

**Rights based Proportionality as the Test of Public Reason:
Some Theoretical and Comparative Observations on the Point and Legitimacy of
Proportionality based Judicial Review**

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The triumph of proportionality analysis in the context of human and constitutional rights adjudication in liberal democracies across the world¹, has given rise to at least three kinds of contentious questions. First, on the *analytical* or conceptual level the question is whether the language of proportionality and balancing as it is used in a variety of contexts is best understood to refer to one common approach that is in principle susceptible to reconstruction in the form of one general test – the proportionality test properly so called-, or whether surface resemblances cover up deeper differences in the tests used in different jurisdictions and contexts.² And if there is such a general test, what exactly is its structure?³ Second, there are a host of philosophical questions raised by proportionality based understanding of rights analysis. On the *metaethical* level the question is whether and to what extent the proportionality test allows for the application of rational criteria that guide and constrain those that apply it. Here there are those who invoke arguments about incommensurability and insist on the noncognitive, subjective or relativist nature of claims about what is proportional and what is not.⁴ On the level of a *theory of rights* the question is whether the structure of the proportionality test, that

¹ See Alec Stone Sweet & Jud Mathews, Proportionality, Balancing and Global Constitutionalism, Colum. J. Transnation'l L. 19 (forthcoming), David Beatty, The Ultimate Rule of Law (2004) Sadurski

² Grimm, Canada and Germany – Proportionality Europe (see my desk), E. Ellis, The Principle of Proportionality in the Laws of Europe (Hart 1999).

³ On this, see R. Alexy, A Theory of Constitutional Rights, OUP 2002.

⁴ See Bernard Schlink, Joseph Raz. For a defense of the principled nature of balancing see Aharon Barak's contribution in this volume.

allows for positions of right to be balanced against countervailing policy concerns, is compatible with the idea – central to the liberal tradition – that rights have a strong kind of priority over competing considerations in some way.⁵ This paper largely ignores these issues and focuses on a third set of questions held together by their *institutional* focus. On the institutional level the question is whether and to what extent it is legitimate and appropriate for courts to apply such a test when they review acts of public authorities, including acts of democratically elected legislatures. What exactly is their comparative institutional advantage, what is the point of establishing judicial review, if that requires courts engaging in the kind of open-ended inquiries that the proportionality test suggests? Furthermore, once the point of judicial proportionality analysis has been established, what institutional or cultural features among liberal democracies encourage or undermine the endorsement of proportionality as a generic test for the substantive analysis of rights claims? More specifically, what explains the relatively uncontested and embrace and prominence of that test in German constitutional practice, when compared to the relatively strong skepticism, resistance and only reluctant and limited acceptance of proportionality analysis in the US? These are the question top be addressed in this paper.

To clarify the nature of the institutional question a first part will examine the basic structure of proportionality based constitutional rights adjudication. (I). The second section will then provide what I take to be the best justification of such an institutional practice (II). Proportionality based human rights adjudication, I will argue, allows individuals to enlist courts in the practice of a kind of Socratic contestation, in which courts assess whether the acts of public authorities can be justified in terms of public reason, that is in terms the rights claimant might reasonably have consented to. The legitimacy of judicial review as Socratic Contestation is based on three complementary claims. First, and most conventionally, there are good reasons to believe that outcomes will actually be improved. Judicial proportionality analysis is an effective instrument for detecting a number of potential deficiencies of legislative processes that are not uncommon even in mature liberal democracies. Furthermore judicial review enhances the

⁵ For a discussion of these issues see M. Kumm, Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement, in: G. Pavlakos (ed.), *Law, Rights, Discourse: The Legal Philosophy of Robert Alexy* (Hart 2007).

democratic process by disciplining legislatures to think about the justification of their actions given the possibility to contest them in later judicial proceedings. Second, there is no plausible conception of democracy that casts serious doubts on judicial review. Third, once it is clear why democracy is regarded as a basic commitment whose justification can't be reduced to consequentialist, outcome related reasoning, it becomes possible to see how the right to vote and participate in the law-generating process and the right to contest the outcomes of that process are deeply connected. Even if there were grounds for skepticism about the *outcome enhancing* role of judicial review, that would not conclude the case against judicial review. Judicial review *gives an archetypal institutional expression* to the fact that in liberal democracies law's claim to legitimate authority is valid only if even those most burdened or disadvantaged by that law might reasonably have given their consent to it. It provides a legal procedure that allows a burdened individual to contest and have an impartial public authority assess whether an act of public authority meets this requirement. Both an equal right to vote and proportionality based judicial review are necessary institutional features of legitimate liberal-democratic government. Both are, to some extent, non-negotiable. What does require careful thought are the specifics concerning the structure of judicial institutions (concerning appointment, tenure, judicial voting, majority requirements, dissenting opinions etc.), the relationship between the judicial and legislative institutions (rules concerning legislative comeback e.g. by reenactment of the original legislation by enhanced majorities or constitutional amendment) and the level of deference courts should accord political branches in different contexts (considerations relating to the 'margin of appreciation' or 'standards of scrutiny'). A third part will briefly analyze a number of features in the US and EU legal and political practices that might help illuminate some of the quite different background assumptions that inform arguments about the judicial role and that help explain why the justification provided is unlikely to be regarded as convincing in the US as it is in much of Europe (III). This discussion seeks to provide a richer understanding of the range of considerations relating to the decision-making environment that are relevant for designing the appropriate secondary norms governing constitutional adjudication. It seeks to provide some ideas about what might explain and even justify quite different approaches to constitutional adjudication in Europe and the US.

I. What courts do: The Structure of Proportionality focused Rights Adjudication

Within contemporary practice of rights adjudication in liberal democracies arguments relating to 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 (1). That test, however, provides little more than a check-list of individually necessary and collectively sufficient criteria that need to be met for behavior by public authorities to be justified in terms of public reason. It provides a structure for the assessment of public reasons (2). Furthermore the range of interests that enjoy prima facie protection as a right are generally not narrow and limited, but expansive. Both the German Constitutional Court and the ECJ, for example, recognize a general right to liberty and a general right to equality. That means that just about any act infringing on interests of individuals trigger are opened up for a constitutional or human rights challenge and requires to be justified in terms of public reason (3). In institutional terms these features of human rights practice require a recharacterization of what courts do when they assess whether public authorities have violated rights. Courts are not simply engaged in applying rules or interpreting principles. They assess justifications. Call this *the turn from interpretation to justification*.

