**Rights, Values and Really Existing Legislatures**

Dimitris Tsarapatsanis

University of York

**1. Introduction**

*Legislated Rights* is a welcome contribution to constitutional theory. The book’s overall aim is to rehabilitate the role of legislation and legislatures in ‘securing human rights’ (p. 1).[[1]](#footnote-2) A major assertion by the authors, who set out to publish not so much an edited collection of essays as a single ‘chain essay’ written by six different contributors (p. viii), is that the dominant approaches to constitutional theory underplay the role of legislation and overplay the role of adjudication in implementing human rights. Hoping to reverse this trend, they argue that legislatures properly understood are deliberative institutions exercising a distinctive kind of rational agency. Once this is recognized, the crucial role of legislatures in specifying the content of abstract human rights norms comes readily to the fore. The book is particularly rich and I cannot hope to do justice to all of its themes. Consequently, I shall critically explore only a limited number of topics. I shall begin by summarizing the authors’ argument (section 2), before moving on to a critical examination of the way they view rights and the doctrine of proportionality (section 3), as well as the role of representative legislatures and legislation (section 4).

**2. Legislatures Fit for Rights**

Despite the richness and diversity of the approaches, the book is characterized by the insistent recurrence of two leitmotivs. The first one is to do with a distinctive understanding of legislatures. The authors forcefully claim that legislatures do not deserve the bad name they currently have in many constitutional theory corners. Far from passively reflecting majoritarian biases, representative legislatures are in fact capable of reasoning with a view to successfully promoting the common good. In developing this theme, the authors criticize a number of different approaches. The most significant amongst these is Ronald Dworkin’s early account of the institutional division of labour between courts and legislatures on the basis of the principle/policy distinction.[[2]](#footnote-3) Dworkin’s account is found wanting for purportedly reducing legislatures to machines of aggregation of individual utility functions (p. 86-92). *Contra* Dworkin the authors claim that legislatures, at least in so-called ‘central cases’ (p. 3), are to be understood as intelligent agents that can respond well to reasons to change the law. These include non-utilitarian reasons to protect and promote the common good (p. 92-101) as well as reasons to secure individual rights through specification of indeterminate human rights norms (p. 101-104). Moreover, by providing a reconstruction of particular episodes of North American legal history, the authors contend that legislatures have at least as venerable a track record as courts, and possibly a much more venerable one, as regards protection and promotion of minority rights (p. 142-150).

The second recurring theme is to do with conceptualizations of human rights. Here, the main target is the so-called proportionality test. Proportionality is the globally dominant (albeit not unanimously accepted) method of judicial reasoning about the legality of state measures that *prima vista* impact on abstractly formulated qualified human rights norms.[[3]](#footnote-4) Famously, the test sets out a number of steps to be taken in order to rationally resolve what at least initially appears to be a conflict between qualified rights and various collective political goals or aims. Importantly, the rights are systematically defined in a generous sense. This almost guarantees that the promoted goal will somehow interfere with the activity they protect. Proportionality purports to determine the conditions under which such interference may be justified. This it achieves by first assessing the suitability and necessity of the means used to promote the aim. If the state measure promoting the aim survives this stage of judicial scrutiny, then the aim is ‘balanced’ against the human right to determine which of the two ultimately wins out.

