

THE DEADWEIGHT OF FORMULAE: WHAT MIGHT HAVE BEEN THE SECOND GERMANIZATION OF AMERICAN EQUAL PROTECTION REVIEW

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I. OCCASIONS FOR MISUNDERSTANDING

Judicial ingenuity is not assured by a rule of inalienability. On the contrary, as a public good, judicial doctrine is subject to a kind of non-rival consumption. Often, courts sense that it may be beneficial to adopt solutions or standards invented by judicial bodies in other countries, and they may then decide to incorporate these foreign standards into their own jurisprudence.¹ This relationship is seen in the interaction between truly inventive judges and more cautious judicial bodies. For instance, it seems as if the common vocabulary of modern human rights jurisprudence would not have been possible without examples from courts such as the German Federal Constitutional Court (the "German Court") and the mediating European Court of Human Rights.² These courts more or less set the tone that other courts, sometimes reluctantly, followed.³

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¹ The Supreme Court of the State of Israel is the most impressive example of such constitutional borrowing. Reading the opinions, one cannot but acknowledge that it is the most important comparative constitutional law institute of the world. Partly, this success stems from the the Court's practice of employing clerks from all over the world, who do the research work on their country of origin. On the development of the Court's basic rights jurisprudence, see David Kretzmer, *Democracy in the Jurisprudence of the Supreme Court of Israel*, 26 ISRAEL YEARBOOK ON HUMAN RIGHTS 267-88 (1996).

² See Manfred Stelzer, *Stand und Perspektiven des Grundrechtsschutzes*, in 75 JAHRE BUNDESVERFASSUNG 585, 586 (G. Scheffbeck ed. 1995); Joseph H.H. Weiler, *Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights*, in THE EUROPEAN UNION AND HUMAN RIGHTS 51, 53-55 (N. A. Neuwahl & A. Rosas eds., 1995). On the substantial convergence of the jurisprudence of courts, see ALEXANDER V. BRÜNNECK, VERFASSUNGSGERICHTSBARKEIT IN DEN WESTLICHEN DEMOKRATIEN. EIN SYSTEMATISCHER VERFASSUNGSVERGLEICH 125-32 (Baden-Baden: Nomos Verlagsgesellschaft 1992).

³ On the late Germanization and Europization of the jurisprudence of the Austrian Constitutional Court, see Alexander Somek, *Conflicting Conceptions of Higher Law: Austria and the European Trend in Judicial Review of Legislation*, in TOWARD A EUROPEAN IUS COMMUNE (A. M. Rabello ed., forthcoming 1999).

It must not be overlooked, however, that uninvited doctrinal takings, as an important subclass of constitutional borrowings, are subject to intrinsic constraints. After all, at least some requirement of national "fit," or specificity, ought to be expected. It is difficult to imagine, for example, that any court in the world could adopt the unique Austrian doctrine of "petrification" in allocating powers. The "petrification" doctrine is a truly esoteric doctrine arising from Austrian history and, as such, any foreign court flirting with its adoption would find itself, to say the least, exposed to great bewilderment.⁴ Conspicuous incommensurabilities aside, even feasible doctrinal takings arise from a specific tradition. A two-fold effect, therefore, is to be expected. First, as a result of grafting a piece of doctrine onto an established jurisprudential scheme, the latter must be restructured in order to introduce the new element. Second, by reacting to what is taken into it, the restructured jurisprudential context must also assimilate the alien doctrinal element. In this respect, doctrinal takings are subject, by their very nature, to reception failure, or, "creative destruction."⁵ The element taken from one constitutional tradition is reinterpreted from the perspective of the other. Ironically, the constitutional lender is compensated for its ingenuity by the borrower's lack of understanding, which is owed to the fact that the latter must carry the burden of its own constitutional past.

The above insights should be relatively familiar to those who have reflected on the basic insights of hermeneutics. As we shall see, however, the subject matter becomes more engaging when constitutional borrowings involve simultaneous *external* and *internal* references. Such dual references exist where a court uses a foreign example to expand the scope of its own evolving doctrine. From the outset, then, the reference to an external example is intended to bridge the gap in the development and clarification of internal, homemade classifications. The external element provides what appears to be a missing link, or, borrowing from bio-technical jargon, the genetic "vector" required for the transmission.

The interaction of *external* and *internal* references involved in the process of doctrinal evolution opens a field of new possibilities, the results of which may be remarkable. With constitutional borrowing,

⁴ According to the "petrification theory," undefined words and phrases of the Constitution have to be construed with precise reference to the content of regulations, below the level of constitutional law, in existence at the time of its adoption. See Ewald Wiederin, *Anmerkungen zur Versteinerungstheorie*, in *FESTSCHRIFT GÜNTHER WINKLER* 1231-32 (E. Wiederin et al. eds., 1997). The basic idea is that when the constitutional law-makers said that the federal legislature shall have power to regulate all "private law" relationships, "private law" meant the type of regulations contained in the civil code in force at the time this provision of the Constitution was enacted.

⁵ Readers might notice the self-reference. The metaphor is taken from Schumpeter's characterization of economic competition and applied in a different context. Its meaning is thereby altered. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 81 (4th ed. 1975).

the original, once-singular doctrinal context of the lender transforms into a maze of interpretations by the borrower, resulting in communication between sometimes incommensurate categories.⁶ It is no wonder that academic observers are sometimes left in a quandary. Such observers might be forced to admit that a constitutional borrowing may render an entire doctrinal context obscure.

II. THE MALAISE OF A PECULIAR GERMAN ESTEEM FOR A SPECIFIC COMPONENT OF AMERICAN CONSTITUTIONAL LAW

Even inventive judicial bodies, such as the German Court,⁷ occa-

⁶ For heuristic purposes, this article will distinguish three effects that we are likely to attribute to constitutional borrowing. First, there is the *happy case*, clearly cherished by Whig historians and their modern successors. In such a happy case scenario, constitutional borrowings are depicted as instances of a world-wide expansion of liberty and the rule of law. Hence, once borrowings attain a certain level of consolidation they are referred to as "historical influences" or lines of historical development. One of the most obvious examples, the Eighth Amendment to the United States Constitution, corresponds almost word-for-word with an existing provision in the English Bill of Rights of 1689 "that excessive bail ought not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." As is well known, a similar comparison could be made between the Second Amendment to the United States Constitution and the provision of the English Bill of Rights granting the right to "have arms to their defense, suitable to their conditions and as allowed by law."

Second, there is the *more complicated case*. This represents the standard or default case of constitutional borrowing. Not surprisingly, it is marked by an interaction or even a conflict between different constitutional cultures. One need not be a student of philosophical hermeneutics in order to understand that the borrowing of a certain component of constitutional law does not leave its meaning unaffected. On the other hand, the integration of a foreign component into a domestic constitutional context also has an impact on the latter. There is a subtle and, indeed, unpredictable interaction between the borrowed element and the receiving context. However, what distinguishes this second case from the third is that, after a period of mutual adaptation, a constitutional culture may finally arrive at novel and, more or less, stable meanings. The transformation of the American rational basis test into the German arbitrariness standards exemplifies this process of mutual adaptation and subsequent consolidation.

Third, there is what I would like to refer to as the *unremittingly confusing case*. In this third type of case, constitutional borrowing may eventually give rise to settled practice of constitutional law, but this practice cannot be conceived of as a practice of constitutional interpretation. This article does not claim that the resulting practice of constitutional law does not lend itself to description; yet it cannot be described in the terms of the application of a legal rule, since the borrowing is the source of a relentless conflict of interpretations. As is well known, a practice of following a normative directive exists only if it is fortified by a unified account of what it means to follow such a directive. There is, however, no straightforward way to follow a rule, since the communal practice of following a rule, as we are told by the champions of legal positivism, presupposes a critical reflective attitude on the part of those monitoring its application. If, however, the accounts given from such a reflective perspective are invariably in opposition to each other, we are committed to embrace the conclusion that, even in spite of an incessant reference to certain directives, there is no single rule governing the practice. Although the ongoing practice may be described in various ways and involves certain regularities, it cannot be described in the terms of following a rule of law. If constitutional borrowing is involved in bringing about such a situation, we are confronted with an unremittingly confusing case. It is not just that the borrowed element and the receiving context change their meanings in the process of merging into a different kind of practice. Instead, in such a case, both the borrowed element and the receiving context are in danger of losing their meaning altogether.

⁷ See DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 340

sionally use foreign examples in their decisions. One specific example concerns the apparently straightforward design of different standards of general equal protection review. In the 1980s, the German Court began borrowing from the United States Supreme Court's equal protection jurisprudence.⁸ This instance of borrowing is particularly intriguing since what initially was perceived to be an Americanization of German doctrinal standards now may be understood as a mere extension of one of the most prominent principles of the German Court's homemade jurisprudence.

At least on its own account, with an eye to "quasi-suspect" differential treatment of groups, the German Court now applies the proportionality principle to equal protection review.⁹ This doctrinal transformation, however, was mainly carried out on the formulaic level of judicial review. Upon closer inspection, it appears that there is a shrouded disparity between what the German Court claims to do and what it actually does.

In the end, a borrowing that was meant to consolidate a confounded field of precedents is now open to at least three conflicting interpretations. According to the first interpretation, the German Court successfully engaged in an Americanization of German doctrine. For the sake of distinction, this article will refer to this first interpretation as the "comparative account."¹⁰ According to the second interpretation, the German Court did indeed introduce the proportionality test into its equal protection review. This article terms this second interpretation the "official account," for it conforms to what the German Court, at least its First Senate, claims to be doing.¹¹ According to the third interpretation, which this article terms the "die-hard account," nothing (or only very little) has changed.¹²

This article will defend a version of the die-hard account that resonates with a justifiable skepticism for the process of constitutional borrowing. Such skepticism stems from the inherent inconsistencies in the application of borrowed constitutional doctrine as revealed by a critical reading of relevant precedents.¹³ In practice, the German

(1994) [hereinafter CURRIE, THE CONSTITUTION] (discussing the implementation of competing interests in German constitutional jurisprudence).

⁸ See *infra* section III.

⁹ See *infra* text accompanying notes 169-172 (explaining that the reasons for a differential treatment of groups must have sufficient weight).

¹⁰ See, e.g., Konrad Hesse, *Der Gleichheitssatz in der neueren deutschen Verfassungsentwicklung*, 109 ARCHIV DES ÖFFENTLICHEN RECHTS 174, 188-89 (1984) [hereinafter Hesse, *Der Gleichheitssatz*].

¹¹ See notably BVerfGE 88, 87 (97). For hornbook expositions of that account, see BODO PIEROTH & BERNHARD SCHLINK, GRUNDRECHTE. STAATSRECHT II 103-04 (RZ 438-40) (Heidelberg: C.F. Müller 13th ed. 1997); GERRIT MANSSEN, 2 STAATSRECHT: GRUNDRECHTSDOGMATIK 207-09 (RZ 700-11) (Franz Vahlen 1995).

¹² See, e.g., Werner Heun, *Art. 3*, in GRUNDGESETZ, 228, 246 (RZ 28) (H. Dreier ed., Tübingen: Mohr & Siebeck 1996); ALBERT BLECKMANN, DIE STRUKTUR DES ALLGEMEINEN GLEICHHEITSSATZES 88 (Carl Heymann 1995).

¹³ See *infra* section XV.

Court has attempted to apply borrowed constitutional provisions in such a manner that routinely falls short of meeting the German Court's idealized approach to equal protection review. Thus, the following analysis of the evolution of equal protection review doctrine is in essence a story about formulae and their failure to instruct.¹⁴ A close reading of the German Court's tinkering with purportedly different but nevertheless similar standards of equal protection review reveals that constitutional borrowings based on generalities are likely to miss their target. The article also strives to offer a better understanding of the implications of the judicial administration of formulae regarding the power it confers on those who substitute self-made guidelines for what the people, however naively, take to be higher law.¹⁵ For our purposes, it is most convenient to begin with the comparative account in order to most effectively contrast the die-hard account with the other two other accounts.

III. THE COMPARATIVE ACCOUNT

According to most commentators, general equal protection review in the Federal Republic of Germany has undergone significant changes in the last few years.¹⁶ The German Court's review method appears to shift from the traditional arbitrariness standard (*Willkürverbot*)¹⁷ to a two-tiered form of review that resembles the American model established and sustained in such leading cases as *Korematsu v. United States*¹⁸ and *Regents of the Univ. of California v. Bakke*.¹⁹ Konrad

¹⁴ See ROBERT F. NAGEL, CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 151-53 (1989) (discussing the formulaic style of the U.S. Supreme Court in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), in which the Court examined the application of the Equal Protection Clause to race-based classifications).

¹⁵ See *id.* at 127, 135 (emphasizing the influence of the U.S. Supreme Court's powerful "style of expression" on people's interpretation of authority).

¹⁶ See, e.g., HANS D. JARASS & BODO PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 86, 96-97 (Munich: C.H. Beck 3d ed. 1995); Konrad Hesse, *Der allgemeine Gleichheitssatz in der neueren Rechtsprechung des Bundesverfassungsgerichts zur Rechtssetzungsgleichheit, in* WEGE UND VERFAHREN DES VERFASSUNGSLEBENS 121-31 (Festschrift Peter Lerche) (P. Badura & R. Scholz eds., Munich: C.H. Beck 1993) [hereinafter Hesse, *Der allgemeine Gleichheitssatz*]; Manfred Gubelt, *Art. 3 Gleichheit*, in 1 GRUNDGESETZ-KOMMENTAR 219, 231 (Ingo Von Münch & Philip Kunig eds., Munich: C.H. Beck, 4th ed. 1992); Friedrich Schoch, *Der Gleichheitssatz*, 103 DEUTSCHES VERWALTUNGSBLATT 863, 875-876 (1988); Gerhard Robbers, *Der Gleichheitssatz*, in 41 DIE ÖFFENTLICHE VERWALTUNG 749, 751-752 (1988); Rainald Maaß, *Die neuere Rechtsprechung des BVerfG zum allgemeinen Gleichheitssatz — Ein Neuansatz?*, in NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 14 (1988); Hesse, *Der Gleichheitssatz*, *supra* note 10, at 188-89.

¹⁷ Currie translates "*Willkürverbot*" as "arbitrariness standard." See David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333, 369 (Gerhard Casper & Dennis J. Hutchinson eds., 1990) [hereinafter Currie, *Lochner Abroad*] (discussing the tendency to replace the arbitrariness standard with "sufficient to justify"). On the role of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), see John Galotto, *Strict Scrutiny for Gender, Via Croson*, 93 COLUM. L. REV. 508, 513 (1993) discussing footnote four as the Court's first attempt to reconcile the Equal Protection Clause as an "edict prohibiting race discrimination" and as a standard based on legislative means and ends.

