INTELLECTUAL PROPERTY RIGHTS IN THE POST PANDEMIC WORLD: AN INTEGRATED FRAMEWORK OF SUSTAINABILITY, INNOVATION AND GLOBAL JUSTICE (2023).

11. WTO, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19*, *supra* note 2. The revised waiver proposal clarifies the scope of the waiver of Section 1, 4, 5 and 7 of Part II of the TRIPS Agreements by adding 'in relation to health products and technologies including diagnostics, therapeutics, vaccines, medical devices, personal protective equipment, their materials or components, and their methods and means of manufacture for the prevention, treatment or containment of COVID-19'. See WTO, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19 (Revised)*, *supra* note 2.

COVID-19 vaccines and treatment — yet also acknowledging that, "[t]o date, there is no vaccine or medicine to effectively prevent or treat COVID-19" – the sponsors and their supporters believed that the TRIPS Agreement provided a "limited option to overcome the barriers" that IP may impose for the prevention, containment and treatment of COVID-19.[12]

In this regard, the sponsors asserted that the flexibilities enshrined in the TRIPS Agreement were inadequate as they were "never designed to address a health crisis of this magnitude" and that certain Members face "legal and institutional difficulties" in implementing flexibilities.[13] The sponsors took particular issue with the complexity involved in issuing compulsory licenses which limit the agreement's value and usefulness during a pandemic.[14]

The second major argument the sponsors and waiver proponents made is that IP and exclusive licensing agreements restrict the scale-up of manufacturing, lockout generic suppliers, and undermine competition that would reduce the price of vaccines.[15] Sponsors and proponents likewise doubted the feasibility of industry and government efforts to create voluntary sharing mechanisms[16] as well as the willingness of innovators to share IP and technologies in, among others, the COVID-19 Technology Access Pool (C-TAP) pool.[17]

12. WTO, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19 – Response to Questions*, supra note 11, at ¶ 1.1.3.

13. Communication from Bolivia, Eswatini, India, Kenya, Mozambique, Mongolia, Pakistan, South Africa, Venezuela and Zimbabwe, WTO Doc. IP/C/W/672, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19 – Response to Questions* (15 January 2021) at 16–18 read with WTO, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19*, supra note 2, at 10. See further Amiti Sen, *WTO members divided over India-South Africa proposal for TRIPS waiver during COVID-19*, THE HINDU BUSINESS LINE (October 17, 2020), https://www.thehindubusinessline.com/economy/wto-members-divided-over-india-south-proposal-for-trips-waiver-during-covid-19/article32878713.ece (last visited June 20, 2022).

14. WTO, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19 – Response to Questions*, supra note 11, at ¶ 1.1.3.

15. *Id.*at 1.2.7 and 2.9.59. *See also* Kathryn Ardizzone, Role of the U.S. Federal Government in the Development of GS-5734/Remdesivir, *KEI Briefing Note 2020:1* (March 20, 2020).

16. WTO, Council for Trade-Related Aspects of Intellectual Property Rights, IP/C/M/96, 16 October 2020, Item 15 Proposal for a waiver from certain provisions of the TRIPS Agreement for the prevention, containment and treatment of COVID-19 Document IP/C/W/669 (Communication from India and South Africa), https://pmindiaun.gov.in/public_files/assets/pdf/TRIPS_Agreemnet.pdf (last visited June 20, 2022).

17. *See* Council for Trade-Related Aspects of Intellectual Property Rights, July 17, 2020, WTO Doc. IP/C/W/666, Intellectual Property and Public Interest: Beyond Access to Medicines and Medical Technologies Towards a More Holistic Approach to TRIPS Flexibilities, Communication from South Africa, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W666.pdf&Open=True (last visited June 20, 2020), ¶ 8.

The proposal attracted sponsorship and support from most developing countries and the LDC Group,[18] but numerous developed countries were opposed.[19] Several developing countries, including influential Members such as Brazil, China, Chile and Mexico, were initially unenthusiastic and almost indifferent to the proposal.[20]

Discussions proceeded slowly, and the proposal seemed doomed until May 2021, when Ambassador Katherine Tai announced the United States' support for the negotiation of a waiver for COVID-19 *vaccines*.[21] While the US shift caused some WTO Members – including China – to change their position and support waiver negotiations, other Members remained opposed. The most vocal and notable opposition came from the European Commission (EC), United Kingdom (UK) and Switzerland. While the latter two were reported to be opposed to a waiver of any sort,[22] the EC preferred changes that better allowed for the use of the already existing TRIPS flexibilities, in particular that of compulsory licensing.[23] That being said, European Union (EU) member States were not

18. *See TRIPS Council to Continue to discuss temporary IP waiver, revised proposal expected in May*, WTO NEWS (April 30, 2021), https://www.wto.org/english/news_e/news21_e/trip_30apr21_e.htm (last visited June 20, 2022).

19. *See, e.g.,* UK Statement to the TRIPS Council: Item 15 Waiver Proposal for COVID-19 (UK Mission to the WTO, UN and Other International Organisations, Geneva; October 16, 2020)- 'A waiver to the IP rights set out in the TRIPS Agreement is an extreme measure to address an unproven problem'. The UK is of the view that pursuing the proposed path would be counterproductive and would undermine a regime that offer solutions to the issues at hand), https://www.gov.uk/government/news/uk-statement-to-the-trips-council-item-15 (last visited June 20, 2022).

20. *Covid: Germany rejects US-backed proposal to waive vaccine patents*, BBC NEWS (May 6, 2021), https://www.bbc.com/news/world-europe-57013096 (last visited June 20, 2022). Countries like Canada, Australia, Norway, Switzerland, the United Kingdom are some of the developed countries which initially opposed the waiver. Ibid. For detailed discussion on the proposal, *see* Mercurio, *supra* note 4.

21. *Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver*, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, Press Release (May 5, 2021) https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver (last visited June 20, 2022). Unsurprisingly, support in the US government for the waiver is not universal. For example, sixteen US Senators issued a letter against the US decision to support waiver, *see* https://www.ipwatchdog.com/wp-content/uploads/2021/05/Tillis-Cotton-letter-to-USTR-Commerce-re.-TRIPS-Waiver-Clean-1.pdf (last visited June 20, 2022).

22. *See* UK Statement to the TRIPS Council, *supra* note 19.