The authors identify a number of problems here. First, as already indicated, proportionality approaches seem to presuppose from the get-go that conflicts are to be expected between individual rights and the common good. In proportionality jargon the ‘legitimate state aim’, i.e. the collective goal pursued by the state, can rarely fail to interfere with the qualified human right. The whole question thus becomes one of determining whether the interference is ‘proportionate’, to wit, ultimately justifiable. This, the authors insist, paints a falsely antagonistic picture of rights and the common good. Far from clashing with the common good, they urge, rights are key components of it (p. 11-14). According to the authors, human rights such as those contained within the Universal Declaration of Human Rights (UDHR) ‘sketch an outline of the common good across a range of human values, goods and needs’ (p. 6). The reasonable legislature specifies these values by enacting determinate norms compliance with which can best promote both human rights and non-human rights values, thus harmonizing them (p. 10-12). Accordingly, there is no genuine conflict between rights and collective aims properly understood. Second, the authors argue that received proportionality approaches conceptualize rights as composed of ‘two terms’ (p. 28-32): a protected ‘subject matter’, which refers to a value, good or need, and a right-holder. The question then becomes one of assessing whether it can be justified to interfere with the right-holder in her enjoyment of the protected good. The authors contend that this misconstrues rights. Along well-trodden Hohfeldian lines, they contend, rights should be construed as three-term normative relationships involving a right-holder, an act-description and some other person or persons (p. 40-45). Two-term rights are at best only articulations of important human interests abstractly formulated. To get from these to rights properly called, and thus secure these interests, legislation must intervene in the form of determinate Hohfeldian three-term normative bundles under some conception of justice (p. 45-54). An overall picture emerges that lays emphasis on the ability of legislatures *qua* reasoned deliberative bodies to specify abstract human rights values by adopting appropriate legislation. At least in the ‘central case’ such legislation publicly marks (p. 69-74) certain act-types as normatively significant and thus secures the convergence of the behaviour of a large number of persons on these types (p. 60-69). Courts would do well to take these legislative specifications of abstract human rights very seriously. Insofar as the specifications instantiate the comparative institutional advantages of legislatures, they can provide determinate ‘legal direction’ in adjudication, itself an important form of productive institutional interaction between legislatures and courts (p. 171-180).

**3. Human Rights, Legal Rights and Proportionality**

I will now attempt to put pressure on some of these arguments. Let me begin with a first issue: the definition of rights. Throughout the book there is an equivocation between two different ways of understanding human rights. First, human rights found in international legal instruments are construed as abstract fundamental human values, goods or needs.[[4]](#footnote-5) Values, goods, needs and interests are *evaluative* concepts referring roughly to the worth of certain states of affairs along some axiological dimension.[[5]](#footnote-6) However, they are silent on what agents ought to do, i.e. on whether agents ought to act in ways such that they will (probably) bring about states of affairs. This is the function of deontic concepts, which, roughly, set out relations between agents, deontic operators (such as ‘obligatory’ and ‘prohibited’) and act types or tokens. Rights construed along Hohfeldian lines are paradigmatic deontic concepts, connecting agents, act-types/tokens and deontic operators understood as primitive (‘claim’/‘duty’). The authors adopt this second deontic view of human rights when they say, for example, that they are not just values but, rather, ‘[Hohfeldian] right relations between persons’ (p. 45).

Now, one of the key questions cutting across much of contemporary legal and moral theory is that of choosing between different ways of relating evaluative to deontic concepts. Simplifying to the extreme we might say that a first tack, familiar from classical utilitarianism, is to insist on the conceptual priority of value and to provide some deontic rule (such as ‘always maximize aggregate expected value’) that maps evaluations of states of affairs to action types (‘rule utilitarianism’) or tokens (‘act utilitarianism’). Of course, utilitarianism is not the only possibility here. Much depends on the specific conception of value adopted as well as on the concomitant deontic rule. The latter might be, for example, to ‘satisfice’ rather than to maximize value. Accordingly, the key structural feature of these approaches is not value-maximization as such. Rather, it is the reducibility of deontic to evaluative concepts with the exception of the deontic rule, which is sometimes defended on independent grounds of rationality. To take one familiar example, Joseph Raz’s non-utilitarian interest theory of rights takes an evaluative concept as primitive (‘interests’ as aspects of human well-being) and then proposes a transition to deontic concepts (‘holding another under a duty’) without committing to anything like a thesis of maximization of interest satisfaction, due mainly to the incommensurability of values.[[6]](#footnote-7)

