

A Kantian system of constitutional justice: Rights, trusteeship, balancing

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Abstract: The article develops a Kantian account of constitutional justice: the explication of those structural features of a legal system whose purpose is to optimise a polity's capacity to achieve a Rightful condition. The People, in enacting a rights-based constitution, have placed their freedom in trust. Rights ground a system of reciprocal freedom among individuals, while conferring on officials the authority to make and enforce law, subject to constraints laid down by the Universal Principle of Right [UPR]. A constitutional court, the trustee of the regime, supervises the rights-regarding acts of all other officials, assesses the reasons officials give when they take decisions that burden rights, and invalidates those acts when reasons given to justify such burdens fail to meet the demands of the UPR. Although some rights will be expressed in absolute terms, most will be qualified by a limitation clause. In adjudicating qualified rights, the court can do no better than to adopt the proportionality principle. The UPR, operationalised through proportionality analysis, lays down a basic criterion for the legitimacy of all law. Because Public, International, and Cosmopolitan Right share certain micro-foundations in common, we can extend the analysis to transnational systems of rights protection.

Keywords: balancing; constitutional justice; Kant; proportionality; rights

I. Introduction

A constitution allowing the greatest possible human freedom in accordance with laws which ensure that the freedom of each can coexist with the freedom of all ... other[s], is at all events a necessary idea which must be

made the basis not only of the first outline of a political constitution but of all laws as well.

– Kant, Critique of Pure Reason¹

Immanuel Kant insisted that all persons and states were under a moral duty to seek to instantiate a Rightful condition under a constitution, which he unambiguously associated with rights protection. Notwithstanding the force of these arguments, the philosopher had remarkably little to say about how public authority ought to be organised to meet this obligation. To be sure, Kant gestures towards separation of powers and other features of the ‘republican state’. But these musings typically appear in the form of vague, sometimes inconsistent generalities (MM: 6: 311–23).² The crucial institutional question, however, is left open: what types of arrangements are most likely to help a community govern itself according to the principle of Right? This gap is hardly surprising, given that Kant wrote before any mature system of constitutional justice had been established anywhere in the world. By *system of constitutional justice*, we mean those arrangements – rights provisions, procedures, and judicial review – whose purpose is to express and protect fundamental rights. This institutional indeterminacy of the Kant’s constitutional theory motivates this article. Our ambition is to fill gaps in ways that make his theory directly relevant to contemporary, global constitutional practice, and to the jurisprudence of the most powerful rights-protecting courts.

The article also builds on a project outlined in this journal, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe* (Stone Sweet 2012a). That article addressed lacunae in *Toward Perpetual Peace among States*,³ and in the scholarship on that essay. Kant, readers will recall, proposed that perpetual peace could be achieved only once a group of ‘republican’ states joined together in a treaty-based regime – which he called a ‘league’ or ‘congress’ of states – insofar as the effectiveness of rights of ‘hospitality,’ and the juridical status of all human beings, were secured. Over the past three decades, political scientists, treating these and other factors as causal variables, have found strong support for the basics of his theory, transforming security studies. Yet, scholars have hardly addressed Kant’s own priority: the achievement, in law, of a Rightful condition at the international level. *Perpetual Peace* contains virtually nothing of substance with regard to how the league’s legal system should be configured. In line with other neo-Kantians, Stone Sweet argued that

¹ 3: 247.

² *The Metaphysics of Morals* [hereinafter MM].

³ *Toward Perpetual Peace: A Philosophical Sketch* [hereinafter PP] 8: 381–6.

hospitality ought to be understood expansively, in light of the template for charters of rights that undergirds contemporary conceptions of justice. And the article defined a cosmopolitan legal order as one in which (i) all officials are under an obligation to fulfil the rights of all individuals within their jurisdiction, through acts that (ii) domestic courts are positioned to supervise, according to the principle of Right. Two properties – ‘decentralised sovereignty’ and ‘constitutional pluralism’ – gradually emerged in Europe, as defining systemic features of a new multi-level system of justice. While the European regime provided an intricate example of the instantiation of Kantian legal order beyond the state, Stone Sweet did not attempt to develop a full account of a system of justice *per se*. We do so here.

