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**Article — Published Version**

## Global Constitutionalism, Human Rights and Proportionality: Institutionalizing Socratic Contestation

Journal of Constitutional Justice

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*Suggested Citation:* Kumm, Mattias (2022) : Global Constitutionalism, Human Rights and Proportionality: Institutionalizing Socratic Contestation, Journal of Constitutional Justice, ISSN 2383-8108, Constitutional Research Institute, Seoul, Vol. 9, Iss. 2, pp. 193-244, <https://doi.org/10.35215/jcj.2022.9.2.006>

This Version is available at:  
<https://hdl.handle.net/10419/268206>

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# Global Constitutionalism, Human Rights and Proportionality: Institutionalizing Socratic Contestation

## 세계입헌주의, 인권과 비례의 원칙: 소크라테스식 논쟁의 제도화

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## Ⅰ 국문초록

냉전 이후 권리 기반 사법심사의 확대와 함께 비례의 원칙 분석이 권리 논증의 핵심으로 등장한 양상에 대해 세계입헌주의 학자들은 서술하고 분석해왔다. 그러나 이러한 사법 관행이 제기하는 핵심적인 질문 중 하나는 그러한 관행의 법적 의미와 이같이 개방적인 사법적 기준을 적용하는 법원의 역할에 관한 것이다.

권리 기반 비례성 심사의 제도화는 플라톤의 초기 대화편을 유명하게 한 소크라테스의 논쟁과 비슷한 특징과 어려움을 공유한다. 소크라테스식 논쟁의 목표, 그리고 민주적 정치체제에서 소크라테스식 논쟁이 하는 역할에 대한 이해는 비례성 기반 권리심사의 목적을 이해하는 열쇠이기도 하다.

법관이 비례성이라는 틀 속에서 인권이나 헌법적 권리를 판단할 때면 일차적으로는 권위 있는 원전의 해석이 아닌, 논리를 판단하는 작업을 하게 된다. 공권력에 의해 받아들여지고 시민들이 널리 찬동하는 입장을 법관이 비판적으로 검토하고 때로는 거부할 때면 소크라테스가 그랬듯 공동체의 가치관과 전통에 위배한다는 비판에 직면한 사실도 놀랄 일은 아니다.

비례성에 기반한 사법심사는 공권력 행사에 이의를 제기하고, 공적 이성애 근거한 정당화를 요구할 권리를 제도화한다.

권리 기반 비례성 심사는 민주적 의사결정에 때때로 침투하는 네 가지 병리를 파악하기에 적합한 수단이다. 첫째는 타당한 정책적 고려사항과 무관한 전통, 관습이나 선호에 근거한 제약이다. 둘째는 인권과 헌법적 권리 제약을 정당화하는 이유로서 허용되지 않는 “선(善)”을 이유로 한 제약이다. 셋째, 정부의 과장이나 사상의 문제이다. 정부 정책이 정당한 목적과 대략적인 연관 관계는 있지만, 확실하고 구체적인 현실적 근거는 약한 경우를 가리킨다. 넷째, 자신들의 이익만을 추구하는(rent seeking, 지대추구 ※‘지대추구’란 경제 주체들이 자신의 이익을 위해 기득권의 울타리 안에서 로비, 면허 취득, 독점권 취득 등 비생산적인 활동에 경쟁적으로 자원을 낭비하는 현상이다.) 이익집단이 입법 절차를 포획하는 문제이다.

자신이 하는 논쟁 실천이야말로 민주적 정치체에서 최고의 찬사를 받아야 마땅하다는 소크라테스의 주장은 옳았다. 마찬가지로 권리 기반 비례성 심사를 하는 공정하고 독립적인 법원을 자유입헌민주주의의 불가결한 요소로 포용해야 마땅하다. 쟁송권은 시민 참여 권한과 정부 책임 확보를 위한 핵심적 법적 장치로서 투표권을 보완한다.

**주제어:** 세계입헌주의, 비례성, 소크라테스식 논쟁, 위헌심사, 정당화를 요구할 권리

(논문접수일: 2022. 11. 21. 심사개시일: 2022. 11. 21. 게재확정일: 2022. 12. 7.)

## I. INTRODUCTION

Global Constitutionalists have tended to focus on and make contributions to three core areas of public law. First, they describe and interpret the *international legal order* in global constitutional terms, with significant implications for the interpretation and progressive development of international law. Global constitutionalists reject the idea that international law is fundamentally based on the consent of states and instead believe that central principles, norms and ideas drawn from the constitutional tradition are of central importance also for the description and interpretation of international law. Second, global constitutionalists insist that states *domestic constitutional order* has to be interpreted as open to, engaged with and integrated into a global legal order. Here the focus is on the constitutional law of foreign affairs, and in particular the rules and doctrines concerning the relationship between the domestic legal order and legal orders beyond the state. The idea of constitutional pluralism, widely endorsed even if not uniformly interpreted by global constitutionalists, carves out a middle path between Monism insisting on a simple hierarchical integration of national law under international law and the state sovereignty protecting idea of dualism which insists on the fundamental conceptual separateness of the state and global legal orders. Third, global constitutionalists have argued for a particular understanding and interpretation of human and constitutional rights practice. It is this third theme of global constitutionalism that this article is focused on.

