The German Constitutional Court and legislative capture

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Political decision-making is often influenced through the lobbying of strong interest groups. This is not per se *a problem for democracy. It becomes a problem if political decisions are primarily motivated by the intention to grant certain interest groups a favor. This contribution deals with the question whether constitutional courts can play a role in curing this pathology of the political process. It has a normative and a reconstructive dimension. The normative part makes a case that constitutional courts should police interest group capture. However, the direct control of legislative motivation is an impossible task. For this reason, constitutional courts should recur to second-order criteria, which focus on the rationality of the legislation. If legislation lacks a tight means–end fit or is inconsistent, this is an indication that the legislature has pursued not only public-regarding aims. The reconstructive part analyzes the jurisprudence of the German Constitutional Court. In several judgments, the German Constitutional Court made allusions to a potential capture of the legislature. However, it never relied on legislative motivation to justify its decisions. Instead, it performed a rationality review and found that the legislation in question was either inconsistent or disproportionate. The contribution thus offers a new perspective on the traditional doctrines of proportionality and inconsistency. Even though these doctrines allow prima facie for a rationality review of the legislature, they can also be used to flush out illicit legislative motivations.*

1. Capture and political corruption

In the coalition negotiations after the German federal elections in September 2009, the Free Democratic Party, the designated junior coalition party, lobbied for a reduction of the sales taxes for the hotel industry. After an initial resistance of the coalition partner, the Christian Democrats, the parties agreed to apply the reduced sales tax of 7 percent—instead of 19 percent—to hotel accommodations. This tax relief fully benefited the hotel industry. As hotels have to display prices including the sales tax

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in Germany, they could effectively raise prices for accommodations without having to adjust the price tag. The price increase was compensated by the reduction of the sales tax. Coincidentally, the Free Democrats received donations worth EUR1.1 million (≈ USD1.6 million) from the Substantia corporation from October 2008 to October 2009—one of the biggest donations in the history of the party. The main shareholder of the Substantia corporation was also a co-owner of the Mövenpick group, which runs a significant number of hotels all over Germany.

Interest-group influence on German politics is not always as blunt as it is in this case; political lobbying is often much more subtle. At the same time, it is less transparent to the general public; however, that does not make it less problematic. Democratic decision-making receives its legitimation from the presumption that democratic decisions aim at promoting the common welfare.[1] This legitimacy is endangered if the decisions of parliamentarians are motivated by pursuing private interests instead of the interests of the general public.[2]

There are several potential solutions to the problem of interest group capture. The most obvious response would be to deal with political corruption under the criminal anti-corruption laws. However, actual corruption will often be difficult to prove. Moreover, many forms of problematic interest-group influence cannot be qualified as corruption in the strict, criminal-law sense. Another possible response would be to impose restrictions on donations to political parties or to regulate campaign financing.[3] However, party donations and spending in election campaigns are fairly unregulated in Germany. There are no limits on donations or on spending in election campaigns. Furthermore, the incentive structure is such that it is unlikely that a stricter regulation will be introduced in the foreseeable future.[4] For these reasons, the following analysis will concentrate on the constitutional law consequences of legislative capture. It will discuss whether a statute that has been the result of excessive interest-group influence is in some way constitutionally deficient.[5]

The analysis will proceed in three steps. In Section 2, I will draw on the political science literature on interest group theory and explain why politics is often captured by specific interests. Small groups with intense preferences often have lower transaction costs to organize and to lobby for their interests than big groups. Politicians are likely to grant favors to such lobbying efforts if the general public is indifferent because the

[1] *See* Giovanni Sartori, The Theory of Democracy Revisited. Part I: The Contemporary Debate (1987); Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 304 (William Rehg trans., 1996).

[2] Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 49 (1985).

[3] *See* Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118 (2010); Samuel Issacharoff & Jeremy Peterman, *Special Interests After Citizens United: Access, Replacement, and Interest Group Response to Legal Change*, 9 Ann. Rev. L. & Soc. Sci. 185 (2013).

[4] *See* Niels Petersen, *Verfassungsgerichte als Wettbewerbshüter des politischen Prozesses*, *in* Das letzte Wort—Rechtsetzung & Rechtskontrolle in der Demokratie 59 (Dominik Elser et al. eds., 2014).

[5] There are surprisingly few studies on this topic in the German constitutional law literature. The major exception is Hans Herbert von Arnim, Gemeinwohl und Gruppeninteressen (1977).

costs for each individual citizen are negligible. In such cases, political favors to interest groups will rarely cost votes in the next elections.

Section 3 deals with the doctrinal consequences of acknowledging interest-group influence. There is no general constitutional prohibition of legislative capture that would render legislation automatically unconstitutional. However, I will argue that capture will make a difference when a statute infringes individual rights. Still, a direct control for capture will often be impossible. On the one hand, the influence of lobby groups is often difficult to prove; on the other, we would need a normative benchmark to determine when interest-group influence is still acceptable and when it has to be deemed excessive. The solution is the recourse to second-order criteria that may be proxies for legislative capture, such as inconsistency or a loose means–end fit of the legislation.

Section 4 reconstructs the case law of the German Constitutional Court. It shows that the Court made several allusions to a potential capture of the legislature in its early jurisprudence. The function of these allusions was to justify a strict standard of scrutiny and gradually to develop the doctrinal tools for individual rights review that are prevalent today. In conclusion, the article does not primarily offer a new normative proposal on how to deal with legislative capture. Rather, it offers a new perspective on the already existing doctrinal structure. Even though the proportionality principle and the consistency test seem *prima facie* to be instruments of rationality review, they also have a second purpose: namely, to counteract legislative capture that leads to an infringement of individual rights.

2. Interest-group theory and the legislative process

Democratic decision-making derives its legitimacy from the accountability of the political actors. Politicians are supposed to make decisions in the interest of the majority of the citizenry because they are accountable to the electorate.[6] If they do not, they have to fear not being re-elected. However, elections cannot ensure that politicians always take public-regarding decisions. The democratic political process is fraught with inherent pathologies. There are certain situations, in which political actors have incentives to make decisions that are inconsistent with the interests of the majority of the citizens. One of these situations is the pursuit of particularistic interests promoted by intensive interest-group pressure.

If politicians want to win elections, they not only need votes, but also financial resources.[7] These financial resources are, in part, provided through public funds or party membership fees. However, a significant part of the party budget is usually

[6] *Seminally* Joseph Alois Schumpeter, Capitalism, Socialism, and Democracy 269–283 (1942). *See also* Philippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, 2(3) J. Democracy 75 (1991); Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, *in* Democracy's Value 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999); Ian Shapiro, The State of Democratic Theory (2006).

[7] Arthur T. Denzau & Michael C. Munger, *Legislators and Interest Groups: How Unorganized Interests Get Represented*, 80 Am. Pol. Sc. Rev. 89, 93 (1986).

provided by private donors. These private donations are often given in the expectation of gaining influence on the political agenda of the respective party.[8] In particular, institutional donors often make financial contributions in order to have policy issues that are important to them receive favorable treatment in return. Empirical research shows that members of parliament are susceptible to the influence of strong lobby groups.[9]

However, this influence is not exclusively monetary. In addition to financial contributions, this influence primarily takes two forms.[10] One the one hand, interest groups may provide important expert information as politicians often do not have detailed knowledge regarding all economic and social relations. On the other hand, the conduct of the interest groups can influence the voting behavior of citizens. Large companies can threaten to lay off a significant number of employees, while labor unions may influence their members by giving specific party recommendations.