A significantly different approach consists in taking at least certain deontic concepts as primitive and to argue that they require (as constraints) or license (as permissions) certain types of actions on grounds that do not reduce to the realization of value in states of affairs, including anyone’s well-being. This is the case, for example, of so-called ‘status’ theories of rights that take at least some rights to be grounded not on any imperative to realize value but rather on other kinds of normative relations between free and equal persons, such as respect for another’s autonomy *qua* capacity to freely set and pursue chosen ends.[[7]](#footnote-8) In a similar vein, constraints of justice or fairness, grounded in normatively relevant relations between socially interacting persons might also directly ground rights. Rights thus construed would not reduce to any kind of value realization and indeed may even thwart such realization.[[8]](#footnote-9) Alternatively, independently identified deontic concepts might function as filters picking out normatively relevant aspects of value. In the context of theories of rights, such filters are typically understood to determine the moral relevance, if any, of various interests or preferences. By doing so, rights also regulate the moral permissibility of promoting interests or preferences.

Once we properly apprehend the significance of the distinction between the evaluative and the deontic a number of issues come into sharper focus. First, on which line of the divide do legal human rights such as the ones contained in the European Convention on Human Rights (ECHR) or the UDHR fall? My answer is: both. In current usage, it seems that the phrase ‘human rights’ is used sometimes to refer to political goals, i.e. to values such as life or health that should be promoted by state agents, and sometimes to constraints or other kinds of deontic concepts. There is no true meaning the phrase has outside these patterns of usage. Now, ambiguity and contestability of content appear to be constitutive features of concepts with a long and complicated pedigree in Western legal and political thought, such as that of rights.[[9]](#footnote-10) However, it is important to carefully distinguish between uses of ‘rights’ that treat them as goals or values to be promoted from uses treating them as irreducibly deontic, since these have different normative features. The authors equivocate in this regard. They sometimes understand rights as ‘well-being’ (i.e. evaluative) claims and sometimes as ‘right [i.e. deontic] relations’.

To be sure, the point is not one about intellectual tidiness. In fact, settling on a way of answering the question of the reducibility of the deontic to the evaluative with respect to rights has consequences as regards institutional competence in the endeavour to secure rights. Indeed, the very term ‘securing’ becomes ambiguous. If human rights are values or reduce to such values, it follows rather trivially that certain types of political institutions are better placed to promote them by securing their realization in states of affairs: those that wield the power to coordinate large masses of persons by engaging in forward-looking action and, if need be, by resort to coercion. Let us stipulate, for the time being, that legislatures are indeed such institutions.[[10]](#footnote-11) Given an evaluative understanding of human rights, it is then natural to assert that legislatures enjoy a comparative advantage in securing them vis-à-vis backward-looking institutions such as courts, whose main function is to license and justify the use of state coercion on the basis of already existing legal entitlements, themselves identified through the patient and procedurally technical normative reconstruction of past institutional facts. In short, as the authors contend, legislatures and, more generally, the political branches are in principle better placed than courts to realize values through specification, including values protected by human rights, insofar as they control and direct the coercive power of the state. Still, this comparative advantage is neither novel nor seriously disputed by anyone (including the courts themselves[[11]](#footnote-12)).

However, if human rights are also deontic concepts not reducible to evaluative ones, especially constraints on possible courses of state action, then assessment of comparative institutional abilities becomes much more complicated and certain theses held by the authors appear contestable. For it then becomes an important issue how exactly rights are to be construed at different levels of pertinent normative interactions between persons and institutions and on the basis of which overarching deontic principle or framework, such as justice, equal concern and respect for persons or legitimate deployment of state coercion on individuals. This, incidentally, is also an important way in which, *pace* the authors, human and constitutional/fundamental rights might come apart. Understood as deontic constraints, human rights are characteristically understood to refer to more basic considerations grounded in the normative concerns flowing from coercive relations between states and populations. Such concerns speak directly to the issue of the international legitimacy of states.[[12]](#footnote-13) Domestic constitutional/fundamental rights or at least a subclass of them (say, many social and economic rights) might on the other hand be further grounded in tighter types of social interaction than simply the possibility of coercion (say, on a Rawlsian conception, on the normative relations flowing from a fair system of social cooperation within a territory[[13]](#footnote-14)). The more fundamental point is that, since on such a view rights do not just reduce to values that can be promoted in agent-neutral ways, their normative unpacking requires a concomitant unpacking of the relations between persons and institutions and the different types thereof that ground them.