With the spread of liberal constitutional democracy after the end of the Cold War and the establishment of rights reviewing constitutional courts, the principle of proportionality has become a central structural feature of rights adjudication.<sup>1)</sup>

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1) Classic accounts describing and explaining the spread of proportionality analysis include Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008), Aharon Barak, *Proportionality* (CUP 2012). Among the classic normative justificatory accounts are Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002) and DAVID BEATTY, *THE ULTIMATE RULE OF LAW* (2004). Among contemporary discussions Grant Huscroft, Bradley Miller, Gregoire Webber (eds.), *Proportionality and the Rule of Law* (CUP 2015) and Vicki Jackson, Mark Tushnet (eds.), *Proportionality: New Challenges, new Frontiers* (CUP 2017) stand out. In the U.S. there is a greater reluctance to embrace proportionality, see Lorraine E. Weinrib, *The*

Scholars as wide ranging as the German legal philosopher and public law jurist Robert Alexy, the Israeli scholar and former Chief Justice of the Supreme Court Barak, or the American Political Scientist Alec Stone Sweet have described, analyzed and explained the rise of this practice. But even though proportionality has been plausibly linked to the idea of rationality, and has been lauded as a rights adjudication technique that diplomatically enables courts to give weight to arguments and concerns by both parties to the dispute, proportionality analysis has generated three core critiques. First, a metaethical critique questions the existence of rational standards for proportionality analysis and balancing in particular, emphasizing the incommensurability or relativity of competing concerns. Second, there is a moral critique that claims that taking rights seriously is not compatible with the kind of reasoning that proportionality requires.<sup>2)</sup> Thirdly, even if there are objective criteria and the best understanding of rights is compatible with proportionality as analysis, there remains the institutional question whether courts rather than democratically elected or appropriately specialized administrative agencies are not better placed to make the kind of judgments that proportionality analysis requires judges to make. What reasons are there to believe that courts are better positioned institutionally than politically accountable actors, if all they are guided by are the abstract criteria provided by the proportionality test? And apart from securing better outcomes, is the empowerment of courts with such a task, inevitably involving engagement with contentious empirical and moral questions and often requiring a judgment on difficult trade-offs compatible with democracy? The debate about judicial review might be an old chestnut, but the ubiquity of proportionality analysis raises the stakes and appears to deepen the problem. What is the point of judicial review that has this kind of structure? This is the question that is the focus of this paper.

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*Postwar Paradigm and American Exceptionality*, in Soujit Choudhry (Ed.), THE MIGRATION OF CONSTITUTIONAL IDEAS 84 (CUP, 2006). This exceptionalism is mostly described in highly critical terms, see already Marie Anne Glendon, *Rights Talk* (Simon & Schuster 1993) and most recently Jamal Greene, *How Rights Went Wrong* (HMH 2021).

2) Another is whether proportionality analysis does justice to the idea of the priority of rights, central to the liberal tradition. For a discussion of these issues, see Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in LAW, RIGHTS, DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY 131 (George Pavlakos ed., 2007).

The following argument<sup>3)</sup> consists of five parts. The first part describes how proportionality analysis transforms the nature of legal reasoning (I). When using a proportionality test to assess whether an action infringing a right are justified, it is misleading to say that Courts interpret rights. Instead of attempting to make sense of authoritative legal materials the focus of courts engaged in proportionality analysis is the assessment whether a public action can be demonstratively justified by reasons that are appropriate in a liberal democracy. Call this the *turn from legal interpretation to public reason-oriented justification*. To some extent this characterization of judicial review raises the stakes. What might justify the considerable powers the judiciary has once such a methodology is used? What is the point of judicial review? The institutional function of this kind of judicial review, I argue, is to institutionalize a practice of Socratic contestation. The second part provides an account of the distinctive structural features of Socratic contestation and how it is connected to proportionality-based adjudication (II) and makes two strong claims about that practice. First, there are good reasons to expect that the institutionalization of such a practice is likely to *improve outcomes* in four distinct ways (III). The Article briefly highlights a) the vice of thoughtlessness based on tradition, convention and preference; b) reasons relating to the good, that do not respect the limits of public reason; c) hyperbole and ideology: legitimate concerns are invoked, but a lack of concrete engagement and grounding in reality leads to the enactment of measures that inappropriately expand the power of public authorities; and d) the capture of the political process by rent-seeking interest groups. Second, proportionality based judicial review is also justified as a matter of principle (IV). Not only is proportionality based judicial review compatible with democratic legitimacy, as is now widely accepted (A), there is a good case to be made for the stronger claim that democracy without judicial review is deficient: (B) and that there is a moral symmetry between a commitment to an equal right to vote and the right to public reason oriented judicial review (C). Proportionality based

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3) The following draws on Mattias Kumm, The idea of Socratic contestation and the right to justification: the point of rights-based proportionality review, 2010 Law & Ethics of Human Rights 4 (2), 142-175.

judicial review institutionalizes a right to justification that is connected to a particular conception of legitimate legal authority: That law's claim to legitimate authority is plausible only if the law is demonstratively justifiable to those burdened by it in terms that free and equals can accept. The idea of competitive elections grounded in an equal right to vote, and the rights-based practice of Socratic contestation institutionalized in a form of judicial review are *complementary* basic institutional commitments of liberal democratic constitutionalism. Liberal democracy without public reason-oriented judicial review is incomplete and deficient. A final part addresses the challenge that the idea of institutionalizing Socratic contestation is necessarily utopian given the limitations of judicial officeholders and the realities of democratic politics (V).

## II. FROM INTERPRETATION TO JUSTIFICATION: THE STRUCTURE OF PROPORTIONALITY FOCUSED RIGHTS ADJUDICATION

Within contemporary practice of rights adjudication in liberal democracies arguments relating to legal authorities—legal texts, history, precedence etc.—have a relatively modest role to play. Instead, the operative heart of the great majority of human or constitutional rights cases is the proportionality test (A). That test, however, provides little more than a checklist of individually necessary and collectively sufficient criteria that need to be met for behavior by public authorities to be justified in terms of reasons that are appropriate in a liberal democracy. In that sense it provides a structure for the assessment of public reasons (B). Furthermore, the range of interests that enjoys *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 (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 for a constitutional or human rights challenge and requires to be justified in terms of public reason (C).

