Varying Intensity of Judicial Review: A Conceptual Analysis

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Abstract: *It is generally acknowledged that the intensity of judicial review varies. The first half of this article provides the conceptual architecture of the different factors that shape the intensity of review, drawing on doctrine from UK, US and EU Law. This provides the foundation for the second part of the article, which critiques argumentation concerning variation in proportionality review.*

It is axiomatic that the intensity of judicial review varies, but it is instructive to draw together the considerations that shape this. The first half of the article draws on UK law, EU law and US law and analyses how the intensity of judicial review is impacted by the following considerations: the initial choice of the standard of review; the more particular meaning accorded to that standard; substantive variation in the standard of review; adjectival variation in this standard; the interplay between the standard of review and variation in its application; the relationship between the standard of review and the standard and burden of proof; how the intensity of review is affected by obligations concerning reason giving and provision of evidence; and the relationship between the intensity of judicial review and the obligations cast directly on the primary decision-maker. This constitutes the conceptual architecture through which intensity of review operates.

[*] I am grateful for comments from Cora Chan and the reviewer.

The second half of the article draws on this analysis in relation to proportionality review. Marcus Teo argues that the standard of proportionality review should not be allowed to vary, and thus should not be used in ordinary public law cases.[1] My critique tracks the stages of Teo's argument. Thus, Teo's claim is premised on untenable assumptions concerning the distinction between variation in the standard of review and its application. The core argument is that to allow such variance would be inconsistent with epistemic independence, which is the belief that the courts must have before finding a decision valid/invalid. This core argument is wrong and internally incoherent. It misconceives the relationship between standards of review and the duties of the court that flow therefrom. Teo seeks to support this central argument through claims based on case law, structure and coherence, which are mistaken.

Varying intensity of review: the conceptual architecture

It is generally accepted that the intensity of judicial review varies, but it is nonetheless instructive to consider the principal factors that inform this process.

Standard of review: initial choice

We begin with the most foundational element concerning intensity of review, which is the choice made by the constitution, the legislature or the courts, or an admixture thereof, as to the standards of review for law, fact and discretion. This choice embodies normative assumptions concerning the degree of oversight that is warranted, and is expressive of the relationship between court and administration for a particular type of error. Thus, a decision that errors of law should be subject to a correctness test, which is the default assumption in UK law post-

[1] Marcus Teo, "Proportionality as Epistemic Independence" [2022] P.L. 245.

Page,[2] is predicated on the assumption that courts should substitute judgment on the meaning of a contested statutory term, whereas a reasonableness test assumes that weight should be accorded to agency expertise for some matters, as exemplified by part two of the *Chevron* test.[3]

Analogous considerations will commonly inform the emergence of more discrete standards of review from what was hitherto a general standard, as exemplified by proportionality review in the EU. Viewed historically, the trajectory was its recognition as a legal principle in the EU, followed 15 years later by proportionality becoming a general principle of law applicable across the entire legal terrain.[4] The ensuing two decades saw the courts fashion more discrete standards of review, for cases involving rights and those involving economic, social and political discretionary choices.[5]

Standard of review: initial meaning

The foregoing is elementary and foundational. The meaning of a particular standard of review can, however, be contested, with consequential implications for intensity. This can be exemplified by review for error of law in accord with a correctness test. The test is premised on the normative assumptions adumbrated above. However, this still leaves crucial issues as to how a court should determine whether such an error exists.

This is readily apparent from the *Chevron* doctrine,[6] with its bifurcated test for review, such that courts substitute judgment on issues of law where Congress has spoken to the

[2] *R v Hull University Visitor, ex p Page* [1993] A.C. 682.

[3] *Chevron USA Inc v NRDC* 467 US 837 (1984).

[4] P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015), pp. 315-341.

[5] P. Craig, *EU Administrative Law* (Oxford University Press, 2018), Chs. 19-20.

[6] *Chevron USA Inc v NRDC* 467 US 837 (1984).

meaning of the relevant term, with reasonableness review pertaining in other cases. This has been the site for Supreme Court battles as to how step one should be applied.[7] For some, the determination should be textualist in nature, such that Congress would only be deemed to have spoken to the meaning of the term if there was something akin to a statutory definition;[8] for others, the approach was much broader, encompassing the ordinary tools of statutory construction widely conceived.[9] Justice Scalia, an advocate of the textualist approach, lambasted his colleagues who adopted the latter approach for eviscerating *Chevron*, arguing that the less intensive review in step two would rarely be reached, because the court could always claim to divine Congressional intent through ordinary tools of statutory construction.[10]

This same point can be exemplified in relation to standards of review used for discretionary determinations. The principal tools are reasonableness, proportionality, the arbitrary and capricious test, and manifest error. We begin by considering the meaning of the relevant standard of review and what this reveals about the intensity with which it is applied. Consider the following example concerning reasonableness review.

Reasonableness is the general tool for review in the UK in cases that do not involve human rights. The definitional starting point for such review is not pre-ordained. It could be couched in various ways. This is prior to any further variation of the kind considered below, whereby reasonableness review can apply differentially depending on the nature of the affected

[7] See, e.g., C. Sunstein, "Law and Administration after Chevron" (1990) 90 Col. Law Rev. 2071; T. Merrill and K. Hickman, "Chevron's Domain" (2001) 89 Georgetown LJ. 833; P. Strauss, "'Overseers' or 'The Deciders'—The Courts in Administrative Law" (2008) 75 U.Chic. Law Rev. 815.

[8] See, e.g., *Rust v Sullivan* 500 U.S. 173 (1991).

[9] See, e.g., *Food and Drug Administration v Brown & Williamson Tobacco Corporation* 529 US 120 (2000).

[10] *Immigration and Naturalization Service v Cardozo-Fonseca* 480 US 421 (1986). However, it should also be noted that Justice Scalia was not averse to using a textualist methodology to 'confirm' his chosen interpretation of the contested statutory term.

interest. The modern definitional starting point is the *Wednesbury* test.[11] It embodies a standard that reflects normative assumptions as to the intensity of review that should prevail in ordinary public law cases. It is expressive of the intrinsic deference[12] that should be afforded to the administration. Where there are no infirmities relating to propriety of purpose or relevancy, the court should only intervene if the decision was so unreasonable that no reasonable body would have made it.