The argument is sequenced as follows. First, rights ground a system of equal freedom in positive constitutional law. The system authorises reliance on state coercion, but only in so far as coercion ensures that each person may exercise her freedom consistently with the freedom of others, that is, according to the Universal Principle of Right [UPR; Box 1]. ‘Omnilateral law-making’ is the basic mechanism for achieving a Rightful condition. Second, constitutional rights establish positive requirements of any valid act of public authority. Public officials – agents of the People – are charged with creating and maintaining a Rightful condition in law (MM 6: 311). Third, the People, by enacting a rights-based constitution, place their freedom in trust. They thereby generate justiciable obligations, borne by all officials, to fulfil these requirements.

Although a fourth point is only implicit in Kant, a constitutional organ possessing strong powers of judicial review is required, if rights are to be rendered effective. It is the duty of members of this *trustee court*, to supervise the rights-regarding acts of all other state officials (PP 8: 381–6). As the caretaker of the system, the court’s primary mission is to evaluate the reasons officials give in justification of acts that burden the exercise of a right, and to invalidate acts when reasons given are judged inadequate. In Kantian terms, the court supervises the incremental process through which Public Right is constructed. Fifth, Kant’s constitutional theory strongly implies that some rights must be expressed in absolute terms, but that most rights can be limited under the UPR. Modern charters reflect these logics, in that most rights are expressly ‘qualified’ by a ‘limitation clause’. Taking a cue from contemporary practice, we argue that the trustee court can do no better than to adopt the proportionality principle, and its distinctive sequence of tests, when it adjudicates qualified rights. Last, our account of constitutional justice is congruent with Kant’s ideas about the multi-level structure of Right. Domestic and international systems of justice are grounded in the same bedrock Kantian principles, facilitating how they engage with one another.

It is important to stress up front that we do not claim that all of our conclusions are directly derivable from Kant. It is a brute fact that Kant's constitutional theory is largely indeterminate when it comes to the operational details of rights protection, and to the substantive content of rights doctrine. Although some of the moves we make are open to challenge, we have taken care to ensure that they do not violate Kantian precepts. Kant's arguments proceed functionally, and he routinely posits the 'necessity' of further stages of social and institutional development from the prior establishment of moral principles and obligations. The article extends this style of reasoning, as Zylberman and others have,⁴ with respect to a modern system of justice. Put differently, our objective is to identify those arrangements that are most likely to resolve the crucial commitment problems that beset any attempt to realise a Rightful constitutional condition.

II. Basic elements

The central thrust of Kant's constitutional theory is to explicate the necessary constraints that individuals and states must accept if they are to fulfil their obligation to leave the 'lawless state of nature', and to enter into a 'Rightful' civil condition. They must do so to secure their own freedom in community. Two principles are foundational, in that they constrain the construction of the system. The *Internal Duty of Rightful Honour* prohibits one from consenting to social arrangements that would permit one to be used as a mere means for others (MM 6: 236). And the Universal Principle of Right [UPR] limits 'authorization to coerce' to those acts that meet the demands of Right (MM 6: 230–1). Kant defined Right as 'the sum of the conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom' (MM 6: 230). He conceptualised the civil version of Right as an inherently constitutional order:

Public Right is ... a system of laws for a people, that is, a multitude of human beings, or for a multitude of peoples, which, because they affect one another, need a rightful condition under ... a constitution ... so that they may enjoy what is laid down as Right (MM 6: 311).

All rational beings are required to set and pursue ends in light of the freedom of every other rational being, and they may not withhold their

⁴ Zylberman (2016), for example, stresses that 'Kant argues that public institutions are *necessary* to a system of rights. ... Public institutions are not necessary simply in order to enforce fully determinate rights. [They] are also necessary in a non-instrumental sense: they are necessary to [the process of] articulating the *content* of rights.' (Emphases in the original.)

consent from law that conforms to the UPR. Public law constitutes the civil condition, on which every person's external freedom *constitutively* depends (MM 6: 316; Zylberman 2016). The state – a set of linked, 'omnilateral' organs through which officials make, interpret, and enforce law, as agents of the sovereign People (MM 6: 313–18) – is authorised to coerce individuals for the purpose of realising Right, but coercion is forbidden for any other purpose (MM 6: 231).

Box 1 contains selected commentary by Kant on these and other core concepts, the implications of which we discuss in each of the sections to come. We begin where Kant does, with the concept of freedom.

Box 1

Kant's Constitutional Theory: Principles and Concepts

Kant elaborated his most important constitutional ideas in Part I of *The Metaphysics of Morals* [1797], the Doctrine of Right (6: 229–378) [all emphases in original.] This article treats these concepts as the micro-foundations of a Rightful constitutional order.