In institutional terms these features of human rights practice require a re-characterization 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 the Champs Élysees 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 First Amendment, for example, simply states that “Congress shall make no laws … abridging the freedom of speech … (or) … the free exercise of religion ….”<sup>4)</sup> Not surprising it remains a unique feature of the U.S. constitutional rights culture to insist on defining rights narrowly, so that there are as few as possible exceptions to them.<sup>5)</sup>

The second approach—a bifurcated approach—is characteristic of Human Rights Treaties and Constitutions enacted in the period following WWII. 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. Article 10 of the European Convention of Human Rights<sup>6)</sup> (ECHR), 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 prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety ….

Similarly, Article 2(1) of the German Basic Law<sup>7)</sup> 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

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4) Perhaps also for reasons relating to the structure of constitutional text in the U.S. 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.

5) See Schauer, *supra* note 1. See also CHARLES FRIED, *RIGHT AND WRONG* (1978).

6) European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

7) See Grundgesetz für die Bundesrepublik Deutschland (Basic Law) GG art. 2(1).

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 cannot is there a *definitive* violation of the right.

Even though the term proportionality is not generally used in constitutional limitation clauses immediately after WWII, over time courts have practically uniformly interpreted these kind 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.<sup>8)</sup>

Chapter VII, Article 52 (1) 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.”<sup>9)</sup>

The constitutional text here serves merely as the basis for an authorization of courts to engage in an open-ended inquiry regarding the justification of acts of public authorities.

8) The Canadian Charter of Rights and Freedoms, 1982, sect. 1, prescribes that rights may be subject to “such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society.” The South African Constitution, 1996, sect. 36 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.

9) Charter of Fundamental Rights of the European Union, 2007, O.J. C 303/01.

2. The connection between rights and proportionality analysis has been thoroughly analyzed by Robert Alexy.<sup>10)</sup> 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 viceversa. 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 the possibilities of the factual and normative world.”<sup>11)</sup> The proportionality test is the means by which values are related to possibilities of the normative and factual world. 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.<sup>12)</sup> Second, the measure has to be necessary in the sense that there are 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

10) ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* (2002). The following pages draw heavily on Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT’L J. CONST. L. 574 (2004).

11) ALEXY, *supra* note 10, at 60.

12) 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.

reasoning about how a particular value relates to the exigencies of the circumstances. It requires general practical reasoning.<sup>13)</sup>

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

In *Lustig-Prean and Beckett v. United Kingdom*,<sup>14)</sup> 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 Article 8 ECHR. Article 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.

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*.

13) See ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION (1989) (examining whether legal reasoning is a special case of general practical reasoning). 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.

14) *Lustig-Prean and Beckett v. UK*, App. Nos. 31417/96 and 32377/96, 29 Eur. H.R. Rep. 548 (1999).

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 for prohibiting 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 U.S. 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 arguably 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 Robert 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.”<sup>15)</sup>

The decisive question in the case of the gay soldiers discharged from the British armed forces is whether when balancing 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 outside the government’s margin of appreciation and held the United Kingdom to have violated Article 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

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15) *See supra* note 10, at 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.

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 fourprong structure of proportionality analysis provides little more than a structure that 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.<sup>16)</sup> *The proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are appropriate in a liberal democracy. Or to put it another way: It provides a structure for the justification of an act in terms of public reason.*<sup>17)</sup>

16) 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,” see *Handyside v. the United Kingdom*, 24 Eur. Ct. H.R. (ser. A), at 23 (1976).

17) For the idea of public reason, see JOHN RAWLS, *POLITICAL LIBERALISM* (1992). A commitment to the idea of public reason does not commit to the particular elaboration of that idea provided by Rawls of that idea in his late work JOHN RAWLS, *LAW OF PEOPLES* (1999). The role of public reason within proportionality analysis is further examined below.

3. Conceiving rights in this way also helps explain another widespread feature of contemporary human and constitutional rights practice that can only be briefly 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 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 ECJ, 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.<sup>18)</sup> The ECtHR has adopted an expansive understanding of privacy guaranteed under Article 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.<sup>19)</sup> It has been held by the Constitutional Court to include such mundane things as a right to ride horses through public woods,<sup>20)</sup> feeding pigeons on public squares,<sup>21)</sup> or the right to trade a particular breed of dogs.<sup>22)</sup> Furthermore, not only liberty interests have been

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18) Case C-280/93, Germany v. Council, 1994, E.C.R. I-4973.

19) BVerfGE 6, 32 (Elfes).

20) BVerfGE 80, 137.

21) BVerfGE 54, 143.

22) BVerfG, 1 BvR 1778/01 (Mar. 16, 2004).



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.<sup>23)</sup> 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.<sup>24)</sup> In this way the language of human and constitutional rights is used to subject practically all 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.<sup>25)</sup>

So, given the remarkable scope of the domain of human and constitutional rights adjudication as well as its public reason oriented, rather than authority based legalistic structure, why should courts be in the business of assessing acts of public authorities, even of legislatures, in such a way? What is the best case for courts to play such a role?

### III. THE IDEA OF SOCRATIC CONTESTATION

1. There is a puzzle relating to the wisdom of proportionality based 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

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23) BVerfG, 1 BvR 3198/07 (Aug. 6, 2008).