Standard of review: substantive variation in meaning

The standard of review can be modified by more detailed specification, which can impact on the intensity with which it is applied. This can be exemplified by development of the arbitrary and capricious test in the USA, pursuant to the Administrative Procedure Act 1946, s. 706(2)(A). The meaning of the test changed over time. Space precludes detailed elaboration.[13] Suffice it to say for present purposes, that the courts initially interpreted the test narrowly, so as to require something extreme before they would intervene.[14] The catalyst for change came from the DC Circuit, where courts began to require more reasoned justification by the agency.[15]

[11] *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 K.B. 223.

[12] M. Elliott, "From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification", in H. Wilberg and M. Elliott (eds.), *The Scope and Intensity of Substantive Review, Traversing Taggart's Rainbow* (Hart, 2015), Ch. 4.

[13] A. Aman and W. Mayton, *Administrative Law* (West, 2nd ed, 2001), pp. 519-529; S. Breyer, R. Stewart, C. Sunstein and M. Spitzer, *Administrative Law and Regulatory Policy* (Aspen Law & Business, 5th ed, 2002), p. 415.

[14] M. Shapiro, "Codification of Administrative Law: The US and the Union" (1996) 2 E.L.J. 26 at 28.

[15] *Greater Boston Television Corp. v Federal Communications Commission* 444 F.2d 841, 850-53 (DC Cir 1970), cert denied 403 US 923 (1971); *Environmental Defense Fund Inc v Ruckelshaus* 439 F.2d 584 (DC Cir 1971); R. Stewart, "The Reformation of American Administrative Law" 88 Harv. L. Rev. 1667 (1975); A. Aman,

This theme was developed by the Supreme Court in *State Farm*,[16] which legitimated what became known as 'hard look' review. The case reveals the significance of reason giving in shaping the intensity of review, which will be considered below. However, the relevant point here is how this was built on substantive elaboration of the arbitrary and capricious test for review. The more detailed specification of what the test entailed drew on prior case law, but the Supreme Court wove this together in *State Farm*.

It began by noting that the scope of review under the arbitrary and capricious test was narrow and that the court should not substitute its decision for that of the agency. The Supreme Court then listed a plethora of factors that could render the decision arbitrary and capricious. Thus, the agency must examine the relevant data, and articulate a satisfactory explanation for its action, including a rational connection between the facts found and the choice made. The agency decision must be based on relevant and not irrelevant considerations. It would be arbitrary and capricious if the "agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise".[17] The agency decision should, moreover, not reveal any clear error of judgment.

There is debate as to how far the Supreme Court uses the hard look form of the arbitrary and capricious test, and how far it employs a less intensive form of this standard.[18] The apposite point is that detailed specification of the standard of review provided the foundation for more

"Administrative Law in a Global Era: Progress, Deregulatory Change & The Rise of the Administrative Presidency" 73 Corn. L. Rev. 1101 (1988).

[16] *Motor Vehicle Manufacturers Assn. v State Farm Mutual Automobile Insurance Co* 463 U.S. 29 (1983).

[17] *State Farm* 463 U.S. 29, 42-43

[18] J. Gersen and A. Vermeule, "Thin Rationality Review" 114 Mich. L. Rev. 1355 (2016).

intensive review. A court minded to intervene could readily find an infirmity listed by the Supreme Court to render the decision arbitrary and capricious.

Standard of review: adjectival variation in meaning

The preceding discussion leads to what can be termed 'adjectival variation' in the standard of review. This captures the common scenario whereby courts decide that the infringement of a standard should be harder/easier depending on the nature of the interest affected. The same idea can be captured through terms such as strict/less strict scrutiny, as exemplified by case law on discrimination.[19] The relevant issue is whether this should be regarded as variation in the standard of review, or merely in its applicability. There are arguments both ways.

The argument that it is variation in the standard of review is that such adjectival modification cannot be disaggregated from the substantive meaning of the standard of review in the respective situations. This is more especially so, given that adjectival variation commonly relates to the relative quantity of evidence required to prove the infirmity, and the seriousness of the error that must be found, the latter being exemplified by the requirement that the claimant show a 'manifest' error. This is reflected in the appellation for such variation. The terminology of 'sub-*Wednesbury*' is used for cases involving rights that require more exacting scrutiny,[20] while 'super-*Wednesbury*' is employed for cases concerning broad issues of macro socio-economic choice that require less exacting scrutiny,[21] although the terminology is not always used consistently by the courts.

[19] See, e.g., *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 W.L.R. 1681; *R (Carson)* v. *Secretary of State for Work and Pensions* [2006] 1 A.C. 173

[20] See, e.g., *R v Ministry of Defence, ex p Smith* [1996] Q.B. 571.

[21] See, e.g., *Nottinghamshire CC v Secretary of State for the Environment* [1986] A.C. 240.

The argument that this is merely variation in application is that the standard remains formally the same, the difference being the manner in which it is proven. It is, however, questionable whether the standard really does stay the 'same', and in any event this type of variation in 'application' is different from that discussed in the subsequent section, because it normally applies in all instances where the respective interests are in play. The variation is, in this sense, structurally built into the standard.

The argument that adjectival variation alters the standard itself is to be preferred. However, even if one takes the contrary view, such variation remains predicated on a normative determination that the respective interests warrant this differential adjectival standard.

Standard of review: variation in application

The chosen standard of review can vary in its application, with implications for the intensity of such review. This speaks to the distinction articulated by Mark Elliott between intrinsic and adjudicative deference. The former concerns the relative degree of deference that should be afforded to the primary decision-maker for a particular type of case by reason of the subject matter involved; it will be affected by "the normative significance of the value impacted by the impugned decision";[22] and will be relatively abstract in nature.[23] The latter is expressive of reasons for affording more fine-tuned calibration of the chosen standard. This is exemplified by the standard of review and its application in rights-based cases in the UK. Analogous techniques are evident in the EU.[24]

[22] Elliott, "From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification", p. 76.

[23] Elliott, "From Bifurcation to Calibration: Twin-Track Deference and the Culture of Justification", p. 81.

[24] P. Craig, *EU Administrative Law* (Oxford University Press, 3rd edn, 2018), Chs. 16, 19.

The UK uses a proportionality test for review under the Human Rights Act 1998. The paradigm case is a prima facie breach of a Convention right, to which the government proffers a defence. The Strasbourg Court requires proof that the government action constituted a proportionate response to the limitation of the right on a specified ground. The proportionality standard of review will commonly require strict scrutiny by the reviewing court, which embodies the normative assumption that rights should be carefully safeguarded.

