

Proportionality and Judicial Review: A UK Historical Perspective

*Paul Craig**

1 Introduction

Academic legal study is perforce temporally grounded. We most naturally consider the here and now. We may take a fleeting backward glimpse, most commonly to confirm our desired impression of the status quo, and add substance to our prognostications, hesitant or not as they may be, about the future. Legal history is commonly left to legal historians in this age of increased specialization. Their expertise is invaluable, but the historical terrain is vast, the numbers of specialist legal historians are limited and the subject matter coverage uneven. There are perforce large gaps, as exemplified by the historical landscape of administrative law. Relatively little is known about legal development in this area, and the regulatory environment from which it grew, as attested to by the nostrum that the UK had no regime of administrative law until the mid-twentieth century, which is as erroneous as it is oft-repeated. We are of course not formally bound by anything that historical legal inquiry reveals. The academic has tools that bear analogy to the judicial. We can distinguish, praying in aid changed social circumstance, altered normative values and shifting policy preferences. Yet this academic ‘power’, like all other forms thereof, comes with responsibility. The argument must withstand scrutiny in the academic market place, and must also be grounded in some knowledge of what preceded the here and now. Insofar as this knowledge is exiguous it thereby diminishes the value of the academic judgment.

* Professor of Law, St John’s College, Oxford. I have benefited from comments from Eirik Bjorge, Jeff King, Sir Philip Sales, Cheryl Saunders and Alison Young.

This chapter is designed to cast historical light on the role played by the concept of proportionality in UK law. This very sentence may provoke skepticism, given the dominant view that it was an import from continental Europe, the integration of which into UK law has been driven by membership of the ECHR and EU. There is no doubt that the classic three or four part proportionality inquiry has continental foundations, particularly Germanic, although it is noteworthy that the German eighteenth century formulation of the principle was embryonic, with the fully-fledged test developing later.¹ Integration of proportionality into UK law has been furthered by ECHR and EU jurisprudence. There is, however, also no doubt that the UK had a concept akin to that of proportionality, from the late sixteenth century onwards. The precise appellation varied, with terms such as proportionability, proportionable, and disproportionate found in the legislation and case law. It was not a formal three-part test of the modern kind, but the older UK concept shared a common theme with its more modern offspring, which is the proscription of excessive regulatory burdens and the need to ensure that the burden was objectively justified.

The story begins with four general misconceptions about UK Administrative law, which sets the backdrop for the ensuing discussion. This is followed by four historical manifestations of proportionability. It will be seen that the concept was very commonly used as a criterion in regulatory legislation from the mid-sixteenth century onwards, with the expectation that the courts would interpret and apply it to the particular regulatory regime, which is exactly what occurred. It was also used in the absence of express statutory mention, as a principle of legal interpretation, such that the courts would interpret regulatory legislation whenever possible so as not to impose excessive burdens on individuals. Proportionability was in addition deployed as a free-standing principle of judicial review, and

¹ A Stone Sweet and J Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Jnl of Transnational Law 73, 98-111.

also on some occasions as a condition for the legality of regulatory intervention. The magic number four frames the discourse in the final section of the chapter, where the focus shifts to the normative. There is discussion of the relationship between proportionality and proportionability, followed by reflections on the connection between the judicial and legislative use of proportionability. The final parts of this section consider the relevance of this material for modern doctrine, the determination of which is predicated on understanding that proportionability was judicially applied with sensitivity to regulatory purpose and appreciation of the limits to judicial oversight of the administration.

2 UK Administrative law: Four Misconceptions

The image that we have of particular legal subjects is commonly constructed from a plethora of sources, real or imagined. This is especially true of UK Administrative law, the image of which is based on four misconceptions.

First, it is common for academics to believe that the UK had no system of administrative law until the mid-twentieth century, a sentiment fuelled by Dicey's conclusion that the subject was not known in the UK.² The reality is quite the contrary. The UK had one of the oldest bodies of administrative law in the post-classical world, the doctrinal foundations of which were laid two centuries before anything comparable began to happen in continental Europe. It had a body of legal rules concerned directly with the legal constraints that should be placed on the administration broadly conceived for at least four hundred years, and many of the core concepts that we use today would be recognized by our judicial forbears such as Coke, Holt, Hale, Abbott, Tenterden, Blackstone, Mansfield and Kenyon because they created them. In doctrinal terms, the courts developed many of the central concepts of

² AV Dicey, *The Law of the Constitution* (J.W. Allison ed, Oxford University Press, 2013).

judicial review with which we are familiar today.³ There was well-established case law on review of fact and law. There was doctrine dating back to the sixteenth century on legal control of discretion, which was cast in terms of rationality review and also what was termed proportionability. There was jurisprudence on due process and damages liability. There was doctrine on principles of good administration, as exemplified by case law limiting the ability of a person who possessed a de facto or de jure monopoly to charge whatever prices he liked, the courts reasoning that such property was imbued with a public interest that limited the normal capacity to charge what the market would bear. The doctrine was given force through judicial creativity in relation to remedies. The number of such cases should, moreover, be borne firmly in mind. Public law cases concerned with direct and collateral challenge were at least 30% of the total case law, and in some periods the figure was almost certainly higher. There were many thousands of such cases between the late sixteenth to the nineteenth century. And the incidence of such judicial review per year, when you take population into account, 4.8 million at the beginning of the seventeenth century, and also the limited number of judges, King's Bench had three judges, was no less than it was in the 1980s.

A second assumption is that the courts applied the emerging principles of judicial review with the sole objective of controlling the administration, betokening in this respect a narrow red-light conception of such review. This is mistaken. Judicial review has always possessed a Janus-like quality. It is the mechanism through which the preceding doctrines were used when an individual contested the legality of a decision or regulatory norm made by a public or quasi-public body. This is the face that we perceive. Judicial review was, however, also the legal mechanism through which the courts commonly effectuated the regulatory schema challenged before them. The claimant challenged the legality of a decision

³ P Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 29-44.

and lost, because the court did not agree that there was such an illegality judged by the terms and purposes of the legislation. In reaching this conclusion the courts interpreted the statute to attain the specified objectives, and often filled gaps to render the legislation more efficacious. They were fully cognizant of the values served by the regulatory legislation. This duality is apparent when one reads the case law in any area where judicial review was applicable.⁴

A third misunderstanding is that we did not need administrative law before the late nineteenth/twentieth century because there was not much governmental regulation, and thus no need for administrative law to render this accountable. This too is badly wrong as a matter of historical fact. England was highly centralized compared to its continental neighbours, more especially from the Tudors onwards. Social⁵ and economic legislation occupied a great deal of time in Elizabethan Parliaments⁶ and ‘was considered, after the granting of taxation, to be the primary function of the House of Commons’.⁷ Adam Smith’s free market ideas were two centuries away, and there was statutory regulation of diverse matters, including trades such as leather, alcohol, iron and cloth; wages; bankruptcy; poverty, unemployment and vagrancy; land use; morality; police powers broadly conceived; tax and flood defences. The later advent of free market principles led to some diminution in trade regulation, but there was also increased regulation in areas such as factories, health and the like, which is the backdrop to continuing historical debates as to whether the nineteenth century really ever was

⁴ Ibid 62-95.