The Internal Duty of Rightful Honour

Rightful honour consists in asserting one's worth as a human being in relation to others, a duty expressed by the saying, 'Do not make yourself a mere means for others but be at the same time an end for them.'^{MM 6: 236}

Innate Freedom

An innate right is that which belongs to everyone by nature, independently of any act that would establish a right; an acquired act is that for which such an act is required.^{MM 6: 237}

There is only one Innate Right. Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.^{MM 6: 237}

This principle of innate freedom already involves the following authorizations ... : innate *equality*, that is, independence from being bound by others by more than one can in turn bound them; hence a human being's quality of being *his own master*, as well as being a human being *beyond reproach*, since before he performs any act affecting rights he has done no wrong to anyone; and finally, his being authorized to do to others anything that does not in itself diminish what is theirs^{MM 6: 237–8}

Public Right and the Universal Principle of Right

Right is the sum of the conditions under which the choice of one can be united with the choice of another in a accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law.^{MM 6: 230}

The sum of the laws that need to be promulgated generally in order to bring about a Rightful condition is *Public Right*.^{MM 6: 311}

The Universal Principles of Right: ‘Any act is *Right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.’^{MM 6: 230}

If then my action or my condition generally can coexist with the freedom of everyone in accordance with a universal law, whoever hinders me in it does me *wrong*, for this hindrance (resistance) cannot coexist with freedom in accordance with a universal law.^{MM 6: 230–1}

[C]oercion is a hindrance or a resistance to freedom. Therefore, if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a hindering of a hindrance to freedom), is consistent with freedom in accordance with universal laws, that is, it is *Right*.^{MM 6: 231}

The State and the Idea of the Original Contract

The act by which a People forms itself into a state is the original contract. Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of the state.^{MM 6: 315}

[T]he *spirit* of the original constitution involves an obligation on the part of the constituting authority to make the *kind of government* suited to the idea of the original contract. Accordingly, even if this cannot be done all at once, it is under an obligation to change the kind of government gradually and continuously, so that it harmonizes *in its effect* with the only constitution that accords with Right, that of a pure republic, in such a way that the old (empirical) statutory forms, which serve merely to bring about the *submission* of the people, are replaced by the original (rational) form, the only form which makes *freedom* the principle and indeed the condition for any exercise of *coercion*, as is required by a Rightful constitution of the state in the strict form of the word. Only it will finally lead to what is literally the state.^{MM 6: 340–1}

[I]t is only in conformity with the conditions of freedom and equality that [the] people can become a state and enter into a civil constitution.^{MM 6: 315}

The Omnilateral Lawmaker

[A] will that is omnilateral, that is united not contingently but *a priori* and therefore necessarily ... is the only will that is lawgiving.^{MM 6: 263}

The legislative authority can only belong to the united will of the people. [O]nly the concurring and united will of all, insofar as each decides the same thing for all and all for each, and to only the united, general will of the people, can be legislative.^{MM 6: 313–14}

Publicity

[Publicity] is implied in any legal claim, since without it there would be no justice (which can only be thought of as *publicly proclaimable*), and thus no Right, since Right can be conferred only by justice.^{PP 8: 381}

Any legal claim must be capable of publicity.^{PP 8: 381}

This principle is to be understood as being not only *ethical* ... but also *juridical* (as concerning the rights of humans).^{PP 8: 381}

The *transcendental formula* of Public Right: All actions that affect the rights of other human beings, the maxims of which are incompatible with publicity, are unjust.^{PP 8: 381}

III. Freedom and rightful coercion

Kant argues that external freedom – ‘independence from being constrained by another’s choice’ is ‘the only one innate right’, possessed by ‘every man by virtue of his humanity’ (MM 6: 237). The scope of freedom is subject to the UPR: the external independence of any person is to be recognised ‘only insofar as it can coexist with the freedom of every other in accordance with a universal law’ (MM 6: 237–8). Freedom is innate in that its existence does not depend on any affirmative act on the part of an agent or the state, unlike the ‘acquired rights’ that form the substance of contract and property law, for example. Kant supposes that a person’s means-based capacity is conceptually prior to the setting of ends. In the absence of such capacity, one can only wish for an end; but one cannot make it one’s purpose to set about achieving that end. It follows that every person must possess certain inherent powers if they are to be, in fact, independent.