There is, however, variance in the application of this standard. There are two principal rationales for doing so. Not all rights are regarded as equally important: thus, for example, a right to property is not as important as a right to life. Not all invasions of the same right are equally important: thus, for example, invocation of the right to free speech to protect the sale of pornography will not be treated as significant as curtailment of the right during elections.[25]

The UK courts have, therefore, developed tools that impact on the intensity of proportionality review in such cases, through according deference to the executive or legislature on epistemic, constitutional and institutional grounds, which has generated a significant body of valuable literature.[26] This article is, however, concerned with the overall architecture of considerations that affect the intensity of review, and space precludes detailed consideration of the literature on deference/respect. The salient point for present purposes is that adjudicative deference fine tunes the basic standard of proportionality review as it applies to rights-based cases, and in doing so affects the intensity of judicial review.

This is illustrative of a theme across the entire terrain of review. The wider the prima facie remit of the standard of review, the greater the need for modulation in its application, because the heterogeneity of cases that fall within the standard precludes a one size fits all

[25] Compare *Belfast City Council v Miss Behavin' Ltd* [2007] 1 W.L.R. 1420, and *R. (ProLife Alliance) v BBC* [2004] 1 A.C. 185.

[26] The literature is cited in P. Craig, *Administrative Law* (Sweet & Maxwell, 9th edn, 2021) Ch 20, fn 265.

answer. This begs the obvious question as to why the standard of review should not be fine-tuned, thereby alleviating the need for variance in application. This does occur, as exemplified by refinement in the standards of EU proportionality review. However, the HRA exemplifies the difficulty of fine tuning the standard itself. It would require demarcation of what rights should be regarded as more important, and which invasions of significant rights should be treated as more pressing, followed by specification of the distinctive standard of review for such cases. The difficulties of this exercise are self-evident.

Similar difficulties are evident in review for manifest error in EU law.[27] There is, as will be seen below, very considerable variation in the intensity of such review, with cases relating to risk regulation, rights and competition subject to far more exacting scrutiny. We then inquire why this has not generated a distinct standard of review for these cases. The difficulty resides in the formulation of a criterion that unites the cases where more intensive review applies, given that different factors have driven the courts in the three areas. It is, therefore, easier for courts to use the 'same' test, while imbuing it with greater force than hitherto.

Standard of review: variation and the burden and standard of proof

The intensity of judicial review can self-evidently be affected by shifting the burden of proof.[28] It can also be affected by the standard of proof imposed on the primary decision-maker. There are a range of such standards, including high degree of probability, probability, possibility, and

[27] Craig, *EU Administrative Law*, Ch. 15.

[28] See, e.g., *Director, Office of Workers' Compensation Programs, Department of Labor* v *Greenwich Collieries Director* 512 U.S. 267 (1994).

sufficiency of evidence.[29] It is common for the standard of proof to differ depending on the nature of the issue, as exemplified by the higher standards demanded in criminal as opposed to civil actions. The reviewing court will determine the standard of proof, subject to any specification by the legislature.

The standard of proof required of the primary decision-maker will frame the test for review applied by the court, but the latter is distinct from the former.[30] Thus, it might be decided that the standard of proof should be probability, such that a chemical could only be prohibited if it was probable that it would cause harm. This leaves open the standard to be applied by the reviewing court when determining whether the evidence sufficed to establish the requisite probability. This might, for example, be cast in terms of substantial evidence: the court would then consider whether the primary decision-maker had substantial evidence to justify the conclusion that there was a probability of the chemical causing harm. The standard of proof can impact on the relative intensity of judicial review. Thus, the higher the standard of proof, the more demanding will be application of the relevant standard of review to determine whether it has been met.

Standard of review and application: variation through reason giving and evidence

The intensity of review is markedly affected by the extent to which courts require reasons and evidence to sustain them, and how closely they assess this material. It drives adjectival

[29] The Administrative Procedure Act 1946, s.556(d) has been interpreted as establishing preponderance of evidence as the general standard of proof, *Steadman v SEC* 450 US 91 (1981); *Greenwich Collieries Director* 512 U.S. 267 (1994).

[30] See, Aman and Mayton *Administrative Law*, pp. 234-236; *Steadman* 450 US 91 (1981), for recognition of this distinction in US law.

variation in the test for review, and is important for the way in which a standard of review operates.

This is exemplified by transformation of the arbitrary and capricious test. Substantive variation in the meaning of this test went hand in hand with reason giving and review of evidence, as attested to by the nomenclature of 'hard look' used to describe the *State Farm* approach. It carries a duality of meaning, signifying that the court requires the agency to furnish reasons plus the evidence to substantiate them, and that the court subjects this to exacting scrutiny.

The significance of these considerations for the intensity of review is cast into sharp relief if we compare the hard look version of the arbitrary and capricious test to the UK *Wednesbury* test. The factors considered under the hard look test were set out above. They are, in reality, pretty close to the totality of the *Wednesbury* test, including relevancy and propriety of purpose and substantive unreasonableness. The intensity of review in the UK is, however, less intrusive than in the US under the hard look doctrine, and this difference resides in the greater willingness of the US courts to consider reason giving and provision of supporting evidence. The UK's reluctance to engage in a comparable manner is the result of reticence concerning a duty to give reasons, combined with reluctance to enforce the provision of evidentiary backup, as attested to by the difficulties concerning discovery/disclosure,[31] which reflect in turn concerns that this would unduly lengthen public law cases, and hence overburden the courts.

The way in which increased scrutiny over reasons and evidence can transform the intensity of review is also powerfully exemplified by review for manifest error in EU law. It is an independent ground for review, derived from French law. Cases involving socio-economic

[31] Craig, *Administrative Law*, Ch 27.

discretion initially involved very light touch review, with courts commonly disposing of the case very briefly. The ECJ drew on the duality of meaning inherent in the word manifest, and required claimants to show an error that was both extreme and evident on the face of the decision.[32] The intensity of review of discretionary decisions made pursuant to EU common policies has increased somewhat over time. However, cases involving fundamental rights, risk regulation and competition entail much more detailed scrutiny.[33] The variation in intensity is driven by the court's demand for greater specificity in reasons and supporting evidence, combined with close scrutiny of the agency's reasoning process.