⁵ See, e.g., P Slack, *Poverty and Policy in Tudor and Stuart England* (Longman, 1988).

⁶ See, e.g., G R Elton, *The Parliament of England 1559-1581* (Cambridge University Press, 1986); D L Smith, *The Stuart Parliaments 1603-1689* (Arnold, 1999).

⁷ R Sgroi, ‘Elizabethan Social and Economic Legislation’, <http://www.historyofparliamentonline.org/periods/tudors/elizabethan-social-and-economic-legislation> .

an era of laissez-faire.⁸ It should moreover be emphasized that these areas were subject to detailed regulatory schemes laid down in enabling legislation, which was amended and fine-tuned repeatedly over the years.

The fourth error, which is directly relevant to the present chapter, is the assumption that insofar as we exercised judicial control over discretion, that was done through reasonableness review and that proportionality was unknown in the UK prior to its introduction via EU and ECHR law. It has indeed been argued that it would be constitutionally improper for the courts to render this concept generally applicable as a tool of judicial review in the UK, this argument being predicated in part at least on the assumption that it is an alien import to be largely confined to the areas from which it is said to owe its origins, viz ECHR and EU law. This reasoning ignores history. The reality is that proportionality-type review existed in the UK from the seventeenth century onwards, and it was most commonly applied in non-rights based cases. We did not have the classic three-part proportionality inquiry, and indeed if you search the legal database for the word proportionality you will get no hits. This is, however, because a range of different words were used in the context of judicial review actions, direct and indirect, including proportionable, proportionability, disproportion and proportionate. The semantic difference should not, however, conceal the substantive similarity: the courts were concerned to ensure that the regulatory burden placed on an individual was not excessive and that it was fair given the nature of the regulatory schema. The legislative and judicial manifestation of this will be explored in the next section.

3 Proportionability: Four Manifestations

⁸ See, e.g., A Taylor, *Laissez-faire and State Intervention in Nineteenth-Century Britain* (Macmillan, 1972).

(a) Judicial Review and Statutory Provision

Public lawyers, indeed lawyers in general, are considerably fonder of case law than legislation. Give them the choice and they will pick a complex case over a difficult statute pretty much every time. This is not the place to consider the rationales for this preference. Suffice it to say for the present that while the preference may be ingrained, we can learn much from the statutes that gave regulatory power to the administration and the terms on which this was done.⁹

The present inquiry is concerned with the extent to which such legislation conditioned the grant of regulatory power through requirements that burdens should be proportionate, or some word equivalent thereto. There were numerous statutes that explicitly contained ideas of due proportion in a public law context, which were then applied by the courts in judicial review actions, or in cases of indirect collateral challenge. Some sense of the range of legislation that conditioned intervention through such concepts can be conveyed from the numbers. From the late sixteenth century the term proportionably was used on 763 occasions in sections of statutes, while the term proportionable can be found in 1,230 statutory provisions.¹⁰ These digital citations used the relevant term at least once, and not infrequently more often. The concept was used in a plethora of regulatory contexts: economic, social, criminal and defence of the realm. Space precludes detailed elaboration, but the ensuing analysis will exemplify use of the concept in these areas, followed by three more particular examples of the way in which it was applied in relation to the poor law, bankruptcy and improvements.

⁹ P Craig, 'The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting The Historical Record Straight', forthcoming.

¹⁰ There were also 1,209 legislative provisions that use the term proportioned, but many of these are less relevant to the present analysis.

The economic usage of the concept is evident in the many statutes concerning tolls charged for roads, bridges, canals and rivers; the legislation commonly empowered collection of a specific sum for every ton of goods conveyed a certain distance, and this sum would then vary proportionably where the weight or distance was greater or lesser.¹¹ Much the same was true in relation to many excise statutes enacted over four hundred years; the legislation would prescribe a basic charge in relation to, for example, a barrel of beer, with smaller or larger amounts leading to proportionably less or more liability.¹²

Social purpose was to the fore in the provision for shipwrecked mariners; the legislation provided that 'it is just and reasonable that all British Merchants trading to Portugal , should proportionably contribute to the Relief of shipwrecked Mariners, and other distressed Persons, your Majesty's Subjects there, and to the other pious and charitable Purposes herein after mentioned'.¹³ A variant on this theme is apparent in statutory provision for what was in effect a social insurance scheme for merchant seamen who became ill or died, with financial contributions made by ship owners and the seamen themselves; the amount of the contribution was determined, inter alia, proportionably judged by length of time, and there was also provision for proportionate increase in the pension in certain circumstances.¹⁴ A different kind of social purpose was evident in legislation designed to prevent bribery and the like during elections; the regulatory legislation made provision for an election auditor to be recompensed by the candidates, including reasonable expenses incurred, which 'shall be paid rateably and proportionably by the Candidates respectively'.¹⁵

¹¹ See, e.g., Bedford Level Act 29 1756, Geo 2, c. 9; Turnpike Roads Act 1822, 3 Geo. 4, c 126; *Strick v Swansea Canal Company* (1864) 16 CB (NS) 245.

¹² See, e.g., Excise Act 1670, 22 & 23 Cha. 2, c. 5; Taxation Act 1701, 13 & 14 Will. 3, c. 5.

¹³ Shipwrecked Mariners Act 1721, 7 Geo. 1, c. 17.

¹⁴ Merchant Seaman's Widows Act 1834, 4 & 5 Will. 4, c. 52, ss. 5-6.

¹⁵ Prevention of Corrupt Practices Act 1854, 17 & 18 Vict., c. 102, s. 34.

