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Democracy is not enough: Rights, proportionality and the point of judicial review

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(forthcoming: M Klatt [ed.], *The Legal Philosophy of Robert Alexy*, [OUP 2009])

In “A Theory of Constitutional Rights”¹ Robert Alexy provides a structural theory of constitutional rights, that is widely believed to provide the key to the reconstruction of contemporary human and constitutional rights practice, not just in Germany, but in Europe and across most liberal democracies in the world.² At the heart of that theory is the claim that there is an intimate connection between the idea of a constitutional right and the principle of proportionality. Whatever the merit of the more technical aspects of his argument, his is, as far as I can see, the only developed theory of rights that helps make sense of the fact that the principle of proportionality has become a central structural feature of the adjudication of rights in liberal democracies worldwide.³ What Alexy does not address in any depth, however, is the institutional question: The principle of proportionality seems to require decision-makers to engage in complex policy arguments, assessing contested empirical questions and making controversial judgments about trade-offs in order to determine how an issue should be decided in a concrete context. Given the remarkable empowerment of rights-enforcing courts that this implies, there is a serious concern: Does a conception of rights at the heart of which is the principle of proportionality not undermine democracy and overburden courts with tasks that they are not institutionally fit to assume? What is the function of courts, and what is their comparative institutional advantage over other political institutions to

¹ R Alexy, ‘A Theory of Constitutional Rights’ (2002). For a review see M Kumm, *Constitutional Rights as Principles: On The Structure and Domain of Constitutional Justice: A Review of Robert Alexy’s ‘A Theory of Constitutional Rights’*, 2004 2 *Int’l Journal of Constit’l Law* 574.

² Even though Alexy’s theory is focused originally on the reconstruction of German constitutional rights practice, the structural features he describes are central to human and constitutional rights practice in most liberal democracies. They define what has become the dominant paradigm of human and constitutional rights practice in the early 21st century. See A Menendez and E Eriksen (eds), *Fundamental Rights through Discourse: On Robert Alexy’s Legal Theory: European and Theoretical Perspectives* (Arena report No 9/2004).

³ See A Stone Sweet & J Matthews, ‘Proportionality and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transnational Law* 73 [providing a descriptive and explanatory account regarding the spread of proportionality based rights review]. D Beatty, “*Ultimate Rule of Law*” (2004) provides a descriptive account of proportionality based rights adjudication, but he does not focus on providing a theory of rights that would support such a practice.

successfully fulfil that function? What justification is there for courts to play this kind of such a central role in liberal constitutional democracies? That is the subject matter of this essay.

These questions connect to the classical chestnut of a debate in constitutional theory about the legitimacy of judicial review. That debate is not over.⁴ The core remaining criticism of judicial review, as articulated in the most sophisticated recent writing on the issue⁵, is primarily focused on two grounds: First, at least in reasonably mature liberal democracies there is no reason to suppose that rights are better protected by judicial review than they would be by democratic legislatures. In particular the legalist nature of judicial rights discourse, its focus on text, history, precedent etc., tend to unhelpfully distract from the moral issues central to the validation of rights claims. These issues can be better addressed by political deliberations not burdened by legalistic distractions. Second, quite apart from the outcome it generates, judicial review is democratically illegitimate. The protection of rights might be a precondition for the legitimacy of law, but what these rights amount to in concrete circumstances is likely to be subject to reasonable disagreement between citizens. Under those circumstances the idea of political equality requires that rights issues too should be decided using a process that provides for electoral accountability.

What the following seeks to do is to address and ultimately refute these arguments *as they relate to the type of constitutional rights practice that is focused on proportionality analysis*. A proportionality based conception of rights gives a specific focus to the general debate about judicial review. Of course in most European jurisdictions and modern constitutions more generally the question whether or not there should be judicial review is institutionally settled by positive law in form of clear constitutional and international legal commitments.⁶ But the persistent criticism provides a welcome occasion to reflect more deeply about the nature of human and constitutional rights practice that focuses on proportionality analysis. A rights practice that has this distinctive structure provides good

⁴ R Fallon, 'The Core of an Uneasy Case for Judicial Review', 121 Harv. L. Rev. 1693 (2008). A good overview of relevant arguments is provided by A Walen, *Judicial Review in Review*, forthcoming in 7 Int'l J. of Constit. Law, September 2009.

⁵ I have found this to be J Waldron, 'The Case Against Judicial Review' (2006) 115 Yale Law Journal 1348. See more generally J Waldron, *Law and Disagreement* (1999), and J Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 OJLS 18, and R Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (2007). See also A Vermeule, *Law and the Limits of Reason* (2009) [arguing against the virtues of 'common law constitutionalism' and for the virtues of legislative codification].

⁶ Of course this is a generalization. In Britain as well as Scandinavian countries the role of courts in authoritatively deciding constitutional rights issues is limited and debates about the appropriate role of courts in liberal democracies remain very much alive.

reasons to think again about the nature and function of rights, the relationship between rights and democracy and the institutions that seek to reflect and realize these commitments.

I will argue that the core arguments against judicial review are unpersuasive. First, outcomes *are* likely to be improved with judicial review. The essay defends conventional wisdom against the challenge of legalist distortion, but does so in a way that is focused specifically on proportionality focused rights practice. In this practice the legalist distortions that Waldron in particular describes are mostly absent. The three prong proportionality test in particular allows courts to engage all relevant moral and pragmatic arguments explicitly, without the kind of legalistic guidance and constraint that otherwise characterizes legal reasoning. Courts engage public reasons, reasons that can serve to justify acts of public authorities that place burdens on people without their explicit consent. Furthermore, when judges do so, they are not generally engaged in an exercise of sophisticated theorizing, but in a relatively pedestrian structured process of scrutinizing reasons.⁷ This process is capable of identifying a wide range of political pathologies that are common enough even in mature democracies. Furthermore, the absence of a doctrine of precedent means that past decisions do not become an authoritative focal point for legally debating new issues. Proportionality remains at the centre of even a mature rights practice, when a great deal has already been decided in earlier court decisions. In first describing this rights practice, whose central features define what I call the *Rationalist Human Rights Paradigm*, the article highlights an understanding of rights, that, in terms of its structure and its scope differs in interesting ways from the US context, to which Waldron and much of the more sophisticated thinking about judicial review, generally refers.

Second, even though the Rationalist Human Rights Paradigm does not provide much in terms of legal constraint and authoritative guidance for courts adjudicating rights claims, this does not exacerbate or confirm the legitimacy problem that skeptics claim is at the heart of the case against judicial review. The opposite is true. Under reasonably favorable circumstances of a mature liberal democracy judicial review is a *necessary* complement to democratically accountable decision-making. *A political system that lacks it is deficient*

⁷ J Waldron and W Sadurski are right, when they claim that judges do not engage in a special class of ‘moral’ reasons, but the same kind of wide ranging reasons that legislatures are expected to engage in, see the exchange between Waldron, Sadurski, Dyzenhaus and Beaud triggered by J Waldron, ‘Judges as moral reasoners’, 7 Int’l J. Const. L., 25-35 (2009). But the image of the Judge that still permeates these debates remains Dworkins Hercules, not the more pedestrian judge engaged in the structured process of reasoning that characterizes the application of the proportionality test.

legitimacy-wise. Such a system might be a constitutional democracy. But it is not a *liberal* constitutional democracy. Both judicial review of legislation and electoral accountability of the legislator give institutional expression to co-original and equally basic commitments of liberal-democratic constitutionalism. An equal right to vote gives expression to a commitment of political equality. A right to contest decisions by public authorities before courts invoking rights under the RHRP gives expression to a commitment of liberty as non-domination: not to be subject to laws that you might not reasonably have consented to. Both are central pillars of constitutional legitimacy. Judicial review deserves to be defended not only on the pragmatic grounds that it leads to better outcomes, but also as a matter of principle.

At the heart of a defence of judicial review has to be an account of the point of such a practice. That account has to both fit the practice it purports to defend and articulate what is attractive about it.⁸ An account can fail either because it does not meaningfully connect to an actual practice or because it does not show what is attractive about it. The rich literature on judicial review generated by US scholars⁹ that generally addresses US Constitutional practice does not capture some central features of the rationalist Human Rights Paradigm. It does not fit that practice and therefore does little to illuminate it.¹⁰ On the other hand those comparative or European constitutional scholars more attuned to the core features of the Rationalist Human Rights Paradigm that dominates European practice have not provided well-developed persuasive accounts about why such a practice should be regarded as attractive. This essay is an attempt to provide the barebones structure of such an account.

The point of judicial review, I will argue, is to legally institutionalize a practice of Socratic contestation. Socratic contestation refers to the practice of critically engaging authorities, in order to assess whether the claims they make are based on good reasons. This

⁸ This way of framing the issue has much in common with the methodology described by R Dworkin, *Law's Empire* (1986). Such an approach does not only provides a positive account that shows the practice in its best light, it also articulates a normative standard by which specific aspects of that practice can be criticized as falling short of what it is supposed to be.

⁹ Canonical contributions include A Bickel, *The Least Dangerous Branch* (1969); JH Ely, *Democracy and Distrust* (1981); R Bork & R Dworkin, *Freedom's Laws* (1996); C Eisgruber, *Constitutional Self-Government* (2001); L Sager, *Justice in Plainclothes* (2004); L Kramer, *The People Themselves* (2004); M Tushnet, *Taking the Constitution Away from the Courts* (1999). See also a recent response to Waldron by R Fallon, 'The Core of an Uneasy Case for Judicial Review' (2008) 121 Harvard Law Review 1693 and support for Waldron from a political science perspective provided by A Vermeule, *Law and the Limits of Reason* (2009).

¹⁰ This is a point rightly made by D Beatty, *Ultimate Rule of Law* (2004).

practice, described most vividly in the early Platonic dialogues,¹¹ led to understandable frustration of many of the established authorities whose claims Socrates scrutinized and found lacking. It led the historical Socrates to be convicted and sentenced to death for questioning the gods of the community and corrupting youth in democratic Athens. Human and constitutional rights adjudication within the Rationalist Human Rights Paradigm, I will argue, is a form of legally institutionalized Socratic contestation. When individuals bring claims grounded in human or constitutional rights, they enlist courts to critically engage public authorities in order to assess whether their acts and the burdens they impose on the rights-claimants are susceptible to plausible justification. The Socrates that Plato describes in his early dialogues is right to have claimed a place of honor in the Democratic Athenian Polis, rather than having to suffer for it on trumped up charges that his activities violated community values and corrupted youth. Conversely, citizens in liberal democracies are right to have legally institutionalized a practice of Socratic contestation as a litmus test that any act by public authorities must meet, when legally challenged. Legally institutionalized Socratic contestation is desirable, both because it tends to improve outcomes and because it expresses a central liberal commitment about the conditions that must be met, in order for law to be legitimate in liberal democracies.