The transformative nature of reason-giving and provision of evidence is apparent yet again in UK law concerning anxious scrutiny.[34] It was developed by the courts prior to the Human Rights Act 1998, and captures, in the words of Lord Bridge, the idea that a reviewing court should "be entitled to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines".[35] Anxious scrutiny furnished the platform for heightened reasonableness review for fundamental rights prior to the Human Rights Act 1998.[36] It has continued to be used post-HRA, providing close scrutiny of the factual assumptions underlying applicability of an HRA right. It has also been used to ensure searching proportionality review

[32] Craig, *EU Administrative Law*, Ch 15.

[33] See, e.g., Case T-13/99 *Pfizer Animal Health SA v Council* [2002] ECR II-3303; Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585; Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987; Cases C-402 and 415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351.

[34] P. Craig, "Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application" [2016] P.L. 60.

[35] *Budgaycay v Secretary of State* [1987] AC 514 at 531. See also, *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1495 at [7].

[36] *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 554.

of the balance struck by the initial decision-maker when applying a Convention right to the facts of the case. Anxious scrutiny continues to be used in other cases, most prominently those dealing with asylum and immigration.

Standard of review and application: variation, reviewing court and primary decision-maker

The intensity of judicial review can be affected by obligations placed on the primary decision-maker, as exemplified by the jurisprudence on hard look and anxious scrutiny. Thus, in a case decided contemporaneously to *State Farm*, the Supreme Court in *Baltimore Gas* employed the terminology of hard look, but used it to signify that the agency should take a hard look at the environmental consequences before taking a decision, while emphasizing that judicial review of scientific determinations should be deferential.[37] An analogous duality is evident in the context of anxious scrutiny, which can be applicable both to the agency when making the initial determination and to the court when exercising judicial review. When applied to the agency the focus is on care concerning the factual evaluation, and ensuring that it comports with the criteria in the legislation. When applied to the court it affects the intensity of review of the initial decision.

There are then logically four choices as to how these two levels interrelate. It might be decided that hard look/anxious scrutiny is not required by the initial decision-maker or the reviewing court, such that default lower intensity reasonableness review applies. The second choice is the converse of the first, viz that hard look/anxious scrutiny applies at both levels, albeit playing a different role at each level in the manner described above. It might, thirdly, be decided that anxious scrutiny should be demanded of the initial decision-maker, but not the

[37] *Baltimore Gas and Electric Co v NRDC* 462 US 87 (1983).

reviewing court. The fourth option is the converse of the third, which is that hard look/anxious scrutiny is not demanded of the initial decision-maker, but the court exercises more searching judicial review than is the norm. This is, however, inherently unstable, since if the public body knows that a court will use more searching judicial review to investigate its reasoning, then this will create a powerful incentive for the agency to use hard look/anxious scrutiny when making its decision, to safeguard itself against judicial challenge.

Two conclusions: legal and normative

The preceding analysis set out the considerations that impact on the intensity of judicial review. Two points can be made by way of conclusion, the first obvious, the second somewhat less so.

The first relates to positive law and is generally acknowledged. Courts have discretion. Individual judges do not always agree on the appropriate test for review. They do not necessarily agree on what a test for review demands in a particular case. Variance within legal systems is therefore to be expected.

The second point is normative, and less obvious. Let us assume a legal system in which there is general agreement about the principal values that inform the intensity of review, and the varying protection given to different interests. This may be effectuated through, inter alia, variation in the standard of review or its application. This does not, however, affect agreement concerning the appropriate degree of protection for different interests. Thus, other things being equal, the more general the standard of review, the more that will need to be done through variation in application; the more differentiated the standard of review, the less that needs to be modified in application. There is, however, no a priori reason why the former option involves choices that are less far reaching than the latter. To assume the contrary is fallacious and allows form to blind one to substance.

Proportionality: the conceptual boundary between standard and application

Marcus Teo contends that proportionality review should not be allowed to vary. His argument proceeds in three stages. It is premised on assumptions concerning the boundary between standards of review and their application; the centre piece is concerned with 'epistemic independence'; and the third stage consists of argument from case law, structure and coherence that are said to sustain that concerning epistemic independence. The following critique tracks these stages.

The argument

Teo distinguishes between 'application variability' and 'standard variability', which are said to correspond to Mark Elliot's distinction between adjudicative deference and intrinsic deference.[38] Teo argues that there is nothing untoward about 'application variability'. This is repeatedly labelled as "trivial" and/or "unremarkable",[39] connoting simply that proportionality can apply differently according to facts. 'Standard variability' connotes the extent to which the "justificatory standard at which each of proportionality's three enquiries is pitched can vary with context".[40] Teo contends that this is more contentious than variability in application, and should not be countenanced for proportionality review. There are four errors in this respect.

Application: variability in application is not trivial

[38] Elliott's distinction is in reality more nuanced, since intrinsic deference covers situations where the formal standard of review does not alter.

[39] Teo, "Proportionality as Epistemic Independence", pp. 248-251.

[40] Teo, "Proportionality as Epistemic Independence", p. 249.

Teo's assumption is that provided the formal test for review remains the same, any modification is variability in application, which is said to be trivial and unremarkable. This does not withstand examination.

There is a large literature concerning judicial deference/respect to the legislature and the executive,[41] which deals principally with 'application variability'. There is vibrant debate as to whether the courts should show adjudicative deference on epistemic, constitutional and institutional grounds. The contributions are rightly premised on the assumption that such variation raises important issues of principle, with a marked impact on outcome. It will come as a surprise to such scholars that their entire discourse is about variation that is trivial or unremarkable. Teo's argument that application is 'merely' concerned with the 'facts' is wrong, as is the argument that variation for 'context' is trivial and value free.

There is, moreover, no a priori reason why variation in intensity via application is necessarily less far-reaching than change in the standard itself. To assume the contrary is to succumb to the formalistic fallacy adumbrated above. This is exemplified by review for manifest error in EU law. The formal test for review remained the same, the variation operating via 'application'. This difference was, however, very significant and would not have been greater if the court had formally varied the standard of review. The reasons why it did not were discussed above.