24) See Case C-117/76, Ruckdeschel & Co v Hauptzollamt Hamburg-St Annen, 1977, ECR 1753.

25) For the argument that the ECJ's human rights jurisprudence fits the RHRPand might even qualify as its most radical instantiation, see Mattias Kumm, *Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm*, in THE PAST AND FUTURE OF EU LAW: THE CLASSICS OF EU LAW REVISITED ON THE 50TH ANNIVERSARY OF THE TREATY OF ROME 106 (Miguel Poiarés Maduro & Loic Azoulay eds., 2009).

public behavior, 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.<sup>26)</sup> 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.<sup>27)</sup> 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,<sup>28)</sup> 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 proportionality-based 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 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

26) PLATO, APOLOGY 21a.

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

28) 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 the special issue on Dworkin, 1 INT'L J. CONST. L. 2003.

judgment made by the democratically accountable politically branches using the checklist that the proportionality test provides.

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,<sup>29)</sup> 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*.<sup>30)</sup> 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."<sup>31)</sup> The Socratic *elenchus* is adversative and bears some resemblance to

29) PLATO, *supra* note 26, at 21c.

30) For an insightful analysis, see Gregory Vlastos, *The Socratic Elenchus*, in OXFORD STUDIES IN ANCIENT PHILOSOPHY 27 (1983).

31) RICHARD ROBINSON, PLATO'S EARLIER DIALECTICS (2d ed. 1953).

cross-examination. His role in the debate is not to defend a thesis of his own but only to examine the 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,<sup>32)</sup> 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.<sup>33)</sup> 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,<sup>34)</sup> but on

32) PLATO, *supra* note 26, at 31c-32a.

33) The claim is not that Socratic eclectic 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* 471e472c, 474a, & 475e).

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.<sup>35)</sup>

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.<sup>36)</sup> 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 ray<sup>37)</sup>—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

34) This does not mean that there is never an occasion theoretical sophistication is required.

35) Interestingly highest courts are sometimes not geographically located not in political power centers, but rather in the provinces. The ECJ is in the sleepy Duchy of Luxembourg, not in the European political power-center—Brussels. The European Court of Human Rights is in Strasbourg, not a European capital. The German Federal Constitutional Court is in Karlsruhe, not in Berlin. Yet, I am unaware 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.

36) PLATO, *supra* note 26, at 30e.

37) PLATO, MENON 84.

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.<sup>38)</sup> 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 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 are no longer of any relevance.<sup>39)</sup> 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

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38) PLATO, REPUBLIC book 1.

39) HANNA ARENDT, THE ORIGINS OF TOTALITARIANISM 474 (1966).

disagreement<sup>40)</sup> and a great deal with the refusal to seriously examine a question from the point of view of what justice and good policy requires.<sup>41)</sup>

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.<sup>42)</sup> 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.<sup>43)</sup> 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.

But why is that so important? In the following I argue that it is important for two reasons: First, it is likely to improve outcomes by addressing four distinct types of pathologies that might at times vitiate the democratic process even in mature liberal democracies (III). And it reflects a basic commitment underlying liberal democracy, serving 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 institutionalizes the idea that the legitimate authority of a legal act depends on the possibility of providing a justification for it

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40) See RAWLS, *supra* note 17.

41) The idea that a great deal of wrong is done simply by failing to take seriously the basic question “what should we be doing here and now? Is this right?” is central to the New Testament. 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 skeptical 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.

42) For the claim that ancient practical philosophy was primarily a way of life, focused on care of the self, or, more traditionally, soulcraft, see PIERRE HADOT, *WHAT IS ANCIENT PHILOSOPHY?* (2002). See also PIERRE HADOT, *PHILOSOPHY AS A WAY OF LIFE: SPIRITUAL EXERCISES FROM SOCRATES TO FOUCAULT* (1995).

43) For a contemporary defense of this idea, see DANA VILLA, *SOCRATIC CITIZENSHIP* (2001).

based on grounds that might be reasonably accepted even by the party who has to bear the greatest part of the burden and empowers individuals to seek redress (IV).

#### IV. IMPROVING OUTCOMES: REMEDYING FOUR POTENTIAL PATHOLOGIES

If judicial review is to be understood as a form of institutionalized Socratic contestation, why would it exhibit the proportionality structure that is described in Part I, rather than, say, the more legalistic reasoning that characterizes most U.S. Supreme Court decisions? In part, the answer is that the idea of Socratic contestation would not resonate much in a context where judicial review had a legalistic character, strongly focused on text, history, and precedent. Legal reasoning requires a kind of professional knowledge and training that Socratic Contestation does not. It is exactly the strong legalistic elements of U.S. Supreme Court practice that Jeremy Waldron, for example, has very plausibly identified as an *obstacle* for thinking about the Supreme Court as an institution that embodies a superior kind of deliberative engagement with public reasons: The conceptual structure of legal doctrine more often than not distorts public reasoning while it professionalizes legal discourse.<sup>44</sup> The proportionality test, on the other hand, provides little more than a structure for the assessment of public reasons. It lacks the legalism characteristic even of “common law constitutionalism.”<sup>45</sup>

But even if judicial review that structurally resembles Socratic contestation has

44) See Jeremy Waldron, *The Case Against Judicial Review*, 115 YALE L. J. 1348 (2006). See more generally JEREMY WALDRON, LAW AND DISAGREEMENT (1999), and Jeremy Waldron, *A Right Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993); see also RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENSE OF THE CONSTITUTIONALITY OF DEMOCRACY (2007).