The first part of the essay will highlight the core structural features of the Rationalist Human Rights Paradigm. As stated above, the structural features of such a Human Rights Practice have been elaborately analyzed by Robert Alexy on whose account of rights this part of the essay will draw. The second part will argue that the point to institutionalize a rights-practice that has this structure is to legally establish a practice of Socratic contestation. Socratic contestation is a practice that gives institutional expression to the idea that all legitimate authority depends on being grounded in public reasons, that is, justifiable to others on grounds they might reasonably accept.¹² In practice Socratic contestation is well suited to

¹¹ Here I follow Gregory Vlastos, who distinguished between the Socrates of the elenctic dialogues of Plato's earlier period and the Socrates depicted in later dialogues. The elenctic dialogues are, in alphabetical order, the *Apology*, *Charmides*, *Crito*, *Eutyphro*, *Gorgias*, *Hippias Minor*, *Ion*, *Laches*, *Protagoras* and *Republic Book 1*. See G Vlastos, *Socrates: Ironist and Moral Philosopher* (1991) 46.

¹² Note how this formulation is different from the one that Scanlon uses to capture the core of the liberal contractualist conception of justice, requiring "justifiability to others on grounds they could not reasonably reject", see TM Scanlon, *What We Owe to Each Other* (1998). The difference between these formulations is the difference between a formulation that seeks to define a criteria for justice and one that establishes a criteria for legitimacy, given that questions of justice will remain disputed. Even though this is in issue of some importance, it can't be addressed here. As I will argue in greater depth below, judicial review is concerned with legitimacy, not justice. For an attempt to connect the criterium for liberal justice with the very idea of the rule of law, see TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001).

address a wide range of ordinary pathologies of the political process. The third part first provides a historical context for the Rationalist Human Rights Paradigm and its relationship to democracy and judicial review, before arguing that judicial review of rights is not in tension with democratic legitimacy but a necessary complement to it. I will argue that the idea of competitive electoral politics grounded in an equal right to vote and the rights-based practice of Socratic contestation are complementary basic institutional commitments of liberal democratic constitutionalism. Judicial review is not just a legitimate option. Liberal democracy without judicial review would be incomplete and deficient.

A. The Rationalist Human Rights Paradigm and the turn to justification

Human and constitutional rights practice is, to a significant extent, not legalist but rationalist. It is generally focused not on the interpretation of legal authority, but on the justification of acts of public authorities in terms of public reason. Arguments relating to legal texts, history, precedence etc. have a relatively modest role to play in European constitutional rights practice. Instead the operative heart of a human or constitutional rights challenge within the Rationalist Human Rights Paradigm is the proportionality test (1). That test, however, provides little more than a check-list of individually necessary and collectively sufficient criteria that need to be met for behavior by public authorities to be justified in terms of public reason. It provides a structure for the assessment of public reasons (2). Furthermore the range of interests that enjoy prima facie protection as a right are generally not narrow and limited, but expansive. Both the German Constitutional Court and the European Court of Justice [hereinafter ECJ], for example, recognize a general right to liberty and a general right to equality. That means that just about any act infringing on interests of individuals trigger are opened up for a constitutional or human rights challenge and requires to be justified in terms of public reason (3). In institutional terms these features of human rights practice require a recharacterization of what courts do when they assess whether public authorities have violated rights. Courts are not simply engaged in applying rules or interpreting principles. They assess justifications. Call this *the turn from interpretation to justification*.

1. It is true that not all constitutional or human rights listed in legal documents require proportionality analysis or any other discussion of limitations. The catalogues of rights contained in domestic constitutions and international human rights documents include norms that have a simple categorical, rule like structure. They may stipulate such things as: “The death penalty is abolished.” “Every citizen has the right to be heard by a judge within 24 hours after his arrest”. Most specific rules of this kind are best understood as authoritative determinations made by the constitutional legislator about how all the relevant first order considerations of morality and policy play out in the circumstances defined by the rule. Notwithstanding interpretative issues that may arise at the margins, clearly the judicial enforcement of such rules is not subject to proportionality analysis or any other meaningful engagement with moral considerations.

But at the heart of modern human and constitutional rights practice are rights provisions of a different kind. Modern constitutions establish abstract requirements such as a right to freedom of speech, freedom of association, freedom of religion etc. These rights, it seems, can’t plausibly have the same structure as the specific rights listed above. Clearly there must be limitations to such rights. There is no right to shout fire in a crowded cinema or to organize a spontaneous mass demonstration in the middle of Champs Élysées during rush hour. How should these limits be determined?

In part constitutional texts provide further insights into how those limits ought to be conceived. As a matter of textual architecture it is helpful to distinguish between three different approaches to the limits of rights.

The first textual approach is not to say anything at all about limits. In the United States the 1st Amendment, for example, simply states that “Congress shall make no laws [...] abridging the freedom of speech [...] (or) [...] the free exercise of religion [...]”.¹³ Not

¹³ Perhaps also for reasons relating to the structure of constitutional text in the US there is a view that courts charged with their enforcement of such provisions should read them as short-hand references to a set of more specific rules that were intended either by the constitutional legislator or that reflect a deep historical consensus of the political community. Whenever courts can’t find such a concrete and specific rule, the legislator should be free to enact any legislation it deems appropriate.

surprising it remains a unique feature of US constitutional rights culture to insist on defining rights narrowly, so that there are as few as possible exceptions to them.¹⁴

The second approach is characteristic of Human Rights Treaties and Constitutions enacted in the period following WWII. Characteristic of rights codifications during this era is a bifurcated approach. The first part of a provision defines the scope of the right. The second describes the limits of the rights by defining the conditions under which an infringement of the right is justified. Art. 10 of the European Convention of Human Rights, for example, states:

1. Everyone has the right to freedom of expression [...].
2. The exercise of these freedoms [...] may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety [...].

Similarly, Art. 2(1) of the German Basic Law states: “Every person has the right to the free development of their personality, to the extent they do not infringe on the rights of others or offend against the constitutional order or the rights of public morals”.

The first part defines the scope of the interests to be protected – here: all those interests that relate respectively to “freedom of expression” or “the free development of the personality”. The second part establishes the conditions under which infringements of these interests can be justified: “restrictions [...] necessary in a democratic society in the interests of [...]” and “when the limitations serve to protect the rights of others, the constitutional order or public morals”. The first step of constitutional analysis typically consists in determining whether an act infringes the scope of a right. If it does a *prima facie* violation of a right has occurred. The second step consists in determining whether that infringement can be justified under the limitations clause. Only if it can not is there a *definitive* violation of the right.

¹⁴ F Schauer, ‘Freedom of Expression Adjudication in Europe and the United States: A Case study in Comparative Constitutional Architecture’ in G Nolte (ed), *European and US Constitutionalism* (2005). See also C Fried, *Right and Wrongs* (1978).

Even though the term proportionality is not generally used in constitutional limitation clauses immediately after WWII, over time courts have practically uniformly interpreted these kinds of limitation clauses as requiring proportionality analysis. Besides the requirement of legality—any limitations suffered by the individual must be prescribed by law—the proportionality requirement lies at the heart of determining whether an infringement of the scope of a right is justified.

Finally more recent rights codifications often recognize and embrace this development and have often substituted the rights-specific limitation clauses by a general default limitations clause.¹⁵

Art. II-112 of the recently negotiated European Charter of Fundamental Rights, for example, states: “Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”.

2. The connection between rights and proportionality analysis has been thoroughly analyzed by Robert Alexy.¹⁶ According to Alexy the abstract rights characteristically listed in constitutional catalogues are principles. Principles, as Alexy understands them, require the realization of something to the greatest extent possible, given countervailing concerns. Principles are structurally equivalent to values. Statements of value can be reformulated as statements of principle and vice-versa. We can say that privacy is a value or that privacy is a principle. Saying that something is a value does not yet say anything about the relative priority of that value over another, either abstractly or in a specific context. Statements of principle express an ‘ideal ought’. Like statements of value they are not yet, as Alexy puts it, “related to possibilities of the factual and normative world”. The proportionality test is the means by which values are related to possibilities of the normative and factual world.

¹⁵ The Canadian Charter prescribes in Section 1 that rights may be subject to “[...] such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society.” Section 36 of the South African Constitution states that rights may be limited by “[...] a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; (e) less restrictive means to achieve the purpose.”

¹⁶ R Alexy, *A Theory of Constitutional Rights* (2002). The following pages draw heavily on M Kumm, ‘Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice’ (2004) 2 *International Journal of Constitutional Law* 574, 574-596.

Whenever there is a conflict between a principle and countervailing concerns, the proportionality test provides the criteria to determine which concerns take precedence under the circumstances. The proportionality test provides an analytical structure for assessing whether limits imposed on the realization of a principle in a particular context are justified. It has three parts. First, the infringing measure has to further a legitimate aim.¹⁷ Second, the measure has to be necessary in the sense that there is no equally effective but less intrusive means to further the legitimate aim. Third, the degree to which the legitimate aim is furthered must be such as to outweigh the extent of the rights infringement.

The proportionality test is not merely a convenient pragmatic tool that helps provide a doctrinal structure for the purpose of legal analysis. If rights as principles are like statements of value, the proportionality structure provides an analytical framework to assess the necessary and sufficient conditions under which a right takes precedence over competing considerations. Reasoning about rights means reasoning about how a particular value relates to the exigencies of the circumstances. It requires general practical reasoning.¹⁸

An example drawn from the European Court of Human Rights [hereinafter ECHR] illustrates how proportionality analysis operates in the adjudication of rights claims.

In *Lustig-Prean and Beckett v. United Kingdom*¹⁹ the applicants complained that the investigations into their sexual orientation and their discharge from the Royal Navy on the sole ground that they are gay violated Art. 8 of the European Convention of Human Rights [hereinafter ECHR]. Art.8, in so far as is relevant, reads as follows:

1. Everyone has the right to respect for his private [...] life [...].
2. There shall be no interference by a public authority with the exercise of this rights except such as is in accordance with the law and is necessary in a democratic society [...] in the interest of national security, [...] for the prevention of disorder.

¹⁷ This prong of the test is sometimes divided into two subparts. First there has to be a legitimate aim. Second, the infringing measure must actually further that aim. The first is a normative, the second an empirical question.