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

circumstances defined by the rule. Notwithstanding interpretative issues that may arise at the margins, clearly the judicial enforcement of such rules is not subject to proportionality analysis or any other meaningful engagement with moral considerations.

But at the heart of modern human and constitutional rights practice are rights provisions of a different kind. Modern constitutions establish abstract requirements such as a right to freedom of speech, freedom of association, freedom of religion etc. These rights, it seems, can't plausibly have the same structure as the specific rights listed above. Clearly there must be limitations to such rights. There is no right to shout fire in a crowded cinema or to organize a spontaneous mass demonstration in the middle of Champs 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 1st Amendment, for example, simply states that "Congress shall make no laws [...] abridging the freedom of speech [...] (or) [...] the free exercise of religion[...]"⁶ Not surprising it remains a unique feature of U.S. constitutional rights culture to insist on defining rights narrowly, so that there are as few as possible exceptions to them.⁷

The second approach is characteristic of Human Rights Treaties and Constitutions enacted in the period following WWII. Characteristic of rights codifications during this era is a bifurcated approach. The first part of a provision defines the scope of the right. The second describes the limits of the rights by defining the conditions under which an

⁶ 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.

⁷ F. SCHAUER, "Freedom of Expression Adjudication in Europe and the United States: A Case study in Comparative Constitutional Architecture" in G. NOLTE (eds.), *European and US Constitutionalism*, Cambridge University Press, 2005. See also C. FRIED, *Right and Wrongs*, OUP, 1978.

infringement of the right is justified. Art. 10 of the European Convention of Human Rights, for example, states:

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

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

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

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.⁸

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

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.

2. The connection between rights and proportionality analysis has been thoroughly analyzed by Robert Alexy.⁹ According to Alexy the abstract rights characteristically listed in constitutional catalogues are principles. Principles, as Alexy understands them, require the realization of something to the greatest extent possible, given countervailing concerns. Principles are structurally equivalent to values. Statements of value can be reformulated as statements of principle and vice-versa. We can say that privacy is a value or that privacy is a principle. Saying that something is a value does not yet say anything about the relative priority of that value over another, either abstractly or in a specific context. Statements of principle, express an ‘ideal ought’. Like statements of value they are not yet, as Alexy puts it, “related to possibilities of the factual and normative world”. The proportionality test is the means by which values are related to possibilities of the normative and factual world. Whenever there is a conflict between a

⁸ The Canadian Charter prescribes in Section 1 that rights may be subject to “[...] such reasonable limits prescribed by law as can demonstrably be justified in a free and democratic society.” Section 36 of the South African Constitution states that rights may be limited by “[...] a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; (e) less restrictive means to achieve the purpose.”

⁹ R. ALEXY, *A Theory of Constitutional Rights*, OUP, 2002. The following pages draw heavily on M. KUMM, “Constitutional rights as principles: On the structure and domain of constitutional justice”, *ICON*, 2004, No. 2, 574-596.

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.

The proportionality test is not merely a convenient pragmatic tool that helps provide a doctrinal structure for the purpose of legal analysis. If rights as principles are like statements of value, the proportionality structure provides an analytical framework to assess the necessary and sufficient conditions under which a right takes precedence over competing considerations. Reasoning about rights means reasoning about how a particular value relates to the exigencies of the circumstances. It requires general practical reasoning.¹⁰

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

In *Lustig-Prean and Beckett v. United Kingdom*¹¹ the applicants complained that the investigations into their sexual orientation and their discharge from the Royal Navy on the sole ground that they are gay violated Art. 8 of the European Convention of Human Rights [hereinafter ECHR]. Art.8, in so far as is relevant, reads as follows:

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

¹⁰ If legal reasoning is a special case of general practical reasoning – see R. ALEXY, *A Theory of Legal Argumentation*, Clarendon, 1989 - reasoning about rights as principles is a special case of legal reasoning that approximates general practical reasoning without the special features that otherwise characterize legal reasoning.

¹¹ E.C.H.R., *Lustig-Prean and Beckett v. United Kingdom*, 27 September 1999.

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. Broken down to its constituent parts, the proportionality test consists of four prongs: 1. Did the government pursue a legitimate aim. 2. Does the measure actually further that aim. 3. Is it necessary or are there less restrictive means that are equally effective in furthering the aim? 4. Is the measure proportionate?

The first question the Court addressed concerns the existence of a *legitimate aim*. Even though the first prong of the test typically does not raise serious issues - there are practically always some legitimate aim that governments have or might have plausibly pursued – as will become clear below the first prong is significantly more important than the analysis of judicial opinions suggest. On its face, at least, 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 constitutional provision limits the kind of aims that count as legitimate for the purpose of justifying an infringement of privacy. Here the UK offered the maintenance of morale, fighting power and operational effectiveness of the armed forces – a purpose clearly related to national security – as its justification to prohibit gays from serving in its armed forces.

The next question is, whether disallowing gays from serving in the armed forces is a *suitable means to further the legitimate policy goal*. This is an empirical question. A means is suitable, if it actually furthers the declared policy goal of the government. In this

case a government commissioned study had shown that there would be integration problems posed to the military system if declared gays were to serve in the army. Even though the Court remained skeptical with regard to the severity of these problems, it accepted that there would be *some* integration problems if gays were allowed to serve in the armed forces. Given this state of affairs there was no question that, as an empirical matter, these problems are significantly mitigated if not completely eliminated by excluding gays from the ranks of the armed forces.

A more difficult question was whether the prohibition of homosexuals serving in the armed forces is necessary. A measure is necessary only if there is no less restrictive but equally effective measure available to achieve the intended policy goal. This test incorporates but goes beyond the requirement known to 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 goes beyond the ‘narrowly tailored’ requirement, because it allows the consideration of alternative means, rather than just insisting on tightening up and limiting the chosen means to address the problem. In this case the issue was whether a code of conduct backed by disciplinary measures, certainly a less intrusive measure, could be regarded as equally effective. Ultimately the Court held that even though a code of conduct backed by disciplinary measures would go quite some way to address problems of integration, the government had plausible reasons to believe that it does not go so far as to qualify as an equally effective alternative to the blanket prohibition.