Standard: variability in the standard of review is standard

Teo gives the impression that variation in the standard for review is unusual or radical. This is wrong. Variation in the standard of review is common in legal systems. Distinctions are drawn between the standard of review in rights and non-rights cases; as to the standard that should

[41] Craig, *Administrative Law* (Sweet & Maxwell, 9th edn, 2021) Ch 20, fn 265.

apply to discrimination cases concerning suspect categories, where strict scrutiny applies, with rationality review being the standard in other instances; distinctions are made that relate to the nature of the right; and they are drawn in relation to proportionality, as exemplified by EU law. There is nothing untoward in this, there is nothing unusual, there is nothing radical. To the contrary, such distinctions reflect normative assumptions as to the standard of review that should pertain for a particular interest. They thereby embody conclusions concerning the intrinsic deference deemed appropriate.

Standard: choice and variation, reasonableness and proportionality

The *Wednesbury* test is expressive of a standard of review, and requires manifest unreasonableness. It is not the natural meaning of the term reasonable. It was chosen because it reflects the deference that should be shown to the administration. Let us leave aside whether this is too narrow. Teo accepts with equanimity the legitimacy of this choice, indeed it is not even deemed worthy of mention.

However, if the same choice is expressed through proportionality it is regarded as suspect, radical and aberrant. There is no warrant for this differential treatment and none is provided. Thus, if a legal system applies proportionality to non-rights-based cases it would be natural to require manifest disproportionality, because this reflects the intrinsic deference that should be accorded to the administration.

Variability in standard and application of review: the respective content

The respective content of standard and application in Teo's analysis is unclear. He provides the following example of variability in application that is said to be trivial or unremarkable: "the more a decision infringes a fundamental right, the less deference courts should accord the

executive's views, making the decision easier to invalidate; conversely, the more the decision involves socio-economic policy, the more deference courts will accord, making it harder to invalidate".[42] We are told that variability in the standard of proportionality review entails, "whether the very justificatory standard its three inquiries are pitched at can change depending on the context",[43] but we are given no instance where this might bite.

The reason for this omission is not hard to divine. The nature of the interest affected is the common rationale for variation in the standard of review in pretty much every legal system. We are then asked to accept the following. It is unproblematic for the nature of the interest to impact on variability in application, but not for it to be recognized in variability in the standard of review. This is an untenable proposition.

This is in part because the former is not trivial and might entail just as much variation as the latter. It is in part because there are advantages in terms of transparency and normative clarity in using variability in the standard of review where feasible. It is in part yet again because variability in 'application' by rendering review 'harder' for certain interests commonly means that the claimant must show some manifest unreasonableness or disproportionality, thereby modifying the adjectival 'standard' of review. It is indeed difficult to understand what the adjective 'harder' connotes, which is distinct from the alternative adjective 'manifest', given that both capture the volume of evidence that must be presented and its seriousness. There is no virtue in insisting on a wilderness of individual decisions expressive of variable application, while ignoring the modified standard of review immanent in the courts' reasoning.

Proportionality: varying intensity and 'epistemic independence'

[42] Teo, "Proportionality as Epistemic Independence", p. 248.

[43] Teo, "Proportionality as Epistemic Independence", p. 249.

The argument

Teo's central argument against variability in the standard of proportionality review is based on epistemic independence, which is said to require that courts must "reach independent beliefs that the challenged decision is suitable, necessary, and fairly balanced, before holding it valid".[44]

Teo argues that epistemic independence requires that one must think for oneself based on first-order evidence when forming beliefs. It is said to be related to internalism, such that beliefs must be based on evidence accessible to the epistemic agent's mind. Epistemic independence is said to go beyond internalism by limiting the kinds of evidence that can support beliefs, such that the epistemically independent person must rely on first order reasons why something is true, and not merely reports about their existence.[45] For Teo, the court's primary aim is to critically assess the evidence and understand why it supports a particular conclusion concerning suitability, necessity, and fair balance.[46] Expert evidence from the executive can assist the court, but only in an advisory capacity, and the court must require the executive to explain its reasoning process in detail.

The conclusion that is said to follow is that "since proportionality as epistemic independence justification posits a single justificatory standard applicable across all contexts, it rejects standard variability",[47] although it is said to be consistent with variability in application.

[44] Teo, "Proportionality as Epistemic Independence", p. 253.

[45] Teo, "Proportionality as Epistemic Independence", p. 252.

[46] Teo, "Proportionality as Epistemic Independence", p. 253.

[47] Teo, "Proportionality as Epistemic Independence", p. 254.

Teo relies on complex philosophical argument. We should, however, be properly mindful of the fit, or lack thereof, with judicial review.

This is exemplified by philosophical debates between internalists and externalists.[48] Thus, the internalist epistemological claim that everything necessary to furnish 'justification' for a belief must reside in a person's consciousness, without resort to external factors, has no direct connection with what should be required by way of 'justification' when a court reviews an agency.

This is further exemplified in relation to epistemic independence. Thus, Teo contends that the court can be epistemically dependent, not independent, in the context of reasonableness review.[49] The very idea that heads of review can be thus divided and hermetically sealed in terms of epistemic independence/dependence does not withstand examination. The distinction is not sustainable on linguistic grounds since, as Teo acknowledges, suitability, necessity and reasonableness can bear different meanings.[50] It is not sustainable in terms of relative intensity of review, since this can vary for reasonableness and proportionality. It is not defensible in terms of the properties of the respective tests, since there is no a priori reason why an expert's view should receive any more or less weight when deciding whether action is suitable or whether it is reasonable.

[48] See, e.g, R. Feldman and E. Conee, "Internalism Defended" (2001) 38(1) Amer. Phil. Quart. 1; Internalism and Externalism in Epistemology | Internet Encyclopedia of Philosophy (utm.edu); Internalism - By Branch / Doctrine - The Basics of Philosophy (philosophybasics.com)

[49] Teo, "Proportionality as Epistemic Independence", pp. 254-255.

[50] Teo, "Proportionality as Epistemic Independence", p. 251.

Standard of review and judicial oversight: the general relationship

Teo's core argument misconceives the relationship between standards of review and the duties of the court when undertaking judicial review. The requirement of epistemic independence does not dictate or preclude any particular standard of review, nor does it dictate or preclude variation in any such standard. It does not dictate second orders issues concerning reason giving and the provision of evidence, nor does it prevent variation in such requirements.

We begin with recognition that variable standards of review are commonplace, and that this is exemplified by proportionality in EU law. It may be that courts have erred and not seen the inexorable logic of epistemic independence as explicated by Teo. It may, conversely, be because Teo misconceives the relationship between standards of review and the duties of courts that flow therefrom. The latter is indeed so for the following reason.