23. European Commission, Opening statement by Executive Vice-President Valdis Dombrovskis at the European Parliament plenary debate on the Global Covid-19 challenge (May 19, 2021) https://ec.europa.eu/commission/commissioners/2019-2024/dombrovskis/announcements/opening-statement-executive-vice-president-valdis-dombrovskis-european-parliament-plenary-debate_en (last visited June 20, 2022). *See also* Philip Blenkinsop and Carl O'Donnell, *EU supports COVID vaccine patent waiver talks, but critics say won't solve scarcity*, REUTERS (May 6, 2021), https://prod.reuters.com/world/europe/eu-willing-discuss-covid-19-vaccine-patent-waiver-eus-von-der-leyen-2021-05-06/ (last visited June 20, 2022).

completely united. Germany maintained that IP was the key to innovation and solution for the pandemic, and therefore steadfastly opposed a waiver.[24]

Garnering consensus on an IP waiver was challenging, however, the revised proposal submitted by India and South Africa on May 21, 2021 did not provide a path for global consensus. Far from building on the momentum gained from the US' reversal of position, the revised proposal did not adjust product coverage, scope, notification requirements, or safeguards and was drafted in such a way that would have allowed the waiver to remain in effect until every WTO Member decided it was no longer needed. Essentially, under the revised proposal, the waiver could remain in effect for an indefinite period.[25]

With Director-General Okonjo-Iweala pushing for a resolution, the US, EU, India, and South Africa controversially began informally negotiating a compromise agreement in late 2021.[26] These negotiations resulted in an "Outcome Document," which was leaked in March 2022 and formally introduced and circulated by the Director-General in the TRIPS Council in May 2022.[27] Far from the original proposal, the Document departed in significant ways from an IP waiver. Instead, the Document was similar to the EU's favored approach of loosening restrictions on compulsory licensing. This Document became the negotiating text in the lead-up to the Ministerial Conference.

Following a week of negotiations, Members reached consensus on the Ministerial Decision.[28] The Decision resembles the Outcome Document, with some important changes. The Decision is not a waiver of IPRs but a clarification of existing flexibilities and a limited exception to exportation restrictions contained in the compulsory licensing provisions of Article 31 and Article 31b is. The Decision primarily focuses on Article 31(f), which limits the authorized use of the license "predominantly for the supply of the domestic market," and Article 31bis – initially adopted as a waiver by the WTO General Council on 30 August 2003 and transformed into a permanent amendment in 2017 – which under certain

24. *Germany rejects U.S. proposal to waiver patents on COVID-19 vaccines*, REUTERS (May 6, 2021) https://prod.reuters.com/business/healthcare-pharmaceuticals/germany-opposes-us-plan-waive-patents-covid-19-vaccines-2021-05-06/ (last visited June 20, 2022).

25. *See* WTO, *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19 (Revised)*, *supra* note 2.

26. *See Members updated on high-level talks aimed at finding convergence on IP COVID-19 response*, WTO NEWS, (March 10, 2022), https://www.wto.org/english/news_e/news22_e/trip_10mar22_e.htm (last visited June 20, 2022).

27. WTO Council for Trade Related Aspects of Intellectual Property Rights, 'Communication from the Chairperson on TRIPS COVID-19', WTO/IP/C/W/688 (May 3, 2018), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W688.pdf&Open=True (last visited 20 June 2022). For a crucial review of the Outcome document, see Siva Thambisetty et al., "The COVID-19 TRIPS Waiver Proposal in Critical Review: An Appraisal of the WTO DG Text (IP/C/W/688) and Recommendations for Minimum Modifications" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4124497 (last visited June 20, 2022).

28. WTO, Draft Ministerial Decision on the TRIPS Agreement, *supra* note 6.

circumstances allows for the exportation of pharmaceuticals under compulsory licenses to Members with insufficient or no manufacturing capabilities.

More specifically, the Ministerial Decision allows an "eligible Member"[29] to limit the exclusive rights provided for in Article 28 of the TRIPS Agreement by authorizing the use of patented IP "required for the production and supply of COVID-19 vaccines without the consent of the right holder to the extent necessary to address the COVID-19 pandemic," subject to the compulsory licensing provisions contained in Article 31 as clarified and waived in the Ministerial Decision.

The core of the Decision is contained in paragraph 2(b), and allows eligible Members to "waive the requirement of Article 31(f) that authorized use under Article 31 be predominantly to supply its domestic market." It allows "any proportion of the products manufactured under the authorization" to the markets of other eligible Members, including thorough "international or regional joint initiatives"[30] , without the need to seek consent from the rights holder. Both the latter requirements deviate from the provisions of Article 31 of the TRIPS Agreement. The Decision applies only to vaccines, but paragraph 8 instructs Members to decide whether to extend coverage to the production and supply of COVID-19 diagnostics and therapeutics within six months of the date of the Decision – and will remain in force for a period of five years, subject to extension from the General Council.[31]

The Decision represents a compromise among Members at the WTO, but is not even close to resembling the original IP waiver proposal. The Decision has been criticized for defining "eligible Member" too narrowly and for including limitations and notification requirements that may limit its practical value to potential users.[32] Supporters counter that the Decision will facilitate easier access to vaccines and also serve an important role in ensuring innovator companies supply vaccines at virtual cost to less developed Member countries.[33] It remains

29. Agreement on Trade-Related Aspects of Intellectual Property Rights *supra* note 1 (for the purpose of this Decision, all developing country Members are eligible Members. Developing country Members with existing capacity to manufacture COVID-19 vaccines are encouraged to make a binding commitment not to avail themselves of this Decision. Such binding commitments include statements made by eligible Members to the General Council, such as those made at the General Council meeting on 10 May 2022, and will be recorded by the Council for TRIPS and will be compiled and published publicly on the WTO website).

30. This wording would include efforts such as COVAX.

31. WTO, Draft Ministerial Decision on the TRIPS Agreement, *supra* note 6, at ¶ 6.

32. Agreement on Trade-Related Aspects of Intellectual Property Rights *supra* note1. For a crucial review of the Outcome document, *see* Siva Thambisetty et al., The COVID-19 TRIPS Waiver Proposal in Critical Review: An Appraisal of the WTO DG Text (IP/C/W/688) and Recommendations for Minimum Modifications, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4124497 (last visited June 20, 2022).