This lobby group influence is not *per se* a bad thing. In particular, the informative function of interest groups is vital to democratic politics. The problem is, however, that there is an asymmetric representation of different interests in the political process.[11] Mancur Olson has shown that small groups with strong particular interests are most likely to form lobby groups to represent their interests in the political process.[12] A group that wants to lobby for its interests in the political process has an issue with free-riders.[13] Lobbying is costly. However, the benefits of lobbying are not limited to the members of the lobby group. We thus have a typical public-good problem.[14] Even though lobbying would be in the common interest of the whole group, every individual would be best off if the other group members shared the costs of the lobbying effort, and he or she only enjoyed the benefits. The result is a suboptimal provision of the common good.[15]

However, there is a difference between small and large groups. Large groups will generally perform less efficiently than small groups, because in small groups the gains for individual group members are higher.[16] The larger the group, the smaller is the individual gain a group member obtains from his or her lobbying efforts, and the

[8] Uwe Volkmann, *Parteispenden als Verfassungsproblem*, 55 Juristenzeitung 539, 541 (2000).

[9] *See* Thomas Stratman, *What Do Campaign Contributions Buy? Deciphering Causal Effects of Money and Votes*, 57 S. Econ. J. 606 (1991); Laura I. Langbein, *Lobbies and Political Conflict: The Case of Gun Control*, 77 Public Choice 551 (1993); Robert E. Baldwin & Christopher S. Magee, *Is Trade Policy for Sale? Congressional Voting on Recent Trade Bills*, 105 Public Choice 79 (2000).

[10] *See* von Arnim, *supra* note 5, at 136–141.

[11] *Cf.* Anthony J. Nownes & Grant Neeley, *Public Interest Group Entrepreneurship and Theories of Group Mobilization*, 49 Pol. Res. Q. 119, 141 (1996), who argue that the interests of certain social groups are overrepresented by interest groups.

[12] Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1965). For an extensive overview on the literature about interest group formation, *see* Nownes & Neeley, *supra* note 11, at 121–125; Andrew McFarland, *Interest Group Theory*, *in* Oxford Handbook of American Political Parties and Interest Groups 37 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010).

[13] Olson, *supra* note 12, at 35.

[14] On the public goods dilemma, *see* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

[15] Olson, *supra* note 12, at 28.

[16] *Id.*

higher are the transaction costs to form such a group. Therefore, small groups are more likely to engage in lobbying efforts than large groups. At the same time, lobbying efforts will be the more successful, the less voters care about the concrete policy outcome.[17] If an interest group manages to receive subsidies, tax cuts, or favorable regulations, the costs of these measures will usually be shared among the general public. Consequently, the negative impact on each citizen is negligible, so that it is unlikely to influence the voting behavior of the electorate.

The case of the Free Democrats lobbying for a reduction in the sales taxes for the hotel business is a textbook case of legislative capture.[18] On the one hand, there is a small group with intense preferences. The interests of the hotel business in the tax reduction were so pronounced that it did not even need coordination of the individual members of the business. The donations were made by one individual hotel owner, which is consistent with Olson's theory and indicates the amount of the expected benefits. On the other hand, we have the diffuse interests of the general taxpayers. The cost of the tax privilege was lowered tax returns for the federal budget. However, if we spread the costs among all taxpayers, the burden on each individual taxpayer was negligible. *Ex ante*, it was thus reasonable for the Free Democrats to assume that their lobbying for lower taxes for the hotel business would not cost them a significant share of votes.

3. Doctrinal repercussions

The danger of private-regarding legislation is most pronounced in the case of state subsidies and tax exemptions.[19] Here, the incentive structures match the assumptions of the interest-group theory. While the group receiving the subsidy has strong incentives to lobby for it, the damage to each individual taxpayer is small. However, it will be challenging to develop doctrinal standards to police these practices. In his work on *Common Interest and Group Interests*, Hans Herbert von Arnim proposed utilizing the social dimensions of the fundamental rights and the equal protection clause to scrutinize tax and subsidy legislation that potentially harms common welfare.[20]

This article will pursue a different path and make a more modest proposal. It will develop standards to police interest-group capture in the context of a fundamental rights review. However, it will not focus on the social dimension of individual rights, but on their function to protect the private sphere of the citizens against sovereign restrictions. It thus targets regulation that promotes the private interests of a particular interest group, while at the same time restricting the fundamental rights of a different societal group. The primary example is professional access requirements. Such access requirements will often have an important regulatory function. On other occasions, however, they may operate as market-entry barriers that protect professionals

17 Denzau & Munger, *supra* note 7, at 103.

18 Emanuel Towfigh & Niels Petersen, Ökonomische Methoden im Recht 148 (2010).

19 *See* von Arnim, *supra* note 5, at 276–279.

20 *Id.* at 285–303.

who are already active in the market against new entrants. These access requirements have negative welfare effects in two respects. On the one hand, they exclude qualified individuals from offering a certain good or service. On the other hand, this exclusion also indirectly affects the general public. As they stymie competition, access restrictions may lead to higher prices and lower quality of professional services.

Yet, one question remains: What impact does the influence of lobby groups on policy outcomes have on the fundamental rights doctrine? *Prima facie*, it seems to be irrelevant. Traditionally, the German constitutional law scholarship assumes that the constitutional compatibility of a piece of legislation depends on the content of the legislation, not on the rationality of the legislative process or the motives of the legislator.[21] Section 3.1 challenges this view. I will argue that it is often difficult to second-guess legislative value decisions. If we want to give the legislature a margin of appreciation with regard to the resolution of value conflicts, we need to introduce a compensatory control of legislative procedure and motives. In Section 3.2, I will then deal with the doctrinal difficulties of controlling for legislative capture. Section 3.3 will offer an indirect control for capture as an alternative. It will identify certain proxies that indicate illicit motives of the legislature, such as the inconsistency or the loose means–end fit of a piece of legislation. Lastly, Section 3.4 adds a cautionary note. It will show that second-order review may sometimes miss its target, and it offers an additional qualification as a remedy.

3.1. Proportionality and the procedural turn in constitutional law doctrine

The central doctrinal instrument of the fundamental rights jurisprudence of the German Constitutional Court is the proportionality test.[22] According to the German conception, fundamental rights are no absolute guarantees or "trumps" in the Dworkinian sense.[23] Instead, the legislature may authorize restrictions of rights in order to promote a public purpose. However, the Court has to strike a balance between the protection of individual rights and the promotion of competing public purposes. This is where the proportionality test enters the picture. A restriction of an individual right is justified if it meets the four requirements of the proportionality test. First, it has to pursue a legitimate goal; second, there has to be a rational connection between means and ends; third, there is no less restrictive, but equally effective means to pursue the same goal; and, finally, the restriction should not be disproportionate when compared to the public benefit.