¹⁸ See 323 U.S. 214 (1944) (evaluating the constitutionality of an exclusion order). On the

Hesse, a former member of the German Court, suggests that the Court's evolving equal protection doctrine is best understood by considering the basic American pattern.²⁰ According to Hesse, the long-established standard, similar to the principle governing American rational basis review, that the legislature should not act arbitrarily vis-à-vis its citizens is now supplemented with a more searching inquiry in cases where government action "threatens to upset basic conditions of human existence and conduct."²¹ According to the comparative account, the German Court adopted the United States Supreme Court's distinctive levels of scrutiny as its model for review analysis.²² Recent judicial decisions reinforce this account.²³ Undeniably, the comparative account has its virtues; one being the sense of unity it lends to an otherwise confusing body of precedents.²⁴ It seems as if the German Court, in particular its First Senate,²⁵ repeatedly employs a "formula" that explicitly distinguishes between normal and heightened equal protection scrutiny.²⁶ However, the German Court, at least according to its official account, assimilated the "American" distinction between different levels of equal protection scrutiny into its matrix of domestic constitutional doctrine by incorporating the proportionality principle (*Verhältnismäßigkeitsprinzip*) into its upper tier.²⁷ It therefore appears as if the borrowing of a prominent theory developed by the United States Supreme Court was superseded by the amendment of a domestic principle alien to the American strict equal protection scrutiny based upon suspect classifications.²⁸ Rather than

role of *United States v. Caroline Prods. Co.*, 304 U.S. 144, 152 n. 4 (1938), see Galotto, *supra* note 17, at 513-14.

¹⁹ See 438 U.S. 265 (1978) (applying equal protection analysis to classifications based on race).

²⁰ See Hesse, *Der allgemeine Gleichheitssatz*, *supra* note 16, at 197.

²¹ See *id.* at 131.

²² See Maaß, *supra* note 16, at 17.

²³ See *id.* at 17-18.

²⁴ See Hesse, *Der allgemeine Gleichheitssatz*, *supra* note 16, at 123, 125-26.

²⁵ The Second Senate followed the formula only occasionally and with reluctance. See BVerfGE 75, 108 (157); BVerfGE 76, 256 (329-30); BVerfGE 78, 249 (287); BVerfGE 92, 277 (218).

²⁶ The American courts have developed a two- and three-tier equal protection review. See Gerald Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1, 8-10 (1972) [hereinafter Gunther, *In Search of Evolving Doctrine*] (discussing the strict scrutiny in 'new' equal protection vs. the minimal scrutiny in 'old' equal protection); GERALD GUNTHER, *CONSTITUTIONAL LAW* 587-91 (11th ed. 1985); JUDITH A. BAER, *EQUALITY UNDER THE CONSTITUTION: RECLAIMING THE FOURTEENTH AMENDMENT* 112-13 (1983) (discussing the "roots of suspect class"); Galotto, *supra* note 17, at 513-18 (discussing the development of the different standards of review beginning with *Caroline Products* and following through to affirmative action cases).

²⁷ This is true in the eyes of one dissenting judge and most of the commentators. See BVerfGE 74, 9 (28) (Katzenstein, J., dissenting); Gubelt, *supra* note 16, at 231; PIEROTH & SCHLINK, *supra* note 11, at 104; Maaß, *supra* note 16, at 16-17; Robbers, *supra* note 16, at 751-52; Hesse, *Der allgemeine Gleichheitssatz*, *supra* note 16, at 123.

²⁸ See Frank I. Michelman, *Foreward, On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 33-34 (1969) (identifying the government's implication in systematic inequality where the government acts to 'classify[]' persons so as to extend to them unequal

importing the distinctive level of scrutiny model, the new standard, instead, is similar to the American "fundamental interest" approach.²⁹

To date, because implementation of the new standard has not yet become a routine practice of the German Court, despite its statement of formulae, the importance of the standard has also not been firmly established.³⁰ According to defenders of the die-hard account, characterizing the new standard as an "Americanization" of general equal protection review encourages the myopic views of those who cling to formulae.³¹ Thus, a great deal of German substantive equal protection doctrine is still inclined to downplay the impact of the more recent formula of review³² and to propose review standards that are only partially supported by precedent.³³

A remarkable facet of this conflict in interpretation is the fact that the development of the new formula of review took shape from within an Americanized field. Although German constitutional law already reflected the different strands of equal protection review, the German Court reintroduced the American distinction into a field already built on the American model. In sections four through nine, this article will first provide a brief sketch of the period before the alleged second Americanization took place, then the article will turn to the evolution of what is now known as the "New Formula." The two final sections will address why the skeptical version of the die-hard account is the most convincing.

IV. THE ESTABLISHED UPPER TIER: ARTICLE 3(3) OF THE BASIC LAW

treatments").

²⁹ See *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("[We] have treated as presumptively invidious those classifications that . . . impinge upon the exercise of a 'fundamental right.'"). One may have reason to doubt, however, whether the relevant string of precedents is adequately understood by claiming that it represents equal protection scrutiny. See Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1078, 1081 (1979) (discussing cases that had nothing to do with equal protection and the imposition of a negative condition).

³⁰ See Hesse, *Der Gleichheitssatz*, *supra* note 10, at 191.

³¹ See, e.g., Heun, *supra* note 12, at 246.

³² See *id.* at 243. See also Paul Kirchhof, *Der allgemeine Gleichheitssatz*, in 5 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 837, 934-36, 947-48 (Josef Isensee & Paul Kirchhof eds. 1992); Ekkehart Stein, *Art. 3 (Gleichheit vor dem Gesetz)*, in 1 ALTERNATIVKOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND 306 (E. Denninger, et al., Neuwid: Luchterhand, 2d ed. 1989) [hereinafter Stein, *Art. 3*]; Christoph Gusy, *Der Gleichheitssatz*, 41 NEUE JURISTISCHE WOCHENSCHRIFT 2505 (1988). As Currie correctly observes, the list of suspect classifications is longer than the United States' list. See CURRIE, *THE CONSTITUTION*, *supra* note 7, at 324.

³³ See STEFAN HUSTER, *RECHTE UND ZIELE. ZUR DOGMATIK DES ALLGEMEINEN GLEICHHEITSSATZES* 226-42 (Berlin: Duncker & Humblot 1993) [hereinafter HUSTER, *RECHTE UND ZIELE*]. For a brief exposition of the basic ideas expressed in this book, see Stefan Huster, *Gleichheit und Verhältnismäßigkeit: Der allgemeine Gleichheitssatz als Eingriffsrecht*, 11 JURISTENZEITUNG 541 (1994) [hereinafter Huster, *Gleichheit und Verhältnismäßigkeit*].

In cases pertaining to Article 3, § 3 of the German Constitution, termed the Basic Law (*Grundgesetz*) of the Federal Republic of Germany,³⁴ the German Court has, more or less consistently, appealed to heightened scrutiny. In contrast to the German Equal Protection Clause of Article 3, § 1, which provides generally that "all persons shall be equal before the law,"³⁵ Article 3, § 3 expressly prohibits, in particular, any adverse or preferential treatment on the basis of sex, birth, race, language, national or social origin, faith, or political opinion.³⁶ An amendment passed in 1994 affords special protection to persons suffering from mental or physical disabilities.³⁷ In addition to Article 3, the Basic Law contains additional, special equal protection clauses, including provisions for the following: equality of the rights and duties of citizenship (Article 33, § 1);³⁸ a guarantee of the equal access to public office (Article 33, §2);³⁹ voting equality (Article 38, §1);⁴⁰ and equality of religious confessions and congregations (Article 4, §§ 1 & 2).⁴¹ The German Court does not immediately consider legislative classifications in violation of these provisions to be facially invalid,⁴² but instead, subjects such classifications to a more

³⁴ See THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY 14 (Bonn: Press and Information Office of the Federal Government, 1989) (English translation of the German constitution) [hereinafter THE BASIC LAW]; see also, the translation found in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 227 (U. Karpen, ed., 1988).

³⁵ See THE BASIC LAW, *supra* note 34, at 14.

³⁶ See *id.* at 14 ("No one may be disadvantaged or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.").

³⁷ The second sentence of Art. 3 § 3 of the Basic Law reads: "No one may be disadvantaged because of a handicap."

³⁸ See THE BASIC LAW, *supra* note 34, at 28 ("Every German shall have in every Land the same political (staatsbuergerlich) rights and duties.").

³⁹ See *id.* ("Every German shall be equally eligible for any public office according to his aptitude, qualifications and professional achievements.").

⁴⁰ See *id.* at 30 ("The deputies to the German Bundestag shall be elected in general, direct, free, equal and secret elections. They shall be representatives of the whole people, not bound by orders and instructions, and shall be subject only to their conscience.").

⁴¹ See *id.* at 14-15 ("Freedom of faith, of conscience, and freedom to profess a religion or a particular philosophy (Weltanschauung) shall be inviolable[.] The undisturbed practice of religion shall be guaranteed."). See also, CURRIE, THE CONSTITUTION, *supra* note 7, at 323 (offering an overview of the Basic Law). For an extensive commentary, see Günter Dürig, Art. 3 § 1, in 1 GRUNDGESETZ 301-30 (RZ 30-196) (Theodore Maunz et al. eds., Munich: C.H. Beck, 7th ed. 1994). On the affirmative duty of treating men and women alike, see the study by Ute Sacksofsky, DAS GRUNDRECHT AUF GLEICHBERECHTIGUNG. EINE RECHTSDOGMATISCHE UNTERSUCHUNG ZU ARTIKEL 3 ABSATZ 2 DES GRUNDGESETZES (Baden-Baden: Nomos, 1991).

⁴² If such legislative classifications were considered automatically invalid on their face, Art. 3, § 3 would amount to what Sunstein refers to as a "rights-constraint" on government's preferences. See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1704 (1984).

Under this approach, the category of rights would create a shield of private autonomy into which the government could not intrude, regardless of the reasons for the attempted intrusion. As a result, invalidation would be automatic, and heightened scrutiny unnecessary.

penetrating review.⁴³ This closer scrutiny is applied by the German Court, in particular, where legislative classifications draw on the essentially immutable characteristics enumerated in Article 3, § 3.⁴⁴ With respect to gender discrimination, Article 3, § 3 is generally construed as strictly prohibiting all differential treatment and, therefore, the provision is understood to screen out some illegitimate ends of government action.⁴⁵ When faced with a legislative classification that involves the immutable characteristics listed in Article 3, § 3, the German Court regularly subjects the "suspect" classification to a means-ends test. This test is designed to ascertain whether the differential treatment either follows from the application of a different criterion⁴⁶ that would turn the suspect classification into a "proxy." Alternatively, the test seeks to determine whether the differentiation follows from a reflection of differences firmly rooted in the "nature of things," rather than from prejudice or "archaic and overbroad generalizations."⁴⁷ The latter test was applied in a case dealing with a stat-

Id.

⁴³ Strict scrutiny is applied because the Basic Law itself seems to have established the relevant criteria for equal treatment. See e.g., Hesse, *Der Gleichheitssatz*, *supra* note 10, at 184. For cases and commentary on the equal right to vote and political participation, see, for example, BVerfGE 4, 375 (384); BVerfGE 51, 222 (235-236); BVerfGE 71, 81 (96). See also, HUSTER, RECHTE UND ZIELE, *supra* note 33, at 352-56; Hans Herbert von Arnim, *Der strenge und der formale Gleichheitssatz*, 37 DIE ÖFFENTLICHE VERWALTUNG 85-92 (1984). No clear doctrine governing all kinds of cases can be articulated, however. Initially, what may be termed "causality review" provided a common theme, indicating that a regulation is constitutionally void only if the trait mentioned in Art. 3, § 3 is the "cause" of discrimination. See JARASS & PIEROTH, *supra* note 16, at 113, 121; Gubelt, *supra* note 16, at 294-95. On the severe problems and, hence, gradual demise of this kind of review, see Heun, *supra* note 12, at 286-87 (RZ 105-110).

⁴⁴ See Currie, *Lochner Abroad*, *supra* note 17, at 364 n. 239. Currie correctly attests that scrutiny has been truly strict only with respect to gender classifications, even though not always "fatal in fact." For commentary on the relatively low level of protection afforded to political opinion, see Heun, *supra* note 12, at 290 (RZ 119); CURRIE, THE CONSTITUTION, *supra* note 7, at 325-28.

⁴⁵ See PIEROTH & SCHLINK, *supra* note 11, at 106 (RZ 447); Gubelt, *supra* note 16, at 294. Some commentators place the emphasis on the means and hold that some criteria of differentiation are prohibited by the Constitution. See, e.g., Stein, *supra* note 32, at 342; Gusy, *supra* note 32, at 2508. See generally, Sunstein, *supra* note 42, at 1715.

⁴⁶ See, e.g., BVerfGE 3, 225 (241); BVerfGE 57, 335 (342-343). It remains unclear whether this principle applies only to statutes that are discriminatory on their face or also to statutes that are facially neutral (and therefore involve an "indirect discrimination"). For an account of this discussion, see Heun, *supra* note 12, at 281. The U.S. Supreme Court has applied different standards to facially-neutral statutes with a racially disproportionate impact and to statutes that contain provisions of equal, but separate treatment for each race. Compare *Washington v. Davis*, 426 U.S. 229 (1976) (holding that a racially disparate impact does not render a statute per se unconstitutional) with *Loving v. Virginia*, 388 U.S. 1 (1967) (noting the fact of equal but separate application of a statute to different races does not immunize a statute from the heavy burden of justification that the Fourteenth Amendment requires of state statutes drawn according to race).

⁴⁷ See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (invalidating the social security system provision that differentiated among covered employees based solely on sex. The distinction was based on the archaic and overbroad generalization not tolerated under the U.S. Constitution, that male workers' earnings, unlike those of female workers, are vital to their families' support); *Califano v. Goldfarb*, 430 U.S. 199 (1977) (striking down a gender-based provision in

ute that banned women from working during the night.⁴⁸ At the outset of the opinion, the German Court proclaimed that Art. 3, § 3 forbids the attachment of unequal legal consequences to gender-specific classifications.⁴⁹ In marked contrast to previous decisions in which regulations, discriminatory on their face, were upheld unless there was proof of a discriminatory purpose,⁵⁰ the Court has inaugurated the principle that differential treatment of men and women cannot pass constitutional muster, even if such differentiation functions as a means in pursuit of some beneficial and legitimate goal.⁵¹ In its overall design, the Court's methodology effectively elevated to the level of strict scrutiny what the United States Supreme Court previously developed, in such cases as *Rostker v. Goldberg*⁵² or *Michael M. v. Sonoma County Super. Ct.*,⁵³ as intermediate review for gender classifications⁵⁴ based upon alleged natural differences. In contrast to the United States Supreme Court's intermediate review standard for gender classifications, the German Court held that in the absence of a relevant functional⁵⁵ or biological difference, only a compelling state interest, and not simply an important one,⁵⁶ could justify the unequal treatment of men and women, provided that the regulatory means were sufficiently narrowly tailored to that end.⁵⁷

a federal benefits program that awarded earnings of a deceased husband to his widow but paid out benefits only if the husband was receiving one-half of his support from his deceased wife). See also, BVerfGE 87, 234 (258); BVerfGE 92, 91 (109).