33. *See, e.g.*, *Statement from Ambassador Katherine Tai on an Intellectual Property Response to the COVID-19 Pandemic* (June 17, 2022), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/june/statement-ambassador-katherine-tai-intellectual-property-response-covid-19-pandemic (last visited June 20, 2022); *UK statement following the conclusion of the WTO*

to be seen whether the Decision is more symbolic than substantive, or whether it was even needed to begin with, as there is currently a sufficient supply of COVID vaccines.

II.FUNDAMENTAL ISSUES WITH AN IP WAIVER

While the Ministerial Decision may be imperfect, its approach and focus on Article 31 and Article 31bis nevertheless remains the better path for the WTO to achieve a sustainable increase in access to vaccines. We reach this conclusion for three reasons: First, problems associated with forcing the transfer of trade secrets; second, negative impacts on the incentive to research; and third, doubts about the ability of a waiver to deliver cheaper and increased sustainable access to vaccines. Each will be addressed in turn.

A. Trade Secrets Protection

Trade secrets arguably play a more important role than patents in the development of vaccines. While a patent application requires disclosure of information to the extent that it enables the functioning of inventions, the patentee is not required to disclose everything that efficiently reproduces the invention.[34] In simple terms, while the patent application may disclose the "recipe," more skill and knowledge may be needed in order to manufacture a safe and high-quality version of the finished product. Therefore, disclosure of trade secrets is an essential component in scaling up vaccine production.

1. Meaning and rationale of trade secrets protection

Trade secrets are IPRs on information that have a commercial value and can be sold or licensed.[35] Trade secrets protection evolved through common law and specific statutes.[36] International IP treaties recognize trade secrets protection. For instance, Article 39 of the TRIPS Agreement contains three requirements for protection: (i) *Secrecy* – the information must be secret and not available in the public domain; (ii) *Commercial Value* – the secrets must have an economic value; and (iii) *Reasonable Efforts to Maintain Secrecy* – the rights holder must take

Ministerial Conference (June 17, 2022), https://www.gov.uk/government/news/uk-statement-following-the-conclusion-of-the-wto-ministerial-conference (last visited June 20, 2022).

34. Sean Flynn, Erica Nkrumah & Luca Schirru, *Non-Patent Intellectual Property Barriers to COVID-19 Vaccines, Treatment and Containment*, PIJIP/TLS RESEARCH PAPER SERIES No. 71, 12–13 (2021), https://digitalcommons.wcl.american.edu/research/71/ (last visited June 20, 2022).

35. *See Trade Secrets*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, https://www.wipo.int/tradesecrets/en/ (last visited June 20, 2022).

36. For an overview of trade secrets protection, *see* Margaret Jackson, *Keeping secrets: International developments to protect undisclosed business information and trade secrets*, 1 INFO. COMMC'N & SOC'Y 467(1998); Michael Risch, *Why Do We Have Trade Secrets?*, 11 INTELL. PROP. LAW REV. 3 (2007).

necessary efforts to ensure that the information is kept secret.[37] These requirements have been embodied in national laws and developed through courts in several jurisdictions.[38]

The economic justification for trade secrets protection lies in incentives; that is, an incentive to invest and develop valuable information and use of that information without the risk of knowledge spillovers.[39] In other words, trade secrets encourage the development of new inventions and valuable knowledge by assuring a return on investment.[40] The protection of such valuable information plays an important role in life sciences and pharmaceutical innovation.[41] In regards to pharmaceuticals, trade secrets cover clinical trial data, biological databases, and cell-lines,[42] among others.[43]

Trade secrets are an important incentive for the biomedical industry in order to ensure that innovators can achieve a return on R&D costs.[44] Moreover, trade secrets in one area of research will likely have benefits in other areas – for instance, messenger RNA (mRNA) technologies used in the leading COVID-19 vaccines were developed to target cancer. It is also crucial to consider that unlike a patent, trade secrets do not prevent competitors from using information and developing an invention. Trade secret protection only applies so long as the information remains secret. Given that the pharmaceutical industry protects essential elements of its processes and procedures through trade secrets, the efforts required to protect trade secrets often include substantial organizational, human and financial resources. For these reasons, companies would be resistant

37. Agreement on Trade-Related Aspects of Intellectual Property Rights art. 39, Apr. 15, 1994, 1869 U.N.T.S. 299, 33 I.L.M. 1197. read with Paris Convention for the Protection of Industrial Property art. 10bis, July 14, 1967, 21 U.S.T. 1583, T.I.A.S. 6923. For a detailed discussion, *see Enquires Into Intellectual Property's Economic Impact*, OECD, 127–172 (2015), https://www.oecd.org/sti/ieconomy/KBC2-IP.Final.pdf (last visited June 20, 2022).

38. For example, in the EU trade secrets are regulated by the EU Directive 2016/943 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 8 June 2016. Whereas, in the US trade secrets is regulated by the Defend Trade Secrets Acts of 2016. *See generally* David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 *Gonzaga L. Rev.* 292 (2019).

39. OECD, *supra* note 37, at 134–35.

40. *See* Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, *in* The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research 109–139 (Rochelle C. Dreyfuss & Katherine J. Strandburg eds., 2011).

41. *See* Tara Nealey, Ronald M. Daignault & Yu Cai, *Trade Secrets in Life Science and Pharmaceutical Companies*, 20:5 Cold Spring Harbor Persp. Med. 1 (2015).

42. Cell lines are permanently established cell culture that can proliferate indefinitely. For more detail, *see Cell Lines*, Pharma IQ, https://www.pharma-iq.com/glossary/cell-lines (last visited June 20, 2022).

43. Steven Hollman, *Trade Secret Protection & the COVID-19 Cure: Observations on Federal Policy-Making & Potential Impact on Biomedical Advances*, The National Law Review (Sept. 14, 2020), https://www.natlawreview.com/article/trade-secret-protection-covid-19-cure-observations-federal-policy-making-potential (last visited June 20, 2022).