[21] *See, e.g.*, Timo Hebeler, *Ist der Gesetzgeber verfassungsrechtlich verpflichtet, Gesetze zu begründen?*, 63 Die Öffentliche Verwaltung 754, 760 (2010). *See also* Klaus Schlaich, *Die Verfassungsgerichtsbarkeit im Gefüge der Staatsfunktionen*, 39 Veröffentlichungen der Vereinigung Deutscher Staatsrechtslehrer 99, 109 (1981); Hans Dieter Jarass, *Die Widerspruchsfeiheit der Rechtsordnung als verfassungsrechtliche Vorgabe*, 126 Archiv des öffentlichen Rechts 588 (2001); Christian Waldhoff, *"Der Gesetzgeber schuldet nichts als das Gesetz"*, *in* Staat im Wort. Festschrift für Josef Isensee 325 (Otto Depenheuer et al. eds., 2007).

[22] *See* Josef Isensee, *Bundesverfassungsgericht—quo vadis?*, 51 Juristenzeitung 1085, 1090 (1996); Matthias Jestaedt, *Phänomen Bundesverfassungsgericht: Was das Gericht zu dem macht, was es ist*, *in* Das entgrenzte Gericht. Eine kritische Bilanz nach sechzig Jahren Bundesverfassungsgericht 77, 146 (Matthias Jestaedt et al. eds., 2011).

[23] *See* Ronald Dworkin, Taking Rights Seriously 184–205 (1977).

The proportionality test has not remained without criticism. The critique focuses, in particular, on the last prong of the test. The critics argue that the balancing required by the fourth step of the test sometimes required a comparison of incommensurable values.[24] There is no common normative currency for comparing, for example, freedom of religion and public security or the freedom of artistic expression and the right to privacy.[25] The critics claim that there is no "rational way" to resolve such value conflicts,[26] so that the decision should be taken by the legislature and not by Constitutional Courts.[27]

Even if the defendants of balancing admit its deficiencies, they counter that balancing is a necessary prerequisite for effective judicial review.[28] In the end, the question comes down to the function that we want to attribute to constitutional courts in a democratic society.[29] If courts are supposed to correct systemic malfunctions of the political process,[30] they cannot cede all questions that involve value decisions to the legislature.[31] Instead, they have to develop effective doctrinal tools to control the limits of legislative discretion. If the legislature, to cite an extreme example, prohibits the construction of minarets, this prohibition may well be an expression of the preferences of the legislative majority. At the same time, it violates the rights of a religious

[24] *Seminally* Bernhard Schlink, Abwägung im Verfassungsrecht 134–135 (1976). *See also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L. J. 943, 972–976 (1987); Stuart Woolman, *Out of Order? Out of Balance? The Limitation Clause of the Final Constitution*, 13 S. Afr. J. Hum. Rts 102, 114–121 (1997); Henk Botha, *Rights, Limitations, and the (Im)possibility of Self-Government*, *in* Rights and Democracy in a Transformative Constitution 13, 21–23 (Henk Botha, André van der Walt & Johan van der Walt eds., 2003); Ralph Christensen & Andreas Fischer-Lescano, Das Ganze des Rechts—Vom hierarchischen zum reflexiven Verständnis deutscher und europäischer Grundrechte 357 (2007); Stavros Tsakyrakis, *Proportionality: An assault on human rights?*, 7 Int'l J. Const. L. 468, 474 (2009); Grégoire C.N. Webber, The Negotiable Constitution 92–93 (2009).

[25] *See* Christoph Engel, *Offene Gemeinwohldefinitionen*, 32 Rechtstheorie 23, 30–31 (2001).

[26] Habermas, *supra* note 1, at 259.

[27] Bernhard Schlink, *Der Grundsatz der Verhältnismäßigkeit*, *in* Festschrift 50 Jahre Bundesverfassungsgericht. Zweiter Band: Klärung und Fortbildung des Verfassungsrechts 445, 461 (Peter Badura & Horst Dreier eds., 2001).

[28] Andreas von Arnauld, Die Freiheitsrechte und ihre Schranken 264 (1999); Aharon Barak, *Proportional Effect: The Israeli Experience*, 57 U. Toronto L.J. 369, 382 (2007).

[29] Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, *in* European and US Constitutionalism 49, 64 (Georg Nolte ed., 2005); Niels Petersen, *How to Compare the Length of Lines to the Weight of Stones—Balancing and the Resolution of Value Conflicts in Constitutional Law*, 14 German L.J. 1387, 1407 (2013). *See also* Engel, *supra* note 25, at 49. On the discussion about the function and legitimacy of the German Constitutional Court, *see, e.g.*, Dieter Grimm, *Verfassungsgerichtsbarkeit im demokratischen System*, 31 Juristenzeitung 697 (1976); Konrad Hesse, *Funktionelle Grenzen der Verfassungsgerichtsbarkeit*, *in* Recht als Prozess und Gefüge. Festschrift für Hans Huber zum 80. Geburtstag 261 (Jörg Paul Müller ed., 1981); Christoph Gusy, Parlamentarischer Gesetzgeber und Bundesverfassungsgericht (1985); Gunnar Folke Schuppert, *Self-restraints der Rechtsprechung*, 103 Deutsches Verwaltungsblatt 1191 (1988); Werner Heun, Funktionell-rechtliche Schranken der Verfassungsgerichtsbarkeit (1992); Ulrich Haltern, Verfassungsgerichtsbarkeit, Demokratie und Misstrauen (1998); Jörg Riecken, Verfassungsgerichtsbarkeit in der Demokratie (2003); Shu-Perng Hwang, Verfassungsgerichtlicher Jurisdiktionsstaat?—Eine rechtsvergleichende Analyse zur Kompetenzabgrenzung von Verfassungsgericht und Gesetzgeber in den USA und der Bundesrepublik Deutschland (2005); Christoph Möllers, *Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts*, *in* Das entgrenzte Gericht, *supra* note 22, 281.

[30] *See* John Hart Ely, Democracy and Distrust. A Theory of Judicial Review (1980).

[31] Engel, *supra* note 25, at 49.

minority. If a constitutional court is supposed to be an institution of effective minority protection, it thus has to have the competence to second-guess legislative value decisions.

Consequently, the balancing test faces a tension between deferring normative value decisions to the democratically accountable legislature and keeping doctrinal tools for an effective judicial review.[32] A possible attenuation of this tension is the recourse to second-order review.[33] Second-order review does not focus on the result of the legislative process, but on the procedure itself. It does not perform a substantive balancing of competing rights and interests, but scrutinizes the motives of the legislature and the legislative fact-finding procedure. Such a procedural understanding of individual rights review is consistent with some proposals in the German constitutional law literature. Some authors have suggested reducing the substantive scrutiny of the Constitutional Court and using procedural rationality as a proxy for the substantive rationality of legislation.[34]

Under this conception, a restriction of an individual right could not be justified if the legislature had the intention to discriminate against, or to privilege, a specific societal group.[35] In contrast, the measure would be justified if the discrimination or the privilege were just a necessary consequence of pursuing a legitimate regulatory goal.[36] If we adopt such a procedural conception of fundamental rights review, legislative capture suddenly has doctrinal implications. If the legislature is captured by special interests, it passes a statute not primarily for its ability to promote a common interest, but to concede a favor to the interest group. The tax break for the hotel industry has little virtue other than pleasing hotel owners. Such a motive would be illicit under a second-order approach and could thus not justify the restriction of an individual right.