Independence is a *relational* concept; as Ripstein stresses, it ‘cannot be predicated of a particular person considered in isolation’ (Ripstein 2009: 15). A person is independent only if she is able to exercise her capacity to set and pursue ends without being subject to the controlling authority or influence of *another person* (Hodgson 2010: 793; Zylberman 2016: 109). Independence is also counterfactually robust: person X is not independent from Y, if Y has a power to interfere with X’s capacity to choose, even if Y foregoes the exercise of that power. Slaves whose master declines to interfere with their decisional autonomy are nonetheless subject to the master’s relational authority, since the master *could* exercise it. On Kant’s view of freedom, actual non-interference is neither a necessary nor sufficient condition for freedom. Indeed, non-interference can coexist with another person’s entitlement to interfere, as in the case of the benign slaveholder. More important for our purposes, Kant stipulates that *coercive* interference with the independence of each person is defensible only when it is necessary to secure the freedom of all in a Rightful, legal order.

Innate Right begets the principle of Rightful Honour, which is expressed through the maxim: one may not allow oneself to be used as a mere means for others (MM 6: 236). At first glance, this requirement looks out of place in the Doctrine of Public Right, which concerns social interactions and arrangements. But the internal duty of Rightful Honour is also relational: it operates to restrict a person’s exercise of freedom, by barring them from entering into legal relationships that are inconsistent with their own status as free and equal persons (also Ripstein (2009: 37). Reciprocal relations among free persons must respect the

Innate Freedom – one’s inalienable, means-based capacity – not undermine or destroy it.

The notion of freedom as an innate attribute of personhood means that all individuals are entitled to pursue their chosen ends, so long as they do not violate Rightful Honour along the way. We can, on these grounds, distinguish freedom from other justifications of coercive public authority, including welfare maximisation. An agent may always ask – why should I accept that reason for coercion? The Kantian response is stark and unyielding: the only acceptable justification for restricting the freedom of a rational agent is the need to instantiate the collective freedom of everyone (MM 6: 316).

A civil condition is Rightful only if it conforms to the UPR, which states that: any action is Right [that is, *just*] if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with universal law (MM 6: 230–1).

Thus, considered in terms of institutional design, Rightful Honour restricts the delegation of certain legislative powers to state organs, thereby constituting a micro-foundation of the Rightful civil condition itself. And the UPR constrains how officials are to fulfil to exercise their powers to make, and coercively enforce, the law. State coercion to promote an end other than the construction of Public Right is categorically forbidden, no matter how worthwhile that end might seem to be, or how many might value it.

Looking forward, what are the structural implications of these arguments for contemporary constitutional law and practice? First, the principle of Rightful Honour means that no person may justifiably accept any binding arrangement that abrogates her basic entitlements to freedom (see Zylberman 2015). Put positively, in a Rightful constitutional condition, every person possesses an *inalienable entitlement to justiciable rights*. Second, public law *constitutes* the external freedom of all. As elaborated further below, a charter of rights does not merely give concrete expression to freedom, but grounds the construction of the Rightful constitutional condition. Third, in any Rightful condition, a person’s independence is subject to justifiable limitations. Kant, after all, connects the UPR to a public lawmaker’s ‘authorization to coerce’ at the outset of the *Doctrine of Right* (MM 6: 230–1). Public law articulates the scope and content of each person’s external freedom to act purposively within society, insofar as that law meets the demands of the UPR. Rights authorise officials ‘to hinder any hindrance’ to freedom (MM 6: 231), in order to realise the external freedom of all under a system of law.

IV. The state and omnilateral law-making

Suppose that two persons, X and Y, attempt to interact on conditions of equal freedom in the absence of authoritative legal institutions. If X makes any territorial claim – even through moving from point A to point B – the effect of X’s action will be to place Y under an implied duty: to refrain from moving to point B or otherwise interfering with X’s purpose for doing so.⁵ By what authority does X impose this obligation on Y? Prior to X’s decision to walk from point A to point B, Y enjoyed an equal entitlement to move to point B. X’s move eviscerates Y’s entitlement, while impliedly shackling Y with new obligations. Given the principles of Rightful Honour, X could not possess the capacity to unilaterally subjugate Y’s freedom to X’s purposes. Y may not allow the private will of X to determine Y’s purposes. Self-abnegating deference to the unilateral determinations of others conflicts, more generally, with the dictates of independence and of Rightful Honour. Simplifying a complex argument, even when people do succeed in freely negotiating rules to govern their relations, these arrangements can only be provisional. In a pre-legal condition, Kant famously insisted (MM 6: 256–317), binding legal entitlements cannot exist, because no private person has a power to bind another to act in accordance with duties of Right.