Thus, the distinction between the evaluative and the deontic casts doubt on some of the arguments made by the authors. Take the practice of making claims involving international legal human rights. Most participants in that practice recognize that at least part of the normative point of such claims consists in invoking deontic constraints on state action the disrespect of which renders illegitimate instances of coercion on individuals residing within the state’s territory. With regard to this point, further specification of the constraints by domestic legislative institutions is simply irrelevant: the question, rather, is whether legislative specifications and indeed all state measures and actions, whatever they might be, conform to the constraints. Of course, different actors may hold divergent views on either the scope or the stringency of the state duties resulting from these constraints. However, the structural role of such claims appears to remain the same across these views. Moreover, this has important repercussions for the assessment of comparative institutional competence. On such an understanding of human rights, international adjudicative institutions such as the European Court of Human Rights tasked with assessing the conformity of past state action with deontic constraints appear to be well placed to perform their backward-looking function on the basis of a detailed focus on a specific case and quite independently of any legislative specification of ECHR rights by the states parties themselves.

Things appear different at the level of securing compliance with deontic constraints in the interactions among private individuals. At that level, as the authors correctly argue, legislative specifications of the duties of individuals backed by the coercive power of the state play an important role in helping stabilize patterns of behaviour and thus expectations among social actors. Still, and this is a separate but important point, these specifications should not necessarily be confused with legal rights. As every competent lawyer knows, in mature legal systems legal rights are not just mirrors of legislative activity. Rather, they are normative reconstructions of chunks of past political activity holistically construed, where legislation is one among many inputs, even if it is a singularly important one. Other inputs include legal principles, shared ways of thinking and arguing as well as past case law. Moreover, reconstruction depends to a significant extent on the aid provided by various epistemic sources (e.g. academics) in a complex intellectual division of labour.

How should we characterize the task of identifying legal rights thus understood?[[14]](#footnote-15) In terms of institutional competence, the pertinent distinction here is between forward-looking and backward-looking institutions or, where real-world institutions perform both functions, as is usually the case, between different ideal functions of institutions. As far as ideal types of institutions go, the first function concerns legislation and the second one adjudication. Adjudication interpretively distils legal rights from past institutional history. For its part, legislation projects into the future measures that both respect deontic constraints and, it is hoped, will contribute to governing populations in ways that not only efficiently achieve desired political goals but also get individuals to respect other individuals’ rights (deontically understood). There is thus a certain sense in which, insofar as legal rights can be understood to be, among other things, a complex function of the impact of past institutional history, adjudication is the paradigmatic practice of identifying them. It is just not the main function of forward-looking institutions, such as legislatures, to do so, however helpful they might otherwise be in specifying initially indeterminate normative concepts (evaluative or deontic).

A yet different issue is to do with the critique of proportionality put forth by the authors. There are two separate worries here. The first is that the critique, whilst welcome, does not cut deep enough to allay the concerns that proportionality raises. These concerns are to do with the type of consequentialist reasoning that seems to be licensed especially by the ‘balancing’ stage of the proportionality test. For many scholars balancing sits uneasily with an insistence on rights as deontic constraints on state action.[[15]](#footnote-16) Recall that the balancing stage is where the qualified right, reflecting a more or less important interest, is set against a collective aim interfering with the right. The question then is which of the two should ultimately prevail. According to what George Letsas calls the maximizing orthodoxy of proportionality[[16]](#footnote-17), in the balancing stage rights may be justifiably limited if the benefits accrued by the collective goal outweigh the costs of setting back the right-holder’s interest. Hence, human rights are understood as defeasible (p. 10-12) and normatively precarious.