44. *Id*.

to disclose know-how even should a waiver of IPRSs be approved at the international level.[45]

2. How could a government effectuate a waiver of undisclosed information?

The waiver proposal sought to suspend provisions related to undisclosed information[46] – that is, trade secrets – but it was never clear how governments would require secrets to be revealed and disseminated, and how this process would be regulated. Trade secrets only hold value for as long as they remain secret. The first challenge would be to put in place a mechanism to ensure that such secrets are transferred to the government. A related issue would be whether companies would somehow be given back their trade secrets after the crisis passes or whether forced disclosure would extinguish all rights, as they would be in the public domain or at the very least "disclosed" and no longer secret.[47]

The draft also fails to set forth what would happen if drug companies do not disclose the existence of a secret. Practically speaking, it seems impossible that a government could force the transfer of a secret when it is unaware of both the secret's existence and content. Other issues with forced technology transfer are the unintended consequences and social costs. To illustrate with a famous example, in the 1970s, India used foreign exchange laws to force the Coca-Cola company to disclose its know-how. The result was the exit of Coca-Cola from India until the 1990s which had detrimental effects to India's economy.[48]

Given the rapid development of mRNA in creating effective vaccines, it is not surprising that various aspects of mRNA manufacturing technologies are protected as trade secrets.[49] As mRNA manufacturing technologies are core assets of pharmaceutical companies (and were so even before the outbreak of COVID-19), these companies are not motivated to disclose those secrets to the State, even if the waiver is implemented. Unfortunately, waiver proponents never discussed

45. *See* Hilty et al., *supra* note 4, at 2.

46. Council for Trade-Related Aspects of Intellectual Prop. Rights, *Communication from South Africa, Examples of IP Issues and Barriers in COVID-19 Pandemic*, WTO Doc. IP/C/W670 (Nov. 23, 2020).

47. Philip Stevens & Mark Schultz, *The Role of Intellectual Property in Preparing for Future Pandemics*, GENEVA NETWORK, 7 (Feb. 28, 2022), https://geneva-network.com/research/the-role-of-intellectual-property-rights-in-preparing-for-future-pandemicss/ (last visited June 20, 2022).

48. Yogesh Pai, *WTO IP waiver too simplistic: Global vaccine tech-transfer needs other strategies*, EXPRESS PHARMA (Apr. 28, 2021) https://www.expresspharma.in/guest-blogs/wto-ip-waiver-too-simplistic-global-vaccine-tech-transfer-needs-other-strategies/ (last visited June 20, 2022).

49. *See* Norbert Pardi et al., *mRNA vaccine– a new era in vaccinology*, 17 NATURE REV. DRUG DISCOVERY 261, 261–279 (2018). For example, BioNtech uses trade secrets to protect mRNA manufacturing technologies. BioNTech SE, Registration Statement (Form F-1) (July 21, 2020), https://www.sec.gov/Archives/edgar/data/1776985/000119312520195911/d939702df1.htm (last visited June 20, 2022).

what incentives must be put in place to encourage companies to disclose trade secrets.

Forced disclosure would likely mean forever losing all rights to the information—but it is unclear how such a mechanism would work. The nature of trade secret protection does not allow for the implementation of a mechanism such as the "mailbox" system adopted by India in its transitional period for product patents, whereby it had an obligation to accept the patent applications and keep them dormant until 2005.[50] Considering that the original proposal sought a waiver "until widespread vaccination is in place globally, and the majority of the world's population has developed immunity,"[51] and that the revised proposal could, if implemented, stay in place for an indefinite period of time,[52] it would be difficult to construct a system whereby the innovators would be able to recoup or recover their trade secrets. Moreover, while mechanisms like that of the "mailbox" could possibly work for other kinds of IPRs, they do not work for trade secret protection where the value is in the secret which, once exposed, remains valueless. Despite it being unclear whether it is possible to construct a mechanism to make the waiver effective, it is worth reiterating that waiver proponents remained silent on this important practicality and offered no plausible suggestions for a way forward.

Even if the operationalisation of the disclosure of trade secrets is put in place, the manufacturing process for vaccines is complex because it requires the use of facilities and equipment with a high degree of specialization.[53] The proposed waiver appeared based on the presumption that developing countries have the infrastructure, institutional capacity, and good governance needed to ensure safety, quality, and efficacy, yet even proponents justified the need on the basis of developing countries not being able to implement TRIPS flexibilities into their system.[54] Unfortunately, medicinal safety standards in development and LDCs are often lacking or virtually nonexistent.[55] Thus, it is crucial to human health and

50. For information on the mailbox system, *see* Arno Hold & Bryan C. Mercurio, *After the Second Extension of the Transition Period for LDCs: How Can the WTO Gradually Integrate the Poorest Countries into TRIPS?*, *in* SCIENCE AND TECHNOLOGY IN INTERNATIONAL ECONOMIC LAW: BALANCING COMPETING INTERESTS 260 (Bryan Mercurio & Kuei-Jung Ni eds., 2013).

51. *Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19*, *supra* note 2, at 13.

52. *See Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19*, *supra* note 2.

53. *See* Mercurio, *supra* note 4, at 29.

54. Sisule F. Musungu & Cecilia Oh, *The Use of Flexibilities in TRIPS by Developing Countries: Can they Promote Access to Medicines?*, SOUTH CENTRE and WORLD HEALTH ORGANIZATION, 33 (April 2006) (discussing how Zimbabwe has been unable to maximize TRIPS flexibilities due to local administrative procedures).

55. *See* Report by the Director-General, *Addressing the global shortage of, and access to, medicines and vaccines*, WHO Doc. EB142/13 (Jan. 12, 2018); *WHO Global Surveillance and Monitoring System for Substandard and Falsified Medical Products*, WORLD HEALTH ORGANIZATION (2017), https://apps.who.int/iris/bitstream/handle/10665/326708/9789241513425-eng.pdf?ua=1 (last visited June 20, 2022). For a general overview of drug safety in developing countries, *see* Yaser Al-Worafi et al., *Drug Safety in Developing Countries: Achievements and Challenges* (2020).

safety that prior to the operationalisation of a waiver and the disclosure of trade secrets, a system is created to address inherent safety issues which can be associated with the unfettered production of vaccines. This will, inevitably, require countries to amend laws or create new legal rules and regulations. As many of these countries have not even legislated for all of the TRIPS flexibilities despite having nearly twenty years to do so,[56] it is highly unlikely these same countries would immediately and effectively legislate for the safe manufacture and dissemination of generic vaccines.