⁴⁸ See BVerfGE 85, 191 (206).

⁴⁹ See *id.*

⁵⁰ See, e.g., BVerfGE 75, 40 (69-70); see also CURRIE, THE CONSTITUTION, *supra* note 7, at 329.

⁵¹ See BVerfGE 85, 191 (206). On this change, see JARASS & PIEROTH, *supra* note 16, at 121-22; but see, Heun, *supra* note 12, at 280 (RZ 94).

⁵² See *Rostker v. Goldberg*, 453 U.S. 57, 83 (1981) (concluding that "Congress acted well within its constitutional authority when it authorized the registration of men, and not women, under the Military Selective Service Act). In comparison, the German Court has underscored that alleged "real" differences are only acceptable when they are formulated with reference to biological and functional characteristics. See, e.g., BVerfGE 10, 59 (74); BVerfGE 71, 224 (229).

⁵³ See *Michael M. v. Sonoma County Super. Ct.*, 450 U.S. 464, (1981) (sustaining the California statutory rape law that punished the male and not the female on the grounds that equal protection does not require things that women as a group, unlike men, "are not eligible for combat").

⁵⁴ See *Craig v. Boren*, 429 U.S. 190 (1975) (noting that to withstand constitutional challenge, classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives). See Currie, *Lochner Abroad*, *supra* note 17 (noting that a "compelling" reason is required to justify sex discrimination); Galotto, *supra* note 17 (detailing the development of intermediate scrutiny). For a more detailed analysis, see Hartwin Bungert, *Gleichberechtigung von Mann und Frau im amerikanischen und im deutschen Verfassungsrecht*, 89 ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT 441-465 (1990).

⁵⁵ On the problems resulting from the resort to "functional differences," which are likely to engender traditional stereotypes, see Currie, *Lochner Abroad*, *supra* note 17, at 365 and Heun, *supra* note 12, at 283 (RZ 99).

⁵⁶ The idea is that such a compelling interest, such as protecting the pregnant or regulating birth, can only be pursued by making a gender-specific distinction. See Heun, *supra* note 12, at 282.

⁵⁷ Since the purpose for the gender-specific differentiation must be narrowly tailored, it follows that it may concern problems arising "by their very nature" only with respect to women or

In a case before it, the German Court conceded that banning employees from working during the night would promote the end of protecting employee health; the means chosen, however, exempted men, and due to that underinclusive "fit," the statute, the Court held, had a discriminatory impact on women.⁵⁸ Moreover, the additional arbitrary purpose of preventing women from bearing the double burden of working during the night and taking care of children during the day, was sought by an inappropriate means, since this additional burden would also fall on men who were raising children.⁵⁹ It should be noted that this is not the only case in which the Court's arguments focused on whether the means chosen by the legislature were rationally related (*geeignet*) and, in light of less burdensome alternatives, necessary (*erforderlich*) in order to advance the policy in question.⁶⁰ This article will return later to the conundrum in which the *rational relationship* requirement, in addition to the requirement of *necessity* of the means used toward the attainment of the end, represent two components of the proportionality principle (*Grundsatz der Verhältnismäßigkeit*) employed by the German Court.⁶¹ However, the third component of the proportionality principle, the requirement of *proportionality in a narrow sense*, which would apparently require balancing⁶² the weight of the governmental interest against the constitutional standard on non-discrimination,⁶³ was conspicuous by its absence in the case reviewing the law banning women from working at night.⁶⁴ Unlike a decision by the Austrian Constitutional Court,

men. See BVerfGE 92, 91 (109). It must be noted, however, that equality may need to yield to other constitutional principles, such as the restriction of compulsory military service to men. See THE BASIC LAW, *supra* note 34, art. 12a(1), at 18 ("Men who have attained the age of eighteen years may be required to serve in the Armed Forces, the Federal Border Guard, or in a civil defence organization.").

⁵⁸ See BVerfGE 85, 191 (208); cf. BVerfGE 92, 91 (109-11) (invalidating a statute in which the duty of serving as a fire-worker was only imposed on men).

⁵⁹ See BVerfGE 85, 191 (208-209).

⁶⁰ See generally, Gubelt, *supra* note 16, at 240.

⁶¹ The proportionality principle plays a prominent role in German constitutional rights jurisprudence, but is generally unknown in American constitutional law. Those who have "discovered" this principle in American constitutional law have either come from a Germanic background or are familiar with German constitutional scholarship. See generally, Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 422-24 (1995) (discussing that the Court's scrutiny of provisions to ensure that the proposed law meets with requirements of due process is essentially a proportionately principle analysis); CURRIE, THE CONSTITUTION, *supra* note 7, at 340; Currie, *Lochner Abroad*, *supra* note 17, at 354, 361; WINFRIED BRUGGER, GRUNDRECHTE UND VERFASSUNGSGERICHTSBARKEIT IN DEN VEREINIGTEN STAATEN VON AMERIKA 40-43 (Tübingen: J.C.B. Mohr, 1987). For an implicit acknowledgment, see JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 105-06 (1980).

⁶² For an account of balancing in the domain of constitutionally protected liberties (*Freiheitsrechte*), see Rudolf Wendt, *Der Garantiegehalt der Grundrechte und das Übermaßverbot. Zur maßstabsetzenden Kraft der Grundrechte in der Übermaßprüfung*, in 104 ARCHIV DES ÖFFENTLICHEN RECHTS 414, 448-74 (1979).

⁶³ For such a model, see Huster, *Gleichheit und Verhältnismäßigkeit*, *supra* note 33, at 544-46.

⁶⁴ Scholars do not for the most part question whether a full test of proportionality is indeed

which upheld a similar over- and under-inclusive statute on the ground that under present conditions, the objective of protecting working-class women carried more weight than the desire to treat them like men,⁶⁵ the German Court performed no such balancing. Instead, the German Court merely scrutinized whether the statute established a "tight fit" between a compelling interest and the means utilized to satisfy it. Finding that the relationship was too loose, the German Court struck down the statute.⁶⁶

V. ALWAYS AND ALREADY AMERICAN: THE ARBITRARINESS STANDARD

Aside from the strict scrutiny test applied in cases pertaining to Article 3(3),⁶⁷ it seemed for a long time as if the general Equal Protection Clause found in Article 39(1) would, for reasons of judicial restraint, support nothing other than a rational basis test.⁶⁸ The rational basis test was first introduced by the German Court under the tenet of constitutionally safeguarding against legislative "arbitrariness."⁶⁹ The German Court's first decision in 1951 established what later came to be known as "the arbitrariness standard" (*Willkürverbot*). The standard provides that the Equal Protection Clause is violated if a sound reason—a reason that reflects the nature of things or is otherwise substantially plausible—in favor of a legislative differentiation cannot be discovered. In short, the Equal Protection Clause is violated if the provision must be regarded as arbitrary.⁷⁰

Before turning to a discussion of the arbitrariness standard, it is important to note that the American doctrine of Equal Protection, as

articulated. Sometimes, it is simply held that there be a "proportional relationship" between the goal and the criterion of differentiation. See, e.g., Gubelt, *supra* note 16, at 240; Stein, *supra* note 32, at 328-29. Huster alone has consistently examined what is really going on behind the veil of formulae. See Huster, *Gleichheit und Verhältnismäßigkeit*, *supra* note 33, at 543-44.

⁶⁵ See VfSlg. 13038/1992 and the prior decision in VfSlg. 11774/1988.

⁶⁶ This strategy of avoiding the delicate issue of directly pitting the governmental purpose against some standard of non-discrimination, as examined in Gunther, *In Search of Evolving Doctrine*, *supra* note 26, at 22-23, might even be present in the "painstaking" review deployed by Justice O'Connor in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989). Although putting enormous strain on the prior discrimination requirement, Justice O'Connor never attacked affirmative action as an exception to equal treatment, however passionately she may have scrutinized the means giving it effect. It should be noted, however, that the principle implicit in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), that remedial action may be taken in response to past discrimination by the state, provided such action does not impose too heavy a burden on innocent victims, is in the course of Justice O'Connor's argument transformed into a principle of retribution, under which the extent of past discrimination determines the remedial measure to be taken.

⁶⁷ For the same conclusion, see Hesse, *Der Gleichheitssatz*, *supra* note 10, at 184.

⁶⁸ See *id.* at 197; Hesse, *Der allgemeine Gleichheitssatz*, *supra* note 16, at 127.

⁶⁹ For an historical account, see Hesse, *Der Gleichheitssatz*, *supra* note 10, at 178, 186; HUSTER, RECHTE UND ZIELE, *supra* note 33, at 45-48.

⁷⁰ See 52 BVerfGE 1, 14 (52).

developed at the turn of this century,⁷¹ had some impact on its gestation. The arbitrariness standard originally appeared in writings of the constitutional scholar Gerhard Leibholz,⁷² first published during the period of the Weimar Republic. Although his ideas gave rise to a heated debate among constitutional scholars, they had no impact on the practice of the State Court (*Staatsgerichtshof*), which refused to submit acts of the legislature to judicial scrutiny on Equal Protection grounds. After the Second World War, however, Leibholz himself was appointed to the German Court, and there can be no doubt that his early scholarship left a discernable imprint on the judicial practice of the 1950s. In fact, it seems almost as if the German Court had simply transferred his early interpretation of Art. 109(1) of the Weimar *Reichsverfassung* to Article 3(1) of the new Basic Law.⁷³ Leibholz's seminal conception was influenced to some degree by comparative studies of the relevant Swiss and American doctrines.⁷⁴ Thus, it appears, at least in retrospect, that the Americanization of German equal protection review preceded the enactment of the Basic Law.

Leibholz's account of general equal protection rests on the distinction between "inaccurate" and "arbitrary" legislation.⁷⁵ A statute is "inaccurately" drafted if the resulting unequal or equal treatment of persons or states of affairs is over- or underinclusive. Mere inaccuracy, as Leibholz explains, is not violative of equal protection; it amounts to nothing more than a question of legal policy.⁷⁶ Under certain conditions, however, a classification or distinction must be regarded as arbitrary, meaning that the statutory provision is unconstitutional and void. According to Leibholz, some of the instances in which a statutory classification is unmistakably arbitrary may have a familiar ring to Americans.⁷⁷ A statute is arbitrary if: (1) no sound reason can be discovered in support of the classification; (2) the relevant state of affairs is incompatible with the legal consequence attached to it; or (3) there is no "internal relationship" between the unequal treatment and the goal pursued by the legislature or if that relationship is too tenuous as to warrant a rational relationship of

⁷¹ For an articulation of the rational basis test, see *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911). "One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Id.* (citations omitted). See also, *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412 (1920) (explaining that a classification must not be arbitrary and must be based on a difference having a "fair and substantial relationship" to a legislative objective).

⁷² See GERHARD LEIBHOLZ, *DIE GLEICHHEIT VOR DEM GESETZ: EINE STUDIE AUF RECHTSVERGLEICHENDER UND RECHTSPHILOSOPHISCHER GRUNDLAGE* (1959) [hereinafter LEIBHOLZ, *DIE GLEICHHEIT VOR DEM GESETZ*]. For the influence of Heinrich Triepel's ideas, see Hesse, *Der Gleichheitssatz*, *supra* note 10, at 178, 186.

⁷³ See THE BASIC LAW, *supra* note 34, at 14 ("All persons shall be equal before the law.").

⁷⁴ See LEIBHOLZ, *DIE GLEICHHEIT VOR DEM GESETZ*, *supra* note 72, at 36-38, 79-81.

⁷⁵ See *id.* at 75.

⁷⁶ See *id.*

⁷⁷ See *id.*

means and ends.⁷⁸ The similarity of this arbitrariness test to the American rationality review is fairly obvious.⁷⁹

VI. A COMMON THEME: MERE RATIONALITY

To be sure, in the hands of the German Court, the arbitrariness standard has taken on a life of its own. Although influential, Leibholz's text did not acquire a canonical form. The narrow focus on arbitrariness, however, has in effect likened the arbitrariness principle to rational basis review. A reading of the arbitrariness standard as based on American rational basis review is supported by a considerable string of precedents to be found in the practice of the German Court.⁸⁰

Above all, one may construe the rational basis requirement and the arbitrariness standard in such a way so as to define the ultimate limits of the legislature's freedom to sort out relevant characteristics of persons⁸¹ in its pursuit of some constitutionally-permissible goal.⁸² This interpretive option is endorsed by those German constitutional scholars who contend that the German Court is not authorized to interfere with legislative value choices based on arbitrary considerations of justice.⁸³ According to this view, the legislature faces few obstacles in furthering legitimate purposes via statutes based on some rational criterion of unequal treatment.⁸⁴ Inasmuch as the use of certain criteria (such as race or gender) is not proscribed by the German Constitution itself,⁸⁵ they argue, the only limitation afforded by general equal protection doctrine consists of the appropriate, though loose, fit between such a criterion, the classificatory means, and the permissible goal.⁸⁶ The fact that these same authors sometimes look for

⁷⁸ See *id.*

⁷⁹ For a discussion of how this type of review operates in the context of several clauses of the Constitution, see Sunstein, *supra* note 42, at 1695-98 (discussing the baseline requirement prohibiting naked preferences). See also Robert W. Bennett, "Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory, 67 CAL. L. REV. 1049 (1979) (discussing the limits of legitimate legislative purposes).

⁸⁰ See Heun, *supra* note 12, at 247 (RZ 29). Accordingly, any unequal treatment has been supported by "the nature of things" or some other plausible reason. See BVerfGE 1, 4 (52); 61, 138 (147); 89, 132 (141); 81, 1 (23).

⁸¹ These characteristics include the "role" according to which human beings are treated differently. See, e.g., Gusy, *supra* note 32, at 2506; Stein, *supra* note 32 at 320.

⁸² See, e.g., BVerfGE 9, 201 (206).

⁸³ See Stein, *supra* note 32, at 322; Gusy, *supra* note 32, at 2506.

⁸⁴ See Stein, *supra* note 32, at 327-29.

