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Freedom and Imagination: Constitutional Space in the Cosmopolitan Project

Vlad Perju*

Twentieth century constitutionalism was preoccupied, before becoming obsessed, with the role of constitutional reason over time. From the rise of originalism to the use of the generation as a criterion for periodizing constitutional development, time had come to play a central role in constitutional doctrine, discourse and theory. In contrast, the project of cosmopolitanism in constitutional law identifies the role of constitutional reason over *space* as a distinct topic of reflection.[1] "Whenever people come together," Hannah Arendt wrote, "the world thrusts itself between them, and it is in this in-between space that all human affairs are conducted."[2] Law shapes the in-between spaces between people. In a liberal constitutional democracy, it promises to keep those social spaces open to access, contestation, and re-imagination. Through what mechanisms can law deliver on that promise? How can it construct public space to help citizens overcome "the frictions of distance"[3] that keep them apart? Furthermore, can law shape perceptions of distance not just within, but also beyond, the ambit of a political community? Does broadening the space strengthen a society's "culture of liberty"[4]? The fate of the cosmopolitan project depends on the answers to these questions.

This paper approaches these questions through a study of how constitutional reasoning shapes, and is in turn shaped, by perceptions of space. While my analysis of styles of constitutional argument focuses on the domestic sphere, the styles themselves are part of a broader process by which constitutional systems of liberal democracies around the world are becoming synchronized under pressure from normative forces that are yet to be understood. The project of "bottom-up" cosmopolitanism illuminates the

* Assistant Professor, Boston College Law School. Email: Perju@bc.edu. This paper is written for the Conference "Constitutionalism in a New Key: Cosmopolitan, Pluralist and Reason-Oriented" (Berlin, 28/29 January 2011). **Draft: Do Not Cite or Quote without Permission**

[1] There are exceptions. See, e.g., Laurence Tribe, The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics, 103 Harvard Law Review 1 (1989).

[2] Hannah Arendt, Introduction into Politics in The Promise of Politics 106 (Jerome Kohn ed., 2005).

[3] David Harvey, Cosmopolitanism and the Geographies of Freedom 140 (Columbia, 2009).

[4] Ronald Dworkin, A Bill of Rights for Britain (1990).

"inevitable globalization of constitutional law."[5] Liberal democracies form what Kant called a confederation of independent republics, which are a "negative substitute" for the impossibility of a *civitas gentium* (an international state).[6] "If all is not to be lost,"[7] Kant wrote, this world confederation would create the conditions for the cosmopolitan right of the universal community. Those conditions refer at least in part to the institutional configuration and normative structure of the independent republics. For the purpose of this paper, I take the republics to be liberal democracies committed the ideals of freedom and equality. It is mostly in these societies that constitutional systems have become the site for struggles for recognition. The task of articulating the cosmopolitan dimensions of constitutional law is thus one to be completed in great part by turning inwards to revisit the normative foundations of domestic constitutionalism.[8]

The styles and methods of constitutional reasoning are primal manifestations of deeply rooted normative assumptions about constitutionalism.[9] Yet even at these deepest levels, cross-constitutional influences have already made an impact. As far as methodology is concerned, ours appears to be the "era of proportionality."[10] Scholars have referred to this method as the "universal criterion of constitutionality."[11] Mattias Kumm has recently suggested that the cosmopolitan paradigm provides the framework for understanding the global spread of proportionality in constitutional analysis.[12]

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[5] Mark Tushnet, The Inevitable Globalization of Constitutional Law, 49 V. J. Int'l L. 985 (2009). See also Vicki Jackson, Constitutional Engagement in a Transnational Era (Oxford 2009).

[6] See Immanuel Kant, Perpetual Peace: A Philosophical Sketch, in Kant, Political Writings 93-130 (H.S. Reiss ed., 1991).

[7] Kant, Perpetual Peace, at 105.

[8] For an argument about the existence of an "internal connection" between domestic and cosmopolitan jurisprudence, see also Mattias Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in Jeffrey L. Dunoff and Joel P. Trachtman, Ruling the World? Constitutionalism, International Law, and Global Governance 315 (2009) ("any conception of national constitutionalism that takes as basic the idea of free and equals governing themselves is internally connected to a cosmopolitan paradigm of constitutionalism. It is ultimately not possible to make sense of the idea of constitutional self-government of free and equals within the statist paradigm.")

[9] For a less than elated view of constitutionalism, see Jeremy Waldron, Constitutionalism: A Skeptical View (NYU Research Paper, 2010)

[10] Aharon Barak, Proportionality and Principled Balancing, in Law & Ethics of Human Rights, vol. 4 (1):1-18, 14.

[11] Beatty, The Ultimate Rule of Law.

[12] See Mattias Kumm, The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State, in Jeffret Dunoff and Joel Trachtman, Ruling the World? Constitutionalism, International Law, and Global Governance (Cambridge, 2009), at 262, 269.

One aim of this paper is to dwell on the connection between cosmopolitanism and proportionality. My own methodology is similar to Ralws's in *Political Liberalism*.[13] I start from the fact that proportionality has colonized constitutional practices and minds around the world.[14] After noting that this method has become an essential feature of global constitutionalism, the aim becomes to understand what sets it apart from other methods, which needs of constitutional democracies proportionality answers better than alternative methodologies and generally how its central normative presuppositions dovetail with the larger structure of modern constitutional consciousness. The perspective from constitutional space helps to answer these questions. Specifically, I contrast the relational constitutional space that proportionality creates with the absolute and relative constitutional spaces of alternative methods.[15] I then show how its specific way of constructing constitutional space explains the perceived capacity of proportionality to enhance the responsiveness of public institutions to the demands of people within their jurisdiction. All the "independent republics" share this need for responsiveness.

Responsiveness refers to a certain posture of normative availability that public institutions must have towards their subjects. These institutions, including courts, have a duty to respond to the claims of a pluralist citizenry in ways that recognize and reinforce the social standing of each citizen claimant as free and equal. That is, they ought to give answers that the claimant and his/her representatives will find intelligible, that shows appropriate respect to the claimant as a free and equal citizen, and demonstrates thoughtful consideration of the meaning of the claim and the impact of the institution's response on the claimant and the political community as a whole. Responsiveness signals the recognition, respect, and consideration that institutions give to citizens, and that citizens give to one another. Judgments of legitimacy are, in part, judgments about the capacity for normative responsiveness of the political institutions.[16]

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[13] Rawls, Political Liberalism.

[14] See Alec Stone Sweet and Jud Mathews. "Proportionality Balancing and Global Constitutionalism" Columbia Journal of Transnational Law 47 (2008): 73

[15] I borrow this classification from David Harvey, Cosmopolitanism and the Geographies of Freedom (Columbia, 2009), Chapter 7, though my use does not completely tracks Harvey's. For more on relational space, see Lefebvre, The Production of Space.

[16] I present this conception in Vlad Perju, Cosmopolitanism and Constitutional Self-Government, ICON vol 8(3)

The components of judicial responsiveness range from access to courts to requirements about the form of judgments, and, as I argued elsewhere, to the use of foreign law in constitutional interpretation.[17] Often overlooked as an aspect of responsiveness is the need of a constitutional system to address what Robert Cover called the "inherent difficulty presented by the violence of the state's law acting upon the free interpretative process."[18] The source of violence is a gap between the *ex ante* perspective of comparable strength of the constitutional claims presented to courts and the *ex post* perspective of the binary effects of the judgment of constitutional validity. *Ex ante*, the claims represent the parties' interpretations of the constitutional text, rooted in their constitutional imaginaries, which aspire to official endorsement by courts as the institutions mandated to settle constitutional meaning.[19] The binary nature of judgments of validity erases all traces of the potential for recognition of the losing claim, as that potential was perceived ex ante the judicial decision.[20] This ex post/ex ante gap is a possible source of constitutional non-responsiveness.

This violence of the state's law acting upon the free interpretative process is known in all societies but is particularly stringent in liberal ones. The reason is the far-reaching and legitimate disagreements that are the expression of "the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime."[21] Pluralism challenges the basic terms of the interaction between citizens and their institutions. How can the free institutions of a constitutional democracy retain an appropriately high degree of responsiveness to the claims of a citizenry that holds deep, reasonable yet incompatible comprehensive doctrines of the good? Through

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[17] Idem.

[18] Robert Cover, Nomos and Narrative, 97 Harvard Law Review, 4, 48 (1983)

[19] I adapt the concept of constitutional imaginary from Charles Taylor, Modern Social Imaginaries (Duke, 2004). See supra, Perju (ICON article). For more on a Protestant vs. Catholic approach to constitutional interpretation see Sanford Levinson, Constitutional Faith (1988). A similar idea is expressed in Robert Cover, Nomos and Narrative, 97 Harv. L. Rev. 4, 40 ("Robert Cover, Nomos and Narrative, 97 Harvard Law Review, 4, 48 (1983) (It is remarkable that in myth and history the origin of and the justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution.")

[20] As Habermas put it, "norms of action appear with a binary validity claim and are either valid or invalid; we can respond to normative sentences, as we can to assertoric sentences, only by taking a yes or no position or by withholding judgment", Habermas, Between Facts and Norms.

[21] Rawls, Political Liberalism at xviii.

what mechanisms can these institutions interpret and process claims originating in diverging life plans in ways that respect and reinforce the free and equal status of each claimant?

Pluralism lengthens the distance between claimants, widens the ex ante/ex post gap and heightens the need for mechanisms of constitutional responsiveness capable of mitigating the gap. It creates a common need in all constitutional systems for constitutional methods that can construct the spaces between claimants and courts in a way that bridges the ex ante/ex post abyss. For all the cultural differences in the interpretation of the duty of responsiveness that public institutions have towards their subjects, this need acts as normative pressure leading to cross-constitutional synchronization. Since proportionality answers this need better than alternative methods, and this explains its status as "the most successful legal transplant of the second half of the twentieth century."[22]

To understand its success, specifically its success at keeping social spaces open to access and contestation, we must take a step back and reflect on the nature of judgment in general and constitutional judgment in particular. The starting point is to see freedom and imagination as faculties of (constitutional) judgment. Only a free mind can judge impartially, and only the "expanded mind," as Kant put it, can become free.[23] The mind expands by seeing the world from the standpoint of other people. The heuristic integration of the perspectives of others into our own outlook expands our knowledge and is a condition of our freedom. Unless and until we train our minds to "go visiting,"[24] we will remain "locked"[25] in bias, prejudice, and ignorance. Because we cannot reach all others in reality, we must reach them in thought. The power of imagination thus becomes the precondition of our enlightenment.[26] Imagining the people we have not become unveils dimensions of the world and of our own self that routine and ignorance would otherwise have continued to conceal.