It is axiomatic that a standard of review is expressive of a normative judgment that a certain type of interest warrants a certain degree of protection. It speaks to the degree of oversight that is judicially warranted when courts review such interests. It embodies the relationship between the reviewing court and the primary decision-maker, by stipulating the relevant degree of scrutiny. It is also axiomatic that this normative evaluation will differ, which is precisely why we have varying standards of review. The stipulation that courts should form an independent belief in the epistemic sense does not dictate any particular standard of review. To contend to the contrary could lead to the nonsensical conclusion that epistemic independence requires courts to substitute judgment in all instances of judicial review.

The standard of review frames the duty of the court and shapes how it should be applied. Thus, let us assume that a legal system decides that for cases involving social, economic or political discretionary choice the standard should be manifest disproportionality. If we wish to use the language of epistemic independence, we then inquire what this demands of the court on the assumption that this is the standard of review. The court must grapple with the evidence,

and make its judgment as to whether the challenged action was necessary, suitable and proportionate, but it does so within the very frame that constitutes the standard of review chosen as normatively fitting for this type of case, which is expressive, inter alia, of the weight given to the views of the primary decision-maker. It is then for the reviewing court to decide whether the alleged infirmity reaches the level that can be described as manifestly disproportionate within this intellectual frame. The legal system will also decide how much disclosure and cross-examination to allow for the evidence to be revealed and tested, and this too may vary depending on the standard of review. There is then nothing whatsoever inconsistent between varying standards of judicial review and the concept of epistemic independence.

This can be further seen if we consider other grounds of review, such as review for error of law. The test for review reflects normative assumptions concerning the appropriate degree of judicial oversight. Some systems use correctness, some use reasonableness, some use an admixture of the two. If we use the language of epistemic independence, we then inquire what this demands of the reviewing court. The answer self-evidently depends on the choice made by the legal system. If it opts for a correctness test then the very meaning of the idea that an epistemic agent must have a justified belief concerning a particular issue will differ markedly than if it adopted a reasonableness test. To suggest the contrary would undermine the distinction between the two tests. No one has ever suggested that such duality offends any idea of epistemic independence, because it self-evidently does not. There is, by parity of reason, nothing untoward if a legal system decides for good normative reason to use different standards of proportionality review to address different types of decision.

Standard of review, application and judicial oversight: the general relationship

Teo contends that his concerns relating to epistemic independence and varying standards of review do not touch variability in application. This does not withstand examination. It will be

recalled that this includes variation judged by the nature of the interest, such that decisions concerning fundamental rights are accorded less deference and easier to invalidate, while decisions concerning socio-economic policy are afforded more deference and harder to invalidate.[51] The earlier discussion revealed the difficulty of regarding this as variability in application, rather than variability in standard.

However, even if one treats this as variability in application, the argument fails and is internally incoherent. If it is harder/easier to overturn a decision depending on the nature of the interest at stake, then this will by definition impact on the reasons that must be given, the evidence required, the scrutiny to which it is subject and what constitutes an 'independent belief' by the court that a particular decision is defensible. The very issues that were said to be invariable in the discussion of 'standards' of review, magically become open to the self-same variation provided only that we conceptualize this as going to 'application'.

This problem is not circumvented by regarding the interest affected as merely a 'relevant factor' that impacts on application of the standard of review.[52] To the contrary, this reinforces the flaw in the argument. This is in part because it is not just one factor, it is the principal driver for such variation. It is in part because the existence of other 'relevant' factors is irrelevant for these purposes. Their existence does not alter the fact that the considerations set out in the previous paragraph will vary, which is the very thing that is said not to be possible through variation in the standard of review. It is in part yet again because the very idea that variation in the standard of review, or its application, could be conditioned on factors that are not relevant is meaningless.

The reality is that Teo is caught between a rock and a hard place. He can try to sustain the argument that variation of review in accord with whether the interest affected is a right or

[51] Teo, "Proportionality as Epistemic Independence", p. 248.

[52] Teo, "Proportionality as Epistemic Independence", p. 254.

socio-economic interest does not entail variability in the meaning of justified/independent belief, which is untenable for the preceding reasons. However, insofar as he maintains this position he undermines his core argument. On this view, variation in 'application' based on the nature of the interest is regarded as trivial and unremarkable, with the consequence that proportionality can be accepted across the public law domain. We simply say that the proportionality test remains formally the 'same', but that it is 'harder' to prove for cases involving discretionary policy choices.

Standard of review and judicial oversight: proportionality and rights

Teo chooses to confine his analysis to proportionality outside the Human Rights Act 1998. However, he elaborates a theory about epistemic independence and proportionality. It is, therefore, important to test the conceptual fit between the thesis and the principal domain where proportionality is applied. Consider then the following related infirmities in the analysis.

Teo's central thesis is that the court must be epistemically independent, and form its own belief as to whether the contested action is necessary, suitable and balanced. However, we know from abundant HRA case law that courts show deference/respect on epistemic, constitutional and institutional grounds. There is then no warrant for claiming that epistemic independence is inconsistent with such deference in rights-based cases. There is a fortiori no warrant for suggesting that these same considerations should not shape the standard of review in non-rights cases. This is precisely what is done through manifest disproportionality, which reflects such considerations as they pertain in ordinary public law cases. The choice of this standard is not conjured from this air. To the contrary, it embodies these very considerations.

Teo's thesis is that there cannot be variation in the standard of proportionality review. Consider then a temporal sequence whereby review for manifest disproportionality in ordinary public law cases precedes proportionality in cases concerning rights. Teo's argument against

variability in the standard of review would mean that the latter could not be subject to stricter scrutiny than the former, which is nonsensical. The obvious answer is that the demands of epistemic independence would be viewed differently in the two domains, precisely because of the normative judgment that different degrees of scrutiny are warranted.

Standard of review and judicial oversight: proportionality and non-rights cases

Teo chooses to wear blinkers. An author's choice is self-evidently an author's choice, but it is nonetheless revealing. He ignores the fact that proportionability was a doctrine of UK law for 300 years in ordinary public law cases, with no adverse effect of the kind claimed by Teo;[53] and ignores also the fact that a varying standard of proportionality review has been used by the EU for 40 years. This jurisprudence provides the perfect template against which to test his argument. The reasoning concerning epistemic independence is conceptual. It is not system dependent. It is premised on the argument that such variability is inconsistent ipso facto with the role of the epistemic agent. If this is correct then the malaise should be palpably evident from this case law. We should then repair Teo's omission. The issue can be succinctly addressed. Consider EU law. There are two logical possibilities.