⁸⁵ See Gusy, *supra* note 32, at 2507-08; see also, Gubelt, *supra* note 16, at 235-37 (emphasizing that according to this approach the rational basis test can identify three legislative failures; the choice of a constitutionally impermissible goal, the use of an impermissible criterion, and the inappropriateness of the means with respect to the purpose). For an earlier account, see ADALBERT PODLECH, GEHALT UND FUNKTION DES ALLGEMEINEN VERFASSUNGSRECHTLICHEN GLEICHHEITSSATZES 110-117 (1971).

⁸⁶ See Wolfgang R fner, Art. 3 § 1, in 1 BONNER KOMMENTAR ZUM GRUNDGESETZ 26-27 (RZ 31) (Dolzer & Vogel, eds., Heidelberg: C.F. M ller, 73rd ed. 1995); Kirchhof, *supra* note 32, at

guidance from such ambiguous concepts as "the basic values of the Constitution,"⁸⁷ eventually likens this restrictive reading of equal protection⁸⁸ to the broader approach taken in the German Court's decisions.⁸⁹

Nevertheless, such a perspective on equal protection can find support in jurisprudence on both sides of the Atlantic. Accordingly, the boundary drawn by general equal protection is marked by what is "evidently" arbitrary,⁹⁰ or, to use the terms of the United States Supreme Court in *Mathews v. DeCastro*,⁹¹ by what is "clearly wrong, a display of arbitrary power, not an exercise of judgment."⁹² Put in positive terms, legislation will be upheld if one can reasonably conceive of a set of facts which constitute a distinction⁹³ and the fit between means and ends is "at least debatable"⁹⁴ or can conceivably be supported by one sound reason, regardless of the quality of that reason.⁹⁵ Both the German Court and the United States Supreme Court announced that the question of control over whether the legislation has settled on the most rational and just solution is not of their concern.⁹⁶ Accordingly, just as the German Court has been criticized for relaxing the arbitrariness standard,⁹⁷ likewise, in the United States, rational basis review⁹⁸ has been attacked for lacking the appropriate "bite."⁹⁹

845 (RZ 34); Stein, *supra* note 32, at 323-24; Gusy, *supra* note 32, at 2508.

⁸⁷ See Gubelt, *supra* note 16, at 239; Stein, *supra* note 32, at 327-28.

⁸⁸ For a thoroughly deferential approach, see Gusy, *supra* note 32, at 2507-08.

⁸⁹ See *infra*, section IX.

⁹⁰ See BVerfGE 12, 326 (333); BVerfGE 17, 318 (330); BVerfGE 18, 121 (124); BVerfGE 23, 50, (60); BVerfGE 50, 177 (191); BVerfGE 52, 277 (281). For an account, see Dürig, *supra* note 41, at 238-45 (RZ 275-284).

⁹¹ See 429 U.S. 181, 185 (1976).

⁹² *Id.*

⁹³ See *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1980).

⁹⁴ See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) ("Here the discrimination against residents is not invidious . . . because . . . it rests . . . upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy, which the state is not prohibited from . . . classifying." (referring to *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153-54 (1938))).

⁹⁵ See, e.g., BVerfGE 17, 122 (130); BVerfGE 33, 44 (51). For further references, see Kirchhof, *supra* note 32, at 943-44 (RZ 236).

⁹⁶ See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980) (explaining in dictum that, in cases involving social and economic benefits, the Court has consistently refused to invalidate on equal protection grounds legislation that is deemed unwise or inartfully drawn); *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979); BVerfGE 17, 311 (330); BVerfGE 33, 44, (52); BVerfGE 50, 177 (191); BVerfGE 53, 313 (330).

⁹⁷ See HUSTER, RECHTE UND ZIELE, *supra* note 33, at 51-53.

⁹⁸ See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). For a more recent case, see *Nordlinger v. Hahn*, 112 S.Ct. 2326, 2329 (1992) explaining that the "Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification."

⁹⁹ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1445-1446 (2d ed. 1988) (criticizing the Court's reluctance to explicitly recognize new categories of classifications and discussing the danger of leaving them to be determined by rational basis review). For a political criticism of German practice, see DIETER-DIRK HARTMANN, *WILLKÜRVERBOT UND GLEICHHEITSGEBOT* 41-43 (1972); see also, Hans-Peter Schneider, *Eigenart und Funktionen der*

In the United States, notable exceptions, however, include *Reed v. Reed*¹⁰⁰ and *Metropolitan Life Insurance Co. v. Ward*.¹⁰¹ As Cass Sunstein observed:

It merely requires something other than raw political power to justify an exercise of authority. In most respects, this is a trivial constraint, for almost any decision can be justified by reference to some public value. One might, for example, support preferential treatment of the poor on the ground that they have a special need for public assistance; preferential treatment of the rich might be justified on the ground that it provides incentives for more work and investment . . . Everything, in short, is at least potentially lawful.¹⁰²

In practice, however, subject matter also impacts whether or not a low level of scrutiny is applied.¹⁰³ Generally, courts are more reluctant to examine legislative decisions in areas involving economic policy, public spending, and budgetary planning than in other areas.¹⁰⁴

Nonetheless, considering the vast array of subject matters open to equal protection examination, it is quite reasonable to demand that the arbitrariness standard and rational basis review be raised to some

Grundrechte im demokratischen Verfassungsstaat, in GRUNDRECHTE ALS FUNDAMENT DER DEMOKRATIE 11, 23 (J. Perels, ed., Frankfurt/Main: Suhrkamp, 1979).

¹⁰⁰ See 404 U.S. 71 (1971) (holding a probate provision giving preference to men over women violated the Equal Protection Clause).

¹⁰¹ See 470 U.S. 869 (1985) (holding that an Alabama statute imposing substantially lower taxes on in-state insurance companies than on out-of-state insurance companies violated the Equal Protection Clause).

¹⁰² Sunstein, *supra* note 42, at 1698.

¹⁰³ See generally, Heun, *supra* note 12, at 247 (RZ 29); BVerfGE 88, 87 (96); BVerfGE 91, 346 (363).

¹⁰⁴ See *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (applying rational basis scrutiny to legislative decisions to increase property taxes and noting the presumption of constitutionality of such decisions); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 885 (1985) (O'Connor, J., dissenting); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980) (notwithstanding classifications created by legislative decision to change eligibility criteria for pension benefits, the decision only triggers low level scrutiny); *Madden v. Kentucky*, 309 U.S. 83, 88 (1940); BVerfGE 11, 50, at 60; BVerfGE 18, 315, (331); BVerfGE 29, 402, (411); BVerfGE 60, 16, (42-43); BVerfGE 61, 43, (63); Rüfner, *supra* note 86, at 109 (RZ 198); KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* 190, n. 89 (RZ 439) (Heidelberg: Müller Verl., 20th ed. 1995) [hereinafter Hesse, *GRUNDZÜGE DES VERFASSUNGSRECHTS*]; see also, Gubelt, *supra* note 16, at 237-38; BRUGGER, *supra* note 61, at 162-71. As the Supreme Court has recently affirmed in *FCC v. Beach Communications Inc.*, 113 S.Ct. 2096, 2101-2 (1993):

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification . . . [W]e never require a legislature to articulate its reasons for enacting a statute.

Currie, however, correctly observes that in the area of taxation and welfare benefits judicial review by the German Court is far less moderate than it is by the Supreme Court. See Currie, *Lochner Abroad*, *supra* note 17, at 369. Apart from the protection of the family afforded by Article 6, Article 3 § 1 of the Basic Law also ensures the most important basic rights for the control of legislation in the area of taxation. See also Heun, *supra* note 12, at 265 (RZ 65).

higher level of scrutiny as well. In light of the general elusiveness of means-ends relationships, the bite of equal protection may be reinforced by introducing what Justice Stevens has described as the "requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class."¹⁰⁵ A collapse into a more or less outspoken balancing¹⁰⁶ is one of two conceivable paths of which a more resolute enforcement of the arbitrariness standard might conceivably take, and, indeed, has taken, at least in the Federal Republic of Germany.¹⁰⁷ The other conceivable path introduces substantive justice as one of the components of the means-ends test. The first path, as adapted in Germany, assesses the overall appropriateness of legislation, despite the fact that the Court cannot officially resort to superlegislating, whereas the second path represents a preferred version of the resolute arbitrariness standard.¹⁰⁸

VII. THE CLOSET RESOLUTE ARBITRARINESS STANDARD: BALANCING

One can readily observe balancing at an early stage in the life of the arbitrariness standard,¹⁰⁹ although the German Court has not followed this course of decision making consistently. For example, in 1964, the German Court reviewed a statute that deprived tenants of the usual protection against a landlord's capricious lease terminations in situations where the tenants' building was devoted for such "public purposes" as supplying a workplace for public officials. The German Court held that the statute did not violate the Equal Protec-

¹⁰⁵ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring). For a reconstruction of the conception of deliberation at the bottom of modern representative systems, see Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 49-55 (1982).

¹⁰⁶ See generally, TRIBE, *supra* note 99, at 1444-45 (explaining that the majority in *Plyler v. Doe*, 457 U.S. 202 (1982), "treated the rationality standard as a balancing test of sorts"). For an interesting account of the fundamental rights branch of American equal protection review, see Cass Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1168-69 (1982). Sunstein argued:

The 'fundamental rights' branch of Equal Protection is self-consciously designed to prohibit states from drawing impermissible lines with respect to rights that the Due Process Clause does not substantively protect. For example, discrimination with respect to the right to vote and the right to appeal is prohibited, even though the states may eliminate both rights. Similarly, the Court has barred distinctions affecting the right to marry and the right to procreate while assuming that those rights are substantively unprotected by the Due Process Clause.

Id.

¹⁰⁷ See *infra* section VII.

¹⁰⁸ See *infra* section VIII.

¹⁰⁹ See BVerfGE 9, 20 (31) (establishing the relevant standard after an assessment of the consequences); BVerfGE 50, 177 (191). On striking the right balance between administrative convenience and the burden imposed, see BVerfGE 29, 402 (411); Heun, *supra* note 12, at 248.

tion Clause of Article 3, § 1.¹¹⁰ The argument supporting the statute stated simply that the public interest must be balanced against the tenants' interest in remaining in their residences. When government officials need office space, the Court held, the public interest will prevail.¹¹¹ In crafting this argument, the Court looked to civil law, which provided that landlords could recover rented apartments for their own residential use.¹¹² Interestingly, the Court reasoned that landlords and the state, as the owners of public buildings, with respect to the civil law standard of "own residential use," were analogous. Hence, the situation involving tenants who were adversely affected by a landlord's decision to terminate their leases was to be regarded in the same manner.¹¹³

While the comparison made in this case was elusively and unsoundly argued, it demonstrates how the factors the German Court purports to determine as relevant criteria of equal treatment indeed can be forged from balancing, or by engaging in review of "proportionality in a narrow sense." Instead of reasoning in the manner it did, the Court first should have introduced a general criterion which grants landlords a right¹¹⁴ to recover premises for their own residential use. The Court then should have asked the question whether the circumstances of private landlords and the state can reasonably be compared. Yet in this case, the facile appeal to equality, although initially based on an appealing desire to balance public gains and private burdens, obscured a manifest difference in the interests affected.¹¹⁵ Substantively, the Court never asked the critical question of whether public and private landlords are truly analogous. Instead, the Court merely assumed that such a criterion of equal treatment existed. In doing so, the Court failed to recognize that the criterion itself was constructed from the process of balancing the state interest against the burden imposed on tenants.

There is a reason why some judicial arguments that begin by following the "balancing path" occasionally end up by following the second, or "adoption of a criterion of substantive justice" path. The long dominant idea that equality, in contrast to basic liberties, is devoid of a *yielding baseline*¹¹⁶ reflects this shift in analytical transition. Against this background, a judicial approach to equal protection, which balances the benefits of government action against the burdens imposed by such action seems out of place. Therefore, prior to the emergence of the New Formula, precedents such as the case dis-

¹¹⁰ BVerfGE 18, 121 (124).

¹¹¹ See *id.* at 124-25.

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 556-58, 565 (1982).

¹¹⁵ See *id.* at 585-86 (making a similar observation).

¹¹⁶ See *id.* at 562-64.

cussed,¹¹⁷ if the balancing test had been detected at all, were likely to be discounted as mere aberrations.¹¹⁸ The following section seeks to explain why this perception would have prevailed.

VIII. THE RECEIVED DISTINCTION BETWEEN BASIC LIBERTIES AND EQUAL PROTECTION

According to well-established German, as well as American¹¹⁹ constitutional doctrine, almost all rights and liberties—the noteworthy exception being “human dignity” in Article 1 of the German Basic Law¹²⁰—may lawfully be infringed or compromised by the legislature if the legislative action is based on a legitimate government interest. Even basic rights, therefore, are not absolute. As discussed above, however, in order to survive judicial review, the legislative infringement of such rights must satisfy the proportionality principle. The third component of this principle, “proportionality in a narrow sense,” is generally understood as requiring the Court to balance the weight of the governmental interest against the interests protected by the constitutional right.¹²¹ Basic constitutional rights, according to the third component of the proportionality principle, avail over a specific “scope of protection” (*Schutzbereich*). A determination of the right’s “scope of protection” with respect to a particular individual is arrived at by evaluating the individual’s interest in the state of affairs in question or by evaluating the individual’s opportunity to engage in certain forms of conduct.¹²² As it is understood, the scope of protection is susceptible to a description that refers to some prototype of human activity or makes reference to some state of affairs or legal institutions protected by the right.¹²³ In the process of balancing, the scope of protection afforded an individual’s basic right may ultimately need to surrender to the opposing governmental interest. Provided that the governmental interest is pursued by rational means, the scope of protection for an individual’s basic right is taken to de-

¹¹⁷ See BverfGE 18, 121 (124).

¹¹⁸ See CURRIE, THE CONSTITUTION, *supra* note 7, at 335. According to Currie, however, there is a long-standing tradition of exercising strict scrutiny in the area of taxation. Moreover, statutes were struck down on the ground of the severity of impact. See *id.* at 333-34. Currie overlooks, however, the fact that the appearance of strict scrutiny is owed to the means-scrutiny exercised in the application of criteria of justice, such as the principle of “ability to pay” (*Leistungsfähigkeitsprinzip*). See Heun, *supra* note 12, at 266.

¹¹⁹ See, e.g., Levy, *supra* note 61, at 422-24; Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 1012, 1061-63 (1979).

¹²⁰ See PIEROTH & SCHLINK, *supra* note 11, at 83.

¹²¹ See Wendt, *supra* note 62, at 448-74.

¹²² See *id.* at 436-38.