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[22] Mattias Kumm, Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice, 2 INT'L J. CONST. L. 574, 595 (2004).
[23] Cite - Kant
[24] Arendt: "to think with an enlarged mentality means that one trains one's imagination to go visiting" (Lectures on Kant, at 43.)
[25] Kant.
[26] See Paulo Barrozo, Law as Moral Imagination: The Great Alliance and the Future of Law (unpublished dissertation, Harvard University)

How do freedom and imagination shape the space between judges and claimants, present and future, and citizens elsewhere?[27] As Michael Walzer put it, the difficulty of judging is not "that of detachment, but of ambiguous connection."[28] As we shall see, the matrix of judicial responsiveness is intricate. But at least part of the answer rests in how the judicial standpoint incorporates the perspectives of claimants and acknowledges the objectivity of their claims leading up to and including at the moment of decision.[29] Judges are positioned vis-à-vis the claimants through the questions they ask and the forms of reasoning they deploy.[30] Their methodology grounds them. Whether in situations of conflicts of constitutional rights or, more frequently, in assessing whether the state may override a specific constitutional right[31], the method that sends them traveling "shows equal concern and respect for everyone involved"[32] and enhances the perception of constitutional responsiveness.

Yet, "everyone included" means not only the litigants before the court in a given case but also future litigants. Judges must be responsive to different audiences with conflicting concerns. Ideally, they must be responsive first to the context that gave rise to the interpretative dispute as well as to the demands for systemic predictability and order that in complex democracies of scale are associated with the rule of law. Their methods must structure contextual, case-based decision making just enough to rein in judicial discretion without undermining the flexibility required to deal with the particulars. Constitutional methods should structure the constitutional space just enough to secure indiscriminate access by citizens but also to keep that space open to contestation and revision.

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[27] The point of this "spatial turn" (see David Delaney, The Spatial, the Legal and the Pragmatics of World-Making 10 (Routledge, 2010)) is not to replace time with space. While modern physics shows that would be straight-out impossible, in constitutional physics such a move would be at least unwise. The path to a better understanding of law's role in the self-government of a free community of equals has both temporal and spatial dimensions.

[28] Walzer, Interpretation and Social Criticism (Harvard, 1987), at 37.

[29] As Hannah Arendt wrote referring to judgment in general, "impartiality is obtained by taking the standpoints of others into account: impartiality is not the result of some higher standpoint that would then settle the dispute by being above the melee." Arendt, Lectures on Kant, at 42.

[30] See Mattias Kumm, The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review, Law and Ethics of Human Rights vol. 4(2): 141-157 (2010).

[31] Depending on the specific framing, the overriding can occur at the definitional or the application stage of a right. For more on this, see section 3.

[32] David Beatty, Ultimate Rule of Law, at 169.

The further away the mind travels, the more enlarged it may become; herein lie the cosmopolitan dimensions of the faculties of constitutional judgment.[33] Its travels take the mind outside the ambit of a particular community. It opens it to the experiences in self-government of other political communities, for instance in the form of using foreign law and legal reasoning in domestic constitutional interpretation. It is no coincidence that the rise of proportionality goes hand in hand with the increased use of foreign law in constitutional interpretation. Proportionality has been the object of such cross-constitutional borrowing, and it has in its turn shaped constitutional process in ways that reach out across jurisdictional boundaries. Both proportionality and the use of foreign law are mechanisms for preserving and enhancing constitutional responsiveness.

The paper is structured as follows. The first three sections identify three different styles of constitutional arguments with different approaches to the cartography of constitutional space. Their different approaches to rights and method shape the space as absolute, relative and relational. I should add that the constitutional approaches are presented as ideal types; they are not accurate descriptions of the views of any one constitutional theory or theorist. Section Four discusses freedom and impartiality as faculties of constitutional judgment. Section Five discusses the ex ante/ex post gap. The paper ends with a brief conclusion.

§1. The Construction of Constitutional Space: Absolute Spaces

Reasoning categorically and top-down from text or high principles, this constitutional approach conceptualizes the responsiveness of the constitutional system as that system's capacity to resist the pressures of particularistic causes. Since judges decide cases "by virtue of their authority, and not because they are any more likely to be right than other people,"[34] judicial authority is weakened whenever courts are perceived as delivering all-things-considered, Solomonic decisions from "Olympian"[35] positions. Hence, its "emancipatory core" is the imperative that legal judgment should resist "subsumption

[33] It is also true that the further away the mind travels, the easier it is to get lost...
[34] See Charles Fried, Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test, 76 Harvard Law Review 755, 761(1963).
[35] Id.

under particularistic causes."[36] Such causes are perceived to reflect political pressures that erode the virtues of generality, universalism, and legal form. In this view, succumbing to particularistic causes corrupts the commitment to the rule of law and undermines the responsiveness of the constitutional system to the demands of it citizens, present and future.

This approach resists particularistic pressures by using walls – the "sworn enemy of caprice, ... the palladium of liberty"[37] – to fragment the constitutional space into different spheres of authority. Rights are walls that delimit spheres of decision making authority. They carve out absolute constitutional spaces.[38] A claim that a right has been violated requires an "assessment of the state's justifications for action in light of the principles that defined the legitimate basis for state action in the particular sphere in question."[39] That assessment is structural, not substantive. For instance, burning a flag and criticizing the government's energy policy are actions that the right to free speech shields from governmental intrusion, no matter how strongly felt or even cogent the government's reasons for interference might be. Rights are grounds for dismissing as irrelevant – not as weak or otherwise defective – claims to the satisfaction of collective goals that conflict with the right-holder's interests.[40]

Constitutional responsiveness is conceptualized from a systemic perspective. The preservation of social order under conditions of pluralism and disagreement require a predictability that stabilizes the expectations of future claimants. Rights are critical to this task. Since they protect the rightholder's actions within designated spheres of authority, the judicial enforcement of a right is not tantamount to endorsing the wisdom of the

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[36] Martti Koskenniemi, The Gentle Civilizer of Nations at 503-504.

[37] "Form is the sworn enemy of caprice, the twin sister of liberty… Fixed forms are the school of discipline and order, and thereby of liberty itself. They are the bulward against external attacks, since they will only break, not bend, and where a people has truly understood the service of freedom, it has also instinctively discovered the value of form and has felt intuitively that in its forms it did not possess and hold to something purely external, but to the palladium of its liberty." (Jhering, quoted in Roscoe Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 HARV. L. REV. 195, 208-209 (1913).

[38] There are a number of ways in which the constitutional spaces are carved out, and here I focus on just one approach See Stephen Gardbaum, A Democratic Defense of Constitutional Balancing, 4 Law & Ethics of Human Rights 78 (2010).

[39] Richard H. Pildes, Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law, 45 Hastings L. J. 711, 713 (1994).

[40] This is the idea of exclusionary reasons. See Joseph Raz, Practical Reason and Norms 35-49 (1975). See also Jeremy Waldron, Pildes on Dworkin's Theory of Rights, Journal of Legal Studies, 2000, vol. 29 (1): 301, 301 ("Rights are limits on the kinds of reasons that the state can appropriately invoke in order to justify its actions"). See also Pildes, supra note (Avoiding Balancing), at 712.

rightholder's substantive choices. Rather, in protecting rights, courts enforce an institutional scheme in which the constitution allocates to the rightholder the space to act and decide as he thinks best.[41] For instance, the question of whether terminally ill patients have a constitutional right to experimental drugs is not about the wisdom of the choice to take such a risk (i.e., whether or not it is wise or reasonable to put oneself at a heightened risk from insufficiently tested and thus potentially unsafe drugs). Rather, the question – which is approached from the stance of the constitutional allocation of decision making authority – is who (the patient, the doctor, the state, etc.) has the right to make the decision that the risk is or is not worth taking,[42] To be sure, that scheme for allocating decision making authority may reflect substantive judgments.[43] But stipulating as rights the outcomes of those judgment marks an epistemological break: a particular liberty interest is protected not because it is important, but rather because the constitution says so. As one scholar argues, "a litigant's reference to freedom of speech or conscience is not simply a claim for immediate satisfaction, but is the assertion of an interest which can be understood only as a reference to systemic ways of doing things, to roles, institutions and practices."[44] This is a world of walls in which "each one creates a new liberty."[45]

In legal systems where constitutional norms do not apply horizontally (that is, they do not apply between private individuals), conflicts of rights of the kind that would challenge this deontological conception are less likely to occur.[46] That conception in turn reinforces a construction of constitutional space structured along a vertical axis: state -

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[41] Howe, Foreword: Political Theory and the Nature of Liberty, 67 Harv. L. Rev. 91,91 (1953) ("Government must recognize that it is not the sole possessor of sovereignty, and that privae groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign immunity.")

[42] See Abigail Alliance for Better Access to Experimental Drugs v. Eschenbach, 495 F.3d 695 (D.C. Cir. 2007), cert. denied mem., 128 S.Ct. 1069 (2008) (holding that the Due Process Clause does not encompass a fundamental right of terminally ill adults to access investigational drugs, neither the common law doctrine of necessity nor that of self-defense weighs in favor of the asserted right, and that the challenged FDA policy bore a rational relation to a legitimate state interest and did not amount to a tort (of intentionally preventing necessary aid)).

[43] They can be "the very product of [substantive] interest-balancing."128 S. Ct. 2783 at 2821. (Scalia, J.)

[44] Charles Fried, Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test, 76 HARV. L. REV. 755 (1963), at 769. The right to free speech or conscience is a second-order reason about how the constitution allocates decision making power within the spheres of authority that it carves out.