Now, the authors claim that a way out of this conundrum consists in taking advantage of the power of legislatures to specify abstract rights by mediating between human well-being and determinate deontic concepts. On this view, courts would not need to balance anything. They would simply apply pre-existing legislative standards setting out determinate three-term indefeasible rights. However, there are at least two concerns with this proposal. First, it appears to presuppose that the determinate legislative standards setting out indefeasible rights can be straightforwardly applied to cases. If they cannot, as in fact so often happens in adjudication, and irrespective of whether the dominant maximizing interpretation of proportionality is the best approach, *some* interpretive reconstructive approach would be needed. Of necessity, it would go beyond the legislative specifications themselves. Moreover, this point does not just apply to rights. It is perfectly general. As we have seen, it is common knowledge and settled practice among all sophisticated lawyers that law and legislation stand in a complex relationship. One need not be a full-blown Dworkinian to recognize that the impact of legislation on the law *qua* reasoned argumentative practice is mediated by many different kinds of normative and interpretive factors. Hence, the remedy proposed appears problematic at best. Second, the proposal accepts that at least some rights are or reduce to values. But it is this evaluative conception of rights as protected interests that fuels balancing approaches in the first place. Stuck with the problem of interpretation anyway, courts would perhaps do better to reconstruct proportionality along lines that jettison both balancing and the more fundamental idea that rights are simply functions of values. Recognizing an irreducibly deontic dimension of rights could then hold more promise than attempts at a probably imaginary quasi-automatic application of ‘clear’ legislative standards to cases.[[17]](#footnote-18)

But there is also a second kind of objection, which comes from the opposite direction. According to it, the critique articulated by the authors is not so much false as irrelevant, since it misunderstands at least one important aspect of how proportionality works as a distinctively legal *doctrine*. On such a construal, proportionality should not be understood to be a theory about the nature of rights, as the authors urge, but merely a kind of heuristic that can aid judges in resolving certain contentious cases by blending genuine normative considerations about rights with considerations of institutional design and empirical propositions about how institutions actually function.[[18]](#footnote-19) Importantly, considerations of institutional design are normative reasons to do with the specific position of institutional agents vis-à-vis other such agents and governed individuals. This way of thinking opens up the possibility that, far frombeing a ‘deep’ theory about the nature of rights, proportionality is simply a relatively superficial judicial doctrine that can be justified, if at all, by reference to its epistemic and perhaps also moral utility. For example, as Kyritsis argues, the ‘definitional generosity’ of the received account with respect to rights might say nothing about the nature of rights themselves but simply be a way in which courts can provide a relatively accessible procedure to challenge governmental and legislative decisions, perhaps because, as a matter of empirical fact, the legislature has a bad record of rights compliance.[[19]](#footnote-20) The point, moreover, is not to do only with this specific component of proportionality but generalizes. On this view, the components of proportionality can be salvaged simply as devices that aid the accuracy of judicial decision-making whilst also fostering its legitimacy. They say nothing about the real nature of rights.

**4. The Realities of Legislatures and Legislation**

The second type of themes from the book that I wish to tackle is to do with the social reality of legislation and legislatures. The overall question is that of the extent to which the ‘legislatures’ that the authors talk about actually exist in contemporary Western states. Recall that the authors attempt to upgrade the scholarly status of legislatures by arguing that, despite views regarding legislatures as preference aggregation machines or as assemblies composed of self-interested legislators (p. 89-90), modern representative assemblies in fact exercise a distinctive kind of rational agency and are thus able to deliberate effectively in order to promote the common good (p.101-104). In response to this, three observations are in order. First, the authors downplay the extent to which legislation is not merely a matter of *reason* but also a matter of *will*. Modern representative legislatures are not just geared towards deliberating about the common good, however defined, but also towards instantiating the *popular will*, i.e. a kind of will that can claim legitimacy even when it substantively errs. Second, the authors vastly underestimate the significance of certain kinds of political phenomena that could be subsumed under the label of the rise of executive and bureaucratic power. Third, by virtue of their ‘central cases’ method, the authors seem to espouse, in Bernard Williams’s terms[[20]](#footnote-21), a kind of political moralism which, given precisely the rise of executive power and the contemporary transformations of the state, could obscure standing threats to political liberty.