Finally the court had to assess whether the measure was proportional in the narrow sense, applying the so-called balancing test. The balancing test involves applying what Alexy calls the ‘Law of Balancing’: “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other”.¹²

¹² R. ALEXY, *supra* note 8, at p. 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

The decisive question in the case of the gay soldiers discharged from the British armed forces is whether on balance the increase in the morale, fighting force and operational effectiveness achieved by prohibiting gays from serving in the armed forces justifies the degree of interference in the applicant's privacy or whether it is disproportionate. On the one hand the court invoked the seriousness of the infringement of the soldiers' privacy, given that sexual orientation concerns the most intimate aspect of the individual's private life. On the other hand the degree of disruption to the armed forces without such policies was predicted to be relatively minor. The Court pointed to the experiences in other European armies that had recently opened the armed forces to gays, the successful cooperation of the UK army with allied NATO units which included gays, the availability of codes of conduct and disciplinary measures to prevent inappropriate conduct, as well as the experience with the successful admission of women and racial minorities into the armed forces causing only modest disruptions. On balance the UK measures were held to be sufficiently disproportionate to fall outside the government's margin of appreciation and held the United Kingdom to have violated Art. 8 ECHR.

The example illustrates two characteristic features of rights reasoning. First, a rights-holder does not have very much in virtue of his having a right. More specifically, the fact that a rights holder has a *prima facie* right does not imply that he holds a position that gives him any kind of priority over countervailing considerations of policy. An infringement of the scope of a right merely serves as a trigger to initiate an assessment of whether the infringement is justified. But the fact that rights are not trumps in this sense does not mean that they provide no effective protection. The example demonstrates that in practice, even without such priority, rights can be formidable weapons. The second characteristic feature of rights reasoning is the flip side of the first. Since comparatively little is decided by acknowledging that a measure infringes a right, the focus of rights adjudication is generally on the reasons that justify the infringement. Furthermore, the

device is useful to illustrate the analogy between the Law of Balancing and the law of diminishing marginal utility.

four-prong structure of proportionality analysis provides little more than a structure which functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshalled 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.¹³ *The proportionality test merely provides a structure for the justification of an act in terms of public reason.*

3. Conceiving rights in this way also helps explain another widespread feature of contemporary human and constitutional rights practice that can only be briefly be pointed to here. If all you have in virtue of having a right is a position whose strength in any particular context is determined by proportionality analysis, there are no obvious reasons for defining narrowly the scope of interests protected as a right. Shouldn't all acts by public authorities effecting individuals meet the proportionality requirement? Does the proportionality test not provide a general purpose test for ensuring that public institutions take seriously individuals and their interests and act only for good reasons? Not surprisingly, one of the corollary features of a proportionality oriented human and constitutional rights practice is its remarkable scope. Interests protected as rights are not restricted to the classical catalogue of rights such as freedom of speech, association, religion and privacy narrowly conceived. Instead with the spread of proportionality analysis there is a tendency to include all kinds of liberty interests within the domain of interests that enjoy *prima facie* protection as a right. Rights claims no longer concern exclusively interests plausibly deemed fundamental, but also the mundane. The European

¹³ 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 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'.

Court of Justice, for example, recognizes a right to freely pursue a profession as part of the common constitutional heritage of Member States of the European Union, thus enabling it to subject a considerable amount of social and economic regulation to proportionality review. The European Court of Human Rights has adopted an expansive understanding of privacy guaranteed under Art. 8 ECHR and the German Constitutional Court regards any liberty interest whatsoever as enjoying prima facie protection as a right. In Germany the right to the ‘free development of the personality’ is interpreted as a general right to liberty understood as the right to do or not to do whatever you please. It has been held by the Constitutional Court to include such mundane things as a right to ride horses through public woods, feeding pigeons on public squares or the right to trade a particular breed of dogs. Furthermore not only liberty interests have been understood very broadly. The principles 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. It has also struck down a law that abolishes tax deductions for work related commutes up to a distance of 20km as discriminatory, in a context where the legislator has chosen to make a host of other work related expenses tax deductible. The ECJ has struck down an EU Regulation providing for subsidies or production refunds for one kind of product, but not another, when both products were substitutable and used the same materials and similar production processes.¹⁴ 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.¹⁵

III. Constitutional Rights Adjudication as Proportionality Review: Socratic Contestation and the Boundaries of the Reasonable

¹⁴ See ECJ C-117/76.

¹⁵ For the argument that the ECJ’s human rights jurisprudence fits the RHRP, see M. KUMM, “Internationale Handelsgesellschaft, Nold and the New Human Rights Paradigm”, in M. MADURO and L. AZOULAI, (eds.), *The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome*, Hart, forthcoming 2008.

1. But what is the point of authorizing courts to adjudicate just about any policy issue, once it is framed as an issue of rights using a the proportionality test as a structured test of public reason?

There is a puzzle relating to the wisdom of judicial review that shares many structural features of the puzzle of Socratic wisdom, as it becomes manifest in Plato's early dialogues. The kind of claims that have to be made on behalf of constitutional courts to justify their role in public life, are, *prima facie*, as improbable as the claims of wisdom made by and on behalf of Socrates, to justify his way of life 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 determines that Socrates is the wisest man.¹⁶ Similarly, constitutional law and European Human Rights Law has 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? There is a puzzle here. 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.¹⁷ 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,¹⁸ no doubt sensing their own ineptness.

¹⁶ PLATO, *Apology*, 21a.

¹⁷ As Vlastos, points out only the Socrates of the middle and later dialogues has sophisticated theories about metaphysics, epistemology, science etc.

¹⁸ 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 *ICON*, 2003, Vol 1 No. 4, Special issue on Dworkin.

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 proportionality based rights review, 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 judgment made by the democratically accountable politically branches using the check-list that the proportionality test provides.

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

At this point it is useful to take a closer look at what the Socrates of Platos' 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,¹⁹ wherever he encounters them in conversations about what they claim is good or just, even when they don't really want to or have had enough. In some dialogues the other party runs away in the end, in others the other party resigns cynically

¹⁹ PLATO, *Apology*, 21c.

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*.²⁰ 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."²¹ The Socratic elenchus is adversative and bears some resemblance to cross-examination. His role in the debate is not to defend a thesis of his own but only to examine the 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,²² 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.²³ At the heart of the judicial process is the examinations of reasons, both in the written part of the proceedings in which the parties

²⁰ For an insightful analysis see G. VLASTOS, "The Socratic Elenchus", *Oxford Studies in Ancient Philosophy* 1983, 1, pp. 27-58.

²¹ R. ROBINSON, *Plato's Earlier Dialectics*, (2nd ed.), Oxford, Clarendon Press, 1953, Chapter 2.

²² PLATO, *Apology*, 31c -32a.