45) “Legalism” is characteristic not only of judicial review that is conceived in textualist or originalist terms, but also of “living tree” constitutionalism, in which judicial practice responds to adapt abstract principles to changing circumstances in a common law fashion. For a defense of such an approach, see W. J. WALUCHOW, A COMMON LAW THEORY OF JUDICIAL REVIEW (2007) (providing a defense of such a practice) and ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON (2009) (arguing against the virtues of “common law constitutionalism” and for the virtues of legislative codification).



to be non-legalistic and the proportionality test meets that requirement, how exactly is it tied to the idea of public reason based Socratic contestation, beyond the general structural similarities described above? The link between proportionality analysis and Socratic contestation becomes clearer when analyzing how it functions to identify potential pathologies of the political process. To begin, it might be useful to return to the ECHR case relating to gays in the military. 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, dishonorably 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 candor, 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, that are 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 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. 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 narrower 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 judicial opinions. Some Christians might have claimed, in line with many—though by no means all—official church doctrine: *Homosexual practices are an abomination against God. They are sinful.*<sup>46)</sup> It makes 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 are 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 specific behavior is sinful is not in and of itself ground to legally restrict a liberty interest protected as a right. An argument relating to sin and the behavior 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

46) There is a strong textual basis for these claims: see Romans 1, Leviticus 18:22, Leviticus 20:13, 1 Corinthians 6:9-10. Note, however, that the Catholic tradition does not rely exclusively on textual authority, but on natural law, to come to the same result (see Catechism of the Catholic Church, Part III Sect. II, Ch. 2, Art. 6, Recital 2357.). This is supported by some “New Natural Law” thinkers, see, e.g., ROBERT GEORGE, IN DEFENSE OF NATURAL LAW (2001).

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 behavior 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 and helps explain 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,<sup>47)</sup> 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 the idea of restricting limitations on rights to those that can demonstrably be justified in a liberal democracy.

Like some of the characters that Socrates quarrels with in the early Platonic dialogues, those who embrace *these kinds 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 argument 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.

47) Even though the basic structural features of the Rawlsian idea of public reason are compatible with the idea of proportionality-based reasoning about rights, the argument presented here does not depend on the specific claims John Rawls makes in *POLITICAL LIBERALISM* 212-54 (1993) or in *Public Reason Revisited*, in *THE LAW OF PEOPLES* 129-80 (1999) about the scope and operation of the idea of public reason.

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 September 11th in Europe and the U.S.<sup>48)</sup> 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

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48) The U.S. Supreme Court has rebuked the U.S. Government's far-reaching measures relating to the "War on Terror" on four occasions: First, in *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S Ct 2633 (2004) the Court held that a U.S. citizen detained on U.S. soil as an "enemy combatant" must receive a "meaningful opportunity" to challenge the factual basis for her detention, countering the assertion that such scrutiny was not compatible with safeguarding national security. Second, in *Rasul v. Bush*, 542 U.S. 466, 124 S Ct 2686 (2004) the Court held that Guantanamo Bay was within the U.S. jurisdiction and subject to its laws; thus, detainees therein were entitled to basic due process protection in American courts. Third, in *Hamdan v. Rumsfeld*, 548 U.S. 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 Constitution's separation of powers. Finally, in *Boumediene v. Bush*, 553 U.S. \_\_\_, 128 S Ct 2229 (2008) the Court determined that even though the administration had succeeded in having Congress authorize the military commissions and therefore strip the Guantanamo detainees of their habeas corpus right, this act was in violation of constitutional guarantees and therefore *ultra vires*.

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 September 11th world has to be recalibrated*, etc. Opponents are castigated as being soft and weak.<sup>49)</sup>

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.<sup>50)</sup>

Finally, there is another type of pathology, of great relevance in practice and the preoccupation of public choice theorists that can only be gestured at 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 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 favor of another, is justified.<sup>51)</sup> If a justification

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49) For a remarkable but not implausible claim concerning the dynamics justification of authoritarian measures even in democracies, see Hermann Goering: " ... after all, it is the *leaders* of the country who determine the policy and it is always a simple matter to drag the people along, whether it is a democracy or a fascist dictatorship or a Parliament or a Communist dictatorship. ...voice or no voice, the people can always be brought to the bidding of the leaders. That is easy. All you have to do is to tell them they are being attacked and denounce the pacifists for lack of patriotism and exposing the country to danger. It works the same way in any country. GUSTAV GILBERT, NUREMBERG DIARY 278-79 (1995).

50) For a review of these decisions, see Eyal Benvenisti, *United We Stand: National Courts Reviewing Counterterrorism Measures*, in COUNTERTERRORISM: DEMOCRACY'S CHALLENGE (Andrea Bianchi & Alexis Keller eds., 2008).

51) 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

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 interest 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

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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).

hyperbole or 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 officeholders, 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 correct, 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 is not immune from and that judicial intervention might help to address. But outcomes might not only improve 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.<sup>52)</sup> They only

illustrate the function that proportionality based judicial review conceived of as Socratic contestation might have and, to some extent, does in fact have. 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 proportionality based judicial review might be attractive. What remains to be explored is whether this type of judicial review raises serious issues with regard to democratic legitimacy.