¹⁸ If legal reasoning is a special case of general practical reasoning—see R Alexy, *A Theory of Legal Argumentation* (1989)—reasoning about rights as principles is a special case of legal reasoning that approximates general practical reasoning without the special features that otherwise characterize legal reasoning.

¹⁹ *Lustig-Prean and Beckett v. UK*, nos. 31417/96 and 32377/96, (1999) 29 EHRR 548.

Since the government had accepted that there had been interferences with the applicants' right to respect for their private life—a violation of a *prima facie* right had occurred—the only question was whether the interferences were justified or whether the interference amounted to not merely a *prima facie*, but a *definitive* violation of the right. The actions of the government were in compliance with domestic statutes and applicable European Community Law and thus fulfilled the requirement of having been 'in accordance with the law'. The question was whether the law authorizing the government's actions qualified as 'necessary in a democratic society'. The Court has essentially interpreted that requirement as stipulating a proportionality test. The following is a reconstructed and summarized account of the court's reasoning.

The first question the Court addressed concerns the existence of a *legitimate aim*. This prong is relatively easy to satisfy in cases where the constitutional provision does not specifically restrict the kind of aims that count as legitimate for justifying an interference with a specific right. In this case the human rights provision limits the kind of aims that count as legitimate for the purpose of justifying an infringement of privacy. Here the UK offered the maintenance of morale, fighting power and operational effectiveness of the armed forces – a purpose clearly related to national security – as its justification to prohibit gays from serving in its armed forces.

The next question is whether disallowing gays from serving in the armed forces is a *suitable means to further the legitimate policy goal*. This is an empirical question. A means is suitable, if it actually furthers the declared policy goal of the government. In this case a government commissioned study had shown that there would be integration problems posed to the military system if declared gays were to serve in the army. Even though the Court remained skeptical with regard to the severity of these problems, it accepted that there would be *some* integration problems if gays were allowed to serve in the armed forces. Given this state of affairs there was no question that, as an empirical matter, these problems are significantly mitigated if not completely eliminated by excluding gays from the ranks of the armed forces.

A more difficult question was whether the prohibition of homosexuals serving in the armed forces is necessary. A measure is necessary only if there is no less restrictive but equally effective measure available to achieve the intended policy goal. This test incorporates

but goes beyond the requirement known to US constitutional lawyers that a measure has to be narrowly tailored towards achieving the respective policy goals. The ‘necessary’ requirement incorporates the ‘narrowly tailored’ requirement, because any measure that falls short of the ‘narrowly tailored’ test also falls short of the necessity requirement. It goes beyond the ‘narrowly tailored’ requirement, because it allows the consideration of alternative means, rather than just insisting on tightening up and limiting the chosen means to address the problem. In this case the issue was whether a code of conduct backed by disciplinary measures, certainly a less intrusive measure, could be regarded as equally effective. Ultimately the Court held that even though a code of conduct backed by disciplinary measures would go quite some way to address problems of integration, the government had plausible reasons to believe that it does not go so far as to qualify as an equally effective alternative to the blanket prohibition.

Finally the court had to assess whether the measure was proportional in the narrow sense, applying the so-called balancing test. The balancing test involves applying what Alexy calls the ‘Law of Balancing’: “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other”.²⁰

The decisive question in the case of the gay soldiers discharged from the British armed forces is whether on balance the increase in the morale, fighting force and operational effectiveness achieved by prohibiting gays from serving in the armed forces justifies the degree of interference in the applicant’s privacy or whether it is disproportionate. On the one hand the court invoked the seriousness of the infringement of the soldiers’ privacy, given that sexual orientation concerns the most intimate aspect of the individual’s private life. On the other hand the degree of disruption to the armed forces without such policies was predicted to be relatively minor. The Court pointed to the experiences in other European armies that had recently opened the armed forces to gays, the successful cooperation of the UK army with allied NATO units which included gays, the availability of codes of conduct and disciplinary measures to prevent inappropriate conduct, as well as the experience with the successful admission of women and racial minorities into the armed forces causing only modest disruptions. On balance the UK measures were held to be sufficiently disproportionate to fall

²⁰ R. Alexy, *A Theory of Constitutional Rights* (2002) 102. Alexy illustrates the Law of Balancing using indifference curves, a device used by economists as a means of representing a relation of substitution between interests. Such a device is useful to illustrate the analogy between the Law of Balancing and the law of diminishing marginal utility.

outside the government's margin of appreciation and held the United Kingdom to have violated Art. 8 ECHR.

The example illustrates two characteristic features of rights reasoning. First, a rights-holder does not have very much in virtue of his having a right. More specifically, the fact that a rights holder has a *prima facie* right does not imply that he holds a position that gives him any kind of priority over countervailing considerations of policy. An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified. But the fact that rights are not trumps in this sense does not mean that they provide no effective protection. The example demonstrates that in practice, even without such priority, rights can be formidable weapons. The second characteristic feature of rights reasoning is the flip side of the first. Since comparatively little is decided by acknowledging that a measure infringes a right, the focus of rights adjudication is generally on the reasons that justify the infringement. Furthermore, the four-prong structure of proportionality analysis provides little more than a structure which functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshaled to justify an infringement of a right are good reasons under the circumstances. Assessing the justification for rights infringements is, at least in the many cases where the constitution provides no specific further guidance, largely an exercise of structured practical reasoning without many of the constraining features that otherwise characterizes legal reasoning. Rights reasoning under this model, then, shares important structural features with rational policy assessment.²¹ *The proportionality test merely provides a structure for the justification of an act in terms of public reason.*

3. Conceiving rights in this way also helps explain another widespread feature of contemporary human and constitutional rights practice that can only be briefly be pointed to here. If all you have in virtue of having a right is a position whose strength in any particular context is determined by proportionality analysis, there are no obvious reasons for defining narrowly the scope of interests protected as a right. Shouldn't all acts by public authorities

²¹ That does not mean that the two are identical. There are at least four differences between substantive rights analysis and general policy assessments. First, courts are not faced with generating and evaluating competing policy proposals, but merely to assess whether the choices made by other institutional actors is justified. Second, they only assess the merit of these policy decisions in so far as they affect the scope of a right. Third, specific constitutional rules concerning limits to constitutional rights or judicial precedence establishing rules that fix conditional relations of preference frequently exist. Fourth, proportionality analysis leaves space for deference to be accorded to other institutional actors. The ECHR refers to this as the 'margin of appreciation'.

effecting individuals meet the proportionality requirement? Does the proportionality test not provide a general purpose test for ensuring that public institutions take seriously individuals and their interests and act only for good reasons? Not surprisingly, one of the corollary features of a proportionality oriented human and constitutional rights practice is its remarkable scope. Interests protected as rights are not restricted to the classical catalogue of rights such as freedom of speech, association, religion and privacy narrowly conceived. Instead with the spread of proportionality analysis there is a tendency to include all kinds of liberty interests within the domain of interests that enjoy *prima facie* protection as a right. Rights claims no longer concern exclusively interests plausibly deemed fundamental, but also the mundane. The European Court of Justice, for example, recognizes a right to freely pursue a profession as part of the common constitutional heritage of Member States of the European Union, thus enabling it to subject a considerable amount of social and economic regulation to proportionality review.²² The European Court of Human Rights has adopted an expansive understanding of privacy guaranteed under Art. 8 ECHR and the German Constitutional Court regards any liberty interest whatsoever as enjoying *prima facie* protection as a right. In Germany the right to the ‘free development of the personality’ is interpreted as a general right to liberty understood as the right to do or not to do whatever you please.²³ It has been held by the Constitutional Court to include such mundane things as a right to ride horses through public woods²⁴, feeding pigeons on public squares²⁵ or the right to trade a particular breed of dogs²⁶. Furthermore not only liberty interests have been understood very broadly. The principle of equality or non-discrimination has been interpreted just as broadly, requiring any legislative distinction to be justifiable. The German Constitutional Court, for example, has recently struck down a state law generally prohibiting smoking in public spaces that creates an exception for restaurants establishing separate smoking rooms, but does not extend such an exception to Discothèques under similar conditions.²⁷ The ECJ has struck down an EU Regulation providing for subsidies for one kind of product, but not another, when both products were substitutable and used the same materials and similar production processes.²⁸ In this way the language of human and constitutional rights is used to subject practically all

²² [1994] ECR I-4973

²³ See BVerfGE 6, 32 (Elfes).

²⁴ BVerfGE 80, 137

²⁵ BVerfGE 54, 143

²⁶ BVerfG, 1 BvR 1778/01 of 16.3.2004

²⁷ BVerfG, 1 BvR 3198/07 vom 6.8.2008

²⁸ See Case C-117/76 *Ruckdeschel & Co v Hauptzollamt Hamburg-St Annen* [1977] ECR 1753.

acts of public authorities that effect the interests of individuals to liberty and equality based proportionality review and thus to the test of public reason.²⁹

B. The point of proportionality based rights review:

Legally institutionalizing Socratic contestation

There are three types of normative³⁰ questions one might ask about a human and constitutional practice that has these structural features. First, there are *metaethical* questions relating to the existence of rational standards for the resolution of rights claims. There are relativist, subjectivist and non-cognitivist positions, connected to claims about the incommensurability of competing values and ways of life that would need to be addressed.³¹ Secondly, on the level of *substantive political philosophy* one might ask whether a rights practice that exhibits such a structure does justice to the substance of a liberal idea of rights. Can the proportionality test be the correct test to determine the limitations of rights, if rights are to function as ‘fire walls’ or ‘trumps’ and have priority over competing considerations, as most political philosophers suggest? And does the expansive scope of interests recognized at least *prima facie* as worthy of rights protection not devalue the currency of rights talk? Is not the proper domain of meaningful rights talk to be defined in more restrictive terms? These questions are important³², but will be addressed here only insofar as they are relevant for a third set of more *institutionally* focused questions: Even if metaethical and substantive questions of these kind can be persuasively answered, does it make sense to have courts function as final arbiters of rights claims?³³ What is their comparative advantage over other

²⁹ For the argument that the ECJ’s human rights jurisprudence fits the RHRP and might even qualify as its most radical instantiation, see M Kumm, ‘Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm’ in M Maduro and L Azoulay (eds), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome* (forthcoming Hart 2009).

³⁰ For the empirical question what explains the spread of a rights practice centered on proportionality see A Stone Sweet and J Matthews, ‘Proportionality Balancing and Global Constitutionalism’, (2008) 47 *Columbia Journal of Transnational Law* 73.

³¹ For a discussion of these issues see the Postscript in R Alexy, *A Theory of Constitutional Rights* (2002). For an illuminating discussion of claims of incommensurability, see J Waldron, *False Incommensurability: A Response to Professor Schauer*, 45 *Hastings Law Journal*, 813 (1994).