²³ The claim is not that Socratic elenctic reasoning is generally like proportionality analysis, or that cross-examination plays an important role in constitutional litigation. Instead the claim is that courts and the early Platonic Socrates engage in a practice, in which they challenge others to provide reasons for their claims and then assess these reasons for their internal consistency and coherence. In this way the two practices share salient features. Note how in the *Georgias* Plato has Socrates describe the difference between his procedure and that of the law courts [see PLATO, *Georgias* 471E-472C, 474A, 475E].

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 four 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,²⁴ but on a considerably more pedestrian form assessing the reasons presented by others, in order to determine their plausibility. Third, this engagement takes place as a public procedure leading to a public judgment, while institutional rules relating to judicial independence ensure that it is immunized from the pressures of the ordinary political process.²⁵

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 honor in Athens. He claims to be to the Athenian people as a gadfly to a noble but sluggish horse.²⁶ 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 ray²⁷ - Socrates shatters the false sense of comfort and complacency associated with conventions and traditional formulas, confronting citizens 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.

²⁴ This does not mean that there is never an occasion where theoretical sophistication is required.

²⁵ Interestingly highest courts are often geographically located not in a political power centers, but in the provinces. The ECJ is in the sleepy Duchy of Luxembourg, not in the European political power-center that is Brussels. The European Court of Human Rights is in Strasbourg, not a European capital. The German Federal Constitutional Court is in Karlsruhe, not in Berlin. On the other hand I am not aware of a single country in Europe that does not have its highest political branches located together in its capital. The widely challenged double seat arrangement of the European Parliament in Strasbourg and Brussels is the only exception to this rule.

²⁶ PLATO, *Apology*, 30 E.

²⁷ PLATO, *Menon* 84.

But what exactly is so important about sustaining a practice of reasoning and truth seeking? What is so terrible about a complacent people governing itself democratically? The answer lies in part in the nexus in Platonic philosophy between seeking knowledge and virtue 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.²⁸ But 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 relentlessly forces on those whom he engages the adoption of *justice-seeking cognitive frame or point of view*. Questions of rights-based justice are distinct 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 and, once the decision has been made, being unwilling to revisit it in light of new circumstances or new evidence. 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, allowing assumptions to be challenged and tested. Establishing a public practice of critical reasoned examination of public claims relating to justice and the good is perhaps a central to avoiding the commission of injustice. Conversely, the surest way to slip into tyranny and injustice is to give up critically examining claims whether what is being done is just. Even the most atrocious evil, Hannah Arendt argued in the context of the Eichmann trials, sometimes takes the banal form of thoughtlessness. The ideal subject of totalitarian rule, she claimed, is not the person who is convinced of a totalitarian ideology. It is the person for whom the distinction between fact and fiction, truth and falsehood is no longer of any relevance.²⁹³⁰ The practice of Socratic contestation can be understood as an

²⁸ PLATO, *Republic*, Book 1.

²⁹ H. Arendt, *The Origins of Totalitarianism* (Harvest Books 1966), 474.

³⁰ In a similar vein Jesus pleaded before god to forgive those who persecuted him, *because they did not know what they are doing*. Pontius Pilate's sceptical shrug "what is justice?", as he leaves it to the vote of the people whether he should free Barrabas the robber or Jesus of Nazareth the self-proclaimed messiah

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 disagreement³¹ and a great deal with the refusal to seriously address a question from the point of view of political justice.

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.³² 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.³³ 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.

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

(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.

³¹ John Rawls, *Political Liberalism* (HUP 1993).

³² 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?* (Harvard University Press 2002), see also: *Philosophy as a way of life: Spiritual Exercises from Socrates to Foucault* (Blackwell 1995).

³³ For a contemporary defense of this idea see Dana Villa, *Socratic Citizenship* (Princeton University Press 2001).

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

To begin with it might be useful to take up a challenge by Waldron and Bellamy. Their skepticism about judicial review producing better outcomes is not just informed by claims about the distracting legalist nature of judicial review. They also claim more generally, that the political process provides an arena where sophisticated arguments can be made and deliberatively assessed. As an example Waldron points to the abortion debate, comparing the dissatisfying reasoning of the US Supreme Court with the rich and sophisticated parliamentary debate in the UK.³⁴ Waldron has chosen his examples well. First he focuses on a case, in which the judicial reasoning by the US Supreme Court³⁵ is particularly poor and did not persuade anyone not already persuaded on other grounds. Second, he describes a political process in the UK that worked as well as one might hope for, with reasons on all sides being carefully assessed. Waldron is right about two things: In many cases the political process works well. And in some instances judicial reasoning is poor. But to make his case stronger it would have been necessary to choose the debates that typically informed state laws prohibiting abortion in the United States as a point of comparison, rather than debates in the UK. It may have turned out that the laws on the books in many US states existed at least in part because of traditional patriarchal views about gender roles and sexual morality, that placed central importance both on chastity and on male control over female sexuality. Given that the Supreme Court had

³⁴ J. WALDRON, “The Case Against Judicial Review”, *supra* note 1.

³⁵ Supreme Court of the United States, *Roe v. Wade*, 1973, 410 U.S. 113.

encountered these prejudices and stereotypes in its previous engagement with issues such as the availability of contraceptives,³⁶ the case against Supreme Court intervention might not be strong, even if a better reasoned judgment could have been hoped for. As it is the UK example does little more than provide an argument for the claim that when a serious, extended and mutually respectful parliamentary debate has taken place before deciding an issue, that is a good reason for the court to be deferential to the outcome reached. But such a conclusion at least comes close to a tautology: If there has been an extended debate of a deliberate, mutually respectful nature in a mature liberal democracy, any results reached is highly likely to be based on plausible reasons and thus deserve and are likely to be given deference by rights-adjudicating courts.

A much more telling example is the ECHR case relating to gays in the military, which also originates in Britain. In order to understand the significance of the role of the judiciary as an arbiter of public reason, it is necessary to move away from the discussions of ‘operative effectiveness and morale’ that the opinion focuses on. What is significant in this opinion *is not just what is made explicit, but also what is forced underground*. Why was it that those suspected of being gay were intrusively investigated and, when suspicions were confirmed, 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, 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 are not 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

³⁶ Supreme Court of the United States, *Griswold v. Connecticut*, 1965, 381 U.S., 479.

concerns, are not legitimate reasons to justify an infringement of someone's right. The proportionality test as the test of public reason requires a different type of justification. There is nothing inherently wrong with traditions, conventions and preferences. But on the one hand 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. On the other hand, and more generally, traditions, conventions and preferences have to be linked to plausible policy concerns to qualify as reasons that legitimately restrict rights of others. The function of courts is to ensure that any coercive act in a liberal democracy can qualify as *a collective judgment of reason* about what justice and good policy requires. It is an antidote against rights-restricting traditions, conventions and preferences that are supported by majorities but that are not supported by any plausible reasons of policy. This is why traditions, conventions and preferences as such are not discussed as legitimate reasons in judicial opinions.