The concept of proportional contribution was part of the changing world of criminal detection, as evidenced in the law relating to hue and cry; the malaise whereby the entire financial burden of recompensing a person who had been robbed was de facto imposed on a particular occupant of the locality where the robbery took place, was ameliorated by legislation requiring that the cost be borne proportionably by each inhabitant, judged in terms of their ability to pay.¹⁶ This dimension is evident once again in statutes to deal with Moss Troopers, which was the vernacular for ‘lewd, disorderly and lawless Persons, being Thieves and Robbers’, who resided in Scotland or counties adjacent thereto, the name deriving from their ability to disappear into tracts of moss and heather to avoid capture; the cost of protection was borne by the counties, and unsurprisingly those further from the border were less inclined to contribute, being less affected by the incursions, and thus the legislation was designed to ensure that they paid their proportionable share towards defence.¹⁷

Proportionability was also part of the regulatory criteria concerning defence of the realm; thus where there was a shortfall in the number of private militia his Majesty's Lieutenant was instructed to ‘discharge by Lot proportionably out of each respective Hundred, Rape, Lathe, Wapentake, or other Division, so many private Militia Men as shall exceed the Number so fixed and settled as aforesaid’.¹⁸ Mutiny and desertion endangered defence of the realm, and were the subject of successive statutes; the legislation commonly made provision for the billeting of soldiers, such that ‘Petty Constables, Headboroughs and Tithingmen, shall ... billet and quarter every such Officer and Soldier in such Houses so subjected thereto by this Act equally and proportionably according to the Number of such Officers and Soldiers so to be billeted and quartered, and of the Houses so subjected to

¹⁶ Hue and Cry Act 1584, 27 Eliz. 1, c. 13, s. 5; Hue and Cry act 1734, 8 Geo. 2, c. 16;

¹⁷ Moss Troopers Act 1662, 14 Cha. 2, c. 22.

¹⁸ Militia Act 1757, 31 Geo. 2, c. 26, s. 21.

receive them'.¹⁹ Economic incentives for defence of the realm were evident in the law relating to prize, whereby enemy fortresses, ships and the like could be so treated; where however the venture was jointly undertaken by the navy and army they shall 'have such proportionable Interest and Property as His Majesty' shall think fit.²⁰

It is therefore readily apparent that proportionability was a common feature of much economic and social regulatory legislation, and that this was true also in relation to statutes where the objectives were police powers broadly conceived. The role played by the concept is evident in the following examples drawn from the poor law, bankruptcy and improvements.

Provision of poor relief began in earnest with the Elizabethan poor law. The Poor Relief Act 1601²¹ placed the primary obligation of support on the parish. This public statute was later complemented by many local Acts, whereby parishes joined together in order to discharge their responsibilities, since this was a more effective and efficient method of doing so.²² The legislation provided that the overseers of the poor should distribute the financial burden of the workhouse in due proportion as between the parishes. This was the approach in numerous statutes enacted after 1601,²³ and was embodied in the Poor Law Amendment Act 1834, section 32.²⁴ It gave the Poor Law Commissioners broad power to create or dissolve

¹⁹ Mutiny Act 1813, 53 Geo. 3, c. 17, s. 52.

²⁰ Manning of the Navy Act 1805, 45 Geo. 3, c. 72.

²¹ Poor Relief Act 1601, 43 Eliz. 1, c. 2.

²² Sidney and Beatrice Webb, *English Local Government: Statutory Authorities for Special Purposes* (Longmans, 1922) 107-51.

²³ See, e.g., Relief of the Poor Act 1782, 22 Geo. 3, c. 83; Poor England Act 1815, 55 Geo. 3, c. 47.

²⁴ Poor Law Amendment Act 1834, 4 & 5 Will. 4, c.76.

Poor Law Unions made up of separate parishes, and to make appropriate rules for their management, as they saw fit.²⁵

Provided always, that in every such Case the said Commissioners shall and they are hereby required to ascertain the proportionate Value to every Parish of such Union of the Workhouses or other Property held or enjoyed by such Union for the Use of the Poor or Benefit of the Rate-payers therein, and also the proportionate Amount chargeable on every Parish in respect of all the Liabilities of such Union existing at the Time of such Dissolution or Alteration of the same, and the said Commissioners shall thereupon fix the Amount to be received, or paid or secured to be paid, by every Parish affected by such Alteration.

It was for the courts to decide on what the due proportion was, and enforce it accordingly. This is exemplified by the *Westmoreland Justices* case.²⁶ The legislation provided for legal redress where the rate assessed on particular parishes was not proportionate to the ratable value of the property contained therein. The claimants argued that there was a disproportion in the rates levied on certain individuals from the township of Shap, as compared to individuals from the parish of Bampton. The court acknowledged that such an action could in principle lie, but held that it failed on the facts because it was improperly pleaded. The statute provided that it was the parish or township that must be aggrieved by the disproportionate rate, and that it did not suffice in this regard for particular individuals from Shap to show that they paid a higher rate than those from Bampton.

The same combination of statutory condition and judicial application is evident in relation to legislation concerning improvement of localities. It was common practice to vest regulatory power in local improvement commissioners, who would be given statutory authority to pave roads and improve local amenities.²⁷ The costs thereof would commonly be borne by the local inhabitants, or the more particular section that benefited from the work. This practice was carried into effect through statutory provisions that each occupier should

²⁵ Ibid s 32.

²⁶ *R v The Justices of Westmoreland* (1829) 10 B. & C. 226.

²⁷ Sidney and Beatrice Webb (n 22)

pay a proportionable share of the costs of the work, with the added incentive that if they did not do so the commissioners could levy distress to recover the relevant sums. It was for the courts to determine the meaning and application of such provisions. Thus in *Cole*²⁸ Tindal CJ held that on the proper construction of the statute the land-owners could not be called on to pay in anticipation of the work being undertaken, but that when it had been done, ‘the commissioners were to be in a condition to call upon the land owners for payment of their proportionable shares of the expenses incurred’, with the court adjudicating on disputes in this respect.

A third area that exemplifies statutory conditions cast in terms of proportionability, which were then applied by the courts, is bankruptcy. There was, as we have seen, much economic and social regulation in the sixteenth and seventeenth centuries. Bankruptcy was a prominent concern, as attested to by the number of statutes dealing with the matter. Thus there were major pieces of legislation dealing with bankrupts in 1542, 1571, 1603, 1625, 1705, 1706, 1731, 1745, 1763, 1772, 1783, 1821, and 1822, with the law being consolidated in 1824.²⁹ It was conceived very much as a public law problem, which could destabilize the economy, and it was regulated by Commissioners of Bankruptcy. The initial legislation was enacted in the reign of Henry VIII, and the preamble attests to the social ill to be combatted, this being the fact that,³⁰ ‘divers and sundry Persons craftily obtaining into their Hands great Substance of other Mens Goods, do suddenly flee to Parts unknown, or keep their Houses, not minding to pay or restore to any their Creditors, their Debts and Duties, but at their own Wills and Pleasures consume the Substance obtained by Credit of other Men, for their own

²⁸ *Cole v Green* (1843) 6 Man. & G. 872.

²⁹ Bankruptcy (England) Act 1824, 5 Geo. 4, c. 98.

³⁰ Statute of Bankrupts Act 1542, 34 & 35 Henry VIII, c. 4.