3.2. Controlling for legislative capture

In the US constitutional law literature, several scholars have advocated a stricter control for legislative capture by the US Supreme Court.[37] The most direct way of

[32] Petersen, *supra* note 29, at 1393.

[33] On the concept of second-order review concept, *see* Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 648 (1998).

[34] *See* Fritz Ossenbühl, *Die Kontrolle von Tatsachenfeststellungen durch das Bundesverfassungsgericht*, *in* Bundesverfassungsgericht und Grundgesetz. Erster Band: Verfassungsgerichtsbarkeit 458, 513 (Christian Starck ed., 1976); Brun-Otto Bryde, Verfassungsentwicklung. Stabilität und Dynamik im Verfassungsrecht der Bundesrepublik Deutschland 328 (1982); Gunnar Folke Schuppert, *Gute Gesetzgebung. Bausteine einer kritischen Gesetzgebungslehre*, 2003 Zeitschrift für Gesetzgebung Sonderheft 4, 22–23 (2003); Indra Spiecker gen. Döhmann, Staatliche Entscheidungen unter Unsicherheit, at Pt IV, ch. 3, B (forthcoming 2014).

[35] *See* Ely, *supra* note 30, at 136–145.

[36] *Id.* at 137.

[37] *See esp.* Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 Supr. Ct. Rev. 127 (1982); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703 (1984); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Col. L. Rev. 1689 (1984); Sunstein, *supra* note 2. *See also* Erwin Chemerinsky, *The Vanishing Constitution*, 103 Harv. L. Rev. 43, 78–81 (1989) (justifying more intensive judicial review because legislative decisions reflect majority preferences only inaccurately because of capture); Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 Tul. L. Rev. 849, 874–875 (1980) (arguing that courts should directly confront legislative failure).

controlling capture would be to check whether interest groups had a significant influence on the legislative procedure. However, such a review method would encounter three major difficulties. First, courts will often not have sufficient information to reconstruct interest-group influence in the law-making process. The example of Free Democrats lobbying for a decrease of sales taxes for the hotel industry is probably a rare exception. Most often, interest-group influence will be much more subtle and difficult to trace. Second, even if courts were able to prove that a law had been heavily influenced by specific interest groups, they would be very reluctant to presume bad faith of the legislature.[38] After all, courts are, to a certain extent, dependent on the cooperation of the political branches if they want to implement their decisions.[39] Accusing the legislature of corruption would probably not improve the relationship with politics.

Third, and most importantly, we will be hard-pressed to find any legislation in which interest groups have not been involved. Lobby groups not only corrupt the political process, but are also an important source of information for the legislature. They inform politicians about the needs and challenges of specific societal or economic groups. The proof of interest-group influence thus cannot be sufficient to invalidate a statute. Instead, we would have to find a measure for "excessive" interest-group influence.

However, it is impossible to define "excessive" interest-group influence without having a normative baseline.[40] It may be that the interest group lobbied for a legislative measure that would anyways be in the public interest. Maybe the fight of competing interest groups over a piece of legislation led to a "public-regarding" compromise. In order to determine whether the influence of an interest group was excessive, we would thus have to make a material value judgment about the result of the legislation. However, this would take us back to square one as the search for a procedural solution was precisely a reaction to the difficulties of the traditional substantive approach.[41]

3.3. Second-order review: finding proxies for legislative capture

A solution to this dilemma might be to look for indirect proxies of legislative capture.[42] When we want to know whether interest-group influence contradicts the common interest, the decisive question is not whether the lobbying effort has been "excessive." Rather, we are interested in the motive of the legislature. Did the legislative majority pass a law because it was convinced that the law was the best solution to a perceived social problem? Or was it instead motivated by material benefits, such as maintaining good relations with a specific interest group. This subjective motivation will be impossible to observe. However, we may try to infer the motivation by relying on external indicators.

[38] I owe this insight to a discussion with Dieter Grimm.

[39] *See* Georg Vanberg, The Politics of Constitutional Review in Germany (2005).

[40] Einer R. Elhauge, *Does Interest Group Theory Justify More Intensive Judicial Review?*, 101 Yale L. J. 31, 49–59 (1991).

[41] *See* Issacharoff, *supra* note 3, at 129.

[42] *Similarly* Sunstein, *supra* note 2, at 69–72 (demanding a stronger rationality review).

The first possible indicator is the legislative history. On the one hand, the Court can try to observe the form and the intensity of interest-group influence. A piece of legislation that benefits a specific group and that coincides with a significant financial contribution to the party initiating the legislation would be an indication of illicit motives of the legislature. On the other hand, the Court can look at the broader picture of the drafting process. We have seen that one form of exerting influence on the political process is to give biased information.[43] An indicator of capture could thus be that the legislature did not take all relevant interests at stake into account[44] or failed to perform reliable pre-legislative fact-finding and consult expert opinions.[45]

A second set of indicators focuses on the content of the legislation. However, the Court does not need to evaluate the legislative purpose materially to detect capture. Instead, it can perform a rationality review in the context of the proportionality analysis. Specifically, there are two red flags that serve as indicators for capture: on the one hand, the inconsistency of a piece of legislation and, on the other, a loose means–end fit. Both allow inferences about the motives of the legislature. If legislation is inconsistent, or if there is no correlation between the adopted measure and the legislative purpose, there are two explanations. Either the legislature did not pay due care during the drafting process, or it had a different motivation than the one that was explicitly declared to justify the legislation.[46]

The World Trade Organization (WTO) Appelate Body and the Court of Justice of the European Union (CJEU) have a long history of using legislative inconsistencies as an indication that the legislature intended to protect domestic business interests instead of promoting the explicitly stated goal.[47] If a state imposes trade-restricting measures

[43] *See supra* Section 2.

[44] *Cf.* Olivier De Schutter & Françoise Tulkens, *Rights in Conflicts: The European Court of Human Rights as a Pragmatic Institution*, *in* Conflicts between Fundamental Rights 169, 208 (Eva Brems ed., 2008) (arguing that courts should scrutinize the decision-making process to ensure that the interests at stake have been properly considered).

[45] This is consistent with proposals in the legal literature to determine the level of judicial scrutiny according to the diligence of the legislative fact-finding procedure, *see* Bryde, *supra* note 34, at 326–330; Sujit Choudhry, *So What Is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter's Section 1*, 34 Sup. Ct. L. Rev. 501, 534 (2006); Julian Rivers, *Proportionality and Variable Intensity of Review*, 65 Cambridge L.J. 174, 204 (2006); Joseph Corkin, *Science, Legitimacy and the Law: Regulating Risk Regulation Judiciously in the European Community*, 33 Eur. L. Rev. 359 (2008); Janneke Gerards, *Pluralism, Deference and the Margin of Appreciation Doctrine*, 17 Eur. L.J. 80, 118–119 (2011); Niels Petersen, *Avoiding the Common Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication*, 11 Int'l J. Const. L. 294, 314–315 (2013); Spiecker gen. Döhmann, *supra* note 34. *See also* Gunther Schwerdtfeger, *Optimale Methodik der Gesetzgebung als Verfassungspflicht*, *in* Hamburg. Deutschland. Europa. Beiträge zum deutschen und europäischen Verfassungs-, verwaltungs- und Wirtschaftsrecht. Festschrift für Hans Peter Ipsen zum siebzigsten Geburtstag 173, 178–182 (Rolf Stödter & Werner Thieme eds., 1977), who wants to impose an independent rationality requirement on the legislature, which includes taking into account all relevant interests and a proper fact-finding procedure.