¹²³ See Peter Lerche, *Grundrechtlicher Schutzbereich, Grundrechtsprägung und Grundrechtsschranke*, in 5 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 739, 748-50 (J. Isensee & Paul Kirchhof, eds., Heidelberg: C.F. Müller 1992).

fine the "yielding baseline" of the right.¹²⁴ Accordingly, in the sphere of rights and liberties, the "yielding" and the "definite" baseline (*Schutzbereich* and *aktueller Garantiebereich*) may legitimately differ.¹²⁵ The "definite" baseline of the right is determined through the application of the principle of proportionality.¹²⁶ The protection of rights and liberties does not presuppose any comparisons between persons and groups, since with respect to the yielding baseline one can ascertain whether the government has infringed upon, or indeed violated, a right. Within this context of yielding and definite baselines, proportionality in a narrow sense—proportionality proper—demands that any adverse impact of a legislative action be proportional to the beneficial ends of that action.¹²⁷

Against this conceptual background, the perceived distinction between rights and liberties on the one hand, and equality on the other, amounts to the following:¹²⁸ Regardless of the interests, activities or state of affairs adversely affected, equality is relevant to all kinds of governmental activity. Hence, equal protection analysis differs from the basic tripartite structure of right, burden, and proportionality.¹²⁹

First, unlike other basic rights and liberties, the right to equality does not have a scope of protection that would lend itself to a description of a naturally given or legally constituted state of affairs or some prototype of human activity.¹³⁰ The right to equality at its core is a claim to be treated equally whenever the government implements certain classifying criteria in the pursuit of legislative goals.¹³¹ Equality demands that certain government behavior be determined with respect to how that government entity acts in relation to others.¹³² The right to equal treatment, therefore, can only be specified in the general context of governmental action (or inaction).¹³³

Second, one cannot plausibly say that the right to be treated alike or unlike is the same as being burdened. Since, unlike other basic rights and liberties, the right to be treated equally has no pre-

¹²⁴ See Bernhard Schlink, *Freiheit durch Eingriffsabwehr — Rekonstruktion der klassischen Grundrechtsfunktion*, 11 EUROPÄISCHE GRUNDRECHTEZEITSCHRIFT 457, 460-62 (1984).

¹²⁵ See GERTRUDE LÜBBE-WOLFF, *DIE GRUNDRECHTE ALS EINGRIFFSABWEHRRECHTE* 29-30 (Baden-Baden: Nomos Verlagsgesellschaft 1988).

¹²⁶ See *id.*

¹²⁷ See Wendt, *supra* note 62, at 460; EKKEHART STEIN, *STAATSRRECHT* 242-43 (Tübingen: Mohr, 14th ed. 1993) [hereinafter STEIN, *STAATSRRECHT*].

¹²⁸ See, e.g., Heun, *supra* note 12, 239 (RZ 15).

¹²⁹ See Kirchhof, *supra* note 32, at 911-12.

¹³⁰ See Rübner, *supra* note 86, at 85-86 (RZ 66, 148). A similar observation can be found in Kenneth L. Karst, *Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 39 (1977) ("The problem of limits is inescapable in any effort to deal with a principle of equality.").

¹³¹ See Rübner, *supra* note 86, at 57 (RZ 96).

¹³² See PIEROTH & SCHLINK, *supra* note 11, at 112-14; JARASS & PIEROTH, *supra* note 16, at 96-97; LÜBBE-WOLFF, *supra* note 125, at 236-46.

¹³³ See Heun, *supra* note 12, at 244 (RZ 25); Kirchhof, *supra* note 32, at 912 (RZ 164); MICHAEL CH. JAKOBS, *DER GRUNDSATZ DER VERHÄLTNISSMÄßIGKEIT. MIT EINER EXEMPLARISCHEN DARSTELLUNG SEINER GELTUNG IM ATOMRECHT* 40 (Carl Heymanns Verlag KG 1985).

determined scope of protection against governmental action, an immediate clash of this right and the public interest cannot occur. In the absence of any conflict, there is nothing to be resolved by a balancing process. Given that the right of equal treatment has no scope of protection against governmental action that would easily lend itself to description, this right amounts to an assertion that the government should not fall short in meeting certain criteria of substantive justice.¹³⁴ By accounting for certain criteria of substantive justice, rules may be introduced for the comparison of persons and states of affairs by highlighting relevant qualities of each person or state of affairs. Normative principles then may establish whether it is just to treat particular persons differently, even though in other contexts such persons might be deserving of equal treatment.¹³⁵ If criteria of substantive justice are applied consistently, persons are given "their due," and treated alike or unlike according to the normative principles that govern what they "deserve."¹³⁶ Accordingly, the right to equal treatment, which "by its very nature" is not susceptible to balancing, has inherent limitations.¹³⁷ Equality has no *yielding* baseline, but there is always a pre-established *definite* baseline that is defined by various criteria of substantive justice.¹³⁸

Given this doctrinal context, it is clear that balancing could not provide a framework for a more resolute application of arbitrariness standards. Conversely, submitting legislation to criteria of substantive justice, such as the "ability to pay" in matters of taxation,¹³⁹ offers a means for devising a truly resolute arbitrariness standard. It is the reference to criteria of substantive justice that marks the second path of the resolute arbitrariness standard, which will be examined in the next section.

IX. THE PREFERRED RESOLUTE ARBITRARINESS STANDARD: THE NATURE OF THINGS AND ITS SUBSTITUTE (SYSTEMATIC CONSISTENCY)

¹³⁴ See, e.g., PETER LERCHE, *ÜBERMASS UND VERFASSUNGSRECHT: ZUR BINDUNG DES GESETZGEBERS AN DIE GRUNDSÄTZE DER VERHÄLTNISSMÄßIGKEIT UND DER ERFORDERLICHKEIT* 29-31 (Cologne: Carl Heymanns Verlag KG, 1961); LÜBBE-WOLFF, *supra* note 125, at 258-60; Kirchhof, *supra* note 32, at 911 (RZ 161-162).

¹³⁵ See Westen, *supra* note 114, at 548-40 ("To say that two people are 'equal' and entitled to be treated 'equally' is to say that they both fully satisfy the criteria of a governing rule of treatment.").

¹³⁶ See *id.* at 557 (reducing justice to a statement, and equality to a statement of justice).

¹³⁷ This view is widely held in German constitutional doctrine. See e.g., HUSTER, *RECHTE UND ZIELE*, *supra* note 33, at 226-42. The basic import of the German conclusion, namely the lack of a yielding baseline on the part of equality, is often confounded with its modal indifference. For a clarification, see LÜBBE-WOLFF, *supra* note 125, at 244-45. The latter ("modal indifference") means that even though government may be at liberty to impose burdens or to distribute benefits, it still must comply with the additional constraint set by criteria of justice. See *id.*

¹³⁸ See LÜBBE-WOLFF, *supra* note 125, at 18.

¹³⁹ See Heun, *supra* note 12, at 266 (RZ 66).

As an alternative to the first path, which entails an absolute balancing of the governmental interests against the individual rights at stake, the second path leading to a more resolute arbitrariness test involves the implicit identification of a substantive criterion of justice within the context of either the means or the ends components of governmental action. To refine this point, one might say, moreover, that resorting to means rather than ends focused analysis represents a distinct characteristic of the arbitrariness standard. If the second path is assumed, judicial inquiry focuses on whether differential or equal¹⁴⁰ treatment caused by legislative action conforms to a criterion of justice,¹⁴¹ rather than, as required in absolute balancing, focusing on whether governmental treatment imposes an excessive burden on the individual. Judicial reasoning, thus, essentially becomes an examination of a classification, and the legal consequences attached to that classification. The examination of the classification and its consequences is conducted against the background of a particular criterion of substantive justice, which is either alleged to have been established by the legislature itself or is understood to be an intrinsic feature of the "peculiarities" of the social situation subject to regulation.¹⁴² Judicial reasoning which recognizes the latter amounts essentially to an appeal to the nature of things. Judicial reasoning which recognizes the former, in contrast, seems to display a more deferential attitude toward the legislature.¹⁴³

By assuming the second path, the German Court developed a double standard that reintroduced the arbitrariness standard into its own doctrine. In a well-known line of cases, the German Court has held that the legislature may select the differences relevant to unequal treatment,¹⁴⁴ provided that it not ignore a similarity of social situations and positions so significant that the similarity must be taken into account from the "standpoint of justice."¹⁴⁵ In practice, in most cases it is imprudent for judges¹⁴⁶ to assert that the legislature has overlooked a similarity of social situations, even when the quasi-natural normative force of the similarity is "evidently" rooted in the

¹⁴⁰ See BVerfGE 4, 144, (155); BVerfGE 86, 81, (87); Heun, *supra* note 12, at 239-240 (RZ 17)

¹⁴¹ Therefore, this conformity-test is to be distinguished from assessing proportionality in a narrow sense. See HUSTER, RECHTE UND ZIELE, *supra* note 33, at 170-71.

¹⁴² See BVerfGE 17, 122, (130); see also, See Kirchhof, *supra* note 32, at 929-37 (RZ 205-21). It comes as no surprise to learn that this approach has been criticized as being too activist. See HUSTER, RECHTE UND ZIELE, *supra* note 33, at 386-88; Hesse, *Der Gleichheitssatz*, *supra* note 10, at 188 n. 52.

¹⁴³ See HUSTER, RECHTE UND ZIELE, *supra* note 33, at 390-92.

¹⁴⁴ See, e.g., BVerfGE 25, 371 (400); BVerfGE 35, 263 (272).

¹⁴⁵ See, e.g., BVerfGE 48, 346 (357); BVerfGE 53, 313 (329-30); BVerfGE 55, 11 (25-26). This principle was originally established by BVerfGE 1, 264 (276). This article will resume an examination of "significance" and the "standpoint of justice" as components of the arbitrariness standard below. See *infra* section XI.

¹⁴⁶ For an example of a brave resort to social reciprocities, see BVerfGE 75, 108 (25-26).

"peculiarities of the regulated subject matter."¹⁴⁷ As a consequence, as we have seen, the German Court has emphasized that the legislature has broad discretion when selecting the standard of equal or unequal treatment.¹⁴⁸ Despite the practical limitations on the power of the Court to assert that the legislature has overlooked a similarity of social situations, it may, nevertheless, require the legislature to adhere to the principles of its own regulation.

For example, the German Court upheld a statutory provision allowing dependents of an insured to receive only sixty percent of retirement benefits after the insured has passed away.¹⁴⁹ The German Court found that this system of retirement benefits rested on two principles: (1) the principle of insurance; and (2) the principle of care (*Fürsorge*). The German Court reasoned that the legislature complied with the principle of insurance when it provided for payment of one hundred percent of retirement benefits to the insured during his or her life. The Court also reasoned that the legislature complied with the principle of care when it provided that the dependents of an insured deceased were entitled to receive only sixty percent of the insured's benefits.¹⁵⁰ Although one might suspect that this reasoning arose from the "peculiarities of the situation" approach,¹⁵¹ the German Court observed, rather, that if the legislature had based the differential treatment on the principle of need, it would have seriously questioned the validity of the statutory provision.¹⁵² The Court found that the legislature did not adopt the principle of need with respect to this statutory provision and upheld the statute because it complied with the two principles described above.¹⁵³

The implied legislative power to establish criteria of justice can be turned against the legislature itself. One may argue that legislation must comply with the established system of principles within a specific area of the law.¹⁵⁴ This principle of systematic consistency, termed *Systemgerechtigkeit*, played a prominent role in the Court's ju-

¹⁴⁷ See, e.g., BVerfGE 26, 72 (74); see also, Rüfner, *supra* note 86, at 25 (RZ 29); Dürig, *supra* note 41, at 146 (RZ 310). For a striking example, according to which progressive taxation is required by the German Constitution, see BVerfGE 29, 402 (412); BVerfGE 32, 333 (339); BVerfGE 36, 66 (72).

¹⁴⁸ For example, the Court gave the legislature leeway to determine the amount of alimony paid to public officials, reasoning that no pre-established relationship would help to translate differences of position and status into monetary terms. In short, there seem to have been no "peculiarities of the subject matter" that would amount to a criterion of justice. See BVerfGE 26, 72 (78).

¹⁴⁹ See BVerfGE 48, 346 (356).

¹⁵⁰ See *id.*, at 358-59.

¹⁵¹ On the different treatment of retirement benefits of public officials and other employees within the system of taxation on the grounds that the respective entitlements are different in nature, see BVerfGE 55, 11 (26, 31).

¹⁵² See BVerfGE 48 346 (356).

¹⁵³ See *id.*, at 356.

¹⁵⁴ See, e.g., Gubelt, *supra* note 16, at 240-41; Gusy, *supra* note 32, at 2508; Dürig, *supra* note 41, at 87-100 (RZ 194-232); Rüfner, *supra* note 86, at 29-32 (RZ 39-40).

risprudence for many years.¹⁵⁵ Apparently yielding to wide criticism,¹⁵⁶ the Court subsequently employed the arbitrariness standard to curtail arguments based on systematic consistency¹⁵⁷ by holding that the legislature may deviate from the established system, so long as it does not do so arbitrarily.¹⁵⁸ The reintroduction¹⁵⁹ of the arbitrariness standard by this departure, however, is to some extent dependent on the sphere of the government action in question.¹⁶⁰

Before the second purported Americanization of German equal protection review occurred, there were "suspect" classifications, the use of which as a basis for a legislative distinction¹⁶¹ was explicitly proscribed by Article 3 § 3. In addition, within the domain of general equal protection furnished by Article 3 § 1, concealed balancing and the use of equal treatment criteria existed as two ways of intensifying review.¹⁶² What was still absent, however, was a general, as opposed to particular, classification-based approach to strict scrutiny. This general classification-based approach is exactly what the New Formula pretended to introduce.

X. THE NEW FORMULA: *CAROLINE PRODUCTS* ABROAD?

In Germany, the special provisions of equal protection have always been understood to be integral parts of an overarching principle.¹⁶³ Thus, according to the German Court, the special provisions of equality are simply detailed manifestations of the general Equal Pro-

¹⁵⁵ See, e.g., BVerfGE 9, 339 (349); BVerfGE 17, 122 (132).

¹⁵⁶ See, e.g., CHRISTOPH DEGENHART, *SYSTEMGERECHTIGKEIT UND SELBSTBINDUNG DES GESETZGEBERS ALS VERFASSUNGSPOSTULAT* 22-23, 27-28 (Munich: C.H. Beck 1976).

¹⁵⁷ See, e.g., BVerfGE 25, 371 (402-403); BVerfGE 59, 36 (39).

¹⁵⁸ See, e.g., BVerfGE 34, 103 (115); BVerfGE 61, 138 (148); BVerfGE 66, 217 (224). For further examples, see HUSTER, *RECHTE UND ZIELE*, *supra* note 33, at 389; FRANZ-JOSEPH PEINE, *SYSTEMGERECHTIGKEIT* 55-56 (Baden-Baden: Nomos Verlagsgesellschaft 1985); Kirchhof, *supra* note 32, at 942 (RZ 232-33); Heun, *supra* note 12, at 249-50 (RZ 34).