Given the lack of clarity regarding the operationalisation of the disclosure of trade secrets, forced disclosure could potentially attract a claim of breach of an international investment agreement leading to investor-State dispute settlement and the possibility of monetary damages to the aggrieved investor.[57] In such a claim, an innovator company could allege that the forced transfer of trade secrets has resulted in a violation of their legitimate expectations of legal stability and predictability in regulatory changes.[58] While this argument may prove to be unsuccessful, Members should have considered the interplay between trade and investment law prior to any discussion on a waiver that allows for the forced disclosure of trade secrets.

B. Incentive to Innovate

While there is emerging economic evidence pointing to the negative effects of overprotection on competition and questioning the link between IPRs and innovation,[59] even the most skeptical economists place the pharmaceutical and chemical industries in a special category.[60] The pharmaceutical industry is characterized as capital- and R&D-intensive, high risk, time-consuming, and expensive.[61] At the same time, the marginal cost of reproducing the finished

56. *See generally* Bryan Mercurio, Tolulope Adekola, & Chimdessa Tsega, *Pharmaceutical Patent Law and Policy in Africa: A Survey of Selected SADC Member States* (2023) 43 L. STUD. 331 (2023).

57. For a general discussion on IP and investor-State arbitration, *see* Pratyush Nath Upreti, *Intellectual Property Objectives in International Investment Agreements* (2022); Daria Kim, *Protecting Trade Secrets Under International Investment Law: What Secrets Investors Should Note Tell States*, 15 J. MARSHALL REV. OF INTELL. PROP. L. 228 (2016): Pratyush Nath Upreti, *Intellectual Property Rights in Investor-State Dispute Settlement: Connecting the Dots through the Philip Morris, Eli Lilly, and Bridgestone Awards*, 31AM. REV. OF INT'L ARB. 337, (2021).

58. For detailed analysis, *see* Bryan Mercurio & Pratyush Nath Upreti, *The Legality of a TRIPS Waiver for COVID-19 Vaccines under International Investment Law*, 71 INT'L & COMP. L. Q. 323 (2022).

59. *See, e.g.*, Joseph E. Stiglitz, *Economic Foundations of Intellectual Property Rights*, 57 DUKE L. J. 1693 (2008); Adam Jaffe, *The U.S. Patent System in Transition: Policy Innovation and the Innovation Process*, 29 RSCH.. POL'Y 531 (2000); Michele Boldrin & David K Levine, *The Case against Patents*, 27 J. OF ECON. PERSP. 3 (2013). *See also* MICHELE BOLDRIN & DAVID K LEVINE, AGAINST INTELLECTUAL MONOPOLY (2008).

60. *Id.*

61. Jaci McDole & Stephen Ezell, *Ten Ways IP has Enabled Innovations That Have Helped Sustain the World Through the Pandemic*, Information Technology & Innovation Foundation (2021),

product is often relatively inexpensive. That is, there is a high cost of innovation and low cost of imitation. For this reason, the pharmaceutical industry model is often described as being wholly reliant on IP. The elimination of patents would likely deter firms from heavily investing in risky R&D leading to less innovation.[62] Thus, for the pharmaceutical industry some form of government intervention is necessary in order to maintain innovation.[63] These studies demonstrate what is commonly known—patents are important for the pharmaceutical and healthcare industry and necessary to ensure a steady flow of new pharmaceutical innovations.[64]

To this end, the Max Planck Institute for Innovation and Competition expressed concern that a waiver would have a detrimental effect on incentives for drug innovation:

> It is important to consider potential effects of a comprehensive waiver of IP protection on innovation incentives in vaccine development (including emerging variants of Covid-19), as well as in *other* areas of medical research… A waiver of IP protection could leave the society vulnerable to such emerging variants of Covid-19 if the current IP holders/vaccine developers abandoned research efforts as a result of such a waiver. In this regard, a waiver… appears to be highly disproportionate in its scope.[65]

The Max Planck Position statement articulates the uncertainty that a waiver would have likely created by effectively delinking the innovation incentive rationale provided by the patent system.[66] Indeed, the success of COVID vaccines

https://itif.org/publications/2021/04/29/ten-ways-ip-has-enabled-innovations-have-helped-sustain-world-through (last visited June 20 2022).

62. Shamnad Basheer, *The Invention of an Investment Incentive for Pharmaceutical Innovation*, 15 J. WORLD INTELL. PROP. 305 (2012).

63. Several studies point to the essential role of patents in promoting pharmaceutical innovation. *See, e.g.*, C.T. TAYLOR, A. SILBERSTON, & Z.A. SILBERSTON, THE ECONOMIC IMPACT OF THE PATENT SYSTEM: A STUDY OF THE BRITISH EXPERIENCE 197–199 (1973); Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 MGMT. SCI. 173 (1986); Ashish Arora, Marco Ceccagnoli, & Wesley M. Cohen, *R&D and the Patent Premium*, 26 INT'L J. INDUS. ORG. 1163 (2008).

64. *See also* DAVID SCHWARTZMAN, INNOVATION IN THE PHARMACEUTICALS INDUSTRY (1976); Iain Cockburn & Genia Long, *The Importance of Patents to Innovation: Updated Cross-Industry Comparisons with Biopharmaceuticals*, 25 EXPERT OP. THERAPEUTIC PATENTS 739 (2015) (discussing 2007–2008 LES survey that found "eighty-nine percent of respondents in the healthcare (including biotechnology, pharmaceuticals and medicals) industry characterized patents as 'extremely important' in 'creating a competitive advantage for your organization'"). *See also* Henry G Grabowski, Joseph A DiMasi, & Genia Long, *The Roles of Patents and Research and Development Incentives in Biopharmaceutical Innovation*, 34 HEALTH AFF. 302 (2015); Yang Guo et al., *Patent Indicators: A Window to Pharmaceutical Market Success*, 23 EXPERT OP. THERAPEUTIC PATENTS 765 (2013).