[45] Michael Walzer, Liberalism and the Art of Separation, Political Theory vol. 12 (3): 315-330 (1984), at 315. Walzer further writes: "The art of separation is not an illusory or fantastic enterprise; it is a morally and politically necessary adaptation to the complexities of modern life. Liberal theory reflects and reinforces a long-term process of social differentiation."

[46] For a discussion of the state action doctrine and constitutional space, see Tribe, supra note 1.

individual. Rights such as free speech or the freedom to practice one's religion have a deontological character that basic goods lack.[47] Rights are not like iPads or designer clothes, or any other consumer good we might wish to own but have no special right to demand. Rather, as Ronald Dworkin put it, "if someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so."[48] Rights have a strong anti-utilitarian animus.[49] Jeremy Waldron captures this when writing that "the resolution of any conflict with considerations of utility is obvious: rights are to prevail over utility precisely because the whole point of setting them up is to correct for the defects in the utilitarian arguments which are likely to oppose them. We do not stare at the utility calculus and then stare at the rights, and discover that the second is sufficiently important to 'trump' the importance of the first. Instead, our sense of the internal connection between the two established the order of priorities."[50]

From this perspective, cracking the deontological shell that encases the constitutional rights breaks down the structure of constitutional liberty. It mistakenly reopens the constitutional space to the kind of substantive negotiations that rights were supposed to authoritatively bring to an end. The stakes of revisiting the allocation of decision making authority between actors of asymmetrical power – the state and the individual – are so high that the constitutional space is not malleable: constitutional experimentation is discouraged. The space is simply not open to contestation in that way.

It is, however, open to contestation in other ways. Understanding rights as structural devices for the fragmentation of political authority into absolute spaces should

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[47] Jürgen Habermas, Between Facts and Norms, at 257.
[48] Ronald Dworkin,Taking Rights Seriously, at 269.
[49] See Ronald Dworkin, Taking Rights Seriously, at 277. See also Jürgen Habermas, Between Facts and Norms, at 259 ("Insofar as a constitutional court adopts the doctrine of an objective order of values and bases its decision making on a kind of moral realism and moral conventionalism, the danger of irrational rulings increases, because functionalist arguments then gain the upper hand over the normative ones.").
[50] Jeremy Waldron, Rights in Conflict, Ethics vol. 99 (1989): 503-519, at 516. See also Ronald Dworkin, A Bill of Rights for Britain (1990) ("Liberty is already lost, whatever the outcome, as soon as old freedoms are put at risk in cost-benefit politics.") As Elaine Scarry points out in the context of the prohibition on acts of torture in the laws of war, every act of torture, as well as smaller acts such as perfidy and treachery, that "carries us into neo-absolutist territory blurs our vision, makes the boundary easier to cross, and puts us at ever-accelerating risk of carrying out moral harm ...from which we may not soon recover." Elaine Scarry, Rule of Law, Misuse of Men (MIT: Boston Book Review, 2010), at 63-64-65.

not obscure that the culture of liberty is nevertheless a culture of argument.[51] For one, rights themselves are not absolute. Limitations are possible so long as they do not mainstream balancing – that is, so long as they are duly justified and presumably as long as they occur only exceptionally.[52] Thus, this culture of argument is a culture of a particular kind of constitutional argument. The object of interpretative disagreement is the constitutional allocation of decision making authority. Does the constitution allocate the authority to make decisions in end of life situations to the dying patient and her doctor, or to the state?[53] Does it place the authority to decide whether to terminate pregnancy with the woman and her doctor or with the state?[54] Does it leave it to the rightholder or to the majority to decide if loaded handguns can be kept at home in urban areas with high crime rates?[55] The advantage of this framing of constitutional questions is not that disagreement will fade away – it won't – but that it provides a better understanding of what such disagreement is about. Specifically, it shows that constitutional disagreement is not about the meaning or importance of values or interests that rights protect, or about the wisdom of specific moral choices or public policies. In this way, this approach seeks to mitigate the ex ante/ex post gap by denying its relevance from a legal standpoint. There is only one legal standpoint – and that is the standpoint of the constitutional allocation of decision-making authority. That standpoint is fixed.

Thus, constitutional structure grounds the impartiality and objectivity of the judicial opinion. The judge understands the standpoint of the claimants but must transcend their claims, or else he would be giving in to their particular interests. A later section will show how, in this conception, constitutional responsiveness requires that the

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[51] Martti Koskenniemi, The Gentle Civilizer of Nations , at 502 ("To put it simply and, I fear, through a banality it may not deserve, the message is that there must be limits to the exercise of power, that those who are in positions of strength must be accountable and that those who are weak must be heard and protected, and that when professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community overriding particular alliances and preferences and allowing a meaningful distinction between lawful constraint and the application of naked power.")

[52] See generally Stephen Gardbaum, Limiting Constitutional Rights, 54 UCLA Law Review 785 (2007) (discussing "internal limits" on rights).

[53] Washington v. Glucksberg 521 U.S. 702 (1997) (holding that a rational relationship existed between a state's ban on assisted suicide and a legitimate state interest, and that further the due process clause did not encompass a fundamental liberty interest in assisted suicide); Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990) (holding that a state did not violate the Due Process Clause where it prohibited causing or aiding a suicide).

[54] See Laurence Tribe, Structural Due Process, 10 HARV. C.R.-C.L. L. REV. 269 (1975).

[55] Heller. 128 S. Ct. 2783.

judge's mind never becomes unmoored, for fear that, if it sets sail, it might drift away from the perspective of the allocation of decision-making power and into the forbidden space of the parties' "particularistic causes." Critics have seen this distancing of the decision-maker from the claimants – and the demand that the claimants take the standpoint of the decision-maker[56] - as a source of estrangement from one's fellow citizens and detachment from one's political world. We turn now to their proposed "correction."

§2. The Construction of Constitutional Space: Relative Spaces

The starting point of this second approach is a critique of the arguments for and presuppositions of the detached judicial standpoint. Its advocates, most powerfully legal feminists, see detachment as a form of violence to the richness of human life. The cold aloofness of judicial reason can become detached from context only by detaching from life itself. As one scholar put it, "impartial reason aims to adopt a point of view outside concrete situations of action, a transcendental 'view from nowhere' that carries the perspective, attitudes, character, and interests of no particular subject or set of subjects."[57] Thus, the attempt to move beyond "current human choices"[58] breeds estrangement and alienation. From this perspective, striving to transcend particularism misunderstands the challenge of modernity. That challenge is not how to construct a detached and artificial discourse that brackets away life's messiness and complexity (including the fact of pluralism). It is, rather, how to face that messiness full on and bridge the "abysses of remoteness"[59] that separate the free and equal members of the political community.[60]

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[56] In Section Four, I discuss, as part of the mutability of institutional roles, the idea that constitutional judgment as legitimate if it is the outcome that the parties themselves would have reached if they had occupied the role of the decision maker.

[57] Iris Marion Young, Justice and the Politics of Difference (Princeton, 1990), at 100.

[58] Martha Minow, Essay on Rights, at 1877 (italics added) ("legal positivism or objectivity that implies an authoritative basis or foundation beyond current human choices."). See also Minow, Martha L. & Elizabeth Spelman. "In Context," 63 Southern California Law Review 1597 (1990).

[59] Cite Arendt.

[60] From this perspective, the arsenal of modern liberal thought that attempts to construct the subject f liberalism - the distinction between hypothetical as opposed to actual consent, the constitutional system as respect-worthy, the construction of the person – only reinforces the distance between situated and constructed subjects of the law.

The alternative to detachment is *situatedness*. Situated decision making rejects "the notion that there is a universal, rational foundation for legal judgment. Judges do not ... inhabit a lofty perspective that yields an objective vision of the case and its correct disposition."[61] Rather than transcending "particularistic causes," this conception commends constitutional authority to fully embrace them. As Judith Resnik argued in the context of how adjudication and feminism can be compatible, "adjudication is one instance of government deployment of power that has the potential for genuine contextualism, for taking seriously the needs of the individuals affected by decisions and shaping decisions accordingly. Precisely because adjudication is socially embedded, it can be fluid and responsive."[62] Its contextual, pragmatic, bottom-up approach leads constitutional analysis to reflect on the richness of the life that law aims to regulate. Constitutional space is therefore relative; it looks differently from the perspective of each claimant.[63]

Under this view, rights are better understood as claims to institutional protection of select substantive needs, and not as ambits delimiting spheres of sovereignty. Free speech, privacy, self-defense, and the free exercise of religion are examples of super-valued, institutionally sanctioned interests that the *pouvoir constituant* selects and for whose protection and/or realization the state will summon its coercive force.[64] By contrast to the deontological approach to rights, this conception authorizes judges to break the shell encasing the right in order to gain access to the background interests.[65] Constitutional norms apply vertically as well as horizontally. Rights are not spaces of exclusion; fellow citizens and the state are not presumed to be intruders. As Dieter Grimm put it, "the function of the constitutional guarantees of rights is not to make

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[61] Catharine P. Wells, Situated Decision making, 63 S. CAL. L. REV. 1727, 1728 (1990).
[62] Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. Cal. L. Rev. 1877, 1935 (1988)
[63] Catharine Wells writes that: "Understanding a controversy … requires that it be experienced from several different perspectives as a developing drama that moves towards its own unique resolution." See Catharine P. Wells, Situated Decisionmaking, at 1734.
[64] The legal recognition of interests is of course not unidirectional. Some interests do not preexist legal norms; they are, rather, a consequence of their creation. The expectation that a benefit-granting statutory scheme will not be discontinued absent change in circumstances may give rise to interests that cannot logically precede the adoption of that scheme. See Goldberg v. Kelly, 397 U.S. 254 (1970).
[65] Constitutional rights and state interests seem to be on the same plane because, the moment constitutional rights enter the decisional calculus, they have already become "interests." See generally Richard Fallon, Individual Rights and the Powers of Government, 27 Ga. L. Rev. 343 (1993).

limitations as difficult as possible but to require special justifications for limitations that make them compatible with the general principles of individual autonomy and dignity."[66]

By contrast to the previous approach, which focuses on the delimitation of the sphere of constitutional authority and interprets rights narrowly, this second conception interprets rights broadly and channels the superior quantum of the interpretative energy to the question of whether their override is justified. For instance, when asked to decide whether there is a constitutional right to physician-assisted suicide, a judge should start by acknowledging that individuals have a privacy interest in these situations and then spends the superior quantum of his analytical energy in deciding whether the government has sufficiently good reasons to limit its exercise.[67] The cumulative effect of the broad interpretation of rights is to make the justificatory burdens on the government significant. To define constitutional rights broadly is tantamount to extending the array of individual interests and wants that receive at least prima facie institutional protection. Governmental policies are thus more likely to impinge upon expansively interpreted constitutional rights. The government's capacity to implement its policies without having to meet demanding justificatory standards accordingly shrinks.[68] But the government can nevertheless justify its interests in override individual rights, or else its activity would be brought to a halt considering the expansive rights provisions in the text of modern constitutions.