¹⁵⁹ On the significance of re-entries for the avoidance of paradoxes, see NIKLAS LUHMANN, *DIE WISSENSCHAFT DER GESELLSCHAFT* 93-94 (Frankfurt am Main: Suhrkamp 1990).

¹⁶⁰ For example, for purposes of reducing spending, the legislature has relatively broad discretion to rearrange welfare-benefits. See BVerfGE 60, 16 (43). For counter-examples, however, see Currie, *Lochner Abroad*, *supra* note 17, at 369 ("Among other things, the Constitutional Court has found fault with the exclusion of employment benefits for students and for persons formerly employed by their parents, limitations on aid of the blind or disabled, and the denial of retirement benefits to persons living abroad.") (citations omitted).

¹⁶¹ See Heun, *supra* note 12, at 287 (RZ 110).

¹⁶² One might add that judicial scrutiny has been higher where an unequal treatment has burdened the exercise of a basic liberty. This holds true, for example, with respect to the equal opportunity to education. As Currie notes, in this respect, German equal protection doctrine closely resembles the fundamental rights strand of equal protection in the United States. See CURRIE, *THE CONSTITUTION*, *supra* note 7, at 333. A further elaboration of the fairly complex body of precedents is beyond the scope of this essay. For a useful overview of the subject matter, see Winfried Rohloff, *Zusammenwirken von allgemeinem Gleichheitssatz und Freiheitsgewährleistungen. Eine Untersuchung der Rechtsprechung des Bundesverfassungsgerichts* (1992) (unpublished Ph.D. dissertation, University of Augsburg).

¹⁶³ See Heun, *supra* note 12, at 293 (RZ 126).

tection Clause.¹⁶⁴ It comes as no surprise, therefore, that, at least in particular cases, one might assimilate the arbitrariness standard into the stricter test of Article 3, § 3.

The step toward assimilating the arbitrariness standard into the Article 3, § 3 test was apparently taken in 1980 with the promulgation of a New Formula¹⁶⁵ by the First Senate of the German Court.¹⁶⁶ Although the Court's own characterization of the New Formula sounded far more moderate,¹⁶⁷ some commentators, insofar as the New Formula introduced a general classification-based higher scrutiny test, posited that it represented a decisive break with the traditional standard.¹⁶⁸

The allegedly revolutionary New Formula¹⁶⁹ appears in an opinion of the German Court¹⁷⁰ in the format of an explanation of some circumstances under which a statute should be invalidated on Article 3, § 1 equal protection grounds. With a bold emphasis on group disadvantage reminiscent of the most famous footnote of American constitutional law,¹⁷¹ the German Court first held that this Clause is violated: In particular if a group of norm-addressees is treated differently from another group, although the differences between those groups are not of such a kind nor of such a weight as to justify the unequal treatment.¹⁷²

Second, the Court declared that this "regulatory import" of Article 3, § 1 had been repeatedly emphasized in decisions dealing with statutes that deviate from a pre-established system.¹⁷³ The Court did not indicate, however, whether the range of this "explication" of the

¹⁶⁴ See, e.g., BVerfGE 25, 167 (173); BVerfGE 44, 1 (18); BVerfGE 48, 346 (365). See also, e.g., BVerfGE 85, 191 (206) (holding that Art. 3 § 3 is to be understood as underscoring the general Equal Protection Clause of § 1).

¹⁶⁵ On the significance of "formulae" in the context of judicial review, see generally Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 182 (1985) (asserting that formulae stem from the effort to combine formalism and realism and to preserve the authority of the text).

¹⁶⁶ See BVerfGE 55, 72 (88).

¹⁶⁷ See *id.* (insinuating that it wishes to clarify aspects of its former jurisprudence).

¹⁶⁸ See Gubelt, *supra* note 16, at (RZ 14); MAAß, *supra* note 16, at 14.

¹⁶⁹ Herzog raises the question of whether these decisions turned out differently then they would have under the old arbitrariness standard. See Roman Herzog, *Art. 3 Anhang: Der allgemeine Gleichheitsgrundsatz (Art. 3 Abs. 1) in der Rechtsprechung des Bundesverfassungsgerichts*, in 1 GRUNDGESETZ 357 (RZ 7) (Theodore Maunz et al. eds., Munich: C.H. Beck, 7th ed. 1994).

¹⁷⁰ See BVerfGE 55, 72 (88).

¹⁷¹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 144 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition . . . curtail[ing] the operation of those political processes ordinarily to be relied upon to protect minorities."). In contrast to footnote four of *Carolene Products*, however, the German Court did not establish any link between group disadvantage and the failure of the political process. This link, however, rests on questionable grounds. See generally, Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (arguing that the *Carolene Products* approach to minority rights "yields systematically misleading cues within the new participatory paradigm").

¹⁷² See BVerfGE 55, 72 (88).

¹⁷³ See *id.*

meaning of general equal protection should be restricted to the context in which it was discovered.¹⁷⁴

The development of the New Formula was disjointed and quite confusing. For a considerable period of time, it was unclear whether this formula was meant to replace the old arbitrariness standard.¹⁷⁵ Although the First Senate announced that the New Formula represented the regular standard of review,¹⁷⁶ several subsequent decisions still seem to rely on the traditional inventory.¹⁷⁷ As this article will suggest, the integration of old and new formulae into something that one might call the "Most Recent Formula" has attenuated this problem. Yet, even before the Court created its Most Recent Formula, the Second Senate expressed reluctance to follow the course taken by the First Senate. The result caused substantial uncertainty in the application of formulae. Although the Second Senate and the German Court employed the New Formula in some instances, opinions of each body exhibited a steadfast preference for the arbitrariness standard.¹⁷⁸ In addition, the Second Senate opted for an approach to the arbitrariness standard even more robust than that employed by the German Court. Under the Second Senate's arbitrariness standard, heightened scrutiny was made conditional on the peculiarities of the social situation subject to legislation, regardless of whether the unequal treatment affected distinct groups.¹⁷⁹

Despite the differences in the old and new formulae variously applied, there is widespread agreement among scholars that both approaches have to some extent incorporated the principle of proportionality into the German Court's equal protection review.¹⁸⁰ This interpretation, "the official account," suggests that the complex principle of proportionality did not emerge until the German Court created the New Formula and the Second Senate synthesized its idiosyncratic method of analysis from a myriad of diverse precedents. The official account also implies that the Court's formulaic discourse about the weighing of differences undertaken in the implementation of the proportionality principle can be taken at face value and, hence, that judicial practice actually involves a strict test of the proportionality of the quasi-suspect differential treatment of groups.¹⁸¹

¹⁷⁴ See *id.*, at 90.

¹⁷⁵ See Hesse, *Der Gleichheitssatz*, *supra* note 10, at 90-91.

¹⁷⁶ See, e.g., BVerfGE 72, 84 (89); BVerfGE 74, 129 (149).

¹⁷⁷ Accordingly, despite the New Formula, the legislature still has wide discretion in matters of social security and the installment of public officials. See, e.g., BVerfGE 68, 287 (301); BVerfGE 57, 107, (113). See also, Maaß, *supra* note 16, at 18.

¹⁷⁸ See, e.g., BVerfGE 67, 70 (85-86); BVerfGE 78, 249 (287); BVerfGE 79, 223 (236). For an overview, see Hesse, *Der allgemeine Gleichheitssatz*, *supra* note 16, at 125-26.

¹⁷⁹ See, e.g., BVerfGE 75, 108 (158).

¹⁸⁰ See, e.g., Hesse, *Der allgemeine Gleichheitssatz*, *supra* note 16, at 123, 126. For a critique of Hesse's view see HUSTER, RECHTE UND ZIELE. ZUR, *supra* note 33, at 193-194 and Heun, *supra* note 12, at 246 (RZ 27-28).

¹⁸¹ Justice Katzenstein expressed the latter idea in a dissenting opinion. See BVerfGE 74, 9,

Before returning to this question, this article will briefly address why the New Formula might just as well have evolved, almost harmoniously, from the arbitrariness standard.¹⁸²

XI.A NON-OFFICIAL ACCOUNT OF THE NEW FORMULA'S PEDIGREE

Over the years, the arbitrariness standard has developed something akin to a scheme of equal protection review. This scheme consists of a sequence of propositions giving effect to the idea that equal protection review must assemble a stable synthesis of considerations of substance and institutional competence. Against this backdrop, the New Formula can be read to specify certain elements of the sequence of considerations for an effective equal protection review.¹⁸³

Under the New Formula, the scheme begins with the blunt assertion that the legislature must not treat differently what is essentially alike. This substantive overture is followed by considering institutional competence, which amounts to the understanding that, in principle, the legislature is free to specify those components of social situations that constitute a similarity or dissimilarity between such situations. Accordingly, such elements may supply a rational basis for equal or unequal treatment. As already noted, the Court has held that the legislature may legitimately bring about the operation of a criterion of justice in a particular domain.¹⁸⁴

The final step in the sequence reintroduces substance. This step is representative of the core of the arbitrariness standard. As under the arbitrariness standard, legislative discretion comes to an end¹⁸⁵ where the differences (or "peculiarities")—existing independently of the legislative appraisal of the situation—are of such significance that they must be taken into account from the standpoint of justice. Composed of the two elements of "significance" and "the assumption

(30). In contrast to the arbitrariness standard, the new type of review embodied a "strict" proportionality test and in effect extended the range of judicial control of legislation. *See id.* Nonetheless, it is doubtful whether resorting to proportionality would indeed entail a more searching inquiry. In the context of rights jurisprudence some constitutional scholars have argued repeatedly that the very same principle operates as a softener of constitutional provisions, which opens the door for almost any form of interference with basic rights. *See, e.g.,* Friedrich E. Schapp, *Die Verhältnismäßigkeit des Grundrechtseingriffs*, in *JURISTISCHE SCHULUNG* 850, 850 (1980); ERNST FORSTHOFF, *DER STAAT DER INDUSTRIE-GESELLSCHAFT* 139-40 (1971). For an overview of the debate, see Detlef Marten, *Zur verfassungsrechtlichen Herleitung des Verhältnismäßigkeitsprinzips*, in *FÜR STAAT UND RECHT* (= Festschrift Heribert Schambeck) 349-79 (J. Hengstschläger & H.F. Köck, eds., Humblot 1994).

¹⁸² My formulation suggests that the question of whether the latter has been overruled by the former is entirely one of interpretation. *See generally* Stanley Fish, *Still Wrong after All These Years*, 6 *LAW AND PHILOSOPHY* 401-18 (1987).

¹⁸³ This sequence can be gleaned from BVerfGE decisions prior to the New Formula. *See, e.g.,* BVerfGE 12, 326 (337); BVerfGE 17, 319 (330); BVerfGE 50, 177 (186-87); BVerfGE 54, 11 (36).

¹⁸⁴ *See, e.g., supra* text accompanying notes 144-145.

¹⁸⁵ *See* BVerfGE 1, 264 (276) (an early formulation).

of the standpoint of justice," this final step in the sequence reintroduces substance in a way that also stresses institutional competence. It is only in instances in which both elements are satisfied that legislative discretion must yield to judicial opinion. In this respect, the core of the arbitrariness standard promises to reconcile the substantive and institutional components of judicial review.¹⁸⁶

Contrary to both the comparative and the official account,¹⁸⁷ one can plausibly maintain that, upon closer inspection, the New Formula and its progeny may have resulted from the judicial attempt to clarify the conditions under which the significance and standpoint of justice elements serve to vindicate the judicial control of legislation.¹⁸⁸ On the other hand, as indicated above, the German Court may have thought that a reference to quasi-suspect differential treatment of groups – a reference which has a strong American connotation in the German context—is necessary in order to extend the proportionality principle to the field of equal protection.

As always in the context of a historical reconstruction, an examination of cases decided immediately before the appearance of the New Formula is instructive. For example, prior to the promulgation of the New Formula, the German Court held that the legislature must recognize those similarities between groups that are of such significance that they must be taken into account from the standpoint of justice.¹⁸⁹ The significance of group difference – a factor which is important enough to engender heightened judicial scrutiny under the New Formula – was already foreshadowed. One can speculate, therefore, that the New Formula initially amounted to nothing more than a judicial specification of the two elements: "significance" and "assuming the standpoint of justice." With the New Formula, the Court established that, other things aside, the former element, "significance," designates a "differential treatment of groups" and the latter, "assuming the standpoint of justice," designates the finding of the absence or presence of "reasons of such a kind and weight as to warrant the differential treatment."¹⁹⁰ Viewed in this light, one should be wary of the official account that takes for granted that the replacement of old phrases such as "taking the perspective of justice" and "a sound reason" with the new slogan "reasons having a certain weight" amounts to an incorporation of the proportionality principle.

Confusion concerning the application of equal protection formulae was compounded by the strategy adopted by the Second Senate to condense both the "significance" and the "the viewpoint of justice" elements into one simple standard that ties judicial scrutiny to the

¹⁸⁶ See Heun, *supra* note 12, at 254 (RZ 43).

¹⁸⁷ See *supra* sections III and X.

¹⁸⁸ Heun argues for a similar position. See Heun, *supra* note 12, at 242 (RZ 20).

¹⁸⁹ See, e.g., BVerfGE 50, 177 (186); BVerfGE 54, 11 (25-26).

¹⁹⁰ Compare BVerfGE 55, 72 (88) with BVerfGE 22, 387 (415) and 52, 277 (280).

"peculiarities of the social situation."¹⁹¹ In fact, the Second Senate also understood that the scope of legislative freedom varies according to the subject matter of the regulation. Moreover, it held that the guidance provided by the nature of things, although of different intensity, emerges from the internal arrangement of social relationships as they tacitly and continuously evolve over time.¹⁹² Of course, this fairly Burkean string of precedents is merely the product of a very robust reading of the arbitrariness standard. This article posits, therefore, that the official account is wrong on both counts. Neither the First nor the Second Senate's practice of equal protection review reveals that the principle of proportionality is of any genuine importance.¹⁹³

Before introducing the most recent developments, I would like to draw attention to a decision that sought to have it both ways. The decision discussed both the New Formula and the "peculiarities of historically given social relationships."¹⁹⁴ A look at this example demonstrates that the New Formula could have been integrated into the old arbitrariness standard, although this did not occur. In addition, against the backdrop of a criterion of justice, the example may also shed some light on the distinction between the mere means-ends test and the control of the means of classification test.¹⁹⁵

XII. AN INTERMEDIATE STEP

In an instructive case, the German Court dealt with a statute which treated full-time and part-time public officials differently with respect to an additional payment that, owing to their marital status, they were eligible to receive. Two part-time judges who were also spouses together received less than half of the additional payment, while every full-time public official was entitled to the full amount.¹⁹⁶ The Court began its analysis with an invocation of the second proposition of the New Formula¹⁹⁷—assuming the standpoint of justice—stating that the legislature has broad discretion in matters relating to the installment of public officials. The German Court then identified the statute's twin purposes of taking marital status into account only once and of disproportionately reducing the relative benefit for pub-

¹⁹¹ See, e.g., BVerfGE 75, 108 (156).