65. Hilty et al., *supra* note 4, at 6.

66. *See generally* Lili Zhang, Ying Guo, & Ganlu Sun, *How patent signals affect venture capital: The evidence of bio-pharmaceutical start-ups in China*, 145 TECH. FORECASTING & SOC. CHANGE 93 (2019); Dirk Czarnitzki, Bronwyn Hughes Hall, & Hanna Hottenrott, *Patents as Quality Signals? The Implications for Financing Constraints on R&D*, Dusseldorf Institute for Competition Economics, Discussion Paper No. 133 (2014) https://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/133_Czarnitzki_Hall_Hottenrott.pdf (last visited June 20, 2022).

is the result of R&D supported by a stable IP framework. The success of pharmaceutical innovation relies heavily on R&D, and often the results are not immediate. For example, the development of mRNA that resulted in Pfizer-BioNTech and Moderna Vaccines started more than twenty-five years ago, and the company which developed the breakthrough did so after more than twelve years of R&D.[67]

That being the case, some scholars supporting the waiver contend that the "incentive-reward" justification of patent protection cannot be applied in a time of crisis.[68] According to Thambisetty et al.:

> Even if one accepts the rhetoric of 'IP as innovation incentives' generally, our position is that it makes very little sense in the extraordinary context of COVID-19 related IP, especially in relation to patents and trade secrets on vaccines. This is because the COVID-19 vaccine market has been created to a large degree by public subsidies. Advance market orders… have de-risked vaccine developments to such a degree in this context it makes very little sense to privatise the fruits of public funding with the additional "incentive" of private monopoly rights…there is a tangible risk that privately held IP monopolies and profit maximization strategies may actually create the wrong incentives in the short term in a pandemic context, prioritizing the production and distribution…[69]

Here, public subsidies alone did not lead to the development of vaccines, but rather the subsidies assisted in advancing and commercializing the pre-existing R&D.[70] This is not to argue that pharmaceutical companies are immune from safeguarding the public good; rather, without the IP regime we would not have witnessed the development of COVID vaccines in such a short period.

While mRNA technology has been studied for some time, it took an investment of billions of dollars to reach the point where it can be utilized in the human body.[71] Pharmaceutical companies did receive government support to

67. Thomas Cueni, *The Risk in Suspending Vaccine Patent Rules*, THE NEW YORK TIMES, Dec. 10, 2020, https://www.nytimes.com/2020/12/10/opinion/coronavirus-vaccine-patents.html%20accessed%2029%20June%202021 (last visited June 20, 2022).

68. Thambisetty et al., *supra* note 3.

69. *Id. See also* Samuel Cross et al., *Who funded the research behind the Oxford-AstraZeneca COVID-19 vaccine?* (2021), https://www.medrxiv.org/content/10.1101/2021.04.08.21255103v1.full.pdf (last visited 20 June 2022); Katarina Foss-Solbrekk, *The IP Waiver and COVID–19: Reasons for Unwavering Support*, J. INTELL. PROP. L. & PRAC. (2021). Waiver proponents further contend that there are ethical, utilitarian and deontological arguments suggesting that an IP waiver would not affect innovation. *See* Nancy S Jecker & Caesar A Atuire, *What's yours is ours: waiving intellectual property protections for COVID-19 vaccines*, 47 J. MED. ETHICS 595 (2021); Rachel Thrasher, *Why Innovation Would Survive a COVID-19 TRIPS Waiver*, IP WATCHDOG (2021), https://www.ipwatchdog.com/2021/03/24/innovation-survive-covid-19-trips-waiver/id=131194/ (last visited June 20, 2022).

70. *See generally* Daniel Gervais, *The TRIPS Waiver Debate: Why, and where to from here?* IPKAT (2021) https://ipkitten.blogspot.com/2021/05/guest-post-trips-waiver-debate-why-and.html (last visited June 20, 2022).

71. Rein Verbeke et al., *Three Decades of Messenger RNA Vaccine Development*, 28 NANOTODAY 1 (2019); Damian Garde & Jonathan Saltzman, *The Story of mRNA: How a once-dismissed idea become a leading technology in the Covid vaccine race*, STAT (2020)

cover some of the costs of R&D for COVID-19 vaccine development,[72] but we fail to see how this should be a reason to deny the companies the right to make a profit. The government subsidies, in essence, allowed for rapid in vitro and clinical trials and can be viewed as a pre-payment for bulk purchases of vaccines should the company succeed in its development; some efforts were successful, and most were not. While the public subsidies increased the speed at which the vaccines came onto the market, the pricing for vaccines is fair and reasonable.[73] The role that IP incentives have played in the advancement of pharmaceuticals and COVID-19 vaccines should not be so easily discounted.

Returning to the main point, there is no evidence suggesting that an IP waiver would have decreased costs, increased access, or reduced distribution inequalities. It is unclear whether a waiver would have been effective, and while it may seem rational or even appropriate to consider new approaches to deal with a once-in-a-generation pandemic, the analysis must consider the potential for failure and risk of non-recovery of cost.[74] In this regard, Kovac and Rakovec caution that "the notorious transaction cost and asymmetric information problem are exacerbated in times of uncertainty (the COVID-19 pandemic-panic) [and that] making hasty changes to the current IP law regime, such as suspending patent rights, during a pandemic and under current severe information asymmetries might prove to be counterproductive and distortive."[75] This raises the question of whether we should put the incentives mechanism that has played an important role in innovations for decades—especially during the current pandemic—at risk based on a speculative assumption that the waiver will achieve its aims with no longer-term negative consequences.

The "special" nature of the pharmaceutical industry does not mean that the status quo must be maintained. There is evidence that pharmaceutical companies engage in strategic patenting to avoid competition in the market and strengthen monopoly by maintaining high prices.[76] Methods to reduce or eliminate patent "evergreening" should be enhanced at the domestic level.[77] Moreover, scholarship in the economic, legal, philosophy, and public health disciplines has for some time questioned whether patent protection provides the proper incentives

https://www.statnews.com/2020/11/10/the-story-of-mrna-how-a-once-dismissed-idea-became-a-leading-technology-in-the-covid-vaccine-race/ (last visited June 20 2022).

72. In the United States, the Biomedical Advanced Research and Development Authority have funded companies for research and clinical trials. *See* Congressional Budget Office, *Research and Development in the Pharmaceutical Industry*, https://www.cbo.gov/system/files/2021-04/57025-Rx-RnD.pdf (last visited June 20, 2022).

73. *See infra* Section C.

74. Mitja Kovac & Lana Rakovec, *The COVID-19 pandemic and long-term incentives for developing vaccines: Patent law under stress*, 25 J. WORLD INTELL. PROP. 292 (2022).