³² They are the subject matter of M Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in: G Pavlakos (ed.), *Law, Rights, Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007). Critical accounts include K Moeller, ‘Balancing and the Structure of Constitutional Rights’, 5 *2007 Int’l J of Constit Law* 453, S Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ NYU Jean Monnet Working Paper No. 09/08, <http://www.jeanmonnetprogram.org/papers/08/080901.html> and G Webber, *The Cult of Constitutional Rights Scholarship: Proportionality and Balancing* (January 3, 2009). available at SSRN: <http://ssrn.com/abstract=1322810>.

³³ For a good discussion of some of the pros and cons see V Jackson, ‘Being Proportional about Proportionality’, 21 *Const. Comment.* 803 (2004).

institutions to decide authoritatively often highly contentious claims of right? Is it democratically legitimate? What is the point of authorizing courts to adjudicate just about any policy issue, once it is framed as an issue of rights within the RHRP?

1. There is a puzzle relating to the wisdom of judicial review that shares many structural features of the puzzle of Socratic wisdom, as it becomes manifest in Plato's early dialogues. The kind of claims that have to be made on behalf of constitutional courts to justify their role in public life, are, *prima facie*, as improbable as the claims of wisdom made with regard to Socrates, to justify his public behaviour, to run around and force members of the Athenian political establishment into debates about basic questions of justice and what it means to live your life well.

That puzzle is not plausibly resolved, but only deepened, by pointing to authority: True, in the case of Socrates it is the Oracle of Delphi that stipulates that Socrates is the wisest man.³⁴ Similarly, constitutional law and European Human Rights Law have authoritatively established courts with the task to serve as final arbiters of human and constitutional rights issues *as a matter of positive law*, presumably believing that this task is best left to them rather than anyone else. But of course the puzzle remains: How can these authorities be right? Does it make any sense? Socrates, a craftsman by trade, denies that he has any special knowledge about justice or anything else. He is not and makes no claim to be the kind of philosopher king that Plato would later describe as the ideal statesman in the Republic.³⁵ In fact he insists that the only thing he does know is that he knows nothing. Similarly a constitutional or human rights court, staffed by trained lawyers, is not generally credited with having special knowledge about what justice requires and constitutional judges widely cringe at the idea that they should conceive of themselves as philosopher kings,³⁶ no doubt sensing their own ineptness. The only thing judges might plausibly claim to know is the law. Ironically, this is much the same as saying they know nothing, because within the rationalist human rights paradigm, the law – understood as the sum of authoritatively enacted norms guiding and constraining the task of adjudication – typically provides very little guidance for the resolution of concrete rights claims. Just as there is no reason to believe that a man of

³⁴ Plato, *Apology* 21a.

³⁵ As Vlastos, points out only the Socrates of the middle and later dialogues has sophisticated theories about metaphysics, epistemology, science etc.

³⁶ Arguably nothing made Ronald Dworkin's account of judging more suspect to judges than his claim that adjudication required demi-god like 'Herculean' intellectual labor. See (2003) 1 International Journal of Constitutional Law, No. 4, Special issue on Dworkin.

humble background and position such as Socrates is the wisest man alive, there seems to be no reason to believe that courts staffed by lawyers are the appropriate final arbiters of contentious questions of right, second-guessing the results of the judgment made by the democratically accountable politically branches using the check-list that the proportionality test provides.

But perhaps the specific wisdom of Socrates and constitutional judges lies not in what they *know* about theories of justice or policy, but *in the questions they know to ask others* who have, at least prima facie, a better claim of wisdom on their side. When Socrates is told that he is the wisest man, he goes and seeks out those who seem to have a better claim on wisdom and scrutinizes their claims. It is only in the encounter with those who are held out as wise or think of themselves as wise that Socrates begins to understand why the Oracle was right to call him the wisest man alive. Socratic questioning reveals a great deal of thoughtlessness, platitudes, conventions or brute power-mongering that dresses up as wisdom, but falls together like a house of cards when pressed for justifications. His comparative wisdom lies in not thinking that he knows something, when in fact he does not, whereas others think they know something, which, on examination it turns out they don't.

At this point it is useful to take a closer look at what the Socrates of Plato's' early dialogues is actually doing. How exactly does he engage others? First, Socrates is something of an annoying figure, insisting to engage respected establishment figures, statesmen first of all,³⁷ in conversations about what they claim is good or just, even when they don't really want to, have had enough and would prefer to just walk away. In some dialogues the other party runs away in the end, in others the other party resigns cynically and says yes to everything Socrates says just so that the conversation comes to an end more quickly. In this way he forces a certain type of inquiry onto others. Second, the characteristic Socratic method in Plato's' earlier dialogues is the *elenchus*.³⁸ On a general level elenchus "means examining a person with regard to a statement he has made, by putting to him questions calling for further statements, in the hope that they will determine the meaning and the truth value of his first statement."³⁹ The Socratic elenchus is adversative and bears some resemblance to cross-examination. His role in the debate is not to defend a thesis of his own but only to examine the

³⁷ Plato, *Apology* 21c.

³⁸ For an insightful analysis see G Vlastos, 'The Socratic Elenchus' in *Oxford Studies in Ancient Philosophy* (1983) 27-58.

³⁹ R Robinson, *Plato's Earlier Dialectics* (2nd edn, 1953) ch 2.

interlocutor's. Socrates is active primarily as a questioner, examining the preconditions and consequences of the premises the other side accepts, in order to determine whether they are contradictory or plausible. Socrates does not know anything, but he wants to know what grounds others have to believe that the claims they make are true. He tests the coherence of other persons views. Third, Socrates does what he does in public spaces, but he does it removed from the practice of ordinary democratic politics. The type of public reasoning he engages in, he claims,⁴⁰ is impossible to sustain when the interests and passions of ordinary democratic politics intervene.

This type of Socratic engagement shares important features that are characteristic of court's engagement with public authorities. First, courts compel public authorities into a process of reasoned engagement. Public authorities have to defend themselves, once a plaintiff goes to court claiming that his rights have been violated. In that sense, like the Socratic interlocutors, they are put on the spot and drawn into a process they might otherwise have resisted. Second, court's engagement with public authorities shares some salient features with the Socratic elenchus.⁴¹ At the heart of the judicial process is the examinations of reasons, both in the written part of the proceedings in which the parties of the conflict can submit all the relevant reason, to a limited extent also in the oral proceedings where they exist and, of course, in the final judgment. Furthermore in this process of reason-examination the parties are the ones that advance arguments. The court's role consists in asking questions – particularly the questions that make up the three prongs of the proportionality test – and assessing the coherence of the answers that the parties provide it with. A courts activity is not focused on the active construction of elaborate theories,⁴² but on a considerably more pedestrian form assessing the reasons presented by others, in order to determine their plausibility. Third, this engagement takes place as a public procedure leading to a public judgment, while institutional rules relating to judicial independence ensure that it is immunized from the pressures of the ordinary political process.⁴³

⁴⁰ Plato, *Apology* 31c-32a.

⁴¹ The claim is not that Socratic elenctic reasoning is generally like proportionality analysis, or that cross-examination plays an important role in constitutional litigation. Instead the claim is that courts and the early Platonic Socrates engage in a practice, in which they challenge others to provide reasons for their claims and then assess these reasons for their internal consistency and coherence. In this way the two practices share salient features. Note how in the *Georgias* Plato has Socrates describe the difference between his procedure and that of the law courts [see Plato, *Georgias* 471e-472c, 474a and 475e].

⁴² This does not mean that there is never an occasion where theoretical sophistication is required.

⁴³ Interestingly highest courts are often geographically located not in a political power centers, but in the provinces. The ECJ is in the sleepy Duchy of Luxembourg, not in the European political power-center that is Brussels. The European Court of Human Rights is in Strasbourg, not a European capital. The German Federal

But even if there are some important structural similarities between the practice of Socratic contestation described by Plato in his early dialogues and the judicial practice of engaging public authorities when rights claims are made, what are the virtues of such a practice? Socrates claimed that the way he lived his life—his perpetual critical questioning—was not just an idiosyncratic hobby of his, but should have earned him a place of honour in Athens. He claims to be to the Athenian people as a gadfly to a noble but sluggish horse.⁴⁴ By seeking to convince Athenians that they are ignorant of the things they think they know—by puzzling them and sometimes numbing his *interlocuteurs* like an electric ray⁴⁵—Socrates shatters the false sense of comfort and complacency associated with conventions and traditional formulas, or the sense of superiority enjoyed by those who seek to justify competitive power-mongering, confronting citizens and elites with what it would mean, to take themselves seriously and engage in the enterprise of truth-seeking. Because of the insights his critical questioning brings to the fore, he is described as a midwife bringing to light insights which otherwise would have remained undeveloped and obscure.

2. But what exactly is so important about sustaining a practice of reasoning and truth seeking? What is so terrible about a complacent, careless people governing itself democratically, by way of manipulation by competing elites? The answer lies in part in the nexus in Platonic philosophy between seeking knowledge on the one hand, and the centrality of the requirement not to do injustice on the other. It is worse, Socrates claims, to commit injustice than to suffer injustice. The life of the tyrant is more miserable than the life of those the tyrant persecutes.⁴⁶ If it is central that you do not commit injustice, how do you avoid doing injustice, when apparently it is so difficult to know what justice requires? The virtue of Socratic contestation is first of all that it helps to keep alive the question what justice requires – *it forces on those whom he engages the adoption of a justice-seeking cognitive frame or point of view. Questions of political justice are distinct, Socrates insists, from questions of preference, power, convention, tradition or religion.* The greatest danger to justice is not that after due deliberations a flawed choice might be made. The greatest danger lies in not seriously engaging the question what justice and good policy might require. The best antidote

Constitutional Court is in Karlsruhe, not in Berlin. On the other hand I am not aware of a single country in Europe that does not have its highest political branches located together in its capital. The widely challenged double seat arrangement of the European Parliament in Strasbourg and Brussels is the only exception to this rule.

⁴⁴ Plato, *Apology* 30e.

⁴⁵ Plato, *Menon* 84.