¹⁹² See *id.* at 158-59.

¹⁹³ See Hesse, *Der allgemeine Gleichheitssatz*, *supra* note 16, at 127-28, 130. See *supra* section I for a discussion of the rationale of this principle. In the context of the judicial invocation of a criterion of justice, the normative productivity of balancing seems to be out of place. The criterion is simply alleged to exist and then applied to a piece of legislation. However, this proves to be a bit more complicated. The difference between formulation and application is systematically indeterminate in the context of equal protection review.

¹⁹⁴ See BVerfGE 71, 39 (52).

¹⁹⁵ See Heun, *supra* note 12, at 244-45 (RZ 25).

¹⁹⁶ See BVerfGE 71, 39 (52) and the prior decision BVerfGE 49, 260 (272).

¹⁹⁷ See *supra* section XI.

lic officials who only worked part-time.¹⁹⁸ In its reconstruction of legislative intent, the German Court imputed both a purpose and an effect to the statute,¹⁹⁹ inferring that the legislature "evidently" did not establish the criterion of distributing benefits according to the amount of work performed for the employer.²⁰⁰ The absence of a genuinely meritocratic principle, the Court found, was manifest in the statute.²⁰¹

The traditional rational basis test would have terminated here. The Court, however, applied both the preferred robust reading of the arbitrariness standard and the New Formula in order to determine whether it was legitimate to disregard the internal reciprocity between workload and payment.²⁰² Explicitly, the Court stated that it had already identified a purpose behind the statute's differential treatment. The disproportionate reduction of the benefit, as well as an underlying normative criterion, was warranted on the basis part-time status. Yet, the Court found that the differential treatment could not be deemed constitutional simply because the legislature had taken this difference into account.²⁰³ The opinion further provides a robust reading of the core of the arbitrariness standard by an incantation of "pre-established differences," the "nature of things," and the "internal composition of the social situation," as well as by a citation to the New Formula.²⁰⁴ This dictum brings an entirely different perspective to bear on the meaning of "significance" and "standpoint of justice."²⁰⁵

Nonetheless, from such compounded premises as these, the Court reached the conclusion that the unequal treatment of different groups of public officials was firmly rooted in the nature of public employment.²⁰⁶ This reasoning echoes a familiar Prussian *esprit de corps*. First, working as a public official demands full-time employment, since public officials devote their entire lives to the state. Accordingly, public officials working on a half-time basis are an irregu-

¹⁹⁸ See BVerfGE 71, 39 (54).

¹⁹⁹ In commenting on the United State Supreme Court's analysis of a similar economic package, Justice Brennan stated in his dissenting opinion that the Court could not critically analyze the rational relationship of a statute to its goal if the Court imputed the goal from the effect of the statute. See *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 187 (1980) (Brennan, J., dissenting):

But by presuming purpose from result, the Court reduces analysis to tautology. It may always be said that Congress intended to do what it in fact did. If that were the extent of our analysis, we would find every statute, no matter how arbitrary or irrational, perfectly tailored to achieve its purpose.

²⁰⁰ See BVerfGE 71, 39 (55).

²⁰¹ See *id.*

²⁰² See *id.* Evidently, the question of whether the means comply with a standard and whether the purpose is a legitimate one are the same.

²⁰³ See BVerfGE 71, 39 (57-58).

²⁰⁴ See *id.* at 58-59.

²⁰⁵ See *id.* See also *supra* section XI.

²⁰⁶ See BVerfGE 71, 39 (60-63).

larity, a disagreeable exception. Second, since the whole-hearted dedication of one's life to the state corresponds to the duty on the part of the state to pay "alimony" — and not a salary — to the public official, the principle of reciprocity between labor and payment would be out of place. Thus, the Court upheld the statute by finding an acceptable rationale for treating part-time workers differently from full-time workers.

XIII. THE MOST RECENT FORMULA

In the past few years the evolution of the equal protection standard has not been as transparent as the public official example discussed above seems to suggest.²⁰⁷ On the contrary, attempts to arrive at a unified standard have persisted, and have mirrored the ordinary circumstances of judicial review. Yet, one can observe some trends. The judiciary, for example, subjects legislation to a more searching inquiry if the legislation "affects" other basic rights,²⁰⁸ or if it burdens particular groups. At the other end of the continuum, a much more relaxed standard exists for legislation involving the detailed construction of a system of positive entitlements²⁰⁹ or, as has always been the case, in the field of economic regulation. Some commentators, therefore, have posited the evolution of a two-tiered scheme of general equal protection review which incorporates the proportionality principle on its higher level, triggered by treatments that are suspect because they affect single groups or burden other constitutional rights.²¹⁰

In 1993, the First Senate, most likely motivated by both the aforementioned developments and the related scholarly commentary, attempted to develop another new formula.²¹¹ For the sake of the distinction, this article shall refer to it as the "Most Recent Formula."²¹² Beyond providing another schematic matrix, however, the opinion of the First Senate developed what amounted to a nutshell theory of equal protection review.

Surprisingly, the First Senate's reflections did not, as its pedigree and its progeny might have suggested, integrate the original —and now more dated—New Formula into the arbitrariness standard. On

²⁰⁷ See Hesse, *Der allgemeine Gleichheitssatz*, *supra* note 16, at 123.

²⁰⁸ See *supra* note 162; BVerfGE 67, 348 (365); BVerfGE 71, 364 (384). For a first express statement of that principle, see BVerfGE 77, 9 (24). See also Currie, *Lochner Abroad*, *supra* note 17, at 278.

²⁰⁹ See e.g. BVerfGE 87, 1 (36-39).

²¹⁰ See Hesse, *Der allgemeine Gleichheitssatz*, *supra* note 16, at 127; Maaß, *supra* note 16, at 18; Hesse, *GRUNDZÜGE DES VERFASSUNGSRECHTS*, *supra* note 104, at 190 (RZ 439). For a more constructive account, see HUSTER, *RECHTE UND ZIELE*, *supra* note 33.

²¹¹ See BVerfGE 88, 87 (96). Almost the same wording can be found in a decision from June 8th, 1993, in 1 *NEUE JURISTISCHE WOCHENSCHRIFT* 122 (1994).

²¹² See Herzog, *supra* note 169, at 381-382.

the contrary, the First Senate drew a sharp line on the grounds that each theory set a distinct limit for legislative discretion.²¹³ It is apparent from the First Senate's opinion that the introduction of a split between the ordinary (lower) and the new (higher) tier of review resulted from a "creative misreading"²¹⁴ of the scattered body of precedents, to put the matter mildly. It may well be that the "best" interpretation of the relevant legal materials has not yet been crafted.²¹⁵

XIV. THE COURT'S OFFICIAL ACCOUNT

The Most Recent Formula redefines the core of equal protection. As we have seen, its ancestor resulted from an interpretation that explained the core of the arbitrariness standard with reference to differences between groups that have a certain "weight." The Most Recent Formula begins with the same frame of reference as the New Formula, declaring that the legislature's zone of discretion can be more or less circumscribed depending upon the subject matter of regulation and the classifying criteria employed.²¹⁶ In practical terms, these limits on legislative action under the Most Recent Formula, therefore, may range from the "mere arbitrariness standard" to the principle of "strict adherence to requirements of proportionality."²¹⁷

More theoretically, the opinion explains that the Most Recent Formula approach to equal protection can be derived from two sources: First, textually, from the words and the meaning of Article 3, § 1; and, second, structurally, from Article 3, § 1's relationship to other constitutional provisions.²¹⁸ With respect to the former textual argument, the Court cites the premise in Article 3, § 1 that everyone shall be equal before the law.²¹⁹ As such, it follows that if the legislature treats certain groups of people differently, the statute is subject to a more searching mode of inquiry.²²⁰

With respect to the latter structural argument, which alleges Arti-

²¹³ With respect to the upper limit, the Most Recent Formula actually removes the traditional core of equal protection, which was characterized by the traditional components of "significance" and "standpoint of justice."

²¹⁴ See HAROLD BLOOM, *A MAP OF MISREADING 2* (1975) (describing the process of revisionist reading, where a reader imputes his own meaning into the words of the text).

²¹⁵ See RONALD DWORKIN, *LAW'S EMPIRE* 51, 226, 235 (1986) (noting that constructive interpretation requires judges to arrive at the best possible interpretation of an existing body of precedents).

²¹⁶ See BVerfGE 88, 87 (96).

²¹⁷ *Id.*

²¹⁸ See *id.*

²¹⁹ See THE BASIC LAW, *supra* note 34, at 14 ("All persons shall be equal before the law.").

²²⁰ See Heun, *supra* note 12, at 26; Magdalena Pöschl, *Über Gleichheit und Verhältnismäßigkeit*, 119 JURISTISCHE BLÄTTER 413, 416 (1997) (critiquing this approach by arguing that since every differential treatment eventually affects persons, one cannot plausibly distinguish between the treatment of persons and the treatment of states of affairs).

cle 3, § 1's relationship to other constitutional provisions, the Court refers to both the special Equal Protection Clause of Article 3, § 3 and to the Bill of Basic Rights.²²¹ Thus, the Court declares that the rigidity of the standard of review increases as the characteristics of the relevant group begin to resemble the qualities mentioned in Article 3, § 3.²²² Surprisingly, the Court seems to be proposing a sliding-scale approach to equal protection. Thus, the shared vision of Justices Stevens²²³ and Marshall²²⁴ may eventually come true in *Karlsruhe*.

Relative to that of the German Court, the equal protection jurisprudence of the United States Supreme Court reflects a more thorough familiarity with comparative constitutional law. Illustratively, under the United States Supreme Court's reasoning, the increasing rigidity of the arbitrariness standard in the face of "suspect" or "quasi-suspect" classifications is indispensable to the protection of minorities against hostile discrimination.²²⁵ The United States Supreme Court also holds that heightened scrutiny should not be restricted to the direct classification of persons, but that it is also appropriate where the treatment of a state of affairs indirectly results in the differential treatment of groups.²²⁶ Of course, it is difficult to predict if this dictum will be read to imply that strict scrutiny should be extended to instances of disproportionate impact without an inquiry into discriminatory purpose.²²⁷ The United States Supreme Court also makes reference to another principle of heightened scrutiny which is not unfamiliar to students of American constitutional law: Regulation of human action should be submitted to a stricter test if the people affected are not in a position to escape the reach of the classifying criteria through their own conduct because the criteria embodies immutable or almost immutable characteristics of persons.²²⁸ Finally,

²²¹ See BVerfGE 88, 87 (96-97).

²²² See *id.*

²²³ See *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) (disagreeing with the Supreme Court's system of levels of scrutiny under the Equal Protection Clause):

I am inclined to believe that what has become known as the two tiered analysis of Equal Protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.

²²⁴ See *Harris v. McRae*, 448 U.S. 297, 341-342 (1980) (Marshall, J. dissenting) (stating his disapproval of a two-tiered approach to equal protection analysis); *Plyler v. Doe*, 457 U.S. 202, 230 (1982) (Marshall, J., concurring) (reiterating his belief that a rigidified approach to equal protection analysis should be replaced with a method that allows for varying levels of scrutiny); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 19 (1973) (Marshall, J., dissenting) (same).

²²⁵ See *United States v. Carolene Products*, 304 U.S. 144 (1938)

²²⁶ See *id.*

²²⁷ See the following cases for examples regarding possible dilution of the minority vote in legislative redistricting claims: *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993); *Rogers v. Lodge*, 458 U.S. 613 (1982); and *Mobile v. Bolden*, 446 U.S. 55 (1980).

²²⁸ See *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that a statute which affords dependency benefits to the spouses of male Air Force officers, but not the spouses of female offi-

the United States Supreme Court refers to the effect such regulation might have on the exercise of other basic rights. Again, legislative discretion is narrower if the unequal treatment of persons or a state of affairs is likely to burden the exercise of such rights.²²⁹

Returning to the German context, after a remarkably detailed explanation of the instances in which legislative freedom is more circumscribed, the Court continued its explication of the Most Recent Formula by explaining that the range of legislative action exacts different standards of equal protection review.²³⁰ In cases where legislative discretion is relatively wide, "merely the arbitrariness standard" applies.²³¹ In essence, legislation must be struck down only if the alleged unreasonableness is "evident."²³² According to the Court, in instances where groups are treated unequally and in instances where one can expect a negative impact on the exercise of other basic rights, a more searching inquiry is necessary into whether reasons of such a kind and weight that could justify the imposition of unequal legal consequences exist.

The narrative on the development of equal protection formulae ends here. Evidently, the Most Recent Formula represents the provisional result of the German Court's ongoing attempt to come to grips with its own practice of review. It would be a mistake, however, to suppose that the theory of the Most Recent Formula has acquired canonical status. Some decisions of the First Senate seem to comply with its program.²³³ The Second Senate, however, still clings in its rulings to a markedly robust reading of the arbitrariness standard,²³⁴ and considers the elements introduced by the New Formula as representing one of the arbitrariness standard's constituent parts.²³⁵

XV. IN DEFENSE OF THE DIE-HARD ACCOUNT

Employing its Most Recent Formula, the German Court explicitly asserts that a strict test of proportionality should be applied to specified cases.²³⁶ One of these cases was one in which the Court reviewed a federal statute that prohibited transsexuals from altering their first name prior to obtaining the age of twenty-five. This is the so-called "small solution."²³⁷ Transsexuals younger than twenty-five were al-

cers is invidiously discriminatory and violative of the Due Process Clause of the Fifth Amendment).

²²⁹ See Currie, *Lochner Abroad*, *supra* note 17, at 368 (noting earlier precedents).

²³⁰ See BVerfGE 88, 87 (96-97).

²³¹ *Id.*

²³² *Id.*

²³³ See 1 NEUE JURISTISCHE WOCHENSCHRIFT 122 (1994).

²³⁴ See BVerfGE 90, 145 (195-196).

²³⁵ See BVerfGE 93, 386 (397).

²³⁶ See BVerfGE 88, 87 (96-97).