Let us begin with the first point. Whatever else we might want to say about modern legislatures, they are animated by a distinctive view of representation that blends together two different ideas. The first idea, rightly underscored by the authors, is that legislation is an exercise of intelligent judgment. As Manin has forcefully pointed out[[21]](#footnote-22), the basic institutional mechanisms of representative government across a range of democratic states, and despite differences between ‘grammars of representation’ akin to divergent national traditions[[22]](#footnote-23), insist on the idea that representatives should not be formally bound by their constituents’ wishes through imperative mandates. Instead, by engaging in unhinged public discussion, they should be free to decide on what the common good requires. However, this is only one side of the coin. The other side is that representatives are not just guided by their independent judgment about the common good but are also responsible for somehow implementing the will of the ‘people’. The main institutional mechanism that generates the incentives to comply with this responsibility is electoral accountability. Political argument thus takes a characteristic form: it often becomes a kind of interpretive exercise consisting in finding some fit between the common good, independently identified, and ‘what the people want’.[[23]](#footnote-24) Irrespective of whether one thinks that references to the ‘people’ are just convenient myths whose function is to justify oligarchic regimes where governing elites compete for control via elections or genuine appeals to a corporate political agent that, no matter how inchoate, can be said to somehow really exist, the fact remains that arguments about the ‘people’s’ will are systematically used to justify various legislative choices. Indeed, this is what we should expect in mass democratic regimes, where claims to wield a legitimate power to rule those who are considered the rulers’ equals, and therefore where rulers are not thought to enjoy any special moral or technocratic expertise, cannot be justified other than by presenting the rulers as implementers of the collective will of the ruled.

Legislation by representatives is thus always a careful navigation between the pole of the common good and that of the popular will (however understood). Sometimes the imperatives stemming from these poles coincide. At other times, they come apart or even stand in conflict. Gravitation between the poles, with one of them sometimes or with regard to certain issues dominating the other, is a possible outcome as a matter of the normal function of representative institutions. Thus, any kind of synthesis that unilaterally emphasizes the rational element of the deliberative capacities of representatives over the voluntaristic one risks obscuring the true nature of political rule by representative institutions. From a historical point of view, the transformation of representative institutions and the concomitant growth of the voluntaristic element is rendered particularly clear once we consider the transition from 19th century oligarchic liberalism, which was still premised on ideas of government by those that the social hierarchies designated as rationally superior, to 20th century egalitarian mass democracy, where everyone has a claim to be everyone else’s equal.[[24]](#footnote-25) This transformation, which has been well documented, is partly the outcome of the extension of the franchise and partly the upshot of deeper structural transformations. Despite what some contemporary commentators appear to think, ‘populism’ as a family of rhetorical tropes that appeal to a single overriding ‘popular will’ is not a pathological state of representative institutions but merely the exacerbation of an inherent tendency of mass democracy. Thus, put in proper historical context, the one-sided emphasis of the authors on representative institutions’ deliberative ability to pursue the common good seems to correspond more to a vision of representation akin to 19th century conditions than to the social and political realities of 20th and 21st century egalitarian mass democracy.

 But there is more. The authors do not just fail to capture an important feature of contemporary representative legislatures. They also fail to take notice of one of the most important transformations of 20th century statehood, which had a massive impact on, among other things, legislation: the rise of executive power.[[25]](#footnote-26) The point may be put quite simply: in advanced Western democracies, which is the authors’ focus, and indeed in almost all states, the vast mass of legislation results not from the free and unhinged deliberation of representatives with a view to identifying the common good, but from more or less hierarchically structured and more or less politically controlled bureaucracies, composed mainly of career bureaucrats. And even when legislation is actually passed by parliaments after due debate, the role of bureaucrats in the process is vital. As a result of this deep transformation, we might (simplifying) say that parliaments have become to a significant extent merely control mechanisms of governments and even then with a mixed record of success. As Christopher Foster has put it referring to the British context: ‘[T]he principal function of Parliament, and particularly the House of Commons, has not been to be part of government or a legislature, which in any true sense it is not, but to hold ministers to account.’[[26]](#footnote-27)