Pleasure and delicate Living, against all Reason, Equity and good Conscience’.³¹ Elizabeth I instituted the regime of Commissioners to administer the Bankruptcy legislation,³² and they were given extensive powers.³³ Proportion and proportionability were aspects of the regulatory regime that were then policed by the courts if the issue should be contested. Thus, to take but one example, the Bankrupts Act 1720 sought to redress an ill in the pre-existing bankruptcy schema by providing that persons who took bills or bonds payable at some future date for goods that had been delivered, and the buyer then went bankrupt, could nonetheless be admitted to prove their bill or bond and ‘be intitled to a proportionable Part of the Bankrupt's Estate, discounting such Securities after the Rate of 5 l. per Cent. for what they receive’.³⁴

(b) Judicial Review and Statutory Interpretation

Principles of statutory interpretation have a firm place in all legal areas, including administrative law, as exemplified by the principle of legality formulated in *Simms*, whereby Lord Hoffmann made clear that a statute that infringed fundamental rights would be interpreted narrowly and that Parliament would have to use express words, or something very close thereto, if it wished the limitation to have effect, thereby paying the political cost of doing so.³⁵ Such interpretive principles are not a modern creation,³⁶ although the particular

³¹ Statute of Bankrupts Act 1542, 34 & 35 Henry VIII, c. 4.

³² Statute of Bankrupts Act 1571, 13 Eliz I, c. 7.

³³ Craig (n 9) section 2.D.1.

³⁴ Bankrupts Act 1720, 7 Geo. 1, c. 31; *Goddard v Vanderheyden* (1771) 3 Wils. K.B. 262.

³⁵ *R v Secretary of State for the Home Department, ex p Simms & O' Brien* [2000] 2 AC 115; *R (Morgan Grenfell & Co Ltd v Special Commissioner of Income Tax* [2003] 1 AC 563 *R (Anufrijeva) v Secretary of State for the Home Department* [2004] 1 AC 604; *A v HM Treasury* [2010] 2 AC 534.

³⁶ J King, ‘The Pervasiveness of Polycentricity’ [2008] PL 401.

ways in which they are deployed may change over time. It is therefore unsurprising that courts lent against the interpretation of a statute where it would place a disproportionate burden on a particular party.

This is exemplified by the decision in the *York Justices* case.³⁷ The applicants sought mandamus to compel the justices of the peace to reconsider a rate charged on their parish as its contribution to payment of the poor law for the wider area. They argued that the charge was excessive. The justices refused to reconsider the rate on the ground that they were not authorised by existing law to vary the fixed proportions of the county rates from the form in which they had existed for many years. Abbott CJ accepted the argument of the applicants' counsel, who pointed to a statute that gave broad power to remedy county rates.³⁸ Counsel argued that the necessity for a new rate could only be brought before the justices by appealing against the disproportion of the existing rate, and that the statutory wording was broad enough to accommodate challenge not only to new rates, but also to those that existed previously, as where they had been made by fixed proportions. Abbott CJ accepted this argument, concluding that the legislation could be construed so as to accord a right of appeal, and that this interpretation cohered with the policy of the legislation. The disproportion in the parish rate was thus a reason to construe the statute so as to enable the justices to hear an appeal on this issue.

The same principle is evident in *Thompson*.³⁹ The plaintiff claimed for money withheld from his wage as a seaman. The sum had been deducted because some crew had broken into the cargo hold in which the fortified wine Madeira was held, and consumed 162 gallons on the voyage back to the UK. There was no proof that the plaintiff had taken part in

³⁷ *R v The Justices of the Peace for the City and County of the City of York* (1824) 2 B. & C. 771.

³⁸ County Rates Act 1815, 55 Geo. 3, c. 51, s. 14.

³⁹ *Thompson v Collins* (1805) 1 Bos. & Pul. (NR) 347.

this bibulous episode. Counsel for the ship owner sought to rely on a statute, which provided that each seaman who undertook the voyage was entitled to his wages, ‘provided always that there be no Plunderage, Embezzlement, or other unlawful Acts committed on the said Vessel's Cargo or Stores’.⁴⁰ He contended that if there was any such plunder, the right to the wage was ipso facto forfeited, and that ‘the terms of the proviso being clear and precise, cannot be done away with by construction’.⁴¹ Mansfield J. was unpersuaded, pointing to the disproportionate impact of this interpretation. He noted the statutory provision set out above which counsel regarded as unequivocal, responding that ‘from these general loose words, the Defendant would contend that, if any good to the value of 5s be plundered or embezzled by A., or any unlawful act committed by A, B and every other sailor on board shall lose his whole wages’.⁴² This was unacceptable and therefore the statutory words should be construed in relation to each sailor respectively, with the consequence that there was no foundation for forfeiture of the plaintiff’s wages, and Mansfield J. doubted, moreover, whether any proportionable deduction in common with all other sailors was warranted.

(c) Principle of Judicial Review: Excessive Burden and Denial of Benefit

Judicial recognition of proportionability as a free-standing principle of judicial review dates back to the late sixteenth century, and the seminal decision in *Rooke’s* case, given in the twilight of the Elizabethan age five years before James I took the throne.⁴³ Commissioners of Sewers levied charges on one person for the repair of river banks, notwithstanding that numerous landowners benefited from the work. The Commissioners were given broad

⁴⁰ Desertion of Seamen Act 1797, 37 Geo. 3, c. 73, Sched. A.

⁴¹ *Thompson* (n 39) 348.

⁴² *Ibid* 349.

⁴³ (1598) 5 Co. Rep. 99b.

discretion as to who should be charged with the payment, although the Statute of Sewers 1531 indicated that all those in the relevant area could be liable to contribute.⁴⁴

The court found the Commissioners' action to be unlawful, since the 'commissioners ought to tax all who are in danger of being damaged by the not repairing equally, and not him who has the land next adjoining to the river only'.⁴⁵ The reasoning strikes a remarkably modern chord. If the charge could be levied solely on the owner with land nearest the river, this might defeat the purpose of the statute 'for perhaps the rage and force of the water might be so great, that the value of the land adjoining will not serve to make the banks',⁴⁶ and it thus followed that he who derived the benefit should share the burden.⁴⁷ The statute required equality which 'well agrees with the rule of equity'.⁴⁸ The court had this to say about the discretion accorded to the Commissioners.⁴⁹

[N]otwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law ... For ... discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.

The link with proportionability and the difference between this concept and equality became evident in *Hetley*.⁵⁰ The Commissioners of Sewers had satisfied a levy on a town by ordering the seizure and sale of the plaintiff's cattle, and then his imprisonment when he had

⁴⁴ Statute of Sewers 1531, 23 Henry 8, c. 5.