There is another kind of reason that one reads nothing about in that opinion. Some Christians (or Muslims or Jews) might have claimed, in line with many – though by no means all – official church's doctrine: "Homosexual practices are an abomination against god. They are sinful." Note how, in the self-understanding of those who make these claims, they are not grounded exclusively in tradition, convention and preference only. They are claims about what it takes to live the right kind of life, for which theological argument is offered for support. Of course this is an issue about which there is significant theological debate and disagreement also within and across different churches. But the important point for understanding public reason as it relates to constitutional rights 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 behaviour is sinful is not in and of itself a ground to legally restrict a liberty interest protected as a right. An argument relating to sin and the behaviour we ought to follow to become worthy of salvation is an argument based on what political philosophers such as John Rawls would call a 'comprehensive conceptions of the good'.

This type of reason, a reason relating to what it means to live a good, authentic life, are not reasons that count as legitimate reasons to restrict someone's right. They are not part of public reason. *These kind 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. That is why they do not figure in the arguments assessed by the ECHR.

Like some of the characters that Socrates quarrels with in the early Platonic dialogues, those who embrace *these kind of reasons* have good reasons to evade Socratic questioning. Once forced into the practice 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.

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. 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 threats related to crime, war or terrorism, where the pay-off for public authorities and the security apparatus in particular in terms of gaining discretionary power is great and the risks of abuse or mistake are seemingly restricted to relatively circumscribed minority groups. Examples both of run of the mill hyperbole and ideological radicalization are prevalent in the context of ‘counterterrorism’ measures enacted after Sept. 11 in Europe and the US. Government hyperbole of the most mundane sort exists where a government claims to be acting to address some security threat, often in response to current events that have highlighted a particular danger. A terrorist attack occurs and old plans about wiretapping and extraordinary police powers emerge and are tabled as a response to what is claimed to be a new threat. Some such measures might, of course be appropriate under the circumstances, but they might also be opportunistically introduced measures 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.³⁷

Judicial review as Socratic contestation can help undermine it at least to some extent and bring back some realism into the discussion of legitimate security concerns. Furthermore it is not implausible that a political culture that supports a practice of legally institutionalized Socratic contestation is immunized to a greater extent from ideological thinking than a political culture that is likely to damn any kind of impartial third party reasoned scrutiny as undemocratic and elitist.

I have identified three 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

³⁷ For a review of these decisions see Eyal Benvenisti, *United We Stand: National Courts Reviewing Counterterrorism Measures*, in: Andrea Bianchi & Alexis Keller (eds.), *Counterterrorism: Democracy’s Challenge* (2008).

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. Third, there is the problem of government 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. This is by no means an exhaustive list of the typology of pathologies that decisions may suffer from in individual instances, even in mature liberal democracies.³⁸

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, responding to majoritarian sentiments, or accommodating powerful interest groups to justify them, nor is it a justification to invoke ideological platitudes (we are at war!) or theology. 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. Furthermore the actual practice of rights based Socratic contestation is likely to improve outcomes, because such contestation effectively addresses a number of political pathologies that even legislation in mature democracies are not immune from. Clearly both the very limited examples and the limited range of arguments that have been addressed so far do not make a comprehensive

³⁸ Another important type of pathology, that can't be discussed at any length here, relates to the capture of the democratic process by interest groups. This type of legislation is often able to avoid serious public scrutiny because of its technical nature: Insurance companies are exempted from certain taxes, professional organizations secure a mandated monopoly on the provision of certain services etc. Here economically disadvantaged, politically less organized actors might successfully have courts assess whether the distinctions made by the legislator, conferring a benefit on one group that was denied to another, or limiting the freedom to provide a service of one group by mandating a monopoly in favour of another, is justified.

case for judicial review as Socratic contestation. But for now it must suffice to have addressed at least some powerful arguments why a certain type of 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.

2. 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?³⁹ In the following I will provide an argument that judicial review based on the RHRP should be regarded as basic an institutional commitment of liberal-democratic constitutionalism as electoral accountability based on an equal right to vote. There is nothing puzzling about the legitimacy of judicial review. Arguably the more interesting issue is why the practice of judicial review receives the critical attention that it does.

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

³⁹ These are the core of arguments of Waldron and Bellamy (cite)

democracy was reconceived to include legislation by elected representatives, who would compete on party platforms for re-election. Participation-wise, the transition from direct to representative democracy involves a significant loss of individual citizen's control over the political process and significant empowerment of officials to the detriment of 'the people'. Similarly, after WWII, the establishment of courts as additional veto-players can be construed as the empowerment of another group of officials, one further step removed from 'the people', whose task includes the supervision of activities by the other group of empowered officials. As a matter of principle I understand the scepticism articulated by those who refused to accept 'representative democracy' as democracy properly so-called. But once the step to the empowerment of officials to legislate in the name of the people has been accepted as a matter of principle, it is difficult to see why the restriction of the powers of those officials by other officials that are generally appointed by the officials that have been given the authority to legislate, can possibly be wrong as a matter of principle. If representative democracy is legitimate, why can't representative democracy involving a rights-based judicial veto-power be legitimate? What is the deep difference 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. 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. It is not clear what the issue of deep principle could be, that would condemn judicial review, but not electoral representation.

At the very least it 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. A parliament is a parliament, 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 hugely important 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 and certainly not by casting our 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 no higher than the probability of winning the national lottery. Some of us may found movements and

become charismatic leaders for a cause or run for office. But nothing the great majority of us will ever do as individuals, is likely to bring about any meaningful change in national public policy. The most likely way that an individual citizen is ever going to change the outcomes of a national political process as a citizen (rather than an office-holder), is by going to court and claiming that his rights have been violated by public authorities. If courts are persuaded by your arguments rather 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.