So, what is left of rights? Are rights more than "just rhetorical flourish?"[69] Breaking the deontological shell turns rights-claims into interest-claims, namely substantive reasons for demanding a particular institutional response - "having a right does not confer much on the rights holder."[70] For example, the existence of right to privacy does not *eo ipso* entitle the rightholder to rely on the state's protection of his privacy interests. That protection is rather the outcome of a balancing process in which

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[66] See Dieter Grimm, Proportionality in Canadian and German Constitutional Jurisprudence, at 391.

[67] Washington v. Glucksberg, 521 U.S. 702 (1997).

[68] This system might still be preferable to that of incidental burdens that raises difficult questions of causality. For a study of incidental burdens, see Michael Dorf, Incidental Burdens on Fundamental Rights, 109 HARV. L. REV. 1175 (1996).

[69] David Beatty, Ultimate Rule of Law, at 171 ("When rights are factored into an analysis organized around the principle of proportionality, they have no special force as trumps. They are just rhetorical flourish.").

[70] Mattias Kumm, Constitutional Rights as Principles, at 582. ("Having a right does not confer much on the rights holder: that is to say, the fact that he or she has a prima facie right does not imply a position that entitles him/her to prevail over countervailing considerations of policy.").

judges as situated decision-makers deem his interests comparatively stronger than whatever interests the state might have to act in ways that infringe upon the rightholder's privacy interests. This sense is rooted in the contextual analysis where the outcome of legal analysis depends on the particular weight of the opposing interests in context of the particular case.[71]

And so, its critics argue, begins the out-of-control process of judicial empowerment. After surveying more than three decades of German constitutional jurisprudence, David Currie concluded that "[a] balancing test is no more protective of liberty than the judges who administer it."[72] No matter how strong, rights as substantive reasons, that is mere "reasons that can be displaced by other reasons."[73] Critics have dismissed the law-ness of this approach: "A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all."[74]

These critics get one point but miss another. Yes, this style empowers judges to set rights aside in specific contexts. But judges do so in a culture of argument that requires them to give reasons for their decisions. This culture of argument is an essential part of the mechanism of responsiveness to the demands of self-governing citizens.[75] Even though the right-holder's substantive interests do not automatically trump the state interests, this does not mean that they are necessarily of comparable strength to the state interests. For instance, the interests that rights protect have a different, and institutionally recognized, pedigree. These interests were singled out to receive the highest form of legal protection (protection as constitutional rights) at the time when the constitutional norm was adopted. The fact that the background interests resurface in the balancing analysis is a reminder of what makes them worth protecting. Kathleen Sullivan has defended

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[71] The outcome of balancing can be stated in the form of a legal rule. See Robert Alexy, Theory of Constitutional Rights, at 56 ("the result of every correct balancing of constitutional rights can be formulated in terms of a derivative constitutional rights norm in the form of a rule under which the case can be subsumed.").

[72] David P. Currie, The Constitution of the Federal Republic of Germany 181 (1994).

[73] Robert Alexy, Theory of Constitutional Rights, at 57. It is of course possible to devise categorical protections within the model of rights as substantive reasons. As Kumm reminds us, certain types of reasons – say, religious reasons for introducing prayer in public schools – are categorically excluded from the comparative weighting of interests in proportionality analysis. See Mattias Kumm, Constitutional Rights as Principles, at 591.

[74] Scalia in Heller 128 S. Ct. at 2821.

[75] See also Charles Tilly, Why?, at 158 ("the credibility of reasons always depends on the relation between the speaker and audience, in part because giving of reasons always says something about the relation itself.").

balancing on precisely this ground. Contrasting balancing to rule-based categorical reasoning, she writes: "[R]ules lose vitality unless their reason for existing is reiterated. Even if they are simply the precipitate of an implicit prior balancing, better to redo the balancing every time. It takes longer but it's worth it."[76]

It may be disquieting to realize that the satisfaction of rights-protected interests depends on judicial recognition. But no constitutional style can get around this problem, if a problem it is. To paraphrase a classic, the jurist who feels uneasy about leaving law to the "mercy" of argument was born in the wrong century. In our late modern age, societies develop cultures of argument, including legal argument, to negotiate the terms of their collective self-government.

So rather than mourn the lost age of certainties, we would be better served to study how different constitutional styles structure the constitutional debate. This style opens the constitutional space to challenge and revision. (*describe how*) In fact, each constitutional case is an opportunity for challenge and revision. The constitutional space is open for contestation only when the outcome of the debate is genuinely open. Hence, there can be "no purely logical or conceptual answer"[77] to the question of the priority of interests that come into conflict. History, political morality, precedent are possible sources of ordering. But those sources and their application must themselves be open to questioning, at least in hard cases, where there claims are such that the constitutional dispute is genuine and each party has an equally forceful claims.

It is precisely in these hard cases that the shortcomings of this approach become apparent. Its insight – *situated* decision-making - becomes the trap. It is here, when judges are confronted with equally strong claims rooted in "particularistic causes" that we need judges who are well positioned. Yet, this is when this approach lets us down because it does not describe the judicial standpoint in a credible fashion. It commands that judges use empathy to approach and understand the context from which claims arise.[78] But just as the previous approach was too cold and distant, its correction runs the

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[76] Kathleen Sullivan, Post-Liberal Judging: The Roles of Categorization and Balancing, 63 U. COLO. L. REV. 293, 309 (1992) (footnotes omitted).

[77] 128 S. Ct. at 2850 (Breyer, J., dissenting)

[78] Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. Cal. L. Rev. 1877, 1935 (1988) ("Rather than bemoan ... a switch in roles, feminism teaches us to celebrate such rearrangements, to require judges to let others judge them. Such moments might better enable judges to be

opposite risk, that of melting under the heat of empathy. We understand how judges seek to be responsive to actual claimants. But what about *future* claimants? After all, duties of responsiveness are owed to them too. This approach has a blind spot for the systemic perspective because it is too dismissive of claims to objectivity and impartiality.[79] As the next section argues, the third approach aims at correcting these shortcomings.

§3. The Construction of Constitutional Space: Relational Spaces

This third approach incorporates the formality of the first approach and the attention to particular context that characterized the second conception discussed above. It seeks to integrate responsiveness to both the interests of the present claimants and the systemic constraints of constitutional structure. Its non-deontological conception of rights, which to some extent it shares with the second approach, is nevertheless integrated within a categorical and formal structure of analysis. This integrative animus is the source of its perceived responsiveness. It structures the constitutional space – both vertically and horizontally – just enough to secure indiscriminate access by citizens while also keeping that space open to contestation and revision.[80] Its construction of the judicial standpoint is relational: the space between the judge and the different audiences to which the judge owes a duty of responsiveness shapes the method of reasoning.

Proportionality is the constitutional method that epitomizes the integrative spirit of this constitutional style. Like all other styles, it is a culture of argument – a *particular* culture of argument. As Mattias Kumm has shown, proportionality marks the shift from interpretation to justification. He writes, "the proportionality test merely provides a structure for the demonstrable justification of an act in terms of reasons that are

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empathetic, to adopt the perspective of the other, to enter into the experience of the courtroom unprotected by their special status. Judge as witness can thus be understood as a profound challenge to a stable hierarchy, as a subversive act to be applauded.")

[79] Advocates of this conception are empowered by their awareness of the spatiality of law. See Richard Hogg, Law's Other Spaces, Law/Text/Culture 6: 20-38 (2002) ("To begin to explore the spatiality of law is our path to subverting its imperial claims to objectivity, generality and sovereignty and to recognize the subsistence of other legal orders and other legal possibilities."), at 39.

[80] Writing about proportionality in Heller, Justice Breyer: "[a]pplication of such an approach, of course, requires judgment, but the very nature of the approach – requiring careful identification of the relevant interests and evaluating the law's effect upon them – limits the judge's choices." 128 S. Ct at 2868 (Breyer, J., dissenting).

appropriate in a liberal democracy. Or to put it another way: it provides a structure for the justification of an act in terms of public reason."[81] Because its integrative animus explains in part the worldwide success of proportionality as a method that can enhance the responsiveness of constitutional systems, identifying the presuppositions that underlie the practice of proportionality will help us understand better that modern democracies need from their constitutional systems.[82] That is the scope of the next two sections. The present section introduces the method and points to how the two polls is seeks to integrate exert centrifugal pressures on the structure and application of the proportionality test. Because the tensions that these pressures create are unresolved, we must seek the normative appeal of proportionality in its promise of responsiveness.

Proportionality analysis it typically described as consisting of four steps: one preliminary step, where courts ask about the purpose of challenged regulation, and three "proper" steps: suitability, necessity, and balancing (where courts weigh the gain from satisfaction of the goal against the loss that results from the intrusion on the constitutional right). Limitations on rights that fail any one of these steps are invalidated as violations of constitutional rights. Measures that survive scrutiny are justified infringements of constitutional rights and valid laws.

Unlike balancing, proportionality is greatly concerned with administrability: its different structures the analysis of courts, thus enhancing the overall legal certainty of the judicial process.[83] One aspect of its administrability is the distinctiveness of its steps. Concerned with approaches that blur the line between the "necessity" stage and the balancing stages of the test, Dieter Grimm has argued that "a confusion of the steps

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[81] Mattias Kumm, The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review, Law and Ethics of Human Rights vol. 4(2): 141-157 (2010), at 150.