⁴⁵ (1598) 5 Co. Rep. 99b.

⁴⁶ Ibid 100a.

⁴⁷ *Qui sentit commodum sentire debet & onus*.

⁴⁸ (1598) 5 Co. Rep. 99b, 100a.

⁴⁹ Ibid 100a.

⁵⁰ *Hetley v Boyer* (1614) Cro. Jac. 336; *The Case of the Isle of Ely* (1610-11) 10 Co. Rep. 141a; *R v Peters* (1758) 1 Burr. 568, 570; *Kerrison v Sparrow* (1815) 2 Ves. Jun. Supp. 587; *R v Commissioners of Sewers for Tower Hamlets Tower* (1829) 9 B. & C. 517, 521; *Soady v Wilson* (1829) 3 Ad. & E. 248.

the temerity to complain of this. Chief Justice Coke had no hesitation in ordering certiorari against the Commissioners, since their action was in direct conflict with the ruling in *Rooke's* case. He reiterated that 'the commissioners of sewers cannot tax a whole township, but it ought to be done severally and proportionably to every inhabitant to himself',⁵¹ and that discretion was framed through law to attain justice.

It was the court that framed the principles against which it was decided whether the regulatory burden on a particular individual was proportionable. The criterion used in the seventeenth century was to judge liability to pay in accord with the degree of danger to the particular property if an inundation should occur, and the degree of fault or not in the person undertaking the repair. The courts when applying such principles were mindful of the dangers of substituting judgment for that of the administration, and equally mindful to ensure that the overall regulatory purpose was not undermined.

This is apparent from *Bow*⁵² where the defendant challenged the need for river improvements in the form of a new sluice, and the amount charged to him by the Commissioners of Sewers. The defendant insisted that an old sluice sufficed and that the levy was unlawful because the amount had to be levied on each person proportionable to the damage that he might sustain. The Lord Chancellor was reluctant to reassess the need for the new sluice since if he did then 'then the orders of commissioners of sewers, and of the sessions, would be made in this Court'.⁵³ He nonetheless acknowledged that the mode of assessment was wrong, and that the particular lands should be assessed according to the danger to them. It was not, however, necessary to name the owners of such lands, since the

⁵¹ (1614) Cro. Jac. 336.

⁵² *Bow v Smith* (1795) 9 Mod. 94.

⁵³ *Ibid* 95.

commissioners might not know them. Moreover, ‘if not naming the owners should make the assessment void, there would be an end of all assessments by commissioners of sewers’.⁵⁴

The preceding principles are also apparent in *Keighley’s Case*,⁵⁵ where the courts further refined their controls over discretion, and subtly gradated the obligations incumbent on those charged with river defences. Thus if a person was bound by prescription to repair a wall against the sea, which was broken through no fault of his by sudden and unusual flow of water, the Commissioners of Sewers should tax all according to the quantity of their land. If however the person charged with repair was at fault and the danger was not inevitable, the Commissioners could charge him to repair it. If the reality was that the danger became inevitable through his fault, those who suffered loss could have an action on the case against him.

The principle of proportionability was not confined to cases concerning the Commissioners of Sewers. In *Brownlow*⁵⁶ it was deployed in the context of regulatory burdens flowing from the Statute of Charitable Uses.⁵⁷ A decree was made pursuant to the statute for the town of Market Raisen, and the monetary burden was placed solely on the defendant who owned land in the area. The defendant ‘insists to pay but his Proportion of the Money, there being several other Persons that have Lands in their Occupations chargeable with the said Charitable Use, yet the Plaintiff lays the whole Decree upon the Defendant’s Lands’.⁵⁸ The court held that the whole charge must be initially borne by the defendant, but that thereafter there should be analysis of all lands liable to bear the charges and the

⁵⁴ Ibid 95.

⁵⁵ (1610-11) 10 Co. Rep. 139a; *R v Commissioners of Sewers in Essex* (1823) 2 Dowling & Ryland 700.

⁵⁶ *Villa de Market Raisen v Brownlow* (1635-36) 1 Chan. Rep. 91.

⁵⁷ Charitable Gifts Act 1601, 43 Eliz 1, c. 4.

⁵⁸ *Brownlow* (n 56) 92.

‘Commissioners to apportion each Party's Payment with such proportionable Part of the Charges the Defendant hath been put to’.⁵⁹

The principle was employed to determine the legality of fees for prisoners in *Johnson*.⁶⁰ The treasurer of Hereford charged the city of Hereford in respect of prisoners that the city had sent to the jail. A dispute arose as to the amount that was due per prisoner, which was larger insofar as the city bore responsibility for the general expenses of the jail, and not merely the personal expenses of each prisoner. The treasurer levied the charges pursuant to the Municipal Corporations Act 1835.⁶¹ Lord Denman CJ held that the larger amount of the weekly charge per prisoner, which was made ‘upon a calculation of the proportion which the expence of each prisoner, bears to the total expences of the gaol, is reasonably made, and ought to be paid, seeing that the borough has a proportionable share of the benefits arising from the whole establishment’.⁶²

The concept was applied in relation to bankruptcy, irrespective of whether there was specific provision to that effect in a bankruptcy statute. Thus in *Vanacre*⁶³ a debtor was indebted to B and C, the former in a very large sum, the latter in a smaller amount. B did not realize that the debtor had become bankrupt, but C did and sued out a Commission of Bankruptcy. C sought to recover the value of some of his goods from B. The court held that the creditors should come to an account, and have proportionable satisfaction from the estate. The whole debt and estate should be accounted for, and there should be a proportionable division of the money recovered. In the similarly named but distinct case of *Vanaker*⁶⁴ the

⁵⁹ Ibid 92.

⁶⁰ *The Queen v Johnson* (1839) 10 Ad. & E. 740.

⁶¹ Municipal Corporations Act 1835, 5 & 6 Will. 4, c. 76, s. 114.

⁶² *Johnson* (n 60) 753.

⁶³ *Vanacre's Case* (1677) 1 Chan. Cas. 303.

⁶⁴ *Vanaker v Nash* (1673) Rep. Temp. Finch 60.

plaintiff succeeded in an action brought against Commissioners of Bankruptcy, whereby he sought to be admitted as a creditor in order to obtain his proportionable benefit from the estate.

It is readily apparent from the preceding discussion that proportionability could be pleaded to avoid excessive burden and to obtain benefit that was properly due. This duality is evident in *Walton*,⁶⁵ where the dispute arose out of inclosure. The facts are complex, but the case in essence concerned inclosure and the extent to which allotments granted pursuant to the inclosure legislation constituted compensation for the loss of access to common land. Lord Ellenborough CJ concluded that the plaintiff had two distinct rights of common, that the allotment granted pursuant to the inclosure legislation only related to one right of common, with the consequence that he was entitled to proportionable compensation in relation to the loss of the second right of common.