[46] Niels Petersen, *Gesetzgeberische Inkonsistenz als Beweiszeichen: Eine rechtsvergleichende Analyse der Funktion von Konsistenzargumenten in der Rechtsprechung*, 138 Archiv des öffentlichen Rechts 108, 130–131 (2013).

[47] *See* Gjermund Mathisen, *Consistency and Coherence as Conditions for Justification of Member State Measures Restricting Free Movement*, 47 Com. Mkt L. Rev. 1021 (2010) (on the European Court of Justice); Daniel Lovric, Deference to the Legislature in WTO Challenges to Legislation 130 (2010) (on the WTO Appellate Body).

to protect consumers or the environment, we expect to observe a similar level of protection of the same interest across the board. If we do not, there is reason to suspect that the legislature did not take environmental or consumer protection as seriously as it had claimed. Let us assume that a state imposes an upper limit on sulfur dioxide in beer in order to protect the health of consumers.[48] If, at the same time, there is no such limit on the share of sulfur dioxide in wine, even though the health implications are similar, the consumer protection argument is not credible. Instead, it seems likely that the legislature was motivated by protectionist concerns.

These considerations also apply in the context of domestic constitutional law. Instead of protecting the domestic industry, members of parliament might privilege a particular social or economic group with a strong lobby. Of course, they will give different reasons and try to argue that the measure is necessary to enhance general welfare. However, legislative inconsistency may raise doubts with regard to the welfare-enhancing intention. The same argument can also be made for legislative measures lacking a tight means–end fit.[49] If there is no rational connection between the means and the purpose, if the legislation is overbroad, or if there are less restrictive alternative measures that would have attained the same goal almost as effectively, there is a suspicion that the legislature pursued different goals than the ones it stated explicitly.

A good illustration is the *Eldred* case of the US Supreme Court.[50] In *Eldred*, the Court had to deal with the Copyright Term Extension Act (CTEA), which extended the existing copyright terms by additional 20 years. For works published before 1978, the term was consequently extended to 95 years. The extension was preceded by a major lobbying effort of the Walt Disney Company, which would have faced the loss of its copyrights for Mickey Mouse, had the term not been extended. In a 7-2 decision, the US Supreme Court upheld the CTEA. The majority argued that the copyright clause of the American constitution only imposed one substantial limit on Congress: the terms for copyright protection had to be limited. As the 95-year term did not establish a perpetual copyright, the majority held that the copyright clause was not violated.[51]

This reasoning of the majority was disputed by Justice Breyer in his dissenting opinion.[52] Breyer argued that the case would have merited a stricter review of the rationality of the statute.[53] The constitution itself expressed that copyright protection was supposed to "promote the Progress of Science."[54] Therefore, it was merely a means, not an end in itself.[55] However, as far as the statute also concerned already existing

48 *See* Case C-13/91 und C-113/91 Michel Debus, 1992 E.C.R. I-3636 (Apr. 4, 1992).

49 *See* John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 San Diego L. Rev. 1155, 1157 (1978) (arguing that the "demand for an essentially perfect fit turns out to be a way . . . of 'flushing out' unconstitutional motivation").

50 Eldred v. Ashcroft, 537 U.S. 186 (2003).

51 *Id.*, at 208–210.

52 Eldred, 537 U.S. at 242 (Breyer J., dissenting).

53 *Id.*, at 244–245. The majority rejected this argument, arguing that it was "generally for Congress, not for the courts, to decide how best to pursue the Copyright Clause's objectives" (*id.* at 212).

54 *Id.* at 245 (Breyer J., dissenting).

55 *Id.*

copyrights, it did not create any economic incentive in this respect.[56] Consequently, it did not have any public benefit, and should thus be held unconstitutional.[57] In his argument, Breyer did not explicitly mention the fact that the CTEA was probably motivated by significant lobbying efforts of a primary beneficiary of the legislation. Instead, he based his opinion on the lack of a rational connection between measure and purpose. By highlighting that the statute lacked any public purpose, he implicitly suggested that the actual purpose of the legislation was the promotion of private interests.[58]

To summarize the point: constitutional courts will rarely target legislative capture directly. On the one hand, capture will often be too difficult to prove. On the other, courts are—for institutional reasons—reluctant to accuse the legislature of bad faith. Instead, they can develop doctrinal tools that can indirectly control for the legislative motivation. First, they can analyze the drafting process: Did the legislature take all relevant interests into account and did it conduct comprehensive pre-legislative fact-finding? Second, they can make a rationality review of the legislation in the context of the proportionality test.[59] If the legislation is inconsistent or if it lacks a tight means–end fit, these may be indications that the legislature also pursued different interests than the ones that were explicitly mentioned.

3.4. Inconsistency, log-rolling, and compromise

The previous sections have an underlying assumption that it is possible to identify a uniform intention of the legislature. The legislature is no such uniform body, though.[60] Different parliamentarians may have different reasons for voting for or against a statute. This does not mean that the assumption of uniform intent is unserviceable. In the majority of cases, legislation is essentially drafted by the ministerial bureaucracy and then confirmed by the legislative majority.[61] For these circumstances, our assumption seems to be an accurate description of the political process. In other cases, however, it might be necessary to make compromises—compromises with particular factions within the majority party, with the coalition partner, or even with the opposition if

[56] *Id.* at 257.

[57] *Id.* at 263.

[58] *See also* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541, 567 (2004), who argue that the Supreme Court recurs to second-order criteria when it reviews redistricting cases. As it is difficult to find a measure of when gerrymandering causes sufficient harm to the political process, the Supreme Court stays away from a first-order review of redistricting, but relies instead on second-order criteria.

[59] *See also* Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 Law & Eth. Hum. Rts 141, 162 (2010), who proposes to use the proportionality test as a means to control for legislative capture.

[60] *See* Christoph Engel, *Delineating the Proper Scope of Government: A Proper Task for a Constitutional Court?*, 157 J. Institutional & Theoretical Econ. 187, 200 (2001); Matthias Cornils, *Rationalitätsanforderungen an die parlamentarische Gesetzgebung im demokratischen Rechtsstaat*, 126 Deutsches Verwaltungsblatt 1053, 1058–1059 (2011).