⁴⁶ Plato, *Republic* book 1.

to the commission of injustice is to remain alert to the question, whether what is being done here and now is perhaps unjust, and to allow assumptions to be challenged and tested. Establishing a public practice of critical reasoned examination of public claims relating to justice and the good is perhaps a central to avoiding the commission of injustice. Conversely, the surest way to slip into tyranny and injustice is to give up critically examining claims whether what is being done is just. Even the most atrocious evil, Hannah Arendt argued in the context of the Eichmann trials, sometimes takes the banal form of thoughtlessness. The ideal subject of totalitarian rule, she claimed, is not the person who is convinced of a totalitarian ideology. It is the person for whom the distinction between fact and fiction, truth and falsehood is no longer of any relevance.^{47 48} The practice of Socratic contestation can be understood as an antidote to political pathologies that become possible, when the right kind of critical reasoning about public affairs is absent. A great many pathologies in public affairs have little to do with what Rawls calls the ‘burdens of judgment’ that give rise to reasonable disagreement⁴⁹ and a great deal with the refusal to seriously examine a question from the point of view of what justice and good policy requires.

Socratic contestation in the early Platonic dialogues is described primarily as a model way of life, the way of life for an individual who genuinely governs himself, cares for his self or, speaking more traditionally, cares for his soul.⁵⁰ But he urges his fellow citizens to adopt it also as a practice that is central to the activities of self-government of a political community.⁵¹ The activity of courts adjudicating human rights claims can be seen as an attempt to give public expression to and help institutionally stabilize a commitment to a critical, reason-driven political process of justice-seeking.

⁴⁷ H Arendt, *The Origins of Totalitarianism* (1966) 474.

⁴⁸ In a similar vein Jesus pleaded before god to forgive those who persecuted him, *because they did not know what they are doing* (Luke 23:34). Pontius Pilate’s sceptical shrug “what is truth?”, as he leaves it to the vote of the people whether he should free Barabbas the robber or Jesus of Nazareth the Messiah (both sentenced to be crucified) on the occasion of a public holiday, is another situation where the critical examination of what justice requires is absent at the moment a great injustice is committed (John 18:38). Similarly, God’s question to Adam after Adam has committed the original sin and hides: “Where are you? (Genesis 3:9) is best interpreted not as God seeking to know where Adam is (he is, after all, all-knowing) but as an admonition to Adam to become aware and attentive to what he is doing (wilfully hiding before God instead of seeking his presence). Furthermore the admonition “Seek and you shall find” also focuses on the adoption of a particular attitude: You actually have to seek truth to be sure to find it.

⁴⁹ J Rawls, *Political Liberalism* (1993).

⁵⁰ For the claim that ancient practical philosophy was primarily a way of life, focused on care of the self, or, more traditionally, soulcraft, see P Hadot, *What is Ancient Philosophy?* (2002). See also P Hadot, *Philosophy as a Way of Life: Spiritual Exercises from Socrates to Foucault* (1995).

⁵¹ For a contemporary defense of this idea see D Villa, *Socratic Citizenship* (2001).

First, the very fact that courts are granted jurisdiction to assess whether acts by public authorities are supported by plausible reasons serves as an institutionalized reminder that any coercive act in a liberal democracy has to be conceivable as *a collective judgment of reason* about what justice and good policy requires. It reminds everyone that the legitimate authority of a legal act depends on the possibility of providing a justification for it based on grounds that might be reasonably accepted even by the party who has to bear the greatest part of the burden. Every judicial proceeding, every judgment handed down and opinion written applying something like the RHRP is a ritualistic affirmation of this idea.

Second, it is not at all implausible that in practice the judicial process functions reasonably well to produce improved outcomes. The most persuasive way to substantiate that claim would be to analyze more closely a large set of randomly selected cases across a sufficiently wide set of jurisdictions and addressing a sufficiently wide range of issues. Such an analysis might provide a typology of pathologies of the political process that courts successfully help uncover and address. It might also uncover the limits and deficiencies of courts as an institution. But none of this can be done here. Here it must suffice to provide some general observations that might go some way to establish *prima facie* plausibility for the claim that the availability of judicial review improves outcomes.

To begin with it might be useful to take up another challenge by Waldron and Bellamy. Their scepticism about judicial review producing better outcomes is not just informed by claims about the distracting legalist nature of judicial review. They also claim more generally, that the political process provides an arena where sophisticated arguments can be made and deliberatively assessed. As an example Waldron points to the abortion debate, comparing the dissatisfying reasoning of the US Supreme Court with the rich and sophisticated parliamentary debate in the UK.⁵² Waldron has chosen his examples well. First he focuses on a case, in which the judicial reasoning by the US Supreme Court⁵³ is particularly poor and did not persuade anyone not already persuaded on other grounds. Second, he describes a political process in the UK that worked as well as one might hope for, with reasons on all sides being carefully assessed. Waldron is right about two things: In many cases the political process works well. And in some instances judicial reasoning is poor. But to make his case stronger it would have been necessary to choose the debates that typically

⁵² J Waldron, 'The Case Against Judicial Review' (2006) 115 Yale Law Journal 1348.

⁵³ *Roe v Wade* 410 US 113, 93 S Ct 705 (1973).

informed state laws prohibiting abortion in the United States as a point of comparison, rather than debates in the UK. It may have turned out that the laws on the books in many US states existed at least in part because of traditional patriarchal views about gender roles and sexual morality, that placed central importance both on chastity and on male control over female sexuality. Given that the Supreme Court had encountered these prejudices and stereotypes in its previous engagement with issues such as the availability of contraceptives,⁵⁴ the case against Supreme Court intervention might not be strong, even if a better reasoned judgment could have been hoped for. As it is, the UK example does little more than provide an argument for the claim that when a serious, extended and mutually respectful parliamentary debate has taken place before deciding an issue, that is a good reason for the court to be deferential to the outcome reached. But such a conclusion at least comes close to a tautology: If there has been an extended debate of a deliberate, mutually respectful nature in a mature liberal democracy, any results reached is highly likely to be based on plausible reasons and thus deserve and are likely to be given deference by rights-adjudicating courts.

A much more telling example is the ECHR case relating to gays in the military, which also originates in Britain. In order to understand the significance of the role of the judiciary as an arbiter of public reason, it is necessary to move away from the discussions of ‘operative effectiveness and morale’ that the opinion focuses on. What is significant in this opinion is not just what is made explicit, but also what is forced underground. Why was it that those suspected of being gay were intrusively investigated and, when suspicions were confirmed, dishonourably discharged? Here are some answers that one might with some degree of sociological realism plausibly expect some military leaders, parts of the ministerial bureaucracy and some Members of Parliament to have invoked in moments of candour, protected from public scrutiny: “We have never accepted homosexuals here. We all agree that this is not a place for homosexuals. We just don’t want them here.” These are arguments, if you want to call them that, based on tradition, convention, preference. It’s always been like that. It’s the way we do things around here. We don’t want this.

An important point about the practice of justifying infringements of human rights is that these types of considerations arguably don’t count. They may not be legitimate reasons to restrict rights and do not fulfil the requirements of the first prong of the proportionality test.

⁵⁴ *Griswold v Connecticut* 381 US 479, 85 S Ct 1678 (1965).

Traditions, conventions, preferences, without an attachment to legitimate policy concerns, might not qualify as legitimate reasons to justify an infringement of someone's right. By requiring a legitimate aim, the first prong of the proportionality test allows for the discussion and contestation of the kind of grounds that are legitimate to invoke as a restriction on the rights of others. It invites the idea that the kinds of reasons that need to be available for the justification of rights infringements are more narrow than the kinds of reasons that an individual might have to act (e.g. it feels good, it's what I wanted. It's the kind of thing I always do). There is nothing inherently wrong with traditions, conventions and preferences. But there are many traditions, conventions and preferences that merely reflect and perpetuate prejudices towards certain groups, defined in terms of class, race, ethnicity, religion, gender or sexual-orientation. More generally, traditions, conventions and preferences have to be linked to plausible policy concerns to qualify as reasons that legitimately restrict rights of others. The function of courts is to ensure that any coercive act in a liberal democracy can qualify as *a collective judgment of reason* about what justice and good policy requires. It is an antidote against rights-restricting traditions, conventions and preferences that are supported by majorities but that are not supported by any plausible reasons of policy. This is why traditions, conventions and preferences as such are not discussed as legitimate reasons in judicial opinions.

There is another kind of reason that one reads nothing about in that opinion. Some Christians might have claimed, in line with many – though by no means all – official church's doctrine: "Homosexual practices are an abomination against God. They are sinful." They are claims about what it takes to live the right kind of life. Of course this is an issue about which there is significant theological and moral debate and disagreement also within and across different churches. But the important point for understanding the function of the first prong of the proportionality test is that it does not matter who is right in these debates. These types of disagreements may be irrelevant for the resolution of the constitutional rights issue. Even if, for example, contemporary official catholic doctrine was right and homosexual practices were sinful, the fact that a behaviour is sinful is not in and of itself a ground to legally restrict a liberty interest protected as a right. An argument relating to sin and the behaviour we ought to follow to become worthy of salvation is an argument based on what political philosophers such as John Rawls would call a 'comprehensive conceptions of the good'. This type of reason, a reason relating to what it means to live a good, authentic life, might not generally count as legitimate reasons to restrict someone's right. They may not qualify as part of public

reason, understood as the kind of reasons that can be invoked in a liberal democracy to justify rights infringements. *These kinds of reasons* may guide the behaviour of a person in her personal life and the religious communities that she is part of. But they may not limit the rights of others. That is why they do not figure in the arguments assessed by the ECHR. The point here is not to endorse a particular conception of public reason, but merely to point to the fact that the first prong of the proportionality test provides a point of entry for the discussion of whether or not certain types of reasons are relevant in the context or should be excluded. The very idea of excluding certain kinds of reasons is central to any conception of public reason as reasons appropriate in a liberal democracy to justify actions of public authorities.

Like some of the characters that Socrates quarrels with in the early Platonic dialogues, those who embrace *this kind of reasons* have good reasons to evade Socratic questioning. Once forced into the game of having to justify a practice in terms of public reason, participants are forced to refocus their arguments, and what comes to the foreground are sanitized arguments relating to ‘operative effectiveness and morale’. But once the focus is on only legitimate reasons of that kind, they often turn out to be insufficient to justify the measures they are supposed to justify, because, just by themselves, they turn out not to be necessary or disproportionate. Very often this is the point of proportionality analysis: Not to substitute the same cost-benefit analysis that the legislature engaged in with a judgment by the court. But to sort out the reasons that are relevant to the issue at hand, while setting aside those that are not, and then testing whether those legitimate reasons plausibly justify the actions of public authorities. One important function of proportionality analysis is to function as a filter device that helps to determine whether illegitimate reasons might have skewed the democratic process against the case of the rights-claimant.