(d) Principle of Judicial Review: Condition of Regulatory Intervention

Proportionability was also used in a different way, to determine the legitimacy of regulatory intervention. This is exemplified by the case of *Customs, Subsidies and Impositions*.⁶⁶ The court held that the King could not at his pleasure place any imposition on merchandize imported or exported, unless it was for advancement of trade. While it was open to the King to prohibit a person with some commodities to leave the realm, this was only where the end sought was public rather than private. The King could also impose tolls for the repair of highways and bridges for the benefit of the subjects, but ‘the sum imposed ought to be proportionable to the benefit.’ Thus in this instance proportionability was used to limit the

⁶⁵ *Hollinshead v Walton* (1806) 7 East. 485.

⁶⁶ (1607) 12 Co. Rep. 33.

circumstances where the King could impose certain charges, viz tolls could be imposed provided that the sum charged was proportionable to the benefit to the King's subjects.

We see this same principle at work in *Hill*,⁶⁷ where the defence against an action for trover and conversion was that the defendant was a bellman, charged with cleaning the streets and the like, for which as a matter of custom he was entitled to take a certain portion of corn from every amount brought into the town. In resolving the case the court drew on Coke CJ's reasoning, to the effect that while the King could grant privileges of murage and pontage for the building and repair of town walls, the tolls thus charged were conditional on the privileges being pro bono publico, and proportionable. This was apposite in the instant case, because this principle was used to help justify the custom whereby the bellman took a share of corn from traders, the reasoning being that because the bellman had performed a valuable public service, therefore his share was a legitimate, proportionable quid pro quo. The same theme is apparent in *Stamford*,⁶⁸ where Lord Alexander CB referred in the course of his judgment to the principle that the King could not grant a right to levy a toll for holding of a market or fair that had hitherto been free, unless there was some quid pro quo, some proportionable benefit to the public.

4 Normative Dimension: Four Issues

The inquiry thus far has considered proportionability from a positive law perspective. A number of related albeit distinct normative issues will now be considered.

(a) Proportionability and Proportionality: The Relationship

⁶⁷ *Hill v Hanks* (1792) 2 Bulst. 201.

⁶⁸ *Corporation of Stamford v Pawlett* (1830) 1 C. & J. 57, 73.

It is important to be clear about the relationship between proportionability and more modern conceptions of proportionality. I make no claim that the concept of proportionable burden or that of proportionability embodied the three-part test associated with the modern conception of proportionality. There is nonetheless a linkage between the older and more modern conceptions, insofar as both have in common the idea that regulatory burdens should not be excessive, and that they should be objectively justified.

Parliament could determine that contributions should be predicated on relative capacity to pay, combined with assessment of the benefit received from the regulatory activity. The statutory provisions provided guidance as to the distribution of benefit and burden in the respective areas, but there was nonetheless often room for contestation as to what ‘proportionable’ meant in the circumstances. This was decided by the courts, as exemplified by difficult judicial determinations as to what the concept should mean for liability to contribute to the rates levied for poor relief, when a river or railway ran through several parishes. We shall return to the case law interpreting these provisions below. Suffice it to say for the present that the courts did not substitute judgment, but showed respect for the administrative determination,⁶⁹ and interpreted the legislation with a keen eye on its overall purpose.⁷⁰ The judicial contribution was a fortiori more significant where there was no direct guidance from the legislation concerning the distribution of benefit and burden, although they did not substitute judgment concerning the administrative task in this type of case either.

It can be acknowledged that much of the historical material was concerned with regulatory burdens that were in some sense quantifiable in monetary terms, which stands in contrast to some modern case law on proportionality. The degree of difference in this respect should nonetheless be kept within perspective. I do not subscribe to the belief that every clash

⁶⁹ See below, part 4(d).

⁷⁰ For more detailed consideration of this, see, Craig (n 3) 69-95.

of interests can be reduced to monetary terms. This is both reductionist and normatively problematic. We should, however, be cautious about the converse proposition: we should not think that merely because the appropriate balance could be expressed in monetary terms, therefore this was somehow easy, or straightforward. In some instances it was, but in many it was not, since the quantifiable conclusion was the result of a complex calculus into which a plethora of values were fed. This was so in relation to many of the instances set out above where judgment as to proportionability turned on an admixture of capacity to pay, stake broadly conceived in the relevant enterprise, and relative benefit or burden. The legislation might provide some guidance on this, and it might not. It was for the courts to apply the legislation, fleshing out the criteria contained therein, or developing them where the legislation was exiguous in this respect. The judicial role was perforce further enhanced where there was no mention of the term in the enabling legislation.

There is therefore no ready equation between a conclusion being capable of being expressed in quantifiable terms, and the ease of the calculation that led to the conclusion. There is also no basis for the assumption that cases in which the conclusion cannot be expressed in quantifiable terms will necessarily entail consideration of a more difficult range of values than cases where the result can be so expressed.

(b) Proportionability: Legislative and Judicial

It is equally important to be mindful of the linkage between statutory embodiment of proportionability as a criterion in the regulatory schema, and the courts' application of the concept as a free-standing principle of judicial review. The courts created the architecture of judicial review, fashioning the relevant principles from the rule of law. These included the concept of proportionability, which was introduced into the case in the late sixteenth and early seventeenth centuries. Its application in the leading cases made good sense in normative

terms, and helped to legitimate and render accountable the considerable power accorded to the administration. There is no evidence of parliamentary dissatisfaction with this case law. To the contrary, the very fact that Parliament enacted very many statutes that conditioned regulatory intervention on proportionability is indicative of the fact that the legislature was mindful of the concept's utility, and it did so knowing full well that the courts would adjudicate on its meaning and application. This in turn would have encouraged courts to regard intervention aimed at denying excessive burden, or ensuring proportionable benefit, as warranted and normal.

(c) Proportionability and Proportionality: Democracy and the Temporal Dimension

It has been argued that whatsoever the history might be, it is of limited relevance in the modern day, given that the principles of judicial review must now be seen against the backdrop of a democratic legislature, with the legitimacy that is attendant thereon, which it never possessed hitherto.⁷¹ There are several points to bear in mind in this regard.

First, it assumes that Parliament lacked legitimacy prior to the modern extension of the franchise when women were granted the vote in 1928.⁷² There is no doubt that modern parliaments elected on this extended franchise enjoy increased democratic legitimacy. To reason from this, to the conclusion that parliaments hitherto lacked legitimacy is, however, a non-sequitur. The determination of who should be entitled to vote has perforce changed very markedly over time. There is no doubt that to modern eyes the property qualifications that conditioned the franchise in earlier centuries appear outdated and unwarranted. This does not mean that the parliaments elected in previous centuries were perceived as illegitimate. There was to be sure some pressure for extension of the franchise, most notably in the more

⁷¹ This argument was advanced by Lord Justice Sales when this paper was delivered at the conference.