²³⁷ See *id.*

lowed to have their sex changed through surgery, in which case the individual's birth records would be modified to reflect the sex change. This is the so-called "big solution."²³⁸ The Court left no doubt that the classification was based on personal characteristics and that it affected the exercise of basic liberties, such as human dignity, guaranteed by Article 1, § 1, and general freedom of action, guaranteed by Article 2, § 1.²³⁹ Thus, the Court raised the question of whether one could imagine reasons, the "kind and weight" of which would justify the unequal treatment of transsexuals below the age of twenty-five in the simple process of name-changing.²⁴⁰

In contrast to its own formulaic manifesto, however, the German Court did not engage in outright balancing. The only component of the proportionality principle that actually appeared in the Court's opinion was focused on the appropriateness of the legislative means. This component, however, constitutes a rather trivial element of equal protection review. Notwithstanding grandiose rhetorical gestures, the Court simply presupposed that the purpose of the "small solution" was to permit experiments with one's sexual identity before any action that would have manifestly irreversible effects was taken.²⁴¹ The prohibition of a name-change for transsexuals below the age of twenty-five, the Court found, did not truly advance the purpose of protecting young adults from the risks of an imprudent sex-change. The only remedy available to this group, rather, was surgery which carries irreversible consequences.²⁴² The Court, therefore, actually engaged in a rational basis test "with a bite," which resulted in finding that the means chosen did not further the goal of legislation.²⁴³

It should be noted that in the transsexuals case the Court's statement of the legislature's professed statutory goal tacitly stemmed from the Court's own reconstruction of legislative purpose, rather than from the government's professed end. The government explained that the age-based restriction of the "small solution" had been enacted to prevent adolescents from prematurely devoting themselves to a transsexual life-style. Had the Court dealt with the government's stated purpose of the statute, perhaps something like a test of proportionality could have been applied. Contemplating this illiberal purpose, the Court could have argued that the classificatory

²³⁸ See *id.*

²³⁹ See *id.* at 97.

²⁴⁰ See *id.*

²⁴¹ See *id.* at 100-01. In this respect, the "small solution" erects a safeguard against an error in prognosis.

²⁴² See *id.* at 100.

²⁴³ A later case, also employing the New Formula, was decided on exactly the same grounds. See 1 NEUE JURISTISCHE WOCHENSCHRIFT 122 (1994). In another, more recent instance, the Court simply applied the robust rationality test, referred to as the "systematic consistency variant," by examining whether the legislature had some reason to refrain from applying a prior established criterion to a specific group, without even approaching the threshold of the proportionality test. See BVerfGE 92, 53, 69 (71-72).

means were moderately appropriate and perhaps even necessary — although it is dubious why the legislature did not choose the general age of maturity, namely eighteen years of age. Nevertheless, at the third stage of the proportionality review, the Court would have been committed to comparing this stated goal with the consequence that young transsexuals who contemplated a sex change would not be able to express this desire by changing their name, but instead would have to undergo surgery, a far more drastic and permanent result. If the Court had compared this consequence with the option available to transsexuals above the age of twenty-five, the Court then could have decided that the less burdensome alternative of a name change should have been made available to younger transsexuals as well.²⁴⁴

Indeed, several of the cases recently decided by the German Court still exhibit the pattern of intensified rationality review — a robust application of the arbitrariness standard — which this article has previously reconstructed.²⁴⁵ The German Court continues to employ the old subterfuges of identifying legislative purpose with substantive cri-

²⁴⁴ The reasoning for such a decision, however, might have followed at least two fairly different tracks:

(a) The Court could have held that there were no sound arguments in favor of the differential treatment of transsexuals on the ground of their age. Since both groups are similarly situated with respect to a psychologically hazardous endeavor, they would be equally deserving of the same concern. This kind of reasoning could avoid addressing whether the adversely affected interest had to prevail over the government purpose if the benefit of the simple name-change were withheld from all transsexuals. Instead, it would establish that, at least in this context, the distinction was not sufficiently reasonable to outweigh the refutable presumption in favor of equality. *But see* Westen, *supra* note 114, at 571-73 (arguing that the principle of equality is meaningless and empty of content, and such rhetoric should therefore be abandoned). According to Westen's notion, the rationale of the decision would derive from two roots: a comparison of groups and the presumption that persons who are similarly or identically situated should be treated alike. As the comparison focused merely on the group of persons whose interests, attitudes, or even sentiments were negatively affected by government action, the need for balancing would not arise. Moreover, the quality and intensity of those factors could be left more or less unexplored. Hence, the substance would remain indeterminate.

(b) The Court also could have focused on the statute's negative impact on the fundamental interest to engage in various experiments with one's sexual identity. In this line of reasoning, the opinion would have to make the claim that this interest is of equal importance to transsexuals below and above the age of twenty-five and that this fundamental individual interest must prevail over the paternalistic state goal of erecting a safeguard against the premature "fixation on transsexualism." Had the Court chosen this line of inquiry, it would have been forced to embrace the criterion of justice, claiming that everyone of a certain age below twenty-five has a fundamental interest in experimenting with his or her sexual identity in a manner least damaging to his or her future psychological development. This would amount to extending the benefit to an additional group of transsexuals on the ground that their equal fundamental interest trumps a valid legislative purpose. Using this reasoning, the Court could not have avoided addressing the basic rights of human dignity and general freedom of action. *See* BVerfGE 88, 87 (101). The Court then necessarily would have to acknowledge that the protection of a fundamental interest, which had been identified in the process of balancing, should be extended to a much larger group. Such reasoning would converge with the fundamental rights strand of Equal Protection in the United States. *See* CURRIE, *THE CONSTITUTION*, *supra* note 7, at 333.

The difference in these lines of judicial reasoning, however, does not actually matter in the equal protection practice in Germany.

²⁴⁵ *See supra* section IX.

teria²⁴⁶ and of juxtaposing the means against the "peculiarities of the situation."²⁴⁷ While the German Court's descriptions have changed, its practice has not. Formulae do not matter much. If anything, they are a means of drawing attention away from what is actually going on in equal protection review.²⁴⁸

XVI. ANALYTICAL CODA

By appealing to a New Formula of equal protection review, the German Court began to emphasize that a differential treatment of groups, as opposed to a mere differential treatment of a state of affairs,²⁴⁹ ought to trigger heightened judicial scrutiny. In the eyes of proponents of a comparative account, this seems to liken the new standard to some *Carolene Products*-footnote-four-type focus on the infliction of group disadvantage.²⁵⁰ This conceptualization would lead to the following type of analysis:

(Part 1) If person A who belongs to group X is treated differently from person B who belongs to group Y, the Court has to inquire whether there is, first, some important interest pursued by the government, and, second, a narrowly tailored relationship between the unequal treatment and the pursuit of that goal.

This kind of inquiry is aimed at extinguishing abuses of government power that are motivated by animosity or hostility toward certain groups.²⁵¹

Upon closer inspection, therefore, the perceived Americanization of German standards can plausibly be understood as a mere extension of one of the most prominent principles of the German Court's home-made jurisprudence. According to the official account, it seems as if, with respect to the differential treatment of groups, the German Court is ready to apply the third component of the proportionality principle to equal protection review. This clearly amounts to a balancing of the benefits and burdens of state action. For example:

(Part 2a) If person A, who belongs to group X, is (as a result of government action) worse off than person C, who belongs to group Y, the Court has to in-

²⁴⁶ See 1 NEUE JURISTISCHE WOCHENSCHRIFT 122 (1994).

²⁴⁷ See BVerfGE 90, 145 (1995-96).

²⁴⁸ See Herzog, *supra* note 169, at 367 (RZ 7).

²⁴⁹ Under the auspices of a *Carolene Products* standard this difference makes sense. Consider *San Antonio School District v. Rodriguez*, 411 U.S. 1, n. 28 (1973), in which the disadvantage conferred by a statute may have had an affect on poor school districts (which could be comprised of rich and poor people), but was not directly aimed at poor people.

²⁵⁰ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (stating that laws directed at "discrete and insular" minorities may prevent the political process from working and, thus, these laws may require a heightened standard of review).

²⁵¹ See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (noting that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect").

quire whether the public interest pursued by the government is important enough to outweigh the relative disadvantage suffered by members of group X.

The meaning of "relative disadvantage" in this type of case is unsettled. For example it is unclear whether it means a disadvantage understood in deontological terms, following from the moral harm inflicted by the differential treatment, or instead whether it means a disadvantage understood in consequentialist terms, following from the resulting inferior level of well-being. In adopting the proportionality principle, the judicial inquiry would not be primarily concerned with identifying uses of government power which are motivated by animosity or hostility toward certain groups, but rather, whether it is reasonable that members of group X suffer relative deprivation for the benefit of all. Such a reading of the New Formula's standard would conform with a transformation of the proportionality principle into equal protection review. The third component of proportionality is usually understood to demand that the public benefit obtained by a regulation ought not be out of proportion to the burden imposed.

At the same time, the German Court has occasionally given an interesting twist to this proportionality requirement in the area of equal protection. Apparently, consistent with the first formulation of the New Formula, the Court asserts that differences between groups, and not the public benefit, could have sufficient weight in order to warrant unequal treatment. Accordingly, the judicial standard suggests:

(Part 2b) If person A, who belongs to group X, is treated differently from person B, who belongs to group Y, then the Court has to inquire whether the differences between group X and Y are significant enough to support the differential treatment.

One may well wonder whether such a standard can really be understood to be an extension of the proportionality principle, because, as this article attempts to explain with respect to the formula's pedigree, the emphasis is not on the relative weight of the public interest or the infringement of the right, but on the significance of the differences between groups. Whereas Part 2a (the first reading of proportionality in the field of equal protection) focuses on the importance, or "compelling" quality of the government interest, Part 2b (the second reading) highlights the relationship between the attainment of any public objective and the different situations faced by groups. The second reading of Part 2b would have us ask whether the perceived difference between groups is either sufficiently plausible or too tenuous to render government action rational. What purports to be a proportionality standard, therefore, turns out to be nothing other than a concealed replica of the rational basis test.

This confusing transformation of domestic doctrine is mainly car-

ried out on the level of the formulae of judicial review. Still, an equally plausible case can be made for the fact that there remains a shrouded disparity between what the Court claims to do on the level of formulaic representations and what it does when deciding a particular case. In particular cases, the reasoning seems to amount to the following:

(Part 3) If A, who belongs to group X, is treated differently from B, who belongs to group Y, then the unequal treatment must not violate a criterion of justice, such as the principle that like cases be treated alike or that each case be considered according to its own merits.

This article has argued that the latter type of reasoning is the hallmark of a more robust understanding of the good old arbitrariness standard.²⁵²

XVII. CONCLUSION: WHITHER HIGHER LAW?

The emerging picture of a difference between the formulaic explanations of general judicial standards and the ways in which cases are actually resolved by the German Court speaks to the fact that the pursuit of formulaic expositions can become detached from the actual resolution of the issue before the Court. It seems as if there are two more or less independent spheres of constitutional law: the sphere of judicial action and the sphere of judicial representation of action.

Should one be concerned about these separate spheres? Is this a disquieting result, or should it be? Misapplication of formulae occasionally happens. One would not want to blame the judicial contemplation of formulae for any misapplication that may occur, however. After all, formulae not only explain the meaning of a constitution, but also serve as a restraint on judicial decision making.²⁵³

Formulae conspicuously lack a statute-like quality in that they do not have a textual basis that is beyond the reach of judicial reasoning. On the contrary, formulae are precedents of a second-order; they are open to revision and improvement on a case-by-case basis. It is not surprising that the effort to arrive at precise articulation of formulae may tend to obscure the constitutional issue before the Court.²⁵⁴ The elaboration of formulae, therefore, involves a paradox. As Nagel correctly points out, the quest for the proper construction of formulae "reflects intellectual embarrassment about the existence of judicial

²⁵² See *supra* section VII.

²⁵³ See NAGEL, *supra* note 14, at 136, 142-44 (explaining that rules must be sufficiently detailed and schematic to bind judges who otherwise might seem beyond the law).

²⁵⁴ See *id.* at 137 ("If in part the Constitution means what judges want it to mean, the Court is obliged to attempt to convince others that its choices are desirable.").

discretion, but is designed to assure plentiful opportunities for its exercise.²⁵⁵

At the same time, formulae do have a somewhat statute-like quality in that they allow for the assessment and re-evaluation of precedents as well as for the immediate exercise of flexible balancing tests.²⁵⁶ In this respect, they are higher lawmaking devices. Tinkering with formulae ostensibly reflects our unwritten constitutional rule of judicial self-authorization. Elaborating the formula, in particular with reference to a foreign example, reflects indifference to the underlying substantive issue.²⁵⁷ In fact, as idols of constitutional law, formulae are precise representations of this indifference, given that they are often at once too specific and too simple for the range of cases that they are designed to solve.²⁵⁸

Formulae constitute a second order of constitutional law. They both assume and do not assume the role of a constitutional statute. Formulae are supreme legal rules and are not supreme legal rules at the same time.²⁵⁹ It is not surprising that the German Court's failure to acknowledge what is actually occurring in its own application of formulae does not necessarily affect their exposition. Moreover, formulae are not only designed to govern adjudication; they are also defined by it. The matter of settling an emerging divergence between the formula and the rationale governing adjudication may be left to an observer who is in the same position as the Court observing its practice. Such an observer may be forced to admit that the proportionality principle was specified by the Court in the moment it was transformed to the field of equal protection. Accordingly, one could argue that the proportionality principle has acquired a different meaning through a transaction relying on borrowing to provide the suitable vector. It is only the Court which is at liberty to either make judicial reasoning conform to the formula or to adjust the formula to what is really at issue in adjudication, or to leave existing divergences as they are.

Endorsing such a liberty on the part of the Court presupposes a commitment that the account offered here is evidently unwilling to make. One would have to subscribe to the unwritten rule of judicial self-authorization. It may well be that we have reason to welcome the

²⁵⁵ *Id.* at 147 (arguing that formulae allow the Court to analyze issues in different ways and thus emphasize the "range of choices available to the Court").

²⁵⁶ *See id.* at 148 (stating that using formulae gives the Court a sort of regulatory role as well because formulae are used in deciding how problems in society should be handled).

²⁵⁷ For a related critique, see RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 35-36 (1996) (arguing that abstract legal principles defy the structures that formulae impose).

²⁵⁸ *See* NAGEL, *supra* note 14, at 151 ("As cases continue to arise, however, the variety of possible fact configurations gradually becomes more and more difficult to ignore.").

²⁵⁹ *See generally* JACQUES DERRIDA, *LIMITED INC.* 53 (1988) (explaining that iteration of language "implies both identity and difference," and, thus this repeated examination of formulae both idealizes and weakens the meaning of formulae).

disappearance of the final traces of constraint resulting from the analytical sweep of our received legal vocabulary; yet, the author is ready to admit that he does not think that there is any such reason.