The first is that EU law does not use variable standards of proportionality review. This is wrong. The variability in the standard of proportionality review has been central for over 40 years.[54] The second possibility is that the EU courts have continually transgressed the ideal of independent belief articulated by Teo. This too is untenable. There has never been any suggestion that the variable standard of proportionality review entails any such systemic

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

[54] Craig, *EU Administrative Law*, Ch. 19.

infirmity. It does not, for the very reason given above. It is accepted that the court should make the ultimate decision whether a contested decision is proportionate. It is accepted that it should consider the reasons and underlying evidence. The EU courts do this in a structured and systematic manner. However, for cases concerning discretionary choice this occurs within the frame of manifest disproportionality, which is expressive of the normative judgment that this is fitting for such cases.

Standard of review and judicial oversight: reasonableness review

Teo contends that his arguments do not affect reasonableness review, insofar as variation in 'application' occurs in cases concerning rights or socio-economic interests. The difficulty of regarding such variation as merely going to 'application' has been addressed above. The argument is, however, problematic for a more fundamental reason, which concerns the base line standard of review. The point can be simply put.

The courts opted for the *Wednesbury* test. This choice was not pre-ordained, given that the UK had review for proportionability for 300 years, and given also that UK courts used different formulations of reasonableness review during 300 years.[55] It might be argued, in accord with Teo's reasoning, that reasonableness demands a single justificatory standard of review, and that the *Wednesbury* relationship between court and administration in terms of reasons, evidence, oversight and intensity of review could not differ from pre-existing forms of review.

The response is readily apparent. The courts opted for the *Wednesbury* test and adopted a standard of review that was felt warranted for ordinary public law cases, thereby expressing a normative judgment as to what should constitute the relationship between courts and

[55] P. Craig, "Reasonableness Review: An Historical Perspective", forthcoming.

administration. The test shapes what should be regarded as a justified belief by the court, and the degree of oversight of the agency's arguments for a decision to withstand scrutiny. This is so, without any further modification for cases concerned with rights or socio-economic interests. The fact that these considerations might play out differently in accord with a different form of reasonableness review, past or present, is no objection in this respect. The same analysis holds for proportionality review.

Standard of review, reasonableness and proportionality: conclusion

Teo's argument against a variable standard of proportionality review is wrong for the preceding reasons. This conclusion is reinforced by two related considerations.

The first is that it is perfectly fine for a legal system to render the 'applicability' of a test harder because of the nature of interest, but it cannot then express this through requiring manifest disproportionality. This is so notwithstanding the fact that the reasonableness standard is formulated so as to require manifest unreasonableness for the same cases.

The second consequence is a generalization from the first. State A uses a reasonableness test. It opts for a different standard of review for rights-based cases and non-rights-based cases, because it believes that this is normatively warranted. It expresses the latter through a default test that requires manifest reasonableness, which is what *Wednesbury* requires. State B uses a proportionality test. It opts for a different standard of review for rights-based and non-rights-based cases, because it believes that this is normatively warranted. It expresses the latter through a test that requires manifest disproportionality. State A's choice is regarded as unproblematic, State B's is regarded as off bounds.

Proportionality as a general ground of review: case law, structure and coherence

Teo's core conceptual argument that 'epistemic independence' precludes variable intensity proportionality review is wrong. He seeks to buttress his argument against proportionality as a general ground of review by three lines of argument.

Argument 1: case law

Teo argues that the case law 'proves' that there can be no variation in the standard of proportionality review. The argument is wrong for the following reasons.

First, Teo repeatedly confuses two distinct precepts: courts making the ultimate determination and courts substituting judgment. Courts make the ultimate determination in proportionality cases, but they do so in all instances, including in reasonableness cases; courts do not substitute judgment on the merits, in the sense of overturning the decision merely because they would have preferred a different outcome if they had been the primary decision-maker.

Secondly, proportionality is not a general head of review in public law cases. We do not know how the UK courts would apply proportionality if it were so regarded. We do know from UK legal history and from EU law that proportionality can have variable standards of review.

Thirdly, the existing HRA case law does not show that proportionality with varying standards of review is inconsistent with epistemic independence or internal justification. The case law embodies the normative judgment as to the standard of review that is fitting for this type of case. Thus, HRA proportionality review is prima facie strict and reflects the normative judgment that this is warranted for rights. It is noteworthy that even in such cases the courts

have made clear that they do not substitute judgment.[56] If proportionality were applied in non-rights cases, the primary decision-maker would assuredly have to present argument as to suitability, necessity and balance, which the court would then assess. This assessment would, however, be framed by the standard of review deemed appropriate for that type of case.

Finally, the case law clearly shows that there is variation of proportionality review within the HRA case law, as exemplified by the different tests applied in discrimination cases.[57] The standard of review is further moderated in its application by deference accorded on epistemic, constitutional and institutional grounds. Such variation in the application of a standard of review will necessarily impact on what is perceived to be a justified belief by the reviewing court. This is readily apparent. In Case A the court applies proportionality and decides that no deference is warranted. Case B is identical to Case A, but the court decides that deference is warranted on epistemic grounds. Case C is also identical, but the court decides that deference is warranted on constitutional grounds. In each case the court assesses whether the decision was proportionate. What the court would require to be thus satisfied in terms of evidence, proof and the relationship between court and primary decision-maker, is not, however, unchanging. To the contrary it will play out differently in each case, as a direct result of whether deference/respect is warranted, and if so on what grounds.

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

[57] See, e.g, *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 W.L.R. 1681; *R (Carson)* v. *Secretary of State for Work and Pensions* [2006] 1 A.C. 173; *In re G (Adoption: Unmarried Couple)* [2009] AC 173; *DA v Secretary of State for Work and Pensions* [2019] UKSC 21.

Argument 2: structure

Teo considers that the structure of proportionality, whereby matters are considered seriatim through the lens of necessity, suitability and balancing is a bad thing. Thus, we told that "proportionality necessarily excludes enquiries conceptually related to the legitimacy of executive decisions, and so promotes an indefensibly blinkered view of what legitimate administrative decision-making requires".[58] The conclusion is that an indeterminate criterion such as reasonableness is to be preferred. This is a far-reaching claim, which is conceptually and empirically unwarranted in equal measure.