There is another form of thoughtlessness, however, that judicial review is reasonably good at countering. It concerns lack of serious engagement with the realities to which the law applies. The reasons produced, though in principle linked to legitimate policy concerns, can’t justify particular government actions, because those actions are not appropriately tailored to engage the realities on the ground. They are not the result of a judicious discernment of the facts as they relate to the government measures and weighing the competing concerns in a contextually sensitive way. It is true that courts might not be particularly good at analyzing complicated means –ends relationships or striking balances between competing goods. But

there are sufficiently common instances of pathologies ranging from government hyperbole to ideological radicalization that judicial intervention is reasonably good at detecting. They tend to occur particularly in conjunction with security concerns related to crime, war or terrorism, where the pay-off for the public authorities in power and the security apparatus in particular in terms of gaining discretionary power is great and the risks of abuse or mistake are seemingly restricted to relatively circumscribed minority groups. Examples both of run of the mill hyperbole and ideological radicalization are prevalent in the context of ‘counterterrorism’ measures enacted after Sept. 11 in Europe and the US.⁵⁵ Government hyperbole of the most mundane sort exists where a government claims to be acting to address some security threat, often in response to current events that have highlighted a particular danger. A terrorist attack occurs and old plans about wiretapping and extraordinary police powers emerge and are tabled as a response to what is claimed to be a new threat. These sweeping laws are passed using reasons such as “we are at war”, “the balance between liberty and security in a post Sept. 11 world has to be recalibrated” etc... Opponents are castigated as being soft and weak. Some such measures might, of course be appropriate under the circumstances. But others might be opportunistically introduced to strengthen the discretion and reduce effective oversight over the state’s security apparatus, authorizing measures that are either massively disproportionate or simply not seriously tailored to address the specific threat they were publicly defended to serve.⁵⁶

Finally there is another type of pathology, of great relevance in practice and the preoccupation of public choice theorists, that can only be gestured to here. It relates to the capture of the democratic process by rent-seeking interest groups. A great deal of socio-economic legislation is able to avoid serious public scrutiny and debate because of its technical nature: Certain companies or individuals are exempted from certain taxes or receive special subsidies or transfer payments denied to others, professional organizations secure a mandated monopoly

⁵⁵ The US Supreme Court has rebuked the US governments far-reaching measures relating to the “War on Terror” on four occasions: In *Hamdi v Rumsfeld* 542 US 507, 124 S Ct 2633 (2004) the court held that a US citizen detained on US soil as an ‘enemy combatant’ must get a ‘meaningful opportunity’ to challenge the factual basis for their detention, countering the assertion that such scrutiny was not compatible with safeguarding national security. In *Rasul v Bush* 542 US 466, 124 S Ct 2686 (2004) the Court held that Guantanamo Bay was within the United States jurisdiction and subject to its laws, meaning that detainees there were entitled to some sort of due process in American courts. In *Hamdan v Rumsfeld* 548 US 557, 126 S Ct 2749 (2006) the court held that the military Commissions that President Bush had established at Guantanamo Bay to try some detainees violated the Constitutions separation of powers. In *Boumediene v Bush* 553 US ___, 128 S Ct 2229 (2008) the court determined that even though the administration had succeeded in getting Congress to authorize the military commissions and strip the Guantannamo detainees of the right to *habeas corpus*, they could not do so, because it was in violation of constitutional guarantees.

⁵⁶ For a review of these decisions see E Benvenisti, ‘United We Stand: National Courts Reviewing Counterterrorism Measures’ in A Bianchi and A Keller (eds), *Counterterrorism: Democracy’s Challenge* (2008).

on the provision of certain services etc.: Here European rights practice provides examples of economically disadvantaged, politically less organized actors successfully having courts assess whether the distinctions made by the legislator, conferring a benefit on one group that was denied to another, or limiting the freedom to provide a service of one group by mandating a monopoly in favour of another, is justified.⁵⁷ If a justification succeeds, the description of the legislative act as the result of ‘capture’ is inappropriate. But if it does not, one of the reasons for its deficiency might well be the role played by interests groups. The justification of legislation in terms of the proportionality test as the test of public reason provides the relevant test for distinguishing between legislation that is responsive to legitimate interests of constituents and legislation that is the result of capture by rent-seeking special interests. Of course any disagreement between economists about what constitutes an efficient market in a particular domain and what is just pork is likely to be reflected, on application, in different assessments regarding the justification of a measure in terms of the proportionality test. In this sense the proportionality test does not purport to solve complex empirical questions relating to economic policy over which economists disagree. Not surprisingly courts often grant a considerable degree of deference to legislatures in the context of social and economic legislation. But often enough courts insist at the behest of a disadvantaged litigant that legislatures actions fails the test. At any rate, the test provides a framework within which disagreements can be presented and assessed in a way that connects them to the language of rights and public reason.

I have identified four types of pathologies of the political process, that even mature democracies are not generally immune from and that a rights based legal practice of Socratic contestation plausibly provides a helpful antidote for. First, there is the vice of thoughtlessness based on tradition, convention or preference, that give rise to all kinds of inertia to either address established injustices or create new injustices by refusing to make available new technologies to groups which need them most. Second, there are illegitimate reasons relating to the good, which do not respect the limits of public reason and the grounds that coercive power of public authorities may be used for. The first two have in common that they typically address situations in which a dominant majority seeks to make legally compulsory elements of the predominant habits or ways of life. Third, there is the problem of government hyperbole or

⁵⁷ Of course there are also examples of courts striking down legislative intervention in favor of economically disadvantaged groups, thus using conservatively inclined courts to undermine progressive agendas set by the socially more responsive legislatures. But I am not familiar with cases that fall in this category, that make use of the proportionality framework. See, most strikingly, *Lochner v. New York*, 198 U.S. 45 (1905).

ideology. Hyperbolic and ideological claims are claims loosely related to concerns that are legitimate. But they fail to justify the concrete measures they are invoked for, because they lack a firm and sufficiently concrete base in reality and are not meaningfully attuned to means-ends relationships. Hyperbole and or ideology serve to increase the discretionary power of public authorities under the guise of ensuring security and tend to undermine effective accountability of office-holders, creating dangers for groups deemed to be suspect by authorities. Fourth there is the problem of capture of the legislative process by rent-seeking special interest groups. This is by no means an exhaustive list of the typology of pathologies that decisions might suffer from in individual instances, even in mature liberal democracies. Nor do I mean to imply that judicial review is the only or even most important antidote to such pathologies. But the examples ought to be sufficient to suggest that realistically, democratic processes sometimes suffer from pathologies that judicial review as Socratic contestation might help to effectively address.

If that is right, the actual practice of rights based Socratic contestation is likely to improve outcomes, because such contestation effectively addresses a number of political pathologies that even legislation in mature democracies are not immune from and that judicial intervention might help to address. But outcomes might not only improved by direct judicial intervention. It is not unlikely that the legal institutionalization of Socratic contestation has a disciplining effect on public authorities and helps foster an attitude of civilian confidence among citizens. The legal institutionalization of Socratic contestation helps keep alive the idea that acts by public authorities that impose burdens on individuals must be understandable as reasonable collective judgments about what justice and good policy requires, to be legitimate. It is not sufficient to describe acts by public authorities as merely serving the perpetuation of a tradition, being responsive to majoritarian sentiments, or accommodating powerful interest groups to justify them, nor is it a justification to invoke ideological platitudes or theology. Clearly both the very limited examples and the limited range of arguments that have been addressed so far do not make a comprehensive case for judicial review as Socratic contestation. Furthermore counterarguments were largely ignored (in part because they will be addressed below). But for now it must suffice to have addressed at least some powerful arguments why a certain type of judicial review, based on the RHRP, might be attractive. What remains to be explored is whether this type of judicial review raises serious issues with regard to democratic legitimacy.

C. Socratic contestation, the RHRP and the legitimacy of law

There are at least two important difference between what the early Platonic Socrates was described as doing and real world judges adjudicating human and constitutional rights claims: First, the Socratic commitment to practical reason has something heroic about it, whereas the institutionalization of Socratic contestation does not generally require judges to be the hero that Socrates was. Instead the impartial posture and commitment to reason-giving that characterized Socratic inquiry is secured in adjudication by means of institutional rules which guarantee relative independence from immediate political pressures. Judges find themselves in an epistemic environment, which favors, supports and immunizes from serious political backlashes the kind of contestation-oriented practice that Socrates risked dying for.⁵⁸ Second, whereas Socrates might have humiliated his interlocutors and undermined their authority, his actions did not have any immediate legal effects. The actions of courts, however, do have legal effects, potentially invalidating political decisions held in violation of human or constitutional rights. This raises the basic issue whether, notwithstanding a plausible claim that outcomes may be improved, legally institutionalizing a practice of Socratic contestation unduly compromises constitutional democracy. Within the RHRP legitimacy concerns about the judicial role may seem to be dramatically heightened not only because of the relative insignificance of legal authority guiding and constraining courts adjudicating human rights claims, but also because of the expansive scope of rights typically recognized under the RHRP: The recognition of a general right to liberty and a general right to equality means that practically all legislation can in principle be challenged on human rights grounds, leading to an assessment of its justification in terms of public reason as prescribed by the proportionality test.

C.1. Some historical background: The scope of rights and the relationship between rights and democracy

Some historical context may help to get a better understanding of the particular juncture in history that liberal constitutional democracy has reached. There is nothing new in understanding rights in the expansive way of the RHRP. The Declaration of Independence states that the whole point of government is to secure the rights that individuals have. And the

⁵⁸ L Sager, *Justice in Plainclothes* (2004) 199-201.

framers of the US constitution knew that the more specific rights they enumerated in the Bill of Rights did not exhaust the rights that the constitution was established to protect.⁵⁹ In the French revolutionary tradition rights were understood in much the way the RHRP describes. The French Declaration of the Rights of Man establishes that everyone has an equal right to equality and liberty. In the enlightenment tradition that gave rise to modern constitutionalism, human rights do not define *a limited domain*. *They define the whole domain of legitimate politics. Furthermore the domain defined by them is not one that requires only negatively that the state must not intervene in it.* Instead the whole task of the political process is conceived as spelling out the implications and giving concrete meaning to the rights of free and equal citizens as they relate to specific areas of policy. All of politics is about delimitation and concretisation of rights. In that sense rights talk occupies the whole domain of politics. Furthermore legislatures not only respect rights. Rights are not only negative barriers to public action. They also authorize legislatures to protect and realize rights by defining more concretely what they amount to in specific contexts. Rights provide the moral-political genome for political action. The core task of democratic intervention in a true republic was to delimitate the respective spheres of liberty between individuals in a way that takes them seriously as equals and does so in a way that best furthers the general interest and allows for the meaningful exercise of those liberties. In this way democracy was conceived not only as rights-based, but as having as its appropriate subject matter the delimitation and specification of rights. Legislation, such as the enactment of the French *Code Civile*, was rights specification and implementation.