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

hypothetically consented to it. Even those left worst of and most heavily burdened by legislation must be conceivable as free and equal *partners* in a joint enterprise of law-giving. Those burdened by legislation must be able to see themselves not only as losers of a political battle dominated by the victorious side (ah, the spoils of victory!), they must be able to interpret the legislative act as a reasonable attempt to specify what citizens – all citizens, including those on the losing side - owe to each other as free and equals. When courts apply the proportionality test, they are in fact assessing whether or not legislation can be justified in terms of public reasons, reasons of the kind that every citizen might reasonably accept, even if actually they don't. When such a justification succeeds a court is in fact saying something like the following to the rights-claiming litigant: “What public authorities have done, using the legally prescribed democratic procedures, is to provide a good faith collective judgment of reason about what justice and good policy requires under the circumstances. Given the fact of reasonable disagreement on the issue and the corollary margin of appreciation/deference that courts appropriately accord electorally accountable political institutions under the circumstances, it remains a possibility that public authorities were wrong and you are right and that public authorities should have acted otherwise. But our institutional role as a court is not to guarantee that public authorities have found *the one right answer* to the questions they have addressed. Using the proportionality framework our task is to *police the boundaries of the reasonable* and to strike down as violations of right those acts of public authorities that, when scrutinized, can not persuasively 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, or ideology, 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.⁴⁰ Acts by public authorities that are unreasonable, can make no plausible claim to legitimate authority in a liberal constitutional democracy. The question is not what justifies the “countermajoritarian”⁴¹ imposition of outcomes by non-elected judges. The question is what justifies the authority of a legislative decision, when it can be established with sufficient certainty that it imposes burdens on individuals for which there is no plausible justification. The judicial practice of Socratic contestation, structured conceptually by rights based proportionality analysis, and institutionally protected by rules relating to independence, impartiality and reason-giving, is uniquely suitable to give expression to and enforce this aspect of constitutional legitimacy. Constitutional legitimacy does not stand only on one leg.

c) The right to contest acts of public authorities that impose burdens on the individual is as basic an institutional commitment underlying liberal-democratic constitutionalism as an equal right to vote. Just as the ideals underlying liberal democratic constitutionalism are not fully realized without the institutionalization of genuinely competitive elections in which all citizens have an equal right to vote, they are not fully

⁴⁰ 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 resurfaces on the meta-level. But whereas it is a plausible claim to suggest 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).

⁴¹ For an account of the “countermajoritarian difficulty” as an academic obsession in US constitutional scholarship, see generally **B. FRIEDMAN**, “The Countermajoritarian Problem and the Pathology of Constitutional Scholarship”, *N.W. U. L. Rev.*, 2001, 95, 933.

realized without a rights and public reason based, institutionalized practice of Socratic contestation. There is a symmetry here that deserves to be described in some greater length, because it helps sharpen the implications of the argument made above.

Both the constitutional justification of an equal right to vote and the legal institutionalization of Socratic contestation do not depend exclusively on the outcomes generated. Both constitutional commitments are justified also because they provide *archetypal expressions*⁴² 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.⁴³ There are many aspects of election laws that can be tinkered with on outcome-related grounds. But any such laws much reflect a commitment to the idea that each citizens vote counts for the same, to be acceptable. The same is true for the idea of Socratic contestation. It expresses the commitment that legitimate authority over any individual is limited by what can be plausibly justified in terms of public reason. If a legislative act burdens an individual in a way that is not susceptible to a justification he might reasonably accept, then it does not deserve to be enforced as law. We should not need to discuss whether or not to provide for the judicial protection of rights, even if it were less obvious that outcomes are improved. What deserves a great deal of thought is how to design the procedures and institutions that institutionalize Socratic contestation. Should there be special Constitutional Courts with the exclusive jurisdiction over constitutional issues? By what procedure should the judges be appointed and how long should their tenure be? What should the rules governing dissenting opinions, submission of amicus briefs be etc. 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,

⁴² For the idea of legal archetype as a legal rule emblematic for a wider commitment, see J. WALDRON, "Torture and Positive Law: Jurisprudence for the White House", *Columbia Law Review*, 2005, 105, 1681.

⁴³ 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.

leaving it to the legislature to abolish or maintain the law? 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? These are the kind of questions that need to be addressed by taking into account outcome-related considerations. But the commitment to legally institutionalize Socratic contestation reflects as basic a commitment as an equal right to vote and is, to a certain extent, immune from outcome-related critiques, much like the equal right to vote.

No doubt the successful institutionalization of both electoral democracy and judicial review depend on a demanding mix of cultural, political and economic presuppositions. In Europe propitious conditions for the institutionalization of Socratic contestation did generally not exist in the ideologically divided world of the late 19th century and first half of the 20th century. Only after the end of WWII and the end of the Cold War had conditions changed in to allow for the complete constitutionalisation of liberal democracy. One of the preconditions for the successful constitutionalisation of judicial review as Socratic contestation might well be a strong and dominant commitment to a rights-based democracy by political elites and a political culture that has a strong focus on deliberation and reason-giving. Just as there may be good prudential reasons not to force an immediate transition from a non-electoral benign despotism to an electoral form of government, because of the disastrous outcomes it might produce in a particular political environments, there might be context specific outcome-related reasons not to move from a purely electoral form of government to one that also institutionalizes a practice of rights based Socratic contestation. But in either case those committed to liberal democratic constitutionalism have reasons to mourn a real loss.

IV. The Rationalist Human Rights Paradigm and its Context

The question is what explains the dominance and widespread acceptance of rights-based proportionality review in Europe and the comparatively widespread suspicion about

courts playing anything close to a comparable role in the US.⁴⁴ The following does little more than point to a number of plausibly salient factors that might help not just to explain the phenomenon, but also go some way towards justifying the different approaches to constitutional rights adjudication in Europe and the US.

1. Differences of textual architecture

As described above, the textual architecture of the legal norms themselves, and their two-tier structure in particular, fits well with the practice of courts in Europe. To the extent that new human rights Treaties or constitutions explicitly embrace proportionality analysis, this provides an even more explicit commitment to exactly the kind of practice courts engage in. The structure of rights provisions in the US context, on the other hand, tend to have a more categorical structure, suggesting that competing considerations need to be resolved on the level of defining the right, rather than on the level of establishing its limits. The key question becomes whether the constitution guarantees a right – clearly a question of constitutional interpretation – whereas in Europe, where the existence of a *prima facie* right tends to decide very little, the key question is whether a limitation of a right is justified in a particular context.