⁷² Representation of the People Act 1928.

eloquent writings of the Levellers, but there was also considerable support for the limits that then existed. The courts did not, moreover, regard Parliament as illegitimate because of its limited franchise. To judge the legitimacy of earlier institutions by modern standards is to commit the inter-temporal error of assuming that criteria currently regarded as the hallmark of legitimacy were always thus perceived.

Second, the argument assumes a clear relationship between the principles of judicial review and the democratic mandate. This is not the place to engage in a detailed exegesis on this topic, which would take us far beyond the confines of this paper. Suffice it to say for the present that the reality concerning this relationship is complex. The argument assumes that principles of review developed in earlier years, such as proportionability, may be unwarranted now that Parliament has assumed its modern democratic form. This contention conceals more than it reveals. The legal reality is that many principles of judicial review have been enlarged since the advent of the current franchise. This includes review for error of law, fact, equality, legitimate expectation and human rights. There is no reason why the current democratic mandate should be regarded as a reason for denying proportionality a role in judicial review, although it may have implications for the intensity with which it should be applied. This is, however, already taken into account, as attested to by the vibrant judicial and academic debates concerning proportionality, deference, respect and the like that abound in the modern case law and secondary literature.⁷³ In my view such respect is warranted on

⁷³ See, e.g., R Edwards, 'Judicial Deference and the Human Rights Act' (2002) 65 MLR 859; J. Jowell, 'Judicial Deference and Human Rights: A Question of Competence', in P Craig and R Rawlings (eds), *Law and Administration in Europe, Essays in Honour of Carol Harlow* (Oxford University Press, 2003), Ch 4; J Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity' [2003] PL 592; M Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"', in N Bamforth and P Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford University Press, 2003), Ch 13; Lord Steyn, 'Deference: A Tangled Story' [2005] PL 346; TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due

institutional, epistemic, and constitutional grounds.⁷⁴ The debate concerning proportionality as a general principle of judicial review is, moreover, predicated on variable intensity proportionality review, with lower intensity review being applicable in cases that do not involve rights. This coheres with the historical jurisprudence in this area, in which, as made clear above, the courts did not substitute judgment for that of the administrator.

Thirdly, it is important to avoid two related errors concerning the earlier jurisprudence. Courts did not, as we shall see in the next section, simply substitute judgment in relation to proportionability, and they did not ignore the regulatory objectives when adjudicating on its application. Nor did courts regard what they were doing in proportionability cases as akin to Coke CJ's strictures ideas in *Dr Bonham's* case concerning review of legislation against natural right and reason.⁷⁵ Coke CJ's ideas in this respect did not develop for a plethora of reasons, but proportionability review was very different, and the two issues were regarded as distinct. The principal target of proportionability was not the primary legislation, but the administration thereof by Commissioners, local justices and the like, and the substantive criteria was not natural right and reason, but excessive burden.

Deference''' [2006] CLJ 671; Lord Justice Dyson, 'Some Thoughts on Judicial Deference' [2006] Judicial Review 103; R Clayton, 'Principles for Judicial Deference' [2006] Judicial Review 109; J King, 'Institutional Approaches to Judicial Restraint' (2008) 28 OJLS 409; A Young, 'In Defence of Due Deference' (2009) 72 MLR 554; A Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 LQR 222; T Hickman, *Public Law after the Human Rights Act* (Hart, 2010), Ch. 5; TRS Allan, 'Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory' (2011) 127 LQR 96; A Brady, *Proportionality and Deference under the Human Rights Act 1998: An Institutionally Sensitive Approach* (Cambridge University Press, 2012); P Daly, *A Theory of Deference in Administrative Law: Basis, Application and Scope* (Cambridge University Press, 2012); A Young, 'Will You, Won't You, Will You Join the Deference Dance?' (2014) 34 OJLS 1.

⁷⁴ Craig (n 3) Ch 2.

⁷⁵ *Dr Bonham's Case* (1609) 8 Co. Rep. 113b.

(d) Proportionability: Intensity and Legislative Purpose

A willingness to engage with the older case law reveals much about judicial reasoning and serves to dispel beliefs as to how the courts applied these controls on discretionary power. There is often an implicit assumption that modern sensibilities concerning the limits of judicial power were lost on our forbearers, and that they were insensible to attainment of legislative purpose. There is no warrant for such assumptions, whether viewed as general conjectures, or as hypotheses concerning the application of proportionability. We, the modern judicial and academic generation, did not suddenly have insights as to the relationship between courts and Parliament that were unknown to our predecessors. The very fact that Parliament and its administration were perceived as legitimate meant that while the courts regarded controls on administration as necessary to ensure its accountability, they were also mindful of the proper limits to judicial intervention. This is readily apparent from cases such as *Bow*⁷⁶ and *Keighley*⁷⁷ considered above. It is evident also in the following examples, drawn from different subject matter areas.

The Cape of Good Hope case concerned a claim by the East India Company to a proportionable share of the benefits resulting from the capture of the Cape.⁷⁸ The ships were used to carry troops to the Cape of Good Hope. Most of the operations necessary to subdue the colony had, however, been performed before the arrival of these ships, although one ship did perform military service, and it was accepted that it should be allowed to share in the prize. The case turned on whether the other ships could partake of a proportionable share, the

⁷⁶ *Bow* (n 52).

⁷⁷ *Keighley* (n 55).

⁷⁸ *The Cape of Good Hope and its Dependencies* (1799) 2 C. Rob. 274.

legislation stipulating that in joint operations between navy and army the men would be given such proportionable share of the property as directed by His Majesty.

Sir Walter Scott giving judgment proceeded on the assumption that the ships were originally no more than transport vessels, 'liable to be called upon occasionally to act, with alacrity and vigour (for British vessels, of any character, are liable to be so called upon on extraordinary occasions of public necessity)',⁷⁹ albeit acknowledging the possibility that 'a military character might be afterwards impressed upon them, by the nature and course of their subsequent employment'⁸⁰. He was, however, sceptical as to whether the requisite military character could be found in the claim that the very appearance of the ships intimidated the enemy, thus entitling the East India Company to a proportionable share of the property. This would, said the judge, lead to unacceptable consequences, since any intimidation was entirely passive in the instant case, given that the ships had no knowledge that they had been seen and no animus to intimidate. It was very different where the non-commissioned ship contributed materially to the act of capture. The judge was, moreover, mindful of the dangers of broadening the circumstances in which the private vessel could obtain some proportionable share of the prize.⁸¹

The interest of the prize is given to the fleet and army, and it would not be the mere voluntary interposition of a privateer that would entitle her to share. It would be a very inconvenient doctrine, that private ships of war, by watching an opportunity, and intruding themselves into an expedition, which the public authority had in no degree committed to them, should be at liberty to say, " we *will* co-operate "; and that they should be permitted to derive an interest from such a spontaneous act, to the disadvantage of those to whom the service was originally entrusted. Expeditions of this kind, designed by the immediate authority of the state, belong exclusively to its own instruments, whom it has selected for the purpose; and it might be attended with very grave obstruction to the public service of the country, if private individuals could intrude themselves into such undertakings, uninvited and under colour of their letter of marque.