[82] I do not meant to ignore the importance of culture and history. They have a shaping role in how responsiveness is conceptualized in different constitutional systems.

[83] Many legal systems expressly recognize the value of legal certainty. For instance, the European Court of Human Rights held that "a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." Sunday Times v. UK, 2 E.H.R.R. 245 (1979), para. 49. The value of legal certainty has implications for the choice, structure and application of methods of constitutional interpretation. To the extend a method seeks to integrate both at certainty without sacrificing "fact sensitivity" (see Philip Sales and Ben Hooper, Proportionality and the Form of Law, 119 Law Quarterly Review vol. 119 (2003), at 428), that method must structure judicial inquiry without stifling it. It must avoid over-structuring the analysis at the risk of becoming too rigid. For instance, the South African Constitutional Court rejected "mechanical adherence to a sequential check-list," S. Manamela, 2000 (3) SA 1 (CC), at 20 (cited in Stephen Gardbaum, Limiting Rights, at 841.

creates the danger that elements enter the operation in an uncontrolled manner and render the result more arbitrary and less predictable."[84] Arbitrariness and unpredictability are attributes of how balancing is described by its critics. The formalization of the different steps reflects the integration of responsiveness to the larger constitutional structure, such as institutional considerations about the separation of powers. Indeed, in practice, judges oftentimes defer to the legislature in the first stages of proportionality analysis on separation of powers grounds. Yet, as we will see, this creates a tension. If laws are rarely invalidated before the last step, then most of the heavy-lifting will be deferred to the last stage of balancing, which will lead to the blurring of the line between proportionality and balancing.

Consider how these issues play out at the preliminary stage, where courts examine the purpose of the measure whose constitutionality is being challenged. Demanding that legislators provide these reasons – specifically at the request and for the review of courts – marks an important, courts-driven change in the nature of the legislative prerogative.[85] According to this change, it is insufficient that elected representatives have voted a particular policy into law; legislative reasons must be laid bare before courts.[86] This interpretation of the legislative prerogative is normatively continuous with the culture of argument, which we have seen as common to all the constitutional styles analyzed. Much like in the first constitutional approach that we discussed, the underlying idea is that there are some purposes that the government may not legitimately pursue.[87] At least in theory, this requirement can be quite demanding; for instance, judges may inquire whether the stated purpose is the real purpose and not an ex post facto rationalization.[88] Or they may request that the purpose be specified at a certain level of generality.

However, in practice, legislation is rarely invalidated at this stage. The reason for this is that judges defer to the legislature on the ground of separation of powers; the democratically elected branch has the right to set its policy agenda.[89] And so begins the

[84] Dieter Grimm, Proportionality in Germany and Canada, at 397.
[85] Cite Rehnquist, Stevens on rationality review in equal protection.
[86] But see Jeremy Waldron, Representative Lawmaking, 89 BU Law Review 335 (2009).
[87] Kumm, supra note ___(Constitutional Rights).
[88] United States v. Virginia, 518 U.S. 515 (1996)
[89] See Grimm, Proportionality, at 388. Canadian courts initially tried to impose a higher threshold on the government by asking that the governmental objective be of "pressing and substantial" (Barak, Proportional Effect, Toronto L. Rev., 371) concern or "sufficiently important to justify overriding a Charter

downwards slide towards the later stages of proportionality. This is not to say that this preliminary step is meaningless. We have seen how it endorses a view of the legislative prerogative that supports a public culture of argument. Even in practice, the purpose of the legislation that is articulated at this stage channels the arguments available to the state at the later stages of analysis so that invalidation of legislation at later steps of proportionality analysis might in effect be determined at this early stage. But the judicial leniency is nevertheless troublesome from the perspective of proportionality, specifically because it runs the risk of diluting the institutional framework that sets proportionality apart from balancing. Unsurprisingly, advocates of proportionality have called for a more incisive analysis of the purpose of legislation.[90]

The same sliding scale is noticeable at the suitability and necessity stages of proportionality analysis, where courts remain deferential to the legislator. But the more deferential courts are to the previous stages of proportionality analysis, the more the substance of their review is pushed back to the balancing stage, making it appear as if the differences between the two methods of constitutional analysis have been diminished. But this isn't all. The back-loading of proportionality analysis puts heightened pressure on the balancing stage. The more stages of proportionality analysis a regulation survives, the stronger the government's claim becomes. The next sections will argue that this aspect of the method enhances its responsiveness. But at the same time, the stronger that claim becomes, the more important it is that decision-makers treat it in a principled manner at the later stages of analysis because the stakes have escalated.

At the balancing stage, courts proceed in the manner described in the second conception identified below. They break the institutional shell that encases the right and engaging in a comparative weighing of the seriousness of the infringement of the right

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[constitutionally protected] right" See Barak, Proportional Effect, at 371 (quoting PETER HOGG, CONSTITUTIONAL LAW OF CANADA, student ed. (2005) at 823. Over time however, as the other steps in the analysis have become more substantial, even Canadian courts have begun to defer more and more to the legislature. See generally Sujit Choudhry, So What Is the Real Legacy of Oakes?).

[90] President Barak has expressed doubts about the wisdom of deferring to the legislator. See Aharon Barak, Proportional Effect, at 371 ("Despite the centrality of the object component, no statute in Israel has been annulled merely because of the lack of a proper object [or purpose]. A similar approach exists in German constitutional law … This is regrettable. The object component should be given an independent and central role in examining constitutionality, without linking it solely with the means for realizing it. Indeed, not every object is proper from the constitutional perspective. This is not the expression of a lack of confidence in the legislature; rather it is the expression of the status of human rights.") (footnotes omitted).

against the degree of satisfaction to the interests protected by the law under review. Much of the proportionality scholarship has focused on this stage of the analysis. Critics have called the analysis unprincipled on the ground that, just like the second approach, it gives in to particularizes interests. Its defenders have attempted to show that the analysis not one of "free-style" moving in and out of form: both the overall, multi-step institutional framework as well as specific guarantee at the last step show that proportionality integrates sufficient formal elements from the first constitutional approach analyzed above.

Let us consider only one example. The distinction between core and periphery is a staple of proportionality analysis around the world. This idea is that tradeoffs in the balancing process should only be allowed at the periphery of rights. As former President of the Israeli Supreme Court Aharon Barak put it, judges "must aim to preserve the "core" of each … libert[y] so that any damage will only affect the shell."[91] The most sophisticated theoretical account of balancing – namely, Robert Alexy's law of balancing, which asserts that "[t]he greater the degree of non-satisfaction of, or detriment to, one right or principle, the greater must be the importance of satisfying the other"[92] – also relies on a version of this distinction.

The gradation of standards matching the hierarchy of protected interests is a reflection of the importance of legal form. Since judges are not at liberty to sacrifice the core of the constitutional right, it follows that the method can – and must – be applied in a principled manner.[93] Hence, the moving in and out of institutional form is not "freewheeling." For instance, once an interest has been identified at the core of a right – for instance, the interest in self-defense at the core of the Second Amendment right – infringements of that interest will be more difficult, perhaps *much* more difficult, to justify since they would impact on the core of the right. Indeed, the harder the justification becomes, the more categorical the protection that the core of the right

[91] See Shavit v. The Chevra Kadisha of Rishon Le Zion, C.A. 6024/97 (1999) (Supreme Court of Israel), at § 9.
[92] See Robert Alexy, Theory of Constitutional Rights, at 102.
[93] The assumption, as Dieter Grimm put it, is that: "It is rarely the case that a legal measure affects a fundamental right altogether. Usually, only a certain aspect of a right is affected… The same is true for the good in whose interest the right is restricted. Rarely is one measure apt to give full protection to a certain good." Dieter Grimm, Proportionality, at 396.

receives. The first style is thus present not only in the formalism of the last step of proportionality analysis; in effect, proportionality analysis itself becomes categorical.

By contrast to the deontological conception of rights, this conception authorizes judges to break the shell encasing the right in order to gain access to the background interests.[94] But that exercise can easily turn constitutional analysis into a Russian doll game where smaller deontological shells are found within larger ones. That is the impulse behind the core/periphery distinction. However, there are a number of difficulties with this distinction. In addition to the fact that not all rights have cores – think of disability rights[95] - there are also many situations where identifying the core of a right is almost impossible. [96] Furthermore, in addition to disagreement regarding the methodology by which to identify the core of rights, which has led some constitutional courts to move away from this methodology[97], critics have argued powerfully that it is almost impossible to identify the core of a right without reference to competing public interests.[98]

All these tensions in the application of proportionality indicate that we should perhaps look elsewhere for the explanation of its success. The next sections look at the

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[94] Constitutional rights and state interests seem to be on the same plane because, the moment constitutional rights enter the decisional calculus, they have already become "interests." See generally Richard Fallon, Individual Rights and the Powers of Government, 27 Ga. L. Rev. 343 (1993).

[95] Samuel Bagenstos, Subordination, Stigma, and "Disability", 86 VA. L. REV. 397, 406 (2000) (arguing that disability rights do not have a "core"). There as many ways of defining the "core" of disability as there are disabilities. For a discussion in the context of social and economic rights, see Katharine G. Young, The Minimum Core of Economic and Social Rights: A Concept in Search of Content, 33 Yale J. Int'l L. 113 (2008).

[96] Take freedom of religion. If judges may break the institutional shell of a right, then they may look for the "core" of the free exercise right in the beating heart of the belief and practice of a religious experience, but this is a notoriously sticky enterprise. "It is no more appropriate for judges to determine the 'centrality' of religious beliefs before applying a 'compelling interest' test in the free exercise field, than it would be for them to determine the 'importance' of ideas before applying the 'compelling interest' test in the free speech field." Employment Division, Dep't of Human Resources v. Smith, 485 U.S. 660 (1988). See also Shavit v. The Chevra Kadisha of Rishon Le Zion, C.A. 6024/97 (1999) (Supreme Court of Israel) (Judge Englard) (deciding whether Jewish burial societies, which customarily administered cemeteries throughout the country, had the right to prevent family members from inscribing on the deceased's tombstone her birth and death dates according to the standard Gregorian calendar (as well as the Hebrew calendar).