[61] Von Arnim, *supra* note 5, at 142; Helmuth Schulze-Fielitz, *Wege, Umwege oder Holzwege zu besserer Gesetzgebung*, 59 Juristenzeitung 862, 865 (2004).

the opposition has some veto power in the second legislative chamber. If we observe legislative inconsistency, it is thus not necessarily an indication of illicit intent of the legislative majority. It may also be the expression of a compromise. The compromise may not be the optimal solution to a problem. If it is, however, the best solution that is politically feasible; inconsistency alone is no sufficient ground for finding a violation of individual rights.[62]

An example of such a misguided use of the inconsistency doctrine is the smoking ban case of the German Constitutional Court.[63] It forms part of a recent line of cases, in which the German Constitutional Court has prominently relied on consistency arguments to overturn legislation.[64] In the smoking ban case, the Court had to decide whether a smoking ban imposed on restaurants, bars, and night clubs was consistent with the freedom of profession. The Court argued that the legislature could, in principle, impose an absolute smoking ban on the gastronomy.[65] However, the state legislatures had introduced certain exceptions. Restaurants or bars could provide a separate smoking room, and the tent gastronomy was excluded from the smoking ban. The Constitutional Court found that these exceptions were inconsistent with the overall goal of the legislation.[66] The existence of the exceptions expressed a relativization of the purpose to protect consumer health.[67] For this reason, the Court held that the smoking ban violated the freedom of profession.

In his dissenting opinion, Justice Bryde argued that the consistency requirement as applied by the majority of the Court was too strict.[68] Because he accepted log-rolling

[62] *See* Christoph Engel, *Inconsistency in the Law: In Search of a Balanced Norm*, *in* Is there Value in Inconsistency? 221, 225 (Christoph Engel & Lorraine Daston eds., 2006); Oliver Lepsius, *Anmerkung*, 64 Juristenzeitung 260, 262 (2009); Philipp Dann, *Verfassungsgerichtliche Kontrolle gesetzgeberischer Rationalität*, 49 Der Staat 630, 640 (2010); Möllers, *supra* note 29, at 399.

[63] Bundesverfassungsgericht [BVerfG] [Constitutional Court], July 30, 2008, 121 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 317 (F.R.G.).

[64] On this tendency, *see* Simon Bulla, *Das Verfassungsprinzip der Folgerichtigkeit und seine Auswirkungen auf die Grundrechtsdogmatik*, 1 Zeitschrift für das Juristische Studium 585 (2008); Lothar Michael, *Folgerichtigkeit als Wettbewerbsgleichheit—Zur Verwerfung von Rauchverboten in Gaststätten durch das BVerfG*, 63 Juristenzeitung 875 (2008); Gerd Morgenthaler, *Gleichheit und Rechtssystem—Widerspruchsfreiheit, Folgerichtigkeit*, *in* Gleichheit im Verfassungsstaat. Symposium aus Anlass des 65. Geburtstages von Paul Kirchhof 51 (Rudolf Mellinghoff & Ulrich Palm eds., 2008); Lepsius, *supra* note 62; Christian Bumke, *Die Pflicht zur konsistenten Gesetzgebung*, 49 Der Staat 77 (2010); Dann, *supra* note 62; Joachim Englisch, *Folgerichtiges Steuerrecht als Verfassungsgebot*, *in* Gestaltung der Steuerrechtsordnung. Festschrift für Joachim Lang zum 70. Geburtstag 167 (Klaus Tipke et al. eds., 2010); Möllers, *supra* note 29, at 397–399; Mehrdad Payandeh, *Das Gebot der Folgerichtigkeit: Rationalitätsgewinn oder Irrweg der Grundrechtsdogmatik?*, 136 Archiv des öffentlichen Rechts 578 (2011); Lerke Osterloh, *Folgerichtigkeit: Verfassungsgerichtliche Rationalitätsanforderungen in der Demokratie*, *in* Demokratie-Perspektiven. Festschrift für Brun-Otto Bryde zum 70. Geburtstag 429 (Michael Bäuerle, Philipp Dann & Astrid Wallrabenstein eds., 2013); Anna Leisner-Egensperger, *Die Folgerichtigkeit—Systemsuche als Problem für Verfassungsbegriff und Demokratiegebot*, 66 Die öffentliche Verwaltung 533 (2013); Petersen, *supra* note 46.

[65] 121 BVerfGE 317, at 357–359.

[66] *Id.* at 360–368.

[67] *Id.* at 363.

[68] *Id.* at 379 (Bryde J. dissenting).

as a necessary element of political life, he claimed that the legislature needed a significant margin of appreciation for controversial political reforms:

> A legislative reform like the protection of passive smokers . . . requires a strenuous political effort, where the legislature faces massive resistance of powerful lobby organizations. The fact that the Federal Republic of Germany is a straggler in Western Europe when it comes to the protection of passive smokers already shows the extent of the resistance. Under such circumstances, it will often not be possible to attain anything but a more or less perforated compromise at first attempt—and compromise is virtually an essential characteristic of democratic politics.[69]

Not every inconsistency is thus a proof that the legislature pursued a problematic purpose with its legislation. It may instead be an expression of a compromise that tries to attain the politically feasible. In the smoking ban case, the problem is not the smoking ban as such. If at all, the problem is the exceptions that privilege a specific group of bars and restaurants. It may well be that these exceptions were, as Justice Bryde suggests, introduced because of strong lobbying efforts. When the court struck down the whole legislation, it threw out the baby with the bathwater, as it handed the lobbyists a victory they could not achieve in the legislative process.

These considerations show that consistency arguments are a double-edged sword. Inconsistency can be an indicator of legislative capture. But it can also be evidence that compromises are an essential part of the political process. So, how do we distinguish between different types of inconsistencies? How do we determine what consequences to draw from the fact that legislation may be inconsistent? As we have seen, legislative inconsistency is a sign of evidence. However, evidence does not necessarily equal proof. As capture is not the only possible cause of inconsistency, we have to acquire additional evidence that the inconsistency is due to the protection of special interests.

One way to strengthen the consistency argument would be to require a theory of harm. The requirement of a theory of harm is a common practice in European competition law for determining whether a specific practice is anticompetitive.[70] Moreover, it is not a totally novel idea in constitutional law scholarship. With regard to the justification clause of the South African Constitution, Stuart Woolman and Henk Botha have proposed to apply a theory of harm for determining whether a measure restricting a fundamental right can be justified.[71] Instead of balancing the public interest and the fundamental right, courts should focus on whether a measure harmed a marginalized social group.[72]

If we transfer these considerations to the context of legislative capture, we have to require a plausible narrative explaining why the inconsistent regulation serves

[69] *Id.* at 380.

[70] *See* Hans Zenger & Mike Walker, *Theories of Harm in European Competition Law: A Progress Report*, *in* Ten Years of Effects-Based Approach in EU Competition Law 185 (Jacques Bourgeois & Denis Waelbroeck eds., 2012).

[71] Stuart Woolman & Henk Botha, *Limitations: Shared Constitutional Interpretation, an Appropriate Normative Framework & Hard Choices*, *in* Constitutional Conversations 149, 183–186 (Stuart Woolman & Michael Bishop eds., 2008).

[72] *Id.*

special interests. Demanding a theory of harm stops short of requiring actual proof of legislative capture. Rather, it is an additional element that helps us to distinguish between different reasons for legislative inconsistency. Inconsistency thus should not automatically lead to the unconstitutionality of a norm. Instead, it is the combination of a theory of harm and inconsistency that constitutes a fundamental rights violation. This approach to legislative capture may not be ideal. But constitutional law is rarely about finding ideal solutions.[73] If we understand it instead as a way of trading off competing risks of inaccurate decisions,[74] the proposed solution is probably the best option we have.