2. The significance of establishing a specialized constitutional court

A second difference is connected to the institutions that have the jurisdiction to adjudicate constitutional rights claims. In Europe special *constitutional courts* whose jurisdiction is generally limited to constitutional questions tend to have a monopoly to set aside legislation on the grounds that it violates constitutional rights. Ordinary civil, criminal or public law courts may not do so. If an ordinary court believes that a piece of

⁴⁴ Whether US constitutional rights practice is in fact that different from European practice and practice in other liberal democracies is subject to some dispute, see Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law* (in this volume). Those who believe that U.S. constitutional practice is exceptional disagree on whether that ought to be embraced (see Steven G. Calabresi, “A Shining City on the Hill”: American Exceptionalism and the S.Ct’s practice of Relying on Foreign Law, 86 B.U. L. Rev. 1335 [2006]) or lamented (see L. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in: *The Migration of Constitutional Ideas* 84 [Soujit Choudhry ed. 2006]).

legislation relevant for the disposal of a case violates a constitutional right, it has to refer that question to the constitutional court. In the US, on the other hand, any court has the authority to address constitutional questions and the highest court for constitutional issues is the highest court for all issues concerning the interpretation of federal law. The fact that a special court has been created for constitutional questions is relevant in a number of ways. First, it reflects a specific and clear commitment to the judicial enforcement of constitutional norms even over legislative acts. The jurisdiction of the court to strike down legislation is not derived from a general argument about the law-saying function of the court in conjunction with expectations the framers might have had. Second, the creation of a special institution reflects an understanding that constitutional adjudication raises a whole host of issues that distinguish it from ordinary activity of courts. It gives public expression to the realization that constitutional adjudication is different and gives constitutional courts a particular stature. More specifically it was widely understood in Europe that constitutional adjudication is connected to politics in a way that ordinary adjudication is not or at least not to the same extent. Constitutional adjudication is generally understood to be more political than ordinary adjudication, first because of potential clashes with the politically accountable electorally legitimated branches of government and second because of the open-ended and abstract nature of many constitutional provisions. In jurisdictions where this insight is reflected in the establishment of specialized constitutional courts, it is not surprising to see the emergence of a practice, whose structure is distinctly different from the structure of ordinary legal practice. *There is no pressure to rhetorically assimilate constitutional adjudication to the adjudication of run of the mill legal issues.* The public legitimacy of the institution does not depend on such assimilation. Third, it is not surprising to see an institution whose jurisdiction is limited to constitutional issues come up with a broad interpretation of what makes an issue constitutional. If only those issues the court can describe as a constitutional issue is an issue it can authoritatively address, this creates an incentive to create a conceptual framework that will allow a constitutional court to address any legal issue it wants to weigh in on as a constitutional issue. A Supreme Court with a final say over all federal issues has less of an incentive to frame an issue as a

constitutional issue, when it can also effectively determine outcomes without having to qualify an issue as constitutional.

3. Jurisprudential background assumptions: Civilian vs. Common Law

Two salient differences between the civilian and the common law tradition help further explain why something like judicial review along the Rationalist Human Rights Paradigm could be regarded as attractive and stable in Europe, but not in the U.S. First, the idea of a universally applicable generic structure along the lines of the proportionality test, taught as part of a general doctrine of rights that structures the whole field of constitutional rights, fits well with the civilian tradition that central fields of law can be helpfully divided in a general and special part (e.g. contracts law, criminal law). Both the abstract and general nature of the proportionality test as well as its tight internal four prong structure provides a framework for analysis that has a distinctly legalist, technocratic flavor and that makes judges confident that it is proper for them to apply. In the common law tradition, on the other hand, the idea of rights is closely tied to the provision of specific remedies.⁴⁵ Constitutional law textbooks do not have a general part concerning rights – the focus is on each right in its own context and with its own history. Originalist attacks against judicial practical reasoning notwithstanding, policy analysis has always been a central element to the analysis of rights. But the discussion of those policy concerns are always part of an overall process of reasoning that remained strongly focused on text, precedent, history and the contingencies of the case.

This leads to a second point. One of the preconditions of a stable proportionality focused rights practice is the absence of a general doctrine of precedent. The absence of a doctrine of precedent ensures that even a mature rights practice will not focus on the interpretation of earlier judgments, defining its holding and distinguishing it, arguing whether it deserves to be overruled etc.. Instead the focus will continue to be on the application of the proportionality test and the relevant contextually specific issues that might arise in a

⁴⁵ Cite Daryl Levinson

case. In European practice, too, reference is made to earlier decisions in litigation and in the justification of judicial decisions, but those references have a heuristic function only. They have no weight of their own and do not count as an independent factor in the rights equation. This means that the focus on proportionality analysis is not likely to be substituted with a more rule-based, doctrinal approach, even as rights practice matures.⁴⁶ After a good 50 years of rights practice in Germany the existence of a rich body of previous decisions has settled a great many issues. But that has not weakened the role that proportionality analysis plays in the adjudication of rights.

4. The link between courts and political institutions: Life Tenure and Constitutional Amendments

Here is a conventional account: In Europe it is generally easier for political branches to secure alignment of judicial decisions with dominant political forces than it is in the US. First, unlike their colleagues in the US, constitutional court judges do not enjoy life tenure. Instead their tenure is limited to a period between 9-12 years, depending on the jurisdiction. (Reappointment is generally not possible.) In practice life tenure in the U.S. has meant that Supreme Court judges retiring after 1970 have enjoyed an average of more than 25 years in office⁴⁷, whereas the replacement rate in Europe is more than twice as high. This means the dominant political forces can appoint judges that share their sensibilities more quickly than in the US. Second, the constitutional amendment process is extremely burdensome in the U.S under Art.5 U.S.C., but considerably less burdensome in most European constitutional jurisdictions. In Europe an agreement between the two dominant parties is likely to be enough to ensure the qualified majority necessary to enact a constitutional amendment, whereas a constitutional amendment supported by 2/3 majority in both houses often still faces considerable difficulties due to the high level of state support that is required for a constitutional amendment to pass.