[97] See S. v. Makwanyane, (1995) (3) SALR 391 (CC), para. 132 (The difficulty of interpretation arises from the uncertainty as to what the 'essential content' of a right is, and how it is to be determined. Should this be determined subjectively from the point of view of the individual affected by the invasion of the right, or objectively, from the point of view of the nature of the right and its place in the constitutional order, or possibly in some other way?"). Note changes in the limitation of rights provision of the 1996 South African constitution.

[98] For these reasons, the distinction between core and periphery raises more questions than it solves. See also, Julian Rivers, Proportionality and Variable Intensity of Review, Cambridge Law Journal vol. 65 (1): 174-207 ("The problem with the 'very essence' of a right is that it is almost impossible to define it usefully without reference to competing public interests."), at 187.

construction of the judicial standpoint and particularly at the role of the two faculties of constitutional judgment (freedom and imagination).

§4. Situated Impartiality: Freedom and Imagination

Let us start with the demand that judgment must be impartial. Impartiality reflects the decisionmakers' distance from the claimants' private interests: the judge speaks from the perspective of the citizenry and its laws.[99] Yet, not every judgment that is sheltered from pressure and independent from private interest is impartial. Impartiality requires something more: it requires a free mind. No judgment can be impartial if it is "locked," as Kant put it, in the "private subjective conditions" of one's judgment.[100] Only the enlightened mind – that is, the mind freed of prejudice and bias [101]- can judge impartially.

This is true of all forms of judgment but especially true of legal judgments. Judicial bias and prejudice are distortion mechanisms that erode a legal system's capacity for responsiveness to the demands of those under its jurisdiction. Consider the equal protection challenge to the statutory provision that US citizenship could pass automatically from mothers who are citizens to their children born out of wedlock abroad, but set conditions for the transmission of citizenship if only the father of such a child was a US citizen.[102] In a judgment shot through with gender stereotypes and prejudice,[103] the Supreme Court upheld the statute. The effect of these biasing factors, understood as "special mental tendencies, particular types of inexperience or constrained

[99] Judicial decisions, like all acts of state authority, are coercive acts. And "any coercive act in a liberal democracy has to be conceivable as a *collective judgment of reason* about what justice and good policy require." See Mattias Kumm, The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review, Law and Ethics of Human Rights vol. 4(2): 141-157 (2010), at 157.
[100] Kant, Critique of Judgment, at 160).
[101] Arendt, lectures on Kant at 43 ("Enlightenment is, first of all, liberation from prejudice.")

[102] Nguyen v. I.N.S., 533 U.S. 53 (2001) (holding that the equal protection guarantee extended by the Fifth Amendment did not reach to invalidate a statute making a claim of citizenship more difficult for a child born abroad, out of wedlock, when only their father was a United States' citizen).

[103] See Suzanne B. Goldberg, Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication, 106 Colum. L. Rev. 8, 1955 at 1975-76 (2006) (arguing that the judicial reliance on "facts" in Nguyen represents the inappropriate impact of biasing factors in perhaps its most insidious form); See also Laura Weinrib, Protecting Sex: Sexual Disincentives and Sex-Based Discrimination in Nguyen v. I.N.S., 12 Colum. J. Gender & L. 222 at 230 (2003) (pointing to Nguyen as an example of judicial stereotyping in the context of parenting).

features of reasoning,"[104] was the denial of the claimant's status of free and equal members of the political community. This showed the court's unresponsiveness to its claimants.

Distortion mechanisms, such as the existence of biasing factors, are not anomalies of constitutional judgment; oftentimes, they are a part of its permanent features.[105] Bias and prejudice are reminders that judges – like their communities – come to the constitutional democratic ideal by a trajectory marked by injustice and indifference that shapes the laws in ways often unseen. The legitimacy of a constitutional system – its "respect-worthiness"[106] – is not an assessment about the existence of such distortion mechanisms, but rather a conclusion about how effectively that constitutional system has developed mechanisms for de-programming distortions from its doctrines and discourse. The process of de-programming is especially important when these distortion results from the ossification into constitutional doctrine of impermissible power asymmetries, such as gender asymmetries in the case mentioned above. The challenge thus becomes how to build into the judicial standpoint mechanisms for self-correction that guarantee impartiality and enhance responsiveness. A closer look the construction of the judicial standpoint helps us to begin answering this question.

The key insight is that bias and prejudice are limitations of knowledge and understanding. The only way to overcome these limitations is to "enlarge the mind"[107], and one reliable way of enlarging the mind is to send it canvassing the space in search for the stories, experiences and perspectives of the people we have not become. That traveling mind will discover what the world looks like from other standpoints.

Because we cannot visit other people's standpoints in reality, we must do it in thought. Imagination plays a crucial role. In Arendt's words, one must "train one's imagination to go visiting."[108] When one "tries to imagine what it would be like to be somewhere else in thought," one becomes "liberated from one's own private interests"

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[104] Amartya Sen, Positional Objectivity, Philosophy and Public Affairs, 22(2) at 137 (1993)
[105] See Perju, Cosmopolitanism and Constitutional Self-Government
[106] Frank Michelman, IDA's Way: Constructing the Respectworthy Governmental System, 72 Fordham L. Rev. 345
[107] Kant, see supra.
[108] Arendt, Lectures on Kant, at 43. Nussbaum refers to this as "narrative imagination", in Martha Nussbaum, Cultivating Humanity.

and "one's judgment is no longer subjective."[109] Seeing the world from other people's standpoints unveils dimensions of one's own identity that routine and thoughtlessness would otherwise have continued to conceal. Only the person that has learned to travel places and has discovered the vastness of social space can be trusted to be free. Arendt again:

"Only imagination is capable of what we know as 'putting things in their proper distance' and which actually means that we should be strong enough to remove those which are too close until we can see and understand them without bias and prejudice, strong enough to bridge the abysses of remoteness until we can see and understand those that are too far away as though they were our own affairs. This removing some things and bridging the abysses to others is part of the interminable dialogue for whose purpose direct experience establishes too immediate and too close a contact and mere knowledge erects an artificial barrier."[110]

To the question, how can a judge sufficiently distance herself from a controversy to gain the perspective on which impartiality depends but not too much so as to become disconnected and aloof, we are now in a position to answer that a properly responsive constitutional system places judges on a standpoint from which they can bridge the abysses of remoteness that separate them from claimants or non-claimants. The device is representation.

Representation – of other people and their views about the values that ought to shape the space between them and others (as people or institutions) – as an essential faculty involved in judgment creates the space on whose existence impartial judgment depends. As one scholar put it, "representation is principally oriented toward creating distance. It detaches me from the immediacy of the present where there is no space in which to stop and think. Representation is a limited withdrawal that makes the present less urgent and the familiar strange but stops sort of disengaging me to the point that I no longer care to wonder what a situation means."[111] At the end, representation creates proximity for that which is afar. In this way, it defines the "ambiguous connection"

[109] Arendt, Lectures on Kant,105-106.
[110] Arendt, On the nature of totalitarianism: An Essay in Understanding (quoted in Lisa Disch, Hannah Arendt and the Limits of Philosophy, at157)
[111] Disch Hannah Arendt and the Limits of Philosophy, at 158 :

between the judge and her institutional role, the claimants, present and future, and the society at large.

I adamantly do not meant to imply that representation in judicial reasoning should either replace or compensate political representation.[112] In fact, scholars such as Kumm have argued that the right to justification is a constitutional archetype, alongside the right to elections.[113] As long as there are situations when judicial review is legitimate, the faculties of constitutional judgment will apply.

Let us now return to the three constitutional approaches presented above. These approaches give different answers to the dilemmas of constitutional space. They all rely on the faculties identified above: the enlargement of the mind, the role of the imagination, and the importance of representation. The mutability of institutional roles, whereby social actors must imagine themselves occupying different stations in society, is present in all the styles, albeit differently. In one way or another, they all conceive as constitutional judgment as legitimate if it is the outcome that the parties themselves would have reached if they had occupied the role of the decisionmaker. Yet, there are many ways of conceiving that role. The faculty of the imagination is essential, but what the mind imagines is no less important. Said another way, expanding the mind is indispensable; but the direction of the expansion is no negligible detail. That is where the three styles differ.

Consider Kant's approach: "However small the range and degree to which a man's natural endowments extend", he wrote, "still indicates a man of enlarged mind: if he detaches himself from the subjective personal conditions of his judgment, which cramp the minds of so many others, and reflects upon his own judgment from a universal standpoint (which he can only determine by shifting his ground to the standpoint of others)."[114] From the perspective of transcendental idealism, representative thinking requires abstracting from one's own contingent situation to think in the place of 'any

[112] The disreputable history of this idea is told in Martti Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World' (2003) 35 New York University Journal of International Law and Politics 471.
[113] See Mattias Kumm, The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review, Law and Ethics of Human Rights vol. 4(2): 141-157 (2010), at 170-171. See also at165 ('proportionality based judicial review is not only compatible with liberal democracy, but that it institutionalizes a right to justification that should be regarded as basic to an institutional commitment of liberal-constitutionalism as electoral accountability based on an equal right to vote.")
[114] Kant, The critique of Judgment, at 153

other man'." This describes one of the central components of the first constitutional approach discussed above.

Furthermore, the parties represented will recognize the legitimacy of the decision by which they are required to abide, as they themselves must represent the decisionmaker.[115] Claimants must imagine themselves in the judges' standpoint. Because that position places the claimants behind a veil of ignorance where awareness of the interests that brought them before courts is bracketed away, this constitutional style imposes great demands on the parties and their representatives.[116] The judge must look upon the facts through the lens of the constitutional system, filtering out every element of the context whose relevance law does not recognize. The objectivity and impartiality of the judicial standpoint are a function of the judge's capacity to transcend the standpoints of the claimants. We thus see how this approach constructs constitutional responsiveness so as to require that the judge's mind never becomes unmoored. However, this is a one-way expansion of the imagination, and a peculiar one at that, to the extent it requires the individual's mind to travel to a place from which no further traveling is allowed. By focusing its entire capacity for responsiveness on the systemic need for future claimants, and order, this approach has no resources left to channel in the direction of the claimants themselves. In the view of the critics, this distancing of the decisionmaker from the claimants, and the demand that the claimants take the standpoint of the decisionmaker, is the recipe for estrangement from one's fellow citizens and detachment from one's political world.