4. Some evidence from the German Constitutional Court

In the jurisprudence of the German Constitutional Court, we find several judgments in which the Court alluded to a potential capture of the legislature.[75] In none of these judgments did the Court actually base the constitutional incompatibility of the statute on illicit motives of the legislature. Instead, it made a rationality review and found either a less restrictive means or a lack of means–end fit. This is consistent with the theory developed in the previous section. For good reasons, courts will be reluctant to control for legislative capture directly. Instead, they rely on second-order indicators, such as legislative inconsistency or the loose fit between the legislative aim and the actual measure. The first judgment in which the Court made an allusion to capture, was the pharmacy decision, one of the landmark judgments from the early days of the German Constitutional Court.[76] In this case, the applicant had challenged a licencing system for the establishment of new pharmacies in the state of Bavaria. According to this licencing system, a new pharmacy could only be approved if its economic survival was assured. In practice, this meant that each locality could not have more than one pharmacy per seven to eight thousand inhabitants.

[73] Engel, *supra* note 25, at 49.

[74] *See* Adrian Vermeule, The Constitution of Risk (2014).

[75] *See* BVerfG, June 11, 1958, 7 BVerfGE 377, at 408 (constitutional incompatibility of a licencing scheme for the establishment of new pharmacies that results in a protection of the existing pharmacies against new entrants into the market); BVerfG, Dec. 14, 1965, 19 BVerfGE 330, at 342 (Extensive training requirement for retailers that imposes significant costs on new entrants into the market violates the freedom of profession); BVerfG, March 16, 1971, 30 BVerfGE 292, at 328–330 (unconstitutionality of a measure that is explicitly supposed to protect domestic refineries against the competition of petroleum importers); BVerfG, July 7, 1971, 31 BVerfGE 229, at 246 (protecting the profit of publishers cannot justify an infringement of intellectual property rights); BVerfG, July 17, 1974, 38 BVerfGE 61, at 100–101 (constitutional incompatibility of a tax exemption that only applies to the transportation of compound animal feedstuff in special tank vehicles has been introduced without specific reasons); BVerfG, Dec. 2, 1992, 88 BVerfGE 5, at 15–16 (the protection of trade unions against competition cannot justify a regulation that exempts labor disputes from a scheme granting financial support for legal advise to people in need); BVerfG, July 3, 2007, 119 BVerfGE 59, at 87–89 ("monopolization" of hoof care with blacksmiths is not necessary to protect the health and wellbeing of hoofed animals).

[76] *See* 7 BVerfGE 377.

The Constitutional Court examined whether this licencing system violated the freedom of profession. In its analysis, it elaborated a three-tiered classification of infringements: the more intense the infringement, the higher was the required burden of justification on the legislature.[77] As the least intense infringement, the Court identified mere regulations of professional conduct.[78] The second category contained "subjective access requirements" that were based on the personal skills and the education of the applicants.[79] The Court put the licencing scheme for pharmacies into a third category, which it called "objective access requirements."[80] Under these, it understood quantitative access restrictions, which were independent of the capabilities of the individual applicants seeking access to the profession. The Court argued that such quantitative access restrictions could only be justified in exceptional cases.[81] In the Court's reasoning, it clearly alluded to the danger that such schemes were a result of legislative capture:

> There is a significant danger of [the legislative decision] being influenced by *illicit motives*; in particular, it seems likely that the access restriction is supposed to protect those who are already part of the profession against competition—a motive that, according to common opinion, cannot justify an infringement of the freedom of profession.[82]

As a consequence, however, the Court did not control whether such illicit motives actually influenced the decision-making process. Instead, it adopted a particularly strict standard of scrutiny.[83] The Bavarian legislature had offered two justifications for the licencing scheme.[84] On the one hand, it wanted to ensure the economic capability of the pharmacies. It feared that a strong level of competition could lead to the bankruptcy of several pharmacies, which would, in turn, endanger the general supply of medical drugs for the population. On the other hand, it assumed that pharmacies could violate their obligations regarding quality control, prescription requirements and the education of personnel if they came into financial trouble. Moreover, financially constrained pharmacists could have had incentives to sell more medical drugs than medically indicated.

However, these arguments did not convince the Court. In particular, the Court doubted that access regulation was necessary to assure the economic viability of pharmacies. As the establishment of a pharmacy required a significant initial investment, the Court assumed that aspiring pharmacists would well calculate the risk of such an

[77] *Id.* at 405–408.

[78] *Id.* at 405–406 ("Berufsausübungsregelungen").

[79] *Id.* at 406–407 ("subjektive Voraussetzungen der Berufsaufnahme").

[80] *Id.* at 407 ("objektive Bedingungen für die Berufszulassung").

[81] *Id.*

[82] *Id.* at 408 (emphasis added) (my translation. In the German original, it says: "Die Gefahr des Eindringens sachfremder Motive ist daher besonders groß; vor allem liegt die Vermutung nahe, die Beschränkung des Zugangs zum Beruf solle dem Konkurrenzschutz der bereits im Beruf Tätigen dienen—ein Motiv, das nach allgemeiner Meinung niemals einen Eingriff in das Recht der freien Berufswahl rechtfertigen könnte.").

[83] *See also* Sunstein, *Naked Preferences*, *supra* note 37, at 1700, who argues that, in the US context, heightened scrutiny usually reflects a concern that the challenged measure "reflects a naked preference."

[84] *See* 7 BVerfGE 377, at 413–414.

endeavor.[85] Applicants would only try to establish a new pharmacy if they expected it to be profitable. Furthermore, the Court drew on a comparison to Switzerland, which managed to have a functioning pharmacy system without a quantitative access restriction.[86] The Court thus assumed that the problem was adequately addressed by the market, so that regulatory intervention was not necessary. Furthermore, it argued that the licencing system was not requisite to ensure that pharmacists complied with their professional obligations. Instead, the legislature could have strengthened the supervision of pharmacies and decreased unnecessary administrative burdens for pharmacists.[87]

The Court supported its reasoning with two consistency considerations. On the one hand, it argued that the danger that professionals in financial difficulties could violate professional obligations could also occur in other liberal professions. Nevertheless, the legislature had not deemed it necessary to establish access restrictions for doctors or other professionals.[88] On the other hand, the concern of the legislature that pharmacists could oversell medical drugs because of financial constraints seemed to be unfounded if it permitted, at the same time, the provision of certain drugs on the shelf in drug stores without any restrictions.[89]

The reasoning in the pharmacy judgment is consistent with our considerations that we developed in the previous section. The Court clearly saw the danger that professional access restrictions were the result of legislative capture. However, instead of analyzing the motives of the legislature, the Court performed a rationality review of the statute. It found that there was only a loose fit between the adopted measure and the legislative purpose. Whether the legislature was actually captured was thus irrelevant. Just the suspicion of illicit motives in combination with a loose means–end fit was sufficient to strike down the challenged legislation.

There were also some later judgments in which the Court cautiously voiced the suspicion that the challenged legislation was the result of legislative capture. In a 1965 decision, the Court dealt with a regulation that likewise raised the concern that it was designed to protect established professionals against the competition of new entrants.[90] The regulation required retailers to have an extensive commercial training. The applicant was fined because he operated a cigarette vending machine without having fulfilled the training requirement.