Consider the conceptual dimension. The claim is that proportionality necessarily excludes inquiries relevant to the case, and that it is indefensibly blinkered. The reader might pause at this juncture, and rightly so, since the argument is clearly a non-sequitur. It entails the following reasoning: proportionality considers issues through the lens of necessity, suitability and balancing, and this is said necessarily to entail the preceding malaise. There is no warrant for this conceptually, and none is provided. This is readily apparent if we ask what is 'necessarily' lost through this 'indefensibly blinkered' view of decision-making. There is some hint that proportionality cannot deal with issues concerning under-inclusiveness. This is, however, clearly wrong. If a contested decision was thus tainted the argument would be addressed through suitability or balancing. There is some hint also that the structured proportionality inquiry cannot address matters that are polycentric in nature. This too is mistaken. Proportionality in HRA cases often deals with such issues without problem, as do the EU courts. It is assumed that necessity or suitability cannot accommodate multiple factors, which has no warrant conceptually and is belied by the case law. It is also assumed that merely

[58] Teo, "Proportionality as Epistemic Independence", p. 262.

because multiple factors are in play, it therefore follows that sequential reasoning is undesirable, which is equally unfounded.

Consider now the empirical dimension. The conceptual claim is far-reaching, and if correct it should be evident in case law. There is much jurisprudence to choose from in the UK, EU and elsewhere. We are, however, not provided with a single example of this infirmity. We are then asked to accept a far-reaching argument that is conceptually erroneous and empirically unfounded.

Argument 3: Coherence

Teo's third argument against variation in the standard of proportionality review concerns coherence. He contends that individual doctrines should have separate functions, otherwise they lose doctrinal coherence. Variation in the standard of proportionality review is said to reveal this malaise. The infirmity is said to reside in the fact that strict proportionality review ensures that the court understands and publicly reasons through the executive's arguments, while less strict proportionality review only institutes a reliability check of the executive's decision-making process.[59] Teo further contends that proponents of proportionality as a general standard of review gloss over the inquiry as to whether reasoned justification for administrative action is warranted, and that application of proportionality across the public law domain requires difficult line drawing as to when different standards of proportionality review should apply.[60]

This is a veritable litany of claims. They are wrong, and the errors are best revealed by disaggregating the different parts of the argument. This is more especially so because the

[59] Teo, "Proportionality as Epistemic Independence", p. 265.

[60] Teo, "Proportionality as Epistemic Independence", pp. 265-267.

second argument is inconsistent with earlier parts of Teo's analysis, and because arguments two and three below are mutually contradictory. The lesson is readily apparent. Do not make allegations concerning incoherence unless you are sure that they are correct, and sure also that the allegations do not exhibit this very malaise.

First, we begin with the most foundational issue: reasoned justification is central for all administrative decision-making, subject to suitable modification for different types of case. It is the very core of accountability.[61] Teo provides no argument as to why reasoned justification should not be regarded as central. There is none, subject to normal qualifiers in terms of justiciability and the like. Proportionality facilitates agency accountability by requiring it to specify why it felt that the challenged action was necessary, suitable and balanced. It fosters judicial accountability, by requiring courts to specify where the agency reasoning did not suffice. The sequential reasoning facilitates the balancing exercise, and renders it more targeted and accountable than the balancing that occurs in reasonableness review.

Secondly, there is no reason why deployment of proportionality across the public law domain is incoherent. Pause and reflect for a moment. Teo's analysis is premised on the assumption that it is perfectly coherent for reasonableness review to embrace a wide range of interests, and that differences based on the nature of the interest are trivial/unremarkable. We are, however, told that it is incoherent for proportionality to cover this same subject matter. There is no warrant for this. The core test remains the same, suitability, necessity and balancing. Different standards of proportionality review embody normative judgments as to the relative strictness of scrutiny that is warranted for that type of case. This distinguishing feature is commonplace in legal orders. The court will, as in the EU, ensure that it understands and reasons through the executive's arguments. The idea that the court will be satisfied with some

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

bare notion of reliability, whatsoever that might mean, simply betokens a lack of understanding of this jurisprudence.

Thirdly, there is the claim that variation in the standard of proportionality review leads to boundary problems because of difficulties of deciding on the criteria for the divide. Pause for a moment, and note the inconsistency between this argument and that which preceded it. Teo wishes to argue both that it is doctrinally incoherent to apply proportionality in rights and non-rights cases; and that it is doctrinally incoherent to apply different criteria to different cases because of boundary problems. You cannot play both sides of this intellectual street at the same time. There are, in any event, three related errors with the boundary problem argument.

Insofar as this is a problem, it is equally present if the system uses a combination of reasonableness and proportionality, since we still need to decide when the respective tests apply. Insofar as this is a problem, it is not obviated by insisting that the standard of review remains the same, while allowing variation in its application. The more general the standard of review, the more work will need to be done through differentiation in its application, since 'one size' does not fit all circumstances. This necessitates criteria to guide such differentiation, which entails consideration of the same factors that Teo regards as problematic when varying the standard of review. These factors will commonly become generalized and function as adjectival variance in the standard of review, thereby further undermining the argument that variance in application is fine, but variance in the standard is not. Insofar as this is a problem, it might be contended the courts should reason in a purely ad hoc manner. The resulting wilderness of single instances would, however, be problematic in terms of the rule of law. It would also, paradoxically, not resolve the underlying substantive issue, since a rational court would still make its individual decision by adverting to considerations that shape the intensity of review, even if these were not then elevated into a distinct standard of review, or even a notable contour in its application.

Conclusion

The intensity of judicial review is a central feature that permeates the entirety of public law. This article has sought to draw together the principal factors that shape the intensity with which judicial review is applied. This will be helpful in assessing the issue in different legal systems, even if the relative weight of the factors plays out differently as between legal orders. Insofar as it does, this is interesting from a comparative legal perspective.

The relative intensity of review is a factor in debates about proportionality, as attested to by the preceding discussion. There is, however, nothing in the concept of epistemic independence that precludes variation in the standard of proportionality review, and its application to ordinary public law cases. The argument to the contrary is premised on untenable assumptions concerning the divide between the standard of review and its application, combined with equally misconceived assumptions as to the relationship between standards of review and the role of the court when adjudicating thereon.