75. *Id.*

76. Olga Gurgula, *Strategic Patenting by Pharmaceutical Companies – Should Competition Law Intervene?*, 51 INT'L REV. INTELL. PROP. & COMPETITION L. 1062 (2020).

77. *See generally* Matthew B. Stanbrook, *Limiting "Evergreening" For a Better Balance of Drug Innovation Incentives*, 185 CANADIAN MED. ASS'N J. 939 (2013).

for R&D and whether it benefits consumers, citizens, or governments.[78] Numerous alternative incentives have been proposed, including open-licensing,[79] prize funds,[80] and a global health impact fund.[81]

Thus, while a normative argument can be made to question whether the "incentive reward" rationale should be reconsidered moving ahead,[82] a radical change to the structure while it is working as intended in the middle of the worst public health crisis in a hundred years and at a time when supply is meeting demand at reasonable prices did not seem to be the most sensible, practical, prudent, or safest option.

C. Cost of and access to vaccines

Waiver skeptics point to dozens of examples of innovator companies engaging in large-scale voluntary licensing to boost the production and distribution of COVID-19 vaccines[83] and point to evidence suggesting little spare

78. *See, e.g.*, Joel Hay, *Prices, Regulation and Innovation in Pharmaceuticals and Biotechnology*, *in* THE VALUE OF INNOVATION: IMPACT ON HEALTH, LIFE QUALITY, SAFETY, AND REGULATORY RESEARCH (Irina Farquhar ed., 2008).

79. Bernard Munos, *Can Open-Source R&D Reinvigorate Drug Research?*, 5 NAT. REV. DRUG DISCOVERY 723 (2006).

80. Joseph E Stiglitz, *Scrooge and Intellectual Property Rights: A Medical Prize Fund Could Improve the Financing of Drug Innovations*, 333 BRITISH MED. J. 1279 (2006); Stiglitz, *supra* note 54, at 1693; James Love & Tim Hubbard, *The Big Idea: Prizes to Stimulate R&D for New Medicines*, 82 CHI.-KENT L. REV. 1519 (2007); Ann Weilbaecher, *Diseases Endemic in Developing Countries: How to Incentive Innovation*, 18 ANN HEALTH L. 281 (2009); Valbona Muzaka, *Prizes for Pharmaceuticals? Mitigating the social ineffectiveness of the current pharmaceutical patent arrangement*, 34 THIRD WORLD Q. 151 (2013).

81. Aidan Hollis & Thomas Pogge, *The Health Impact Fund: Making New Medicines Accessible for All*, REP. INCENTIVES GLOB. HEALTH (2008).

82. Peter Drahos, *Public Lies and Public Goods: Ten Lessons from When Patents and Pandemic Meet*, EUI LAW WORKING PAPERS, (2021) https://cadmus.eui.eu/bitstream/handle/1814/71560/EUI_WorkingPaper_Law_2021_5.pdf?sequence=1&isAllowed=y (last visited June 20, 2022); Duncan Matthews, *Reappraising the Relationship between Intellectual Property Rights and Human Rights: A COVID-19 Pandemic Response*, QUEEN MARY LAW RESEARCH PAPER No. 366/2021 (September 9, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3918325 (last visited June 20, 2022); See also Susy Frankel, COVID-10, Vaccines and International Knowledge Governance on Trial, 12 QUEEN MARY J. INTELL. PROP. 441 (2022).

83. For example, by mid-2020 AstraZeneca had already arranged voluntary licensing with numerous generic drug companies, including the Serum Institute of India, Fiocruz in Brazil, Biokangat in China, and R-Pharm in Russia. *See AstraZeneca takes next steps towards broad and equitable access to Oxford University's potential COVID-19 vaccine* (2020), https://www.astrazeneca.com/media-centre/articles/2020/astrazeneca-takes-next-steps-towards-broad-and-equitable-access-to-oxford-universitys-potential-covid-19-vaccine.html (last visited June 20, 2022); Marcelo Rochabrun, *Brazil sign agreement to produce AstraZeneca's experimental COVID-19 vaccine*, REUTERS (2020), https://www.reuters.com/article/us-health-coronavirus-brazil-vaccine-idUSKBN23Y0NB (last visited 20 June 2022); Roxanne Liu & Ludwig Burger, *AstraZeneca in first COVID-19 vaccine deal with Chinese company*, REUTERS (2020), https://www.reuters.com/article/uk-health-coronavirus-astrazeneca-kangta-idUKKCN2520YJ (last visited June 20, 2022); *Russia's R-Pharm signs deal to make UK-developed COVID-19 vaccine*,

high-quality and reputable manufacturing capacity exists.[84] Moreover, the COVAX Facility led by the Coalition for Epidemic Preparedness Innovations, Gavi, and the World Health Organization, has delivered vaccines to more than 144 countries, including low-income economies, since its first international delivery in February 2021.[85] As of May 2022, the US government agreed to license eleven medical technologies developed at the National Institutes of Health into C-TAP, a move which not only undercuts one of the main arguments made in favor of a waiver but that also makes it easier for low- and middle-income countries to gain access to and produce vaccines, drugs, and diagnostics for COVID-19.[86]

As of June 2022, it is unclear whether there are any suitable, capable, and qualified manufacturing facilities seeking to license vaccine production and being denied the opportunity to do so. Moreover, newly developed manufacturing facilities are struggling to receive orders as demand is at present being fully met through existing facilities making use of licensing agreements.[87] In short, and unlike in mid-2021, supply is outstripping demand.

Likewise, it is not clear whether a waiver would allow generic drug manufacturers to produce vaccines at a cheaper price than are currently available. COVID-19 vaccines are being made available at reasonable prices.[88] In June

REUTERS (July 17, 2020), https://www.reuters.com/article/us-health-coronavirus-cyber-russia-vacci-idUSKCN24I1XF (last visited June 20, 2022).

84. Similarly, the pharmaceutical companies have cooperated by forgoing their benefits of market exclusivity to ensure effective expedited treatment of COVID-19. For example, Gilead rescinded the Orphan drugs designation granted for the antiviral remdesiver for the treatment of COVID-19 and Moderna declined to enforce COVID-19 related patents. *See Gilead Sciences Statement on Request to Rescind Remedesivir Orphan Drug Designation*, GILEAD (2020), https://www.gilead.com/news-and-press/company-statements/gilead-sciences-statement-on-request-to-rescind-remdesivir-orphan-drug-designation (last visited Jun 20, 20222); '*Statement by Moderna on Intellectual Property Matters during the COVID-19 Pandemic'*, MODERNA (2020), https://investors.modernatx.com/node/10066/pdf (last visited June 20, 2022).