## V. SOCRATIC CONTESTATION AND JUDICIAL REVIEW: DEMOCRACY AND THE RIGHT TO JUSTIFICATION

But of course, there is one particularly important distinction between the practice of Socratic contestation as described in the early Platonic dialogues and proportionality based judicial review. 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 proportionality-based framework legitimacy concerns about the judicial role may seem to be dramatically heightened

52) It is nonetheless striking that the great majority of the cases that are widely recognized as wrongly decided among comparative constitutional scholars are decisions in which courts did not make use of the proportionality test. Recent examples by the US Supreme Court include *Dobbs v. Jackson Women's Health Organization*, No. 19-1392 597 U.S. (2022) (holding that there is no right to abortion, notwithstanding a constitutional text that protects liberty that can be limited only by due process of law), *New York Rifle & Pistol Association et al vs. Bruen, Superintendent of New York State Police, et al*, No. 20-843 U.S. (2022) (holding the 2nd Amendment right to bear arms may not be restricted to require licensing to permit the public carrying of guns in New York, which are granted only if there special reasons related to self-defense). In Europe decision by the European Court of Human Rights cases upholding legislation by Member States that prohibit the wearing of a full face veil in public similarly lack meaningful proportionality analysis, *See SAS*, 2014-III Eur. Ct. H.R. 341 ¶ 142. (2014), see also *Dakir*, App. No. 4619/12, Eur. Ct. H.R.; *Belcacemi*, App. No. 37798/13, Eur. Ct. H.R. (2017). Conversely, it is challenging to find examples of cases where constitutional courts apply the proportionality test and yet get to a result that are widely deemed to be misguided.



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: 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.

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? 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?<sup>53)</sup> In the following I provide an argument that proportionality based judicial review is not only compatible with liberal democracy, but that it institutionalizes a right to justification that should be regarded as basic an institutional commitment of liberal-democratic constitutionalism as electoral accountability based on an equal right to vote.

## 1. WHAT COUNTS AS DEMOCRATIC?

The argument that judicial review is in principle compatible with democracy, if it actually improves outcomes has been made by many<sup>54)</sup>. Here it must suffice to

53) See Waldron, *The Case Against Judicial Review*; *supra* note 44; see more generally WALDRON, LAW, AND DISAGREEMENT: *A Right-Based Critique of Constitutional Rights*; and see also Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy*, *supra* note 44.

54) Canonical contributions include ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1969); JH ELY, DEMOCRACY AND DISTRUST: THEORY OF JUDICIAL REVIEW (1981); ROBERT BORK & RONALD DWORKIN, FREEDOM'S LAWS (1996); CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELFGOVERNMENT (2001); LAWRENCE SAGER, JUSTICE IN PLAINCLOTHES (2004); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). For recent contributions, see Richard Fallon, *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008), ADRIAN VERMEULE, LAW, AND THE LIMITS OF REASON (2008) as well as Alec Walen, *Judicial Review in Review: A Four-Part Defense of Legal Constitutionalism—A Review Essay on Political Constitutionalism*, by Richard Bellamy, 7 INT'L J. CONST. L. 329 (2009).

briefly recapitulate some basic points.

From a historical perspective there is a peculiar asymmetry between the contemporary critical attitude displayed toward 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 eighteenth century France, the idea of representative democracy was thought by many to be a contradiction in terms and in the U.S. 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<sup>55</sup>). They did not conceive of themselves as Democrats.

Over the course of nineteenth century 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 vetoplayers 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 conducted by the other group of empowered officials. As a matter of principle, it is not difficult to understand the skepticism 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

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55) Only Members of the House of Representatives were directly elected. Senators were appointed by state legislatures until the Seventeenth 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."

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.<sup>56)</sup> 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 officeholder), is by going to court and claiming that his rights have been violated by public authorities. If courts are persuaded by your arguments rather 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.

## 2. PROPORTIONALITY-BASED JUDICIAL REVIEW AS A PREREQUISITE FOR LIBERAL-DEMOCRATIC LEGITIMACY? THE BURDENED PARTIES’ RIGHT TO JUSTIFICATION

But the puzzle deepens. The legitimacy of the political process depends on the consent of the governed. On these 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 and an equal right to vote needs to be at the heart of political

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56) 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 RICHARD TUCK, *FREE RIDING* (2008).

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 of and most heavily burdened by legislation must be conceivable as free and equal *partners* in a joint enterprise of lawgiving. 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 circumstances,*<sup>57)</sup> *it remains*

57) The fact that a court engages in proportionality analysis does not imply anything about the degree of deference it should accord political actors. The proportionality test itself does not provide a standard merely for reasonableness, but for rightness. But a court can inquire more or less searchingly whether the relevant prongs of the test are satisfied. The very existence of the multiprong structure allows the court to ask relatively specific questions, requiring specific answers. In that sense proportionality review is inherently incompatible with what in the U.S. context generally passes as "rational basis" review. I provide no answer to the question how much deference in which types of contexts courts should provide. Here the core point is merely to describe a particular institutional function of courts engaged in proportionality-based rights adjudication. The correct level of deference depends what, in light of this function, is appropriate in different contexts and is likely

*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, cannot 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.* 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.<sup>58)</sup> Acts by public authorities that are unreasonable can make no

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to vary depending 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.

58) 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

plausible claim to legitimate authority in a liberal constitutional democracy. The question is not what justifies the “counter majoritarian”<sup>59)</sup> 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 reasonable justification. The judicial practice of Socratic contestation, structured conceptually by the idea of rights-based proportionality review, 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.

### 3. 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.<sup>60)</sup> Just as the ideals underlying liberal democratic constitutionalism are not 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 at least briefly elaborated upon, because it helps sharpen the implications of the argument made above.

Both the constitutional justification of an equal right to vote and the legal

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on the meta-level. But whereas it is a 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).

59) For an account of the “countermajoritarian difficulty” as an academic obsession in U.S. constitutional scholarship, see generally Barry Friedman, *The Countermajoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933 (2001).