The Court struck down the legislation and based its reasoning on rationality considerations. The legislature had argued that the requirement was supposed to improve the performance of the retail business. The Court countered that the regulatory barrier was unnecessary to pursue this goal.[91] As the retailer bore the financial risk of his business, he had every incentive to acquire the essential commercial skills. To require schematically

[85] *Id.* at 416–421.
[86] *Id.* at 415–416.
[87] *Id.* at 438–442.
[88] *Id.* at 429–430.
[89] *Id.* at 435–437.
[90] 19 BVerfGE 330.
[91] *Id.* at 340.

the same training for all kinds of retail businesses would thus "by far exceed the necessary proportion."[92] In an *obiter dictum* of the decision, the Court suspected a potential capture of the legislature, but did not inquire whether this was actually the case, as it had already overturned the statute on the basis of the proportionality test:

> [I]t is unnecessary to determine whether the legislature intended covertly to protect the already existing retailers against competition by requiring a significant training period.[93]

In the oil storage case, the Constitutional Court had to deal with an explicit privileging of the domestic refinery industry against mineral oil importers.[94] The challenged regulation was an attempt to react to the danger of energy crises. It required refineries and mineral oil importers to store a notable amount of refined oil, so that the German economy would be able to overcome temporary scarcities on the global oil market. However, this regulation imposed a significant burden on independent mineral oil importers. In the market, these independent importers had the role of satisfying peak demand and to provide particularly low-priced light fuel oil and diesel fuel to consumers.[95] As these independent importers usually had no storage facilities of their own, the regulation required them to make significant investments either to build or to rent storage facilities in order to comply with the storage obligations.

For these reasons, the German government had proposed an exception for independent importers in the drafting process. According to this proposal, the importers should have been able to apply for a significant reduction of their storage obligations.[96] However, this proposal was rejected by the Federal Council (*Bundesrat*). The Federal Council argued that an exception could give incentives to an increased import of mineral oil and thus lead to an extension of imported oil at the expense of domestic refineries, which would lead to "undesirable shifts in competition."[97] For this reason, the Federal Council removed the exception from the government proposal. In its judgment, the Constitutional Court cited economic evidence for why the storage obligation had a more severe economic impact on the independent importers than on the importers, which were affiliated with a corporate group with domestic refineries.[98] It thus argued that the regulation imposed an unacceptable burden on the independent importers and required the legislature to enact an exception to ease economic hardships.[99]

In contrast to the previously discussed cases, the Constitutional Court carried out a detailed analysis of the legislative history in the oil storage case.[100] Even though it

[92] *Id.*

[93] *Id.* at 342 (My translation. In the German original, it says: "Da aus den dargelegten Gründen die gesetzliche Regelung mit der Berufsfreiheit nicht vereinbar ist, braucht nicht geprüft zu werden, ob der Gesetzgeber etwa mit der vorgeschriebenen verhältnismäßig langen Ausbildungszeit auch einen versteckten Konkurrenzschutz für die bereits im Beruf stehenden Einzelhändler bezweckte.")

[94] 30 BVerfGE 292.

[95] *See id.* at 303.

[96] *See id.* at 327–328.

[97] *See id.* at 328–329.

[98] *Id.* at 330–331.

[99] *Id.* at 332–333.

[100] *See id.* at 327–330.

did not directly refer to legislative capture, it found that the Federal Council clearly privileged one class of economic actors over another. In order to protect domestic refineries, it vetoed an exception for independent importers of refined oil. As before, the legislative history did not determine the result of the Court's decision. Instead, the Court argued that the regulation violated the freedom of profession because it imposed a higher burden on independent importers than on importers affiliated with a corporate group with domestic refineries. However, this is again consistent with our assumption that the Court will try to find an "objective" basis for overturning a statute instead of openly accusing the legislature of capture.

The three cases discussed in this section were all decided in the first twenty years of the Court's existence. In the later jurisprudence, the Court made allusions to capture only on very rare occasions.[101] However, the doctrinal instruments of the Court have not changed. It still frequently uses consistency arguments or controls for the means–end fit of a legislative measure in the context of the proportionality test. These doctrinal tools do not exclusively target cases of excessive interest-group influence, but they also encompass such cases.

The reason why the Court refers less frequently to the potential capture of the legislature probably lies in the gradual development of a formal doctrinal framework for analyzing individual rights cases. When the Court decided the pharmacy case, it had not yet established such a framework. Instead, the case was a crucial step towards developing the proportionality test,[102] which today is the core doctrinal instrument for the analysis of individual rights cases. The Court thus used the danger of legislative capture to motivate the strict scrutiny of the legislative measure. Even after the pharmacy case, the proportionality test was not immediately consolidated as a doctrinal instrument in individual rights cases. Instead, it took the Court some time fully to develop the proportionality test and to anchor it in the German constitutional law doctrine. This may be the reason why we still find some occasional allusions to legislative capture in the early jurisprudence of the Court.

5. Conclusion

Special interest legislation is a serious problem that undermines the legitimacy and the efficiency of today's democracies. Constitutional courts have an important role to play in providing a remedy for this pathology of the political process. In most cases, it will be difficult to unveil the actual motivation of the legislature. For this reason, courts should recur to second-order criteria for policing legislative capture. The most relevant indications of an illicit purpose are legislative inconsistency and a bad fit

[101] *See supra* note 75.

[102] *See* Eberhard Grabitz, *Der Grundsatz der Verhältnismäßigkeit in der Rechtsprechung des Bundesverfassungsgerichts*, 98 Archiv des öffentlichen Rechts 568, 569–570 (1973); Dieter Grimm, *Proportionality in Canadian and German Jurisprudence*, 57 U. Toronto L.J. 383, 385 (2007); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 Col. J. Transnat'l L. 73, 108 (2008); Jestaedt, *supra* note 22, at 122.

between the means and the end. However, this normative dimension comes with a cautionary note. As we have seen, legislative inconsistency is no sufficient proof for an illicit motive. If the doctrine is applied too strictly, it is susceptible to the allegation of scholarly critics who argue that it imposes an overly strict standard of rationality to legislative decision-making and does not respect the nature of the political process.

This study does not propose a new doctrinal approach for the combat of legislative capture. Rather, it offers a new perspective on the traditional doctrines of proportionality and consistency in the jurisprudence of the German Constitutional Court. The reasoning in the three discussed cases suggests *prima facie* that the Court was performing a rationality review of the legislature. However, what appears to be a rationality review was most likely an attempt to police legislative capture, relying on second-order criteria. In all three cases, the Court made an allusion to a potential capture of the German legislature. The reason that a piece of legislation was inconsistent or had a bad means–end fit might thus simply have been that the legislature had illicit motives.[103] However, the Court did not have to investigate whether interest-group influence was actually the decisive factor for enacting the legislation in question. Instead, it used the lack of legislative rationality as a second-order criterion for constitutional inconsistency.

[103] On illicit motives as reasons for inconsistency, *see* already Petersen, *supra* note 46, at 117–119. For a similar interpretation of the case law of the US Supreme Court, *see* Sunstein, *supra* note 2, at 65.