The second style errs in the opposite direction: it fully dwells on the particulars of other people's existence. It uses empathy to represents the other by taking that person's standpoint to the point of losing oneself.[117] This space is relative; from each standpoint,

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[115] Exactly what they represent are the constraints of the institutional position. For a discussion of Kant's view, see Jeremy Waldron's Kant's Legal Positivism, 109 Harv L Rev 1535

[116] See Koskeniemmi, The Gentle Civilizer of Nations, at 501 ("formalism seeks to persuade the protagonists (lawyers, decisionmakers) to take a momentary distance from their preferences and to enter a terrain where these preferences should be justified, instead of taken for granted, by reference to standards that are independent from their particular positions or interests.)

[117] Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges, 61 S. Cal. L. Rev. 1877, 1935 (1988) ("Rather than bemoan ... a switch in roles, feminism teaches us to celebrate such rearrangements, to require judges to let others judge them. Such moments might better enable judges to be empathetic, to adopt the perspective of the other, to enter into the experience of the courtroom unprotected

the landscape looks different. When distance shrinks, there remains no standpoint to enable critical reflection. The self that loses itself in another cannot be said to remain situated anywhere: it is always at the mercy of its object of attention. Its object assimilates it. As one commentator describes Arendt's criticism of empathy, her central objection is that "empathy is assimilationist. She takes it as a literal attempt to 'be or to feel like somebody else,' while visiting is hypothetically to think and to feel as myself in a different position."[118] But because the self lacks the distance for critical judgment, the mutability of institutional in this view roles becomes "an exchange of (others') prejudices for the prejudices proper to my own station."[119]

Arendt carves out space differently.[120] As she describes it: "I form an opinion by considering a given issue from different viewpoints, by making present in my mind the standpoints of those who are absent: I represent them. This process of representation does not blindly adopt the actual views of those who stand somewhere else, and hence look upon the world from a different perspective: this is a question neither of empathy ... nor of counting noses and joining a majority but of being and thinking in my own identity where actually I am not. The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, then stronger will be my capacity for representative thinking and valid my final conclusions, my opinions."[121]

This is a "middle ground between cognitive truth claims and mere subjective preferences."[122] Under this conception, "impartiality is obtained by taking the standpoints of others into account: impartiality is not the result of some higher standpoint that would then settle the dispute by being above the melee."[123] In this relational constitutional space, moving back and forth enlarges the standpoint by integrating different perspectives. This integrative account borrows from Kant the need for critical reflection, which requires that

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by their special status. Judge as witness can thus be understood as a profound challenge to a stable hierarchy, as a subversive act to be applauded.")

[118] Disch at 168

[119] Disch, 162

[120] On Arendt's interpretation of Kant, see Disch at 155

[121] Arendt, Lectures on Kant, Interpretative essay, at 107.

[122] Nedelsky cited in Salyzyn, The Role of Agency in Arendt's Theory of Judgment: A Principled Approach to Diversity on the Bench, 3 J. L. & Equal. 165 (2004) at 174

[123] Arendt, Lectures on Kant, at 42.

one must always retain some distance from others, and from the second approach, the importance of the particulars, which does not fade away at the critical moment when the decision must be made.[124] The "general standpoint" is one of "situated impartiality," understood as "a critical decision that is not justified with reference to an abstract standard of right but by visiting a plurality of diverging public standpoints."[125] In a method like proportionality, this plurality is not free-floating but integrated within an administrable multi-step institutional framework. This structure is superimposed on the demand that judges justify their decisions, a constraint on biasing factors that is common to all cultures of argument. Deliberation and reflection are central to the institutional role of the judiciary and offset the all too human impulse to decide based on intuition.[126] The operative word here is "decide." It may well be that sometimes judges incline to decide a given case based on intuition, but the role of structured reflection is to override the pull of intuition.[127] The features of proportionality act as cognitive constraints, or as a "mental double-check"[128] on judges.

Sen's work of a conception of objectivity that embraces parametric dependence helps to grasp the idea of "situated impartiality"[129] of the judicial standpoint. Sen argues that observations as well as beliefs and actions are inescapably position-dependent; that is, they are influenced (not to say determined) by the position of the belief-holder and the

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[124] Amy Salyzyn, The Role of Agency in Arendt's Theory of Judgment: A Principled Approach to Diversity on the Bench, 3 J. L. & Equal. 165 (2004) --- at 169 ("while she seeks to appropriate many of the core concepts of Kant's theory, she rejects his transcendental universalism and moves away from his formalism to situate judgments in real, particular communities.")

[125] Disch (162)

[126] Some authors have raised the question whether the training judges receive to "think like a lawyer" does not set their cognitive instincts apart. See Frederick Schauer, Is There a Psychology of Judging? in DAVID E. KLEIN & GREGORY MITCHELL (EDS.), THE PSYCHOLOGY OF JUDICIAL DECISION MAKING (forthcoming 2008)

[127] Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, Blinking on the Bench: How Judges Decide Cases, 93 CORNELL L. REV. 1, 3 (2007). Id at 5 ("Eliminating all intuition from judicial decision making is both impossible and undesirable because it is an essential part of how the human brain functions. Intuition is dangerous not because people rely on it but because they rely on it when it is inappropriate to do so. We propose that, whenever feasible, judges should use deliberation to check their intuition.") (footnote omitted).

[128] Dan H. Kahan, David A. Hoffman & Donald Braman, Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. (2009), at 57.

[129] Amartya Sen, Positional Objectivity, Philosophy and Public Affairs, Vol. 22 (2) 126-145 (1993). The article was reprinted, and expanded, in AMARTYA SEN, RATIONALITY AND FREEDOM (2003). The text was originally delivered as the Storrs Lectures on "Objectivity" at Yale Law School (September 1990).

action-taker.[130] While objectivity does not require positional invariance, Sen argues that it does rely on interpersonal invariance. Observations and beliefs are objective if any subject could reproduce them when placed in a position similar to that of the initial observer. If I make a statement that "country music is elating," objectivity does not require that everyone be convinced this is correct, but rather that anyone would be so convinced if placed in a position similar to mine (same cultural upbringing, interests, life experiences etc.) Thus, the mind needs to expand itself to imagine what it is like to think about the world from another's perspective. Once it has occupied that standpoint, it need not like what it sees. But regardless of that, it will become enlarged after having integrated another perspective on the world. That mind is freer than before.

We see now the process by which broadening the space deepens the freedom of the mind. "The more people's standpoints I have present in my mind while I am pondering a given issue, and the better I can imagine how I would feel and think if I were in their place, the stronger will be my capacity for representative thinking and the more valid my final conclusion, my opinions" (BFP, 241; Disch 153). We find here the seed of the cosmopolitan vocation of the faculties of judgment. The longer the distances that one can travel, the freer her expanded mind becomes.[131] "Critical thinking, while still solitary, does not cut itself off from 'all others.' To be sure, it still goes on in isolation, but by the force of imagination it makes the others present and thus moves in a space that is potentially public, open to all sides: in other words, it adopts the position of Kant's *world* citizen."[132]

Consider in this context the issue of the authority of foreign law in constitutional interpretation. In a different paper, I argued that that authority is grounded in the liberal constitutional commitment to freedom and equality.[133] Openness to the experiments in self-government of other political communities enhances the responsiveness of domestic courts to the claims brought by its own citizens. We now see how it does so by freeing the mind of the judge, and why reference to foreign law has authority even when the

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[130] Sen, Positional Objectivity, at 128-129.

[131] As one scholar put it, "the more angles of vision we are capable of taking into account in our judgment, the more we can free ourselves of the limitations of our private conditions." Nedelsky at 111, cited in Salynzyn, at 175).

[132] At 43.

[133] Perju, Cosmopolitanism and Constitutional Self-Government.

parties do not demand it.[134] Their judicial impartiality becomes better situated after they consider how foreign peers addressed similar issues.[135] Because its role is to enlarge, not abandon, the judicial standpoint, the persuasive authority of foreign law can go in the direction of lack of persuasion. As scholars have noted, there are many situations in legal practice where foreign law is the "anti-model."[136]

§5. Respect as Responsiveness

The fact of (reasonable) pluralism challenges the basic terms of the interaction between citizens and their institutions. How can the free institutions of a constitutional democracy retain an appropriately high degree of responsiveness to the claims of a citizenry that holds deep, reasonable yet incompatible comprehensive doctrines of the good? Through what mechanisms can these institutions interpret and process claims originating in diverging life plans in ways that respect and reinforce the free and equal status of each claimant?

These are important questions, though many distinguished jurists have denied that they are *legal* questions. Be that as it may, I want to identify one connection between the social pluralism of the kind mentioned above with salient features of the law – specifically, with the nature of legal validity – all by reference to the duty of responsiveness. Assuming the existence and legitimacy of judicial review, I argue that respect to claimants is a form of responsiveness in constitutional democracies. This dimension of responsiveness explains why advocates of proportionality have made so much of the fact that this method "solves conflict between fundamentally antagonistic moral values in a way that shows equal concern and respect for everyone involved".[137]

There is a discontinuity in the structure of constitutional decision making between the strength of a constitutional claim (*ex ante* perspective) and the effects of binary

[134] A similar account can be given about judges citing foreign law.
[135] "Judges have formed a kind of community of judging... They do routinely...consider how their colleagues would see a problem, how they would judge it. They take this into account, engage in real or imagined arguments before arriving at their own judgment... (they test their judgments) against the judgments of their colleagues" --- (Nedelsky at 114, cited in Salynzyn, at 175).
[136] See Kim Lane Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models, 1 INT'L J. CONST. L. 296 (2003).
[137] David Beatty, Ultimate Rule of Law, at 169.

statements of legal validity (ex post perspective). *Ex ante*, the legal arguments of litigants, at least in hard cases, are perceived to be of comparable strength. That is why predicting which argument is going to win is difficult or indeed outright impossible. *Ex post*, however, legal judgments have a binary nature (valid/invalid). This has nothing to do with the existence of "right answers." Even patently wrong answers have binary effects (*President* Gore, anyone?). *Ex post*, as Habermas put it, "norms of action appear with a binary validity claim and are either valid or invalid; we can respond to normative sentences, as we can to assertoric sentences, only by taking a yes or no position or by withholding judgment."[138]

This binary nature creates a gap between that *ex ante* perception of comparable strength and the *ex post* effects of the judicial judgment.[139] Despite the comparable strength *ex ante,* judgments of validity have zero-sum effects for the citizen stakeholders.[140] Law's binary effects are harsh: laws are either upheld or invalidated; interests are either protected or exposed to trespass.[141] Contemporary constitutional theory has not seriously challenged the analytics of legal validity, but it has nevertheless attempted to devise strategies to mitigate the *ex ante*/*ex post* gap.