Originally, the abstract rights, as they were articulated in the French Declaration, were meant to be specified, interpreted and implemented exclusively through the *legislative process*. Courts had no role to play whatsoever in the exercise to determine the specific content of what it means to be free and equal in specific circumstances. Courts, discredited as part of the *ancien régime*—the *noblesse de robe*—were to function as the mouthpiece of the law as enacted by the legislature and had no additional constitutional role. Rights and democracy were not conceived as in tension to one another, but as mutually referring to one another. Rights needed specification and implementation by democratic legislatures and the authorization of the democratic legislatures consisted exclusively in spelling out the implications of a commitment to everyone’s right to be regarded as free and equal. Rights and

⁵⁹ See the 9th Amendment of the US Constitution. Also C Black, *A New Birth of Freedom* (1997).

democracy were co-equal and mutually dependant. Democratic actions not conceivable as rights specification and implementation—for example laws establishing one religion as the true religion—were illegitimate, as was rights specification and implementation that was not democratic. The basic rights of individuals were the exclusive subject matter of legislative intervention and, in abstract form, guided and constrained legislative intervention.⁶⁰

The RHRP, it turns out, is little more than the constitutionalization of this idea. There is nothing radical or new about the RHRP on the level of a conception of rights. What is new about post WWII constitutionalism is the *general supervisory role of the judiciary* in the process of rights-specification and implementation. In the second half of the 20th century the vast majority of countries that have gone through the experience of either national-socialist, fascist-authoritarian, communist or simply racist rule and made the transition to a reasonably inclusive liberal constitutional democracy have made a remarkable and original institutional choice: To establish a Kelsenian type constitutional court and constitutionalize rights that generally authorize those whose non-trivial interests are effected by the actions of public authorities to challenge them in court.⁶¹ The court would then assess whether, under the circumstances, the acts of public authorities, even of elected legislatures, can plausibly be justified in terms of public reason. Of course the primary task of delimitating the respective spheres of liberty of free and equals continuous to be left to the legislatures. Legislatures remain the authors of the laws in liberal constitutional democracies. But courts have assumed an important editorial function⁶² as junior-partners and veto players in the enterprise of specifying and implementing a constitutions commitment to rights. Courts, as guardians and subsidiary enforcers of human and constitutional rights serve as an institution that provides a forum in which legislatures can be held accountable at the behest of effected individuals claiming that their legitimate interests have not been taken seriously.

⁶⁰ Even today France is something of an outlier in the institutions it chooses to protect rights. In France the *Conseil Constitutionnel*, an institution that increasingly engages in rights analysis of the kind described above, is not referred to as a Court. Though it is a veto player in that it can preclude legislation from entering into force by holding it to be in violation of rights, it remains a ‘Council’ to the legislature and individuals may not bring cases.

⁶¹ Individuals can either vindicate their rights by filing a complaint with the constitutional court after exhausting other remedies, or they have to convince an ordinary court that their constitutional claim is meritorious, requiring that court to refer the issue to the constitutional court.

⁶² P Pettit, *Republicanism: A Theory of Freedom and Government* (1997). Larry Sager refers to the court as a redundant ‘quality control’ mechanism. See L Sager, *Justice in Plainclothes* (2004). Tom Franck refers to the function of courts as ‘providing a second opinion’, T Franck, ‘Proportionality as Global Second Opinion’ (on file with author).

C.2. Rights and democracy: The institutional question

But given that there is often reasonable disagreement about what rights individuals have with regard to concrete issues, should decisions relating to that disagreement not be made by a political process, in which electorally accountable political decision-makers make the relevant determinations? Was the original French institutional commitment to legislation by an elected assembly not right? Given reasonable disagreement, does the idea of political equality not demand, that everyone's conception of how to delimitate these rights, should be given equal respect? Is the idea of political equality not undermined, when electorally unaccountable courts are empowered to override legislative decisions to make these determinations? That, as I understand it, is the core challenge posed by arguments such as those put forward forcefully by Waldron and Bellamy. In the following I will provide an argument that judicial review based on the RHRP should be regarded as basic an institutional commitment of liberal-democratic constitutionalism as electoral accountability based on an equal right to vote. There is nothing puzzling about the legitimacy of judicial review. Arguably the more interesting issue is why the practice of judicial review receives the critical attention that it does.

a) What counts as democratic?

From a historical perspective there is a peculiar asymmetry between the contemporary critical attitude displayed towards judicial review in some jurisdictions and the relatively untroubled contemporary embrace of representative, electorally-mediated decision-making. Historically, the transition from direct democracy – Athens, Geneva and the New England Town Hall – to the elections of representatives was a serious issue. Democracy referred only to a process by which the people, personally present, legislated directly. In 18th century France the idea of representative democracy was by many thought to be a contradiction in terms and in the US the framers thought of themselves as establishing a republic, not a democracy, exactly because the constitution had no place for a national town hall or national referenda and, for that matter, only a very limited space even for direct election of representatives.⁶³ They did not conceive of themselves as Democrats. Over the course of the 19th century

⁶³ Only Members of the House of Representatives were directly elected. Senators were appointed by state legislatures until the 17th Amendment established direct elections in 1913. And as a matter of formal constitutional legal provisions, the President continues to be elected not by citizens directly, but by the Electoral College appointed by each state “in such a Manner as the Legislature thereof may direct”.

democracy was reconceived to include legislation by elected representatives, who would compete on party platforms for re-election. Participation-wise, the transition from direct to representative democracy involves a significant loss of individual citizen's control over the political process and significant empowerment of officials to the detriment of 'the people'. Similarly, after WWII, the establishment of courts as additional veto-players can be construed as the empowerment of another group of officials, one further step removed from 'the people', whose task includes the supervision of activities by the other group of empowered officials. As a matter of principle it is not difficult to understand the scepticism articulated by those who refused to accept 'representative democracy' as democracy properly so-called. But once the step to the empowerment of officials to legislate in the name of the people has been accepted as a matter of principle, it is difficult to see why the restriction of the powers of those officials (legislators) by other officials (judges) that are generally appointed by the officials that have been given the authority to legislate, can possibly be wrong as a matter of principle. If representative democracy is legitimate, why can't representative democracy involving a rights-based judicial veto-power be legitimate? What is the deep difference of principle between them? All three decision-making procedures are majoritarian: In referenda it is the majority of those who vote that count, in legislative decision-making it is the majority of representatives that count, and in judicial decision-making it is the majority of judges. Furthermore all of these institutions are republican in that they claim to make decisions in the name of the people and derive their legitimacy ultimately from the approval of the electorate. The core difference is the directness of the link between authoritative decision-making and the electorate. That difference is one of degree. If the principle of democracy required the most direct and unmediated form of participation possible, under present day circumstances much of representative decision-making would be illegitimate. There would seem to be as much cause to talk about the undemocratic empowerment of elected representatives, who get to decide on laws without the people having a direct say in the legislative decision, as it is to talk about the undemocratic empowerment of judges, who make their decisions without direct participation of the people and who tend to serve out their term (generally 9-12 years), rather than being up for re-election after a limited number of years (generally 4-6). The reason why representative democracy is *not* regarded as illegitimate, is presumably because any plausible commitment to democracy allows trade-offs along the dimension of participatory directness, when less direct procedures exhibit comparative advantages along other dimensions, such as deliberative quality or outcomes. Just as there might be good reasons to generally have moved from legislation by plebiscite to legislation by elected representatives, there might be good

reasons to add judicial review in the mix. It is not clear what the issue of deep principle could be that would condemn judicial review, but not electoral representation.

But the argument from democracy might still survive in a weak form: As a claim that gains along some other dimension (such as improved outcomes) must exist to justify taking another step to diminish the role of direct participation. But even that argument is not persuasive, as the following will clarify. It is by no means obvious that a straightforward parliamentary system scores higher than a system where judicial review complements that process even along the dimension of participatory directness.

What should already be clear that is utterly implausible to claim that through ordinary legislative procedures ‘the people themselves’ decide political questions, whereas decisions of duly appointed judges are cast as platonic guardians imposing their will externally on the people. Anyone who uses that language engages not in an argument, but a rhetorical sleight of hand. Why not say that elected representatives have usurped the power of the people by making decisions for them? Why is the legislature the medium of “We the people”? And if it can be, why not say that the people themselves, through the judicial process, sometimes act to constrain a runaway legislature? What excludes the possibility of including the judiciary as a medium by which “We the people” articulates itself? The rhetoric of ‘the people themselves’ sabotages clear thinking. There are no plausible reasons to identify ‘the people’ with the voice of one institution, even when that institution is a Parliament. Elected representatives and appointed representatives alike are representatives. They are not the people.

You and I and the others subject to the public authorities that have jurisdiction over us are the people. You and I, as citizens, can participate in the political process. Seen collectively such participation is hugely important in securing effective electoral control of elites and enhancing the democratic process. Furthermore when we discuss political issues we may understand more deeply what we believe and who we are as citizens. Participating in politics allows us to understand ourselves as part of a collective political enterprise. But all these virtues of political participation should not detract from a decisive point: As individuals among millions of similarly situated individuals, practically none of us, taken for ourselves, can make much difference by participating in the political process through our equal right to vote. Whether you vote or not is unlikely to ever change the government that you are under. The probability that your or my individual vote, looked at in isolation, will change anything is

lower than the probability of winning the national lottery.⁶⁴ The most likely way that an individual citizen is ever going to change the outcomes of a national political process as a citizen (rather than an office-holder), is by going to court and claiming that his rights have been violated by public authorities. If courts are persuaded by your arguments rather than the counterarguments made by public authorities, you will have effectively said ‘no, not like this!’ in a way that actually changes outcomes. In the real world of modern representative democracy, the right to persuade a court to veto a policy is at least as empowering as the right to vote to change policy. They complement one another.

b) Standards of constitutional legitimacy

But the puzzle deepens. The legitimacy of the political process depends on the consent of the governed. On this thinkers in the enlightenment contractualist tradition as well as French and American Revolutionaries agree. Note that *consent* is the starting point for thinking about legitimacy, *not majorities*. Of course, given reasonable disagreement, actual consent is impossible to achieve in the real world. If legitimate law is to be possible at all—and given the problems that law is required to solve it had better be possible—less demanding criteria of constitutional legitimacy adapted to the conditions of real political life need to be developed to serve as real world surrogates and approximations to the consent requirement. In modern constitutional practice there are two such surrogates that need to cumulatively be fulfilled in order for law to be constitutionally legitimate. First, a political process that reflects a commitment to political equality and is based on majoritarian decision-making needs to be at the heart of political the decision-making process. This is the procedural prong of the constitutional legitimacy requirement. But this is only the first leg on which constitutional legitimacy stands. The second is outcome-oriented: The outcome must plausibly qualify as a *collective judgment of reason* about what the commitment to rights of citizens translates into under the concrete circumstances addressed by the legislation. Even if it is not necessary for everyone to *actually* agree with the results, the result must be justifiable in terms that those who disagree with it *might reasonably accept*. It must be morally plausible to imagine even those addressees most burdened by a law to have hypothetically consented to it. Even those left worst off and most heavily burdened by legislation must be conceivable as free and equal