60) For a powerful defense of a “right to justification” as central to liberal democracy, see RAINER FORST, *DAS RECHT AUF RECHTFERTIGUNG* (2007).



institutionalization of Socratic contestation do not depend exclusively on the outcomes generated. Both constitutional commitments are justified also because they provide *archetypal expressions*<sup>61)</sup> 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.<sup>62)</sup> 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 demonstrably justified to the person burdened 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.

Of course a commitment to the institutionalization of a right to justification using a rights-based proportionality framework does not without further argument determine the specific institutional features of the judiciary that is to have such a function. Here are just some of the core issues of institutional design which need to be considered: 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?<sup>63)</sup> What

61) For the idea of legal archetype as a legal rule emblematic for a wider commitment, see Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

62) 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. *But see* JOHN STUART MILL, ON REPRESENTATIVE GOVERNMENT (1861), who entertained the possibility of weighing votes according to the level of education attained.

63) ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY 146-52 (2007) rightly points out that whether and to what extent judges ought to defer to judgments of public authorities depends in part on

should the rules governing dissenting opinions, submission of amicus 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 and leave it to the legislature to abolish or maintain the law?<sup>64</sup> 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?<sup>65</sup> These are the kind of questions that need to be addressed by taking into account both outcome-related considerations and democracy related considerations.<sup>66</sup> The right institutional rules are those that enable the courts to best function as enablers and participants in the practice of Socratic contestation that might itself helps foster and sustain a liberal culture of justification in a constitutional democracy. Whatever the right solutions to these institutional questions might be,<sup>67</sup> the commitment to legally institutionalize Socratic contestation reflects as basic a commitment as an equal right to vote and is, just like the right to an equal vote, to a large extent, immune from outcome-related critiques.

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the majorities necessary for a court to strike down legislation. Norms relating to standards of review and procedural norms relating to majorities required to strike down a decision can both serve to institutionalize the idea that review should be deferential.

- 64) See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. (2001).
- 65) On the relationship between national constitutional law and international human rights law, see generally Gerald Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003).
- 66) At least one of the reasons why debate about judicial review remains alive in the U.S., 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 Steven Calabresi, James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L. & PUB. 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, see ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 31-60 (2000) provides a helpful overview.
- 67) For a discussion of the relevant concerns governing each of these questions see Mattias Kumm, Constitutional Courts and Legislatures: Institutional Terms of Engagement, *Católica Law Review*, 2017 Vol. 1 (1), pp. 55-66. See also Rosalind Dixon, The Forms, Function and Varieties of Weakened Judicial Review, *International Journal of Constitutional Law* 17(3), pp. 904-930 (2019).

## VI. CONTEMPORARY CHALLENGES AND THE CHARGE OF UTOPIANISM

Even if the institutionalization of Socratic contestation is a morally attractive ideal, is it the kind of ideal that ought to meaningfully guide the assessment of actual institutional practices? Is that not necessarily a form of romanticism that in practice will lead either to blind apologetics or cynic disillusionment when actual practice is assessed in its light?

Here is one way to articulate the challenge more concretely: The Socratic commitment to practical reason is unique and heroic, so how can anything he stands for be a meaningful guide for actual institutional practice by ordinary officials and citizens? The answer is, of course, that 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.<sup>68)</sup> In that sense the idea of Socratic contestation is brought down from an ideal personified by one of the great heroes of western culture to an ideal that might plausibly guide the practice of real officials and in actual institutions.

But there is a different way of understanding of the challenge. Don't the early Platonic dialogues illustrate the stark tension between the practice of Socratic contestation and life in a democratic polity? Socrates, after all, did not do so well in democratic Athens. He was sentenced to death by a jury of fellow citizens for undermining the gods of the community and corrupting its youth. That dramatic story has given rise to a tradition in philosophy that is preoccupied with the

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68) For a sophisticated version of a legal process-based argument that emphasizes the connection between institutional rules governing courts and their function to serve as a kind of "quality control mechanism" of legislative decisions, see LAWRENCE SAGER, *JUSTICE IN PLAINCLOTHES* 199-201 (2004).

frustration of being a philosopher and surviving as part of a political community.<sup>69)</sup> So is it realistic to hope to institutionalize the practice of Socratic contestation in liberal democracies? Is any claim to be doing something along those lines not condemned to fail in face of political and institutional realities? An answer to that question would need to describe the contexts in which proportionality-based rights review has a chance of flourishing and the contexts in which it would not. Times of rising authoritarianism and democratic backsliding<sup>70)</sup> pose their own challenges to such a practice. And even in generally favorable contests, it would be necessary to discuss the various ways that judges might address exceptional situations in which prudence dictates that they step back from the fray, instead of insisting on denouncing misguided, but widely accepted, government measures the government claims are necessary in times of crisis. Here again, an analogy to the philosophical tradition inspired by Socrates may be illuminating. One strand of that tradition is focused on how philosophy might be taught and written, to escape from the persecution by the *hoi polloi* or established authorities.<sup>71)</sup> This tradition embraces esotericism and analyzes devices and disguises purportedly used by philosophers that hide the actual meaning of what is said from those who are not initiated, while indicating clearly enough what is meant to those who are. One might imagine a similar discussion on how the judiciary should address issues practically where the political situation makes it impossible for them to strike down government conduct without committing institutional suicide, while at the same time avoiding the judicial endorsement of the wrongful act, thus safeguarding its institutional identity and integrity.<sup>72)</sup>

That leads to a final wrinkle. Does the institutionalization of Socratic contestation itself have to follow an esoteric strategy to succeed? Perhaps the secret of the success

69) See LEO STRAUSS, PERSECUTION AND THE ART OF WRITING (1952).