 At the same time, the massive growth of enormous swaths of often bafflingly complex legislation produced from a wide range of different and often antagonistic bureaucratic bodies, both international and domestic, shatters hopes of a straightforward rational integration of legislation, on which the authors place many of their hopes (p. 22-25). At times one thus has the impression that the authors are still animated by ideas of rational legislation initially expressed in the 18th and 19th century codification movements across Europe. But the current historical conjuncture is significantly different. And irrespective of its best explanation[[27]](#footnote-28), the rise of the executive with its distinctive forms of sociological legitimation (efficiency rather than democratic legitimacy, with security often considered as an overriding public good) clearly poses an important legal and political quandary, especially in relation to rights compliance. Any realistic view should keep it firmly in sight. Contemporary phenomena such as mass surveillance as a response to real or perceived terrorist threats, penal populism resulting in the exponential growth of the incarcerated population or emergency economic measures to avoid imminent meltdowns underpin demands for ever more concentration of executive power. They also result in mass production of legislation that vastly outflanks, in terms of both volume and sheer technocratic expertise, the control resources of parliaments. Legislation’s record is thus much more complicated and mixed than the authors appear to think.

 Of course, it is open to the authors to retort that they simply do not have anything to say about these phenomena. What they care about is fleshing out the ‘central case’ of a good representative legislature, which both sets the appropriate epistemic standard and identifies various real-world deviations from it (p. 9). But such a tack comes with risks. By taking it, the authors appear to subscribe, in Williams’s terms, to a kind of ‘priority of the moral over the political.’[[28]](#footnote-29) One clear risk consists in providing a skewed account of the realities of state power and the threats that states pose to both individuals and groups. From the point of view of a legal and political theory more sensitive to these realities and threats, the rise of the Westphalian sovereign state with its vast concentration of power, along with the ever-present temptation on the part of ruling elites to use that power extensively to pursue various ends, only some of which are benign, presents a problem that has no easy solution. A more realistic understanding of state power places issues of institutional design pertaining to the protection of rights in a significantly different light. Far from being assessed only from the vantage point of morally ideal functioning, political institutions would then be approached from a more sceptical viewpoint that focuses on the enormous dangers that vast concentrations of state power pose.[[29]](#footnote-30) Judicial review could perhaps then be vindicated as one more attempt at control of concentrated political power that may allow, through systematic use of a normative argumentative practice both backward-looking and more patient than the political alarmism which arms the political branches, for the institutional possibility of frustrating the temptation either to mistake the reality of state power for its idealized idol or to simply use it to pursue what the governing elites almost always present as noble ends.