⁶⁴ The fact that it is generally instrumentally irrational for individuals that are part of a large electorate to vote is a major paradox for rational choice theory. For a recent discussion of these issues see R Tuck, *Free Riding* (2008).

partners in a joint enterprise of law-giving. Those burdened by legislation must be able to see themselves not only as losers of a political battle dominated by the victorious side (ah, the spoils of victory!), they must be able to interpret the legislative act as a reasonable attempt to specify what citizens—all citizens, including those on the losing side—owe to each other as free and equals. When courts apply the proportionality test, they are in fact assessing whether or not legislation can be justified in terms of public reasons, reasons of the kind that every citizen might reasonably accept, even if actually they don't. When such a justification succeeds a court is in fact saying something like the following to the rights-claiming litigant: "What public authorities have done, using the legally prescribed democratic procedures, is to provide a good faith collective judgment of reason about what justice and good policy requires under the circumstances. Given the fact of reasonable disagreement on the issue and the corollary margin of appreciation/deference that courts appropriately accord electorally accountable political institutions under the circumstances⁶⁵, it remains a possibility that public authorities were wrong and you are right and that public authorities should have acted otherwise. But our institutional role as a court is not to guarantee that public authorities have found *the one right answer* to the questions they have addressed. Our task is to *police the boundaries of the reasonable* and to strike down as violations of right those acts of public authorities that, when scrutinized, can not plausibly be justified in terms of public reason." Conversely, a court that strikes down a piece of legislation on the grounds that it violates a right is in fact telling public authorities and the constituencies who supported the measure: "Our job is not to govern and generally tell public authorities what justice and good policy requires. But it is our job to detect and strike down as instances of legislated injustice measures that, whether supported by majorities or not, impose burdens on some people, when no sufficiently plausible defense in terms of public reasons can be mounted for doing so."

⁶⁵ The fact that a court engages in proportionality analysis does not imply anything for the degree of deference it should accord political actors. The proportionality test itself provides a standard for rightness, not merely for reasonableness and does not by itself suggest anything about the appropriate level of deference to be used by courts. Courts can inquire more or less searchingly whether the relevant prongs of the test are satisfied. The very existence of the multi-prong structure allows the court to ask relatively specific questions, requiring specific answers. In that sense proportionality review is inherently in tension with what in the US context generally passes as 'rational basis' review or 'Wednesbury reasonableness' in the UK. I provide no answer to the question *how much* deference in which types of contexts courts should provide. But the difference between rightness – what ideally a political actor should have decided – and reasonableness – what the burdened addressee might reasonably have consented to – conceptually marks the space of deference that is appropriate for a court, given its specific function to review law's claim to legitimate authority. This is not the place to explore the idea of reasonableness and its connection to sociological, analytical and moral criteria, nor can the implications of the idea for articulating concrete standards of deference be developed here. Here it must suffice to point out that the right level of deference depends on factors that include, but are not limited to a) the political, social and cultural context b) the complexity of the policy questions involved c) the structure of the processes and institutions that have generated the decision that is under review and d) the structure of the judicial institution and its position within the overall constitutional structure.

Note how this understanding of the role of courts acknowledges that there is reasonable disagreement and that reasonable disagreement is best resolved using the political process. But it also insists that not all winners of political battles and not all disagreements, even in mature democracies, are reasonable. Often they are not. Political battles might be won by playing to thoughtless perpetuation of traditions or endorsement of prejudicial other-regarding preferences, ideology, fear mongering or straightforward interest-group politics falling below the radar screen of high-profile politics. Socratic contestation is the mechanism by which courts ascertain whether the settlement of the disagreement between the public authorities and the rights claimant is in fact reasonable. *Courts are not in the business of settling reasonable disagreements. They are in the business of policing the line between disagreements that are reasonable and those that are not* and ensure that the victorious party that gets to legislate its views is not unreasonable.⁶⁶ Acts by public authorities that are unreasonable can make no plausible claim to legitimate authority in a liberal constitutional democracy. The question is not what justifies the “countermajoritarian”⁶⁷ imposition of outcomes by non-elected judges. The question is what justifies the authority of a legislative decision, when it can be established with sufficient certainty that it imposes burdens on individuals for which there is no plausible justification. The judicial practice of Socratic contestation, structured conceptually by the RHRP and the proportionality test, and institutionally protected by rules relating to independence, impartiality and reason-giving, is uniquely suitable to give expression to and enforce this aspect of constitutional legitimacy. Constitutional legitimacy does not stand only on one leg.

c) Constitutional archetypes: The right to vote and the right to contest

The right to contest acts of public authorities that impose burdens on the individual is as basic an institutional commitment underlying liberal-democratic constitutionalism as an equal right to vote. Just as the ideals underlying liberal democratic constitutionalism are not

⁶⁶ Of course the very fact of rights litigation suggests that there is also reasonable disagreement about the limits of reasonable disagreement. Here the original argument about reasonable disagreement about rights as the proper domain of the democratic process can be reintroduced on the meta-level. But whereas it is plausible to claim that disputes about justice are at the heart of what the democratic process is about, it is not as obvious that the democratic process is also good at policing the domain of the reasonable. At any rate, there is no reason not to entrust the task of delimitating the domain of the reasonable to courts, both as a matter of principle—giving expression to the link between legitimacy and reasonableness—and because it improves outcomes (see below).

⁶⁷ For an account of the “countermajoritarian difficulty” as an academic obsession in US constitutional scholarship, see generally B Friedman, ‘The Countermajoritarian Problem and the Pathology of Constitutional Scholarship’ (2001) 95 *Northwestern University Law Review* 933.

fully realized without the institutionalization of genuinely competitive elections in which all citizens have an equal right to vote, they are not fully realized without a rights and public reason based, institutionalized practice of Socratic contestation. There is a symmetry here that deserves to be described in some greater length, because it helps sharpen the implications of the argument made above.

Both the constitutional justification of an equal right to vote and the legal institutionalization of Socratic contestation do not depend exclusively on the outcomes generated. Both constitutional commitments are justified also because they provide *archetypal expressions*⁶⁸ of basic liberal-democratic constitutional commitments. Citizens get an *equal* right to vote largely because it expresses a commitment to political equality. The weight of a vote is not the result of carefully calibrating different assignment of weights to outcomes. We do not ask whether it would improve outcomes if votes of citizens with university degrees, or those with children or those paying higher taxes would count for more, even though it is not implausible to think that it might.⁶⁹ There are many aspects of election laws that can be tinkered with on outcome-related grounds. But any such laws much reflect a commitment to the idea that each citizens vote counts for the same, to be acceptable. The same is true for the idea of Socratic contestation. It expresses the commitment that legitimate authority over any individual is limited by what can be plausibly justified in terms of public reason. If a legislative act burdens an individual in a way that is not susceptible to a justification he might reasonably accept, then it does not deserve to be enforced as law. We should not need to discuss whether or not to provide for the judicial protection of rights, even if it were less obvious that outcomes are improved. What deserves a great deal of thought is how to design the procedures and institutions that institutionalize Socratic contestation. Should there be special Constitutional Courts with the exclusive jurisdiction over constitutional issues? By what procedure should the judges be appointed and how long should their tenure be? How many judges should there be on a panel and what majorities are necessary to strike down legislation?⁷⁰ What should the rules governing dissenting opinions, submission of amicus

⁶⁸ For the idea of legal archetype as a legal rule emblematic for a wider commitment, see J Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 Columbia Law Review 1681.

⁶⁹ Even when the right to vote is withdrawn, as it is in many states for convicted prisoners, the reasons for doing so are not outcome-oriented, but seek to punish the prisoner by expressly denying him the status of an equal member of the political community.

⁷⁰ A Vermeule, *Mechanisms of Democracy* (2007), pp. 146-152 rightly points out that whether and to what extent judges ought to defer to judgments of public authorities depends in part on the majorities necessary for a court to strike down legislation. Norms relating to standards of review and procedural norms relating to

briefs etc be? How are the decisions by the judiciary linked to the political process? Should judges just have the power to declare a law incompatible with human rights, leaving it to the legislature to abolish or maintain the law?⁷¹ Even if the court has the authority to strike down a law, should the legislature be able to overrule that decision? If so, what kind of majority should be necessary? What are the advantages, what the drawbacks of having an additional layer of judicial review in the form of transnational human rights protection?⁷² These are the kind of questions that need to be addressed by taking into account outcome-related considerations and democracy related considerations.⁷³ But the commitment to legally institutionalize Socratic contestation reflects as basic a commitment as an equal right to vote and is, to a certain extent, immune from outcome-related critiques, much like the commitment to an equal right to vote.

majorities required to strike down a decision can both serve to institutionalize the idea that review should be deferential.

⁷¹ See S Gardbaum, 'The New Commonwealth Model of Constitutionalism' 49 No. 4 American Journal of Comparative Law (2001). Available at SSRN: <http://ssrn.com/abstract=302401> or DOI: 10.2139/ssrn.302401

⁷² See generally on the relationship between national constitutional law and international human rights law G. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance', 55 *Stanford Law Review* 1863 (2003).

⁷³ At least one of the reasons why debates about judicial review remain alive in the US more than anywhere else might be connected to the particularly rigid features of constitutional review: Without explicit constitutional authorization a bare 5:4 majority of judges with life tenure – in practice translating into an average term of 26.1 years for judges retiring after 1970 [see S Calabresi, J Lindgren, 'Term Limits for the Supreme Court: Life Tenure Reconsidered', 29 No. 3 *Harvard Journal of Law and Public Policy*]:- decide questions, that for all practical purposes are nearly impossible to overturn by constitutional amendment. Compare this with other jurisdictions where there is an explicit constitutional commitment to judicial review and qualified majorities of judges appointed for 9-12 years make decisions that can be overturned in a significantly less burdensome override process. For the institutional arrangements that predominate in Europe A Stone Sweet, 'Governing with Judges: Constitutional Politics in Europe' (2000), pp. 31-60 provides a helpful overview.