One strategy has been to experiment with remedies, under the assumption that the binary nature of judgments of validity must reflect insufficiently nuanced remedies.[142] This is an important, and quite successful, strategy. But it has posed an insuperable institutional difficulty: on the one hand, courts need additional means (from information-gathering tools to follow-up systems) to perform remedial tasks appropriately, while on the other hand, giving courts the tools they need for such a project empowers them to overstep the boundaries of their institutional roles. The effect has been, at least in the new governance literature, an ambivalence towards law altogether.

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[138] Jürgen Habermas, Between Facts and Norms 255 (1996).
[139] Of course there are countless cases in a legal system where there is no ex ante/ ex post gap.
[140] The Supreme Court delivers final statements of legal validity. Justice Jackson: "We are not final because we are infallible, but we are infallible only because we are final", Brown v. Allen 344 US 443, 540 (1953) (Jackson J., concurring). See Larry Alexander and Frederick Schauer, On Extrajudicial Constitutional Interpretation,110 Harv. L. Rev. 1359 (1997).
[141] See also Ronald Dworkin, A Matter of Principle 119-120 (1985).
[142] See Charles F. Sabel and William H. Simon, Destabilization Rights, 17 Harv. L. Rev. 1015 (2004); Richard H. Fallon, Justiciability and Remedies--And Their Connections to Substantive Rights, 92 VA. L. REV. 633 (2006); Daryl Levinson, Rights Essentialism and Remedial Equilibration, 99 COLUM. L. REV. 857 (1999).

Another strategy of mitigating the *ex post*/*ex ante* gap has been to emphasize judicial candor and transparency. The assumption underlying this strategy has been that, since the binary effect of legal validity cannot be challenged, at least judges should be candid about the process by which they arrive at such judgments.[143] At least in theory, there is a difference between transparency and argument. Argument is a stylized version of reasoning. Transparency requires pulling up the curtain and exposing the process. Civil law systems have long opposed the idea of judges entering separate – both concurring and dissenting – opinions on the ground that the civil law tradition is not one of transparency.[144] Common law cultures, including common law "constitutionalism," know that reality is more nuanced. In his argument against judicial review, Jeremy Waldron has made the point that legal argument – at least at appellate levels of jurisdiction – is stylized and removed from the real controversy that raised the question.[145]

But suppose that transparency reveals ideal judicial deliberations, and that the point of candor about those deliberation is the same as that of justifying the judicial decision, namely to (re)negotiate, through access to the court's reasoning, the relationship of power between the court and its addressees. [146] Charles Tilly, who studied reason-giving from a sociological perspective, concluded that "the ability to give reasons without challenge usually accompanies a position of power. In extreme cases such as high public offices and organized professions, authoritative reason giving comes with the territory. Whatever else happens in the giving of reasons, givers and receivers are negotiating definitions of their equality or inequality."[147] Transparency is an important dimension of the requirement of *publicity*.[148]

For instance, one argument in favor of "interpretative balancing" over "definitional balancing" is that the former is more transparent. The deontological model

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[143] See generally David L. Shapiro, In Defense of Judicial Candor, 100 HARV. L. REV. 731 (1987); Scott Altman, Beyond Candor, 89 MICH. L. REV. 296 (1990); Scott C. Idleman, A Prudential Theory of Judicial Candor, 73 TEX. L. REV. 1307 (1995); Micah Schwartzman, The Principle of Judicial Sincerity, 94 VA. L. REV. (2008); Nicholas S. Zeppos, Judicial Candor and Statutory Interpretation, 78 GEO. L.J. 353 (1989).

[144] See Vlad Perju, Reason and Authority in the European Court of Justice, Virginia J. Int'l Law 49 (2): 307 (2009).

[145] Jeremy Waldron, The core of the case against judicial review, 115 Yale L. J. 1346 (2006)

[146] See Charles Tilly, Why?, 20-21 (2006) (arguing that reasons confirm, establish, negotiate and repair relationships between giver and receiver).

[147] Charles Tilly, Why?, at 24-25 (footnotes omitted).

[148] On publicity, see Disch, at 211.

of rights tends to front-load the interpretation of rights toward the definition, as opposed to limitation, stage of analysis. Rather than interpreting rights broadly and then focusing the interpretation on whether the infringement is justified, the central question in this model is whether there is a right in the first place. Take as an example, the question of whether constitutional liberty protects the interests of terminally ill patients to access experimental drugs.[149] In this view, the question turns in the first place on the definition of constitutional liberty (or privacy), rather than relying on a broad interpretation of the right followed up with a further question as to whether the government's interest prevails over the rightholder's. Yet "definitional balancing" is performed in the dark, thus opening judges to the critique that they silently assume the standpoint of the party it wants to see prevail. From this perspective, "interpretational" balancing makes the legal reasoning more public. The effect is important, just as the effect of transparency and reason-giving is important. By itself, however, it is insufficient to close the *ex ante*/*ex post* gap. There is a violence to law that cannot be hidden. The binary effects of judgments of validity mirror that form of violence. All the styles that we have studied rely on cultures of argument, but by itself, that culture cannot mitigate the harshness of *ex ante*/*ex post* gap

A third strategy has been to emphasize the larger social audience of rights-adjudication. Once the framework of legal analysis expands to include a wider audience,[150] a court's authoritative validity pronouncement is no longer just the expression of a single interaction, but rather part of an ongoing interaction between the rightholder and social institutions over time.[151] As Minow writes: "A claimant asserts a right and thereby secures the attention of the community through the procedures the community has designated for hearing such claims. The legal authority responds, and though this response is temporary and of limited scope, it provides the occasion for the

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[149] Abigail Alliance for Better Access to Experimental Drugs v. Eschenbach, 495 F.3d 695 (D.C. Cir. 2007), cert. denied mem., 128 S.Ct. 1069 (2008).

[150] See Martha Minow, Essay on Rights: Essay for Robert Cover, 96 YALE L. J. 1860 (1987). at 1867. The relation between law and the social and political background against which law exists is dialectical. See Laurence Tribe, The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics, 103 HARV. L. REV. 1, 25 (1989) (describing the post-Newtonian legal paradigm as one in which "the state is not [viewed] as a thing but as a set of rules, principles, and conceptions that interact with a background which is in part a product of prior political actions. (…) [T]he people and the events (…) are not pre-political; they too are in part shaped by political and legal interactions").

[151] See Grutter v. Bollinger, 539 U.S. 306 at 342 (2003) (discussing the sunset provision in the context of race-based admission policies). See also Robert Post, Forward: Fashioning the Legal Constitution,117 HARV. L. REV. 4 (2003).

next claim. Legal rights, then, should be understood as the language of a continuing process rather than the fixed rules. Rights discourse reaches temporary resting points from which new claims can be made. Rights, in this sense, are not "trumps" but the language we use to try to persuade others to let us win this round".[152] Thinking in terms of "rounds" is a powerful tool. Yet by itself is insufficient. It requires a method to institutionalize the fiction of the expanded audience. Since not all claimants are repeat players, it must be that the perspective is enlarged to encompass all citizens of a political community. The decision in one case impacts on everyone else. But this approach already presupposes, rather than creates, the social solidarity. Unresponsiveness (including the unresponsiveness generated by what I called the *ex ante*/*ex post* gap) erodes solidarity.

I believe the appeal of proportionality must be sought in how it answers this need. By constructing the situated impartiality of the judicial standpoint in such a way that deciding constitutional cases does not require judges to deny the objectivity of the claimant's positions, proportionality mitigates the gap between the *ex ante* perception of these positions' comparable strength and the *ex post* binary effects of the judicial judgment.

I have already sketched out in previous sections the building blocks of this argument. Recall the analysis from Section Three on the balancing step of proportionality analysis. In a vertical conflict (individual rightholder vs. state), courts put into balance two strong, prima facie claims. On the one hand, there is the claim to the protection of the interests that have already been granted the highest form of protection that a modern legal system can offer, namely enshrinement as a constitutional right. Those claims represent the parties' interpretations of the constitutional text, rooted in their "constitutional imaginary," which aspire to official endorsement by the institutions mandated to decide on that meaning (courts). On the other hand, there is a challenged regulation that has survived the preceding stages of proportionality analysis, by which point an independent judiciary has already assented that its purpose is legal and legitimate, and that its content and method of application is both suitable and necessary to achieve that legitimate purpose. The more stages of proportionality analysis a regulation survives, the stronger the government's claim becomes.

[152] See Martha Minow, Essay on Rights, at 1875-1876 (footnotes omitted).

Recognizing the objectivity of claims is an implicit acknowledgment of the viability of the standpoints from which the parties make them. It signifies the recognition of the inner worth of the standpoints – the decisionmaker (i.e., the state) has visited those standpoints and has not downgraded them. Using Robert Cover's concept, the standpoints are "jurisgenerative." As he writes, "It is remarkable that in myth and history the origin of and the justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution."[153] So, courts must choose among the multiplicity of laws.

It matters not only *that* they choose, but also *how* they choose. Their method of choosing structures the spaces where people live their lives. As Arendt put it: "Being seen and being heard by others derive their significance from the fact that everybody sees and hears from a different position. This is the meaning of public life... The end of the common world has come when it is seen only under one aspect and is permitted to present itself in only one perspective."[154]

(*conclusion*)

[153] Robert Cover, Nomos and Narrative, 97 Harv. L. Rev. 4, 40 (1983)
[154] The Human Condition (1958), at 57-58.