85. *See COVAX reaches over 100 economies, 42 days after first international delivery*, GAVI (April 8, 2021), https://www.gavi.org/news/media-room/covax-reaches-over-100-economies-42-days-after-first-international-delivery (last visited June 20, 2022).

86. Jon Cohen, '*A pretty big deal': U.S. makes COVID-19 technologies available for use in developing countries*Science (2022), https://www.science.org/content/article/pretty-big-deal-u-s-makes-covid-19-technologies-available-use-developing-countries (last visited June 20, 2022).

87. *See UNICEF COVID-19 Vaccine Market Dashboard*, https://www.unicef.org/supply/covid-19-vaccine-market-dashboard (last visited 20 June 2022); For global and country-level data, *see Caronavirus* (*COVID-19) Vaccinations*, OUR WORLD IN DATA, https://ourworldindata.org/covid-vaccinations (last visited June 20, 2022).

88. *See, e.g., Johnson & Johnson Announces a Lead Vaccine Candidate for COVID-19; Landmark New Partnership with U.S. Department of Health & Human Services; and Commitment to Supply One Billion Vaccines Worldwide for Emergency Pandemic Use* (2020), https://www.jnj.com/johnson-johnson-announces-a-lead-vaccine-candidate-for-covid-19-landmark-new-partnership-with-u-s-department-of-health-human-services-and-commitment-to-supply-one-billion-vaccines-worldwide-for-emergency-pandemic-use (last visited June 20 2022); *See also* Lucy Hooker and Daniele Palumbo, *Covid vaccines: Will drugs companies make bumper profits?*, BBC NEWS (2020), https://www.bbc.com/news/business-55170756 (last visited June 20, 2022).

2022, UNICEF's Vaccine Market Dashboard reported that the price per vaccine dose ranged from $2 to $40—the majority of sales under $4 a dose went to developing countries, and the most expensive doses sold by Sinopharm, Sinovac, and Bharat Biotech to countries such as Kazakhstan, and private markets in Nepal and Thailand.[89] The prices of vaccines in South Asia and Africa normally vary between $2.88 and $6.75.[90]

Thus, and despite assertions regarding the high price of patented vaccines, the industry has not only rapidly produced vaccines for the novel coronavirus but is also making them available at reasonable prices. It is unclear, and doubtful, that locally manufactured versions of innovative vaccines produced under a waiver will be cheaper than those that are voluntarily licensed.[91]

Given that in spring 2022 vaccines were available at affordable prices, the necessity of a waiver becomes doubtful.[92] Instead, enhanced use of voluntary and compulsory licenses through Article 31bis and supplemented by the Ministerial Decision would be the better option to accomplish the objective of increasing access. Moreover, such options would do so without abandoning the system of property rights which has delivered life-saving vaccines with extraordinary swiftness.

CONCLUSION

This article argues that WTO Members were wise in not endorsing a blanket waiver proposal and instead adopting an approach that provides for a more flexible application of the compulsory licensing provisions contained in the TRIPS Agreement. While the Ministerial Decision may not prove to be a tectonic shift in IP lawmaking, it will facilitate easier access to vaccines and reduce costs as importing countries now have an additional tool to use in negotiating prices with innovator companies and licensees. Perhaps more importantly, the Ministerial Decision does not provide for a solution which could easily turn into a problem. This was the case with the IP waiver proposal in numerous respects, most of which stem from the starting premise that IP was or could be the most important barrier to vaccines.

This article analyzed three such issues. First, while the IP waiver proposal and its proponents acknowledged the importance of trade secrets in innovation

89. UNICEF COVID-19 Vaccine Market Dashboard, *supra* note 86.

90. Nilanjan Banik & Debashish Chakraborty, *COVID-19 and IPR Waiver: An Indian Perspective*, 56 ECON. & POL. WEEKLY 19 (2021).

91. This is already the case in India, where the vaccine developed by Bharat Biotech Ltd. in collaboration with the government is priced higher than the Indian version of the AstraZeneca vaccine. *See* Menaka Doshi, *Free to Rs 2,400: What a Covid vaccine will cost you*, BLOOMBERG QUINT (2021), https://www.bloombergquint.com/coronavirus-outbreak/the-price-of-covid-vaccines-covishield-and-covaxin-in-india (last visited June 20, 2022).

92. See *UNICEF COVID-19 Vaccine Market Dashboard*, https://www.unicef.org/supply/covid-19-market-dashboard (last visited 20 June 2022).

and the development of new pharmaceutical products, it was left unstated how a transfer of rights would be facilitated and failed to discuss the differences between trade secrets and other IPRs—namely, that once the trade secret has been disclosed it is no longer protected and can therefore be exploited by rivals for commercial advantage.

Second, the biopharmaceutical sector is one of the few that depend on IPRs for continued and sustainable innovation. The sector is wholly reliant on the innovation incentive rationale provided by the patent system, and the IP waiver or any such attempt to delink innovation from incentive places future investment in the sector and R&D at risk. This would have been extremely dangerous as not only will the COVID-19 virus continue to mutate, requiring vaccines to evolve in order to maintain efficacy, but also because it is likely that other pandemics will emerge in the future.

Third, in the space of little more than a year, an access crisis and worries of vaccine hoarding are no longer relevant as vaccine supply outstrips demand and in many countries unused vaccines are going out of date and being discarded. Likewise, with several rival vaccines and multiple producers in the marketplace due to extensive voluntary licensing, vaccine prices are reasonably priced across the globe. Therefore, it is doubtful that an IP waiver allowing for new entrants could have driven the price of vaccines lower than the current price.

The WTO Members were correct to shift away from a proposal which brought more potential risks than benefits, and to a model which seeks to ease existing restrictions and to better facilitate the importation of vaccines into developing countries. Work remains to be done, however, and Members would be wise to keep this issue on the agenda and continue seeking to better ensure access to vaccines both in times of crisis and beyond.