The dilemma Kant diagnoses is one of *unilateral authorisation*: Y is never required to accept X’s attempts to assert, unilaterally, any entitlement that would limit Y’s freedom. X possesses no legitimate authority to compel Y to do anything. The solution requires delegation of powers to an *omnilateral* lawgiver – an institution with public authority – to create a Rightful condition (MM 6: 263). Public acts are omnilateral insofar as they are choices taken on behalf of all citizens, rather than the choices of one or a group of particular persons. Omnilateral acts are those that seek to create or preserve the formal conditions under which persons can rule themselves, that is, to be externally free in community, under the UPR (MM 6: 263).

Omnilateral lawmakers establish determinate boundaries on the zone of freedom in which individuals interact. At the same time, the UPR constrains the exercise of public authority (see also Ripstein 2009: 145–81). Thus, with respect to tensions that may result from a territorial clash between

⁵ The fact that the world is round turns out to be a crucial underpinning of Kant’s theory of property and, ultimately, of his Doctrine of Public Right; MM, notably 6: 311, and 6: 352–3. As Flikschuh (2000: 179) puts it: ‘Kant’s image of the earth’s spherical surface is that unavoidable constraint of nature within the limits of which finite rational beings must resolve conflicts of external freedom and justice.’

X and Y, the omnilateral state regulates. The law may: (i) demarcate the spatial zones in which X and Y may act without being liable in trespass; (ii) enforce a rule of first-in-time for occupancy; (iii) establish conditions for claiming title; or (iv) turn the land into a public park. Officials can realise Public Right through myriad means. It is crucial, however, to stress that omnilateral law-making has the inherent capacity to construct a new *normative* condition that can not be fully comprehended in terms of *a priori* moral reasoning; only the principles of Public Right, which are given content through law-making, can be known *a priori*. Thus, nothing in Kantian theory tells us what types of meanings people may invest in a public park, or how such meanings may influence subsequent disputing about its use.

Tellingly, Kant defines the state as ‘a union of a multitude of human beings under laws of Right’, whose legislative powers ‘can belong only to the united will of the People’ (MM 6: 313). He characterises deputies in parliament as both representatives of the People, and ‘the guardians of its freedom and rights’ (MM 6: 319). The next step comes naturally: all state officials, agents of the people, are under a duty to make, interpret, and apply law in a manner consistent with the UPR. While we will specify these duties with more precision below, at this point it is enough to repeat that the delegation of law-making authority is a functional necessity, given the incapacity of individuals to realise Public Right on their own.

V. Rights as positive requirements of legality

What little Kant tells us about delegation and the creation of the state is filtered through *the idea of the original contract*:

In accordance with the original contract, everyone ... gives up his external freedom in order to take it up again immediately as a member of the commonwealth, that is, of the people considered as a state ... [O]ne cannot say: the human being in a state has sacrificed part of his innate outer freedom for the sake of an end, but rather, *he has relinquished entirely his wild lawless freedom in order to find his freedom as such undiminished, in a dependence upon laws, that is, in a Rightful condition, since this dependence arises from his own lawgiving will* (MM 6: 315–16). [Emphasis added.]

Kant characterised the ‘idea’ as a necessary *theoretical* construct; it does not depend upon the facts of how any state actually emerged or operates. The construct contrasts with classical contractarian accounts of political authority, which link the legitimacy of state coercion to a datable act

of voluntary agreement or authorisation in which persons cede powers to the state. Presupposing the original contract sets the stage for an elucidation of the demands imposed by the UPR on the exercise of public authority.

Kant wrote before any state, as he defined it above, had ever been established. He was also silent on many crucial issues of constitutional design. He did not develop a full-fledged theory of rights, or specify the mechanisms for their protection. Kant illustrates his arguments with reference to a small handful of rights; and he provides little guidance to a polity that commits itself to compliance with the UPR. In response to these gaps, we propose a structural account of constitutional justice that is both Kantian-congruent and consistent with the basic facts of contemporary, rights-based constitutionalism. We thus confront the following question: what components of a system of constitutional justice would optimise a community's capacity to achieve Public Right?