⁷⁹ Ibid 281-282.

⁸⁰ Ibid 282.

⁸¹ Ibid 287-288. Italics in the original.

The same sound sense in the interpretation of proportionability is evident in *Page*.⁸² The case concerned the meaning to be accorded to the concept in the context of legislation imposing tolls, and in relation to liability to contribute to poor relief in a particular parish. A statute provided for payment of tolls on the river Kennet from Reading to Newbury, specifying that this should not be greater than four shillings per ton; that the charge should be proportionably larger or smaller, where the weight was greater or less; and that it should vary also depending on the distance for which the goods were carried. The case was, however, concerned not simply with the proportionable tolls for the river, but also with the proportion of the tolls thus raised that should be rateable for poor relief in a particular parish, which was relevant given that the river flowed through several parishes.

Lord Kenyon CJ considered the principles on which a proportionable share of the poor rates should be distributed between the respective parishes. It was argued on grounds of ‘policy and justice’⁸³ that the tolls should be considered to be due in each parish in respect of the quantity of land occupied by the navigation. Lord Kenyon rejected this criterion, stating that ‘hard would be the lot of the officers who are to make the rates in these several parishes’, since ‘they would have to measure not only the length but the breadth of the navigation in each respective parish, and to ascertain with precision the exact quantity of land covered with water’, and these ‘difficulties would be insuperable’, such that it would ‘be in vain to think of rating at all, if such were the rule’.⁸⁴

The correct principle was rather that ‘where a person has a valuable interest in any parish or township, he ought to contribute towards the relief of the poor in that parish in

⁸² *R v Page* (1792) 4 TR 543.

⁸³ *Ibid* 547.

⁸⁴ *Ibid* 547.

proportion to such valuable interest'.⁸⁵ This in turn generated interesting legal inquiry as to where the property interest in the collection of the toll vested. The claimant was rated only in respect of tolls that became due at Newbury, the place where the navigation finished, and where the goods were delivered. The court held that this was valid, notwithstanding the fact that the statute allowed the proprietor of the toll to appoint the place of collection, since if this were the criterion for liability for poor rates the toll owner 'might appoint a place of collection not in any parish through which the navigation passes',⁸⁶ or 'fix a place of collection in some parish where the poor rates are the lightest, which could not be within the meaning of the Act'.⁸⁷

Judicial sensibility to policy objectives is also apparent in *Wilson*.⁸⁸ The corporation of Carlisle brought an action in assumpsit for tolls due from the defendant for the passage of their coaches and carriages, which were loaded with goods as well as passengers. The defendant claimed to be exempt, arguing that their carriages were principally used to convey passengers, not goods, and that the customary right to the toll was applicable only to the latter not the former.

The court disagreed. Lord Ellenborough CJ held that the custom was to pay a toll for goods conveyed in carriages in proportion to the number of horses, the rationale being, as Lawrence J noted, that the damage to the roads was proportionably greater depending on the number of horses used, thereby justifying the higher toll. The type of carriage was therefore irrelevant, provided that it was used for carrying goods for sale the custom attached to it. The defendant contended that the toll charged on carriages that carried people as well as goods

⁸⁵ Ibid 547.

⁸⁶ Ibid 547.

⁸⁷ Ibid 550.

⁸⁸ *Mayor of Carlisle v Wilson* (1804) 5 East 2.

was disproportionately high. Lord Ellenborough CJ rejected the argument: ‘as to the disproportion stated to arise from the application of the toll to carriages of this description, where the number of horses is adapted more to the carriage of passengers than of goods, that is the party's own act, of which he cannot complain’.⁸⁹ It would not have been practicable for the corporation of Carlisle to determine how much weight was attributable to passengers, and how much to goods: if the ‘coach-owners will multiply the number of their horses because of the additional weight of passengers which they carry, together with goods for which the toll is payable in proportion to such number, it is their own act, and the corporation have no means of ascertaining the proportion of horses used for each’.⁹⁰

5 Conclusion

There will be no attempt to summarize the entirety of the preceding argument. Suffice it to say the following. Common lawyers rightly note the absence of the divide between public and private law of the kind that exists in civil law systems. Historically we did not have a separate regime of public and private law courts commonly found in civil law regimes, and that remains true in the UK notwithstanding the creation of a more specialist administrative law jurisdiction within the High Court. The absence of separate courts for public law and private law cases did not, however, mean that the substantive principles applicable to the respective areas were the same. The nature of the subject matter, combined with the distinctive nature of the legal issues that arose in public and private law cases, led to doctrinal rules that differed. There were distinct concepts, or different conceptions of the same concept.

We should nonetheless not veer too far in this direction, and assume that there was no overlap in the concepts used, or that there was necessarily significant divergence in the

⁸⁹ Ibid 7.

⁹⁰ Ibid 7.

particular conception deployed. The commonality between the concepts of responsibility imposed on trustees, fiduciaries and public officials is merely one powerful exemplification of this point. This is not the place for exegesis on the reasons that drove this commonality or overlap, although it was at base underpinned by a similar normative view as to the nature of responsibility that pertained in the respective areas.

This is salient in the present context. This chapter focused on the application of proportionability and related terminology in regulatory contexts, where the claimant sought relief against a body that was public, charged with carrying out its regulatory tasks by legislation. It is noteworthy that the concept was also used in a plethora of other contexts, including, *inter alia*, employment law, debt, commercial law, succession and private law aspects of bankruptcy. Those minded to try to dismiss the analysis in this chapter on whatever ground should bear this in mind. The reality was that the courts applied the concept in those areas where it was felt to be normatively warranted, without any fixed boundaries between public and private law. It was not alien to the common law, and it was not confined to some narrow area of legal doctrine. I make no claim that legal doctrine *ipso facto* warrants application now, merely because of its historical provenance. There is, however, a *fortiori* no basis for predicated conclusions about present application of a legal concept on ignorance of legal history, or of the way in which the concept was applied, that do not cohere with reality.