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1. . Throughout, page numbers refer to the book under discussion. The authors have taken the deliberate decision to use the terms ‘human’, ‘fundamental’ and ‘constitutional’ as rough synonyms (p.2). I shall adopt the same convention whilst pointing to one possible issue it raises in section 2. [↑](#footnote-ref-2)
2. Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977) 82-86. [↑](#footnote-ref-3)
3. For what follows see, among many others, Aharon Barak, *Proportionality* (CUP 2012). [↑](#footnote-ref-4)
4. See, for example, p. 6. Despite important differences between categories of value (‘goods’ are not the same as ‘interests’ or ‘needs’), for the purposes of my argument I shall treat all evaluative concepts as roughly equivalent, since they seem to share one main feature that distinguishes them from deontic concepts, i.e. their silence on action-guidance. [↑](#footnote-ref-5)
5. Christine Tappolet, ‘Evaluative vs. Deontic Concepts’ in Hugh LaFolette (ed) *The International Encyclopedia on Ethics* (Blackwell 2013) 1791-1799. [↑](#footnote-ref-6)
6. Joeseph Raz, *The Morality of Freedom* (OUP 1986) 183-186 and 321-366.Importantly, the authors also adopt claims about the incommensurability of the values protected by human rights. They argue on this basis that legislative specifications of human rights involve an element of genuine choice among values (p. 48-51). [↑](#footnote-ref-7)
7. See, among many others, Thomas Nagel ‘Personal Rights and Public Space’ (1995) 24 Philosophy and Public Affairs 83. [↑](#footnote-ref-8)
8. Dimitrios Kyritsis, ‘Whatever Works: Proportionality as a Constitutional Doctrine (2014) 34 Oxford Journal of Legal Studies 395 at 405-409. [↑](#footnote-ref-9)
9. Michael Oakeshott, *The Politics of Faith and the Politics of Skepticism* (Yale University Press 1996) 8-10. [↑](#footnote-ref-10)
10. Later on I shall qualify this claim and argue that, placed within proper historical context, it is rather the executive that is now the crucial institutional actor [↑](#footnote-ref-11)
11. This is an important aspect of judicial doctrines of deference. For an overview and critical analysis see Dimitrios Kyritsis, *Where Our Protection Lies* (2018 OUP) 153-178. [↑](#footnote-ref-12)
12. See, among many others, Allen Buchanan, *The Heart of Human Rights* (2013 OUP). [↑](#footnote-ref-13)
13. John Rawls, *Justice as Fairness: A Restatement* (2001 Harvard University Press). [↑](#footnote-ref-14)
14. Note that I do not claim that this is the only way of understanding legal rights; it is merely a possible and indeed well established one. There might also be other ways, which map much more closely to the authors’ views about legal rights. [↑](#footnote-ref-15)
15. Stavros Tsakyrakis, ‘Proportionality: An Assault on Human Rights?’ (2010) 7 International Journal of Constitutional Law 468. [↑](#footnote-ref-16)
16. George Letsas, ‘Rescuing Proportionality’ in Rowan Cruft, S. Matthew Liao and Massimo Renzo (eds) *Philosophical Foundations of Human Rights* (2014 OUP) 316 at 323. [↑](#footnote-ref-17)
17. Letsas ‘Rescuing Proportionality’ (n 16) 330-338. [↑](#footnote-ref-18)
18. Kyritsis ‘Whatever Works’ (n 8) 410-415. [↑](#footnote-ref-19)
19. Ibid 413. [↑](#footnote-ref-20)
20. See Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton University Press 2005) 1-17. [↑](#footnote-ref-21)
21. Bernard Manin, *The Principles of Representative Government* (Cambridge University Press 1995). [↑](#footnote-ref-22)
22. Dimitris Tsarapatsanis, ‘Representative Legislatures, Grammars of Representation and the Generality of Statutes’ (2018) 31 Ratio Juris 444. [↑](#footnote-ref-23)
23. Ibid. 449-451. [↑](#footnote-ref-24)
24. Panajotis Kondylis, *Die Niedergang der der bürgerlichen Denk- und Lebensformen.* *Die liberale Moderne und die massendemokratische Postmoderne*  (VCH-Verlagsgesellschaft 1991). [↑](#footnote-ref-25)
25. See, among many others, Adrian Vermeule and Eric Posner, *The Executive Unbound: After the Madisonian Republic* (OUP 2011). [↑](#footnote-ref-26)
26. Christopher Foster, *British Government in Crisis* (Hart Publishing 2005) 7. [↑](#footnote-ref-27)
27. War and, more generally, geopolitical antagonisms are major drivers of these developments (see Philip Bobbitt, *The Shield of Achilles: War, Peace and he Course of History*, Alfred Knopf 2003). In fact, the transformation of constitutional forms could be understood as a function of the global competition between hegemonic states. In this context, the rise of the executive in the West post-World War I can be interpreted as a necessary concentration of political power in the (ultimately successful) attempt by mass democratic states to win the ‘epochal war’ against the competing constitutional models of fascism and communism. The transition to mass democracy through the extension of the franchise is, of course, also tightly related to the mass mobilization and conscription that the world wars necessitated. [↑](#footnote-ref-28)
28. Bernard Williams *In the Beginning* (n 20) 2. [↑](#footnote-ref-29)
29. This would correspond to what Michael Oakeshott has called ‘politics of scepticism’; see Oakeshott *Politics of Faith* (n 9) 30-38. [↑](#footnote-ref-30)