70) See Stephen Harrard & Ronald Kaufmann, Backsliding (CUP 2021) and Steven Livitski & Daniel Ziblatt, How Democracies Die (Random House 2018).

71) See *supra* note 66.

72) One might think of *non liquet* decisions, see Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 (July 8) or the refusal to pronounce on the substance of certain issues, see for example the position of J. Jackson dissenting in *Korematsu v. U.S.*, 323 U.S. 214 (1944).

of rights-based proportionality review is directly connected to its technocratic camouflage (a multi-prong legalistic sounding test) and its embeddedness in legal institutions that work together to obscure its true nature. Perhaps the secret of proportionality based judicial review is that it succeeds primarily because its true nature as a form of public reason based Socratic contestation remains publicly unacknowledged. Instead the institutions, rituals and the way that opinions are structured and provisions are cited emphasize institutionally and symbolically the connection to the ordinary “legalistic” practice of law. Perhaps this essay exhibits what in the eyes of those who embrace “noble lies” the ultimate vulgarity: it exposes rights-based proportionality review for what it is, thereby endangering its acceptance. Most practicing lawyers would no doubt be surprised, and many citizens perhaps disturbed to hear that judicial review actually proceeds along the lines described and analyzed here. These are, if you will, the uninitiated. And among the initiated there are those who fear that exposing proportionality based judicial review for what it is will help bring about its demise: Is there not always the danger that the *hoi polloi*, encouraged by interested elites, will clamor to assert power self-righteously in the name of a badly misunderstood idea of democracy against what they might call “juristocracy,” equating politics as a struggle of wills (the will of a majority vs. the will of a judicial elite, inappropriately ‘imposing their values’)? Would it not be wise if the symbolic forms and rituals of legalism and tradition—emphasizing the role of courts as enforcers of texts enacted by “We the People” and the shared traditions of the community—hide the public reason-oriented character of proportionality based judicial review as best it can? Are there not at least circumstances where such a form of institutionalized esotericism may be the best to be hoped for, so that the legalist camouflage qualifies as a noble lie, recognized as such by the *cognoscenti* but believed by the *hoi polloi*?<sup>73) 74)</sup>

Whatever the answers to these questions may be, the deepest insight of Socrates

73) The idea of the “noble lie” stems from the *Nomoi*, widely recognized today as the latest of Plato’s dialogues. For the claim that modern politics is not possible without such noble lies, see LEO STRAUSS, *THE CITY AND MAN* (1964).

74) For an incisive analysis and critique of esotericism as paradoxical and internally instable, see MOSHE HALBERTAL, *CONCEALMENT AND REVELATION* ch. 17 (2007).

legacy in terms of the relationship between the philosopher and the political community is not that the philosopher will inevitably have to disguise his thinking to be safe from the wrath of fellow citizens and/or established authorities. Instead, Socrates' audacious admonition that the practice he was engaging in should be at the heart of ordinary civic practice deserves to be taken seriously, instead of being derided as utopian. Some have plausibly claimed that this is at least in part what the revolutionary project of liberal democracy, itself derided as utopian at various points in history, is about.<sup>75)</sup> The fact that Socrates demanded such an embrace and was condemned to die for it does not illustrate the utopian nature of the demand. Instead, it illustrates the precariousness of genuine liberal democracy,<sup>76)</sup> the importance of defending it with courage and the urgency to effectively institutionalize its basic commitments. The institutionalization of Socratic contestation in the form of rights-based proportionality review is one such commitment.

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75) See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

76) See, Steven Levitski & Daniel Ziblatt, *How Democracies Die* (Random House 2018) and Stephen Harrard & Ronald Kaufmann, *Backsliding* (CUP 2021).

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## | Abstract |

Global Constitutionalists have described and analyzed how with the spread of rights based judicial review after the end of the Cold War proportionality analysis has become a central feature of reasoning about rights. Yet one of the core questions such a practice raises concerns the legal point of such a practice and the role of courts applying such an open ended test.

The institutionalization of a rights-based proportionality review shares a number of salient features and puzzles with the practice of contestation that the Socrates of the early Platonic dialogues became famous for. Understanding the point of Socratic contestation, and its role in a democratic polity, is also the key to understanding the point of proportionality-based rights review.

When judges decide human or constitutional rights cases within the proportionality framework, they do not primarily interpret authority. They assess reasons. Not surprisingly, they, like Socrates, have been prone to the charge that they offend the values and traditions of the community, when they critically examine and sometimes reject positions held by public authorities and widely endorsed by citizens.

Proportionality-based judicial review institutionalizes a right to contest the acts of public authorities and demand a public reasons-based justification.

There are four types of pathologies that occasionally infect democratic decision-making, that rights-based proportionality analysis is well suited to identify: first, restrictions based on tradition, convention or preference that are not connected to plausible policy concerns. Second, restrictions based on reasons relating to “the good”, which are off limits as a reason to justify restrictions of human and constitutional rights. Third, the problem of government hyperbole or ideology. Here government policies are loosely related to legitimate purposes, but they lack a firm and sufficiently concrete base in reality. Fourth, there is the problem of capture of the legislative process by rent seeking interest groups.

Socrates was right to insist that the practice of contestation he engaged in deserves

the highest praise in a democratic polity. It is equally true that an impartial and independent court engaged in rights-based proportionality review deserves to be embraced as a vital element of liberal constitutional democracy. The right to contest complements the right to vote as a core legal mechanism empowering citizens to participate and ensuring that government is held accountable.

**Keywords:** Global Constitutionalism, Proportionality, Socratic Contestation, Judicial Review, Right to Justification