⁴⁶ Cite Schauer

⁴⁷ (check statistics)

5. Differences in the Structure of the Political Process: Proportional Representation vs. First Past the Post Single Person Districts

A further factor that plausibly influences the legitimacy of rights adjudication is connected to the structure of the political process. Here it must suffice to provide only a very rough outline of the argument. In systems that establish first past the post single person districts there are considerable pressures towards a two-party system. Although there are other factors that can attenuate or strengthen this tendency⁴⁸, a two party system tends to create situations where for every salient political issue there is likely to be a government party supporting a measure and an opposition party opposing it. Whenever the judiciary decides against the government, judicial intervention is likely to be perceived as simply giving the opposition party something that it failed to convince voters of at the ballot. Within a system of proportional representation, on the other hand, the existence of a diversity of parties and the predominance of coalition governments means that the negotiation and deliberation between different policy options is likely to take place more in the open between different parties within and without government. The elections in a two-party system are about whose legislative program will be legislated. The elections in a system of proportional representation tend to be more about who gets how much leverage in the negotiations and deliberations within the legislative process. When the judiciary intervenes, it is more often seen as intervening in an ongoing process of negotiation and deliberation, rather than handing a victory to one clearly defined side against another. In systems that embrace proportional representation, the deliberative give and take nature of the legislative process is more apparent on the surface, whereas in a two-party system that give and take takes place behind the scenes between the different groups that are the constituents of that party. In a two-party system it is considerably more difficult for the judges to avoid the semblance of just replicating

⁴⁸ These factors include but are not limited to: The control of parties over the candidate selection process, the practices governing district apportionment (the tendency to engineer 'safe' districts leads to a situation where the primaries become the decisive procedure to determine a representative, increasing polarization), the structure of the legislative process (an increase in the number of veto-points tends to require cooperation between parties, whereas a straightforward parliamentary system like that of the UK tends to authorize the winning party to whatever it deems appropriate).

party divisions in their own ranks and siding with one party, thus undermining their legitimacy as an independent and impartial actor.

6. Salient differences in General background culture: Levelling Up vs. Levelling Down

When lawyers discuss the role of the judicial function in the U.S., the reference to the *Lochner* era is always close at hand. The disastrous judicial prevention of progressive reforms in the early decades of the 20th century has left a deep trauma and perennially casts a cloud of suspicion over judicial review of legislation. In Europe, on the other hand, only the French have a similarly deep distrust of a strong judiciary, fostered by the role of the ‘noblesse de robe’ as supporters and integral part of the prerevolutionary *ancien regime*. In many jurisdictions in Europe, it has been said⁴⁹, the trauma is a different one. The prevailing trauma is the historical failure of the Demos: its embrace of totalitarian or authoritarian xenophobic nationalism and rejection of liberal democracy. It involves the memory of oppressive majorities cheering along authoritarian statesmen to help suppress minorities, dissent and spread nationalist xenophobic hatred. Whether or to what extent Hitler, Mussolini, Franco or Salazar and others were democratically elected is not the relevant question, because there can be no doubt that for a significant time of their reign these dictators had strong and stable majoritarian support. Whatever else these characters have been, they have also been able to successfully present themselves as one of the people, even plausibly claiming to embody “We the People” in their person. A commitment to liberal democracy has old roots in Europe and did not disappear even in its darkest times. But historically those who had endorsed liberal democracy have found themselves in a minority position often enough. Not surprisingly any idea that the results of the democratic process should be given unqualified deference is regarded as implausible and the idea that the protection of human dignity and public reason might be enhanced by impartial judicial institutions focused on reason-giving is widely resonant.

⁴⁹ See for example Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. Rev. 1971 (2004).

There may be something that is right in the conventional account, but it is also one-sided, covers up a great deal and needs qualification. It suggests that, given historical experience, ‘the people’ can be trusted less in Europe than in the US and, therefore, liberal democracy needs to be insulated by elites from populist mischief in Europe, but not in the US. That, however, is deeply implausible. The conventional account reveals more about cultural differences in the kind of collective myths that resonate, than actual historical differences. There is a peculiar populist bias in the American narrative, just as there is an elitist bias in the European narrative. In the US trust in popular democracy and the goodness of “the people” is not undermined by the history of slavery, Jim Crow laws, not to speak of lynching mobs encouraged by hate-mongering populist leaders. Notwithstanding strong anti-populist sensibilities that informed the framing of the U.S. constitution, populist democracy in the U.S. of the past century is not viewed with the same kind of critical suspicion as judicial review. Indeed there is a bias to describe anything that went deeply wrong in the past as a sign that democracy was merely insufficiently realized. Within the American constitutional discourse the very idea of legitimacy is typically analytically connected to democracy (the only legitimacy there is, is democratic legitimacy). If democracy goes wrong, then more and better democracy is the remedy. If judicial review goes wrong, it is not a sign that judicial review should be improved, but that it is undemocratic.

In Europe suspicion of ‘populism’ and the rough and tumble of democratic politics tends to cover up or at least underemphasizes the failure of elites. Hitler's rise and exercise of power, for example, required not just the support of the Demos, it required partially supportive and dominantly compliant military, bureaucratic, judicial elites. “The people” may have been prone to manipulation and criminal misjudgment, but the elites – including the upper echelons of the judicial branch - did not fare any better.

Even though a great deal more would have to be said, the dominant narratives that resonate in legal and political culture reflect different cultural dispositions to political trust. To simplify grotesquely: In US public and political culture the people, grass roots, ordinary folks, Main Street, are good. The elites – in particular, but not only nonelected

federal judicial elites - in Washington are bad. In Europe elite ideals relating to culture are more widely embraced by citizens (at least they believe they ought to embrace them, and feel a sense of shame, when they don't really – people might not go to the museum more in Europe than in the US, but the public funding of high art institutions is not a contentious issue). As Jim Whitman has argued in the context of the discussion of the idea of human dignity: The revolutionary ideas of freedom and equality in Europe meant that ordinary citizens would assimilate upwards in terms of education, manners etc. and thus all share in the dignity traditionally claimed only by those of high birth (the idea of levelling-up). Equal citizenship is all about acquiring the status that was previously restricted only to aristocrats and becoming more like them. In the US liberal equality meant rejection of European elitest ideals in favor of an embrace of the basic and unrefined as the authentic and true (levelling down). In Europe a politician will try to seem sophisticated, even if he is not. Citing Descartes or Kant at the right time would not be regarded as out of place and fluency in other languages will, all other things being equal, be regarded as an electoral plus. In the US a sophisticated politician will more often than not do his best to seem like an ordinary guy, and will play down his education or language skills to gain acceptance by the public (does not the devil speak all languages?). Within such a cultural context the language of public reason and decisions by electorally unaccountable courts are less likely to be embraced by citizens as theirs. It is easy to cast judges as external Platonic guardians imposing their 'value judgments' on the people. In Europe judges are more readily regarded as an integral part of the practice of liberal democratic self-government. There are no particular difficulties in identifying with an institution that is open to everyone and whose internal structure and public voice reflects a commitment to impartiality and public reason.