The first step is to conceptualise constitutional rights as *positive requirements of legality*. Rights – substantive limitations on the exercise of public authority, along with standing and due process requirements – are justiciable commands. Every official owes a duty to make and enforce laws in a manner consistent with the UPR, and to refrain from subjecting individuals under their authority to coercive rules that are inconsistent with the UPR. And every individual has a right to defend their rights in a lawsuit.

Conceived in Kantian terms, rights formally express external freedom in law for individuals, however imperfectly realised or under construction. Rightful Honour restricts the consent of the People in ways that limit rights provisions. Kant, himself, derived the content of a few rights from Rightful Honour, including freedom of expression, religious liberty,⁶ and the presumption of innocence (MM 6: 238). An expansive notion of freedom of expression, for example, is linked to the right to be one's 'own master' (MM 6: 238). Limiting expression is appropriate to prevent one person from depriving another of her own capacity as a free and honourable agent; thus, one may not impugn another's reputation, or deprive them of choice and Rightful means through fraudulent inducement (Ripstein 2009: 210). The right to the presumption of innocence is also rooted in the foundational principles: to be treated, presumptively, as 'a human being beyond reproach' (MM 6: 238). And Kant bluntly states that 'no human being in a state can be without any dignity', before explaining why slavery must be categorically forbidden (MM 6: 330).

⁶ Kant, *An Answer to the Question: What is Enlightenment?* 8: 39.

The principles of Innate Freedom and Rightful Honour imply that certain rights, such as freedom from being enslaved, are absolute, insofar as no legitimate, UPR-compliant reasons can be given for their infringement. Absolute rights are those that are required to secure a person's place as a juridical person in a system of equal freedom writ large. Most rights in modern constitutions, however, are not expressed in absolute terms, but are 'qualified' by limitation clauses. Qualified rights command the omnilateral lawmaker to secure the reciprocal freedom of all in law. In Kantian terms, such rights recognise the individual's entitlements to set and pursue ends, while providing reasons for officials to restrict the scope of those same entitlements, in order to realise Public Right.

The distinction between absolute and qualified rights is not always obvious. Consider the right to life and the prohibition of slavery.⁷ The latter is an absolute right, because it amounts to a complete deprivation of a person's entitlement to freedom. There are no UPR-compliant reasons which could justify imposing this status – a denial of juridical personhood – on anyone. By contrast, the right to life has an absolute dimension, in that it safeguards a person's purposiveness as such. But there may well be UPR-compliant reasons licensing the state to take someone's life. The state might kill person X, for example, in order to prevent X from depriving Y of life. The maintenance of a system of equal outer freedom may, at times, depend on the use of lethal force when there is no alternative means of protecting the freedom of others or all. Under this view, only the core of the right to life – a right against being arbitrarily put to death, or killed for the sake of private ends – is absolute.

We can push Kant's method of deriving entitlements further, to sketch a picture of a charter of rights as foundational norms of justice in law. Again, the key is to consider the UPR as a legal obligation binding on the exercise of state authority. Thus, the constitutional contract places officials under a duty, owed to every person subject to their authority, not to make or enforce law in ways that are inconsistent with their rights. When it comes to qualified rights, the legitimacy of the justification for the limitation of one's freedom will turn on its consistency with the UPR. Further along, we will propose a way of conceptualising the proportionality framework as an analytical procedure for arriving at answers to precisely this type of question. Before doing so, we need to bring judicial review into the picture.

⁷ Kant, 'Theory and Practice' 8: 293.

VI. The constitutional court as omnilateral trustee

We have argued that an enumerated bill of rights deserves pride of place in a Kantian constitutional order. The rights-based constitution converts the idea of the original contract into positive constitutional law, while delegating to officials the authority to secure Public Right. Kant insisted that it was the cardinal duty of every official to give effect to the normative principles extrapolated and defended in the *Doctrine of Right*, without which a just, constitutional order could never be realised. Enforcing the charter of rights would, in effect, operationalise the UPR as the basic criterion of law's legitimacy. In this constitutional order, some rights will be expressed in absolute terms, but most will be qualified by limitation clauses that expressly authorise lawmakers to infringe on freedoms when necessary to achieve Public Right.

We now take on the task of describing a Kantian-congruent system of constitutional judicial review, a topic on which he wrote virtually nothing. Our claim is that Kantian theory requires a 'constitutional court,' which we define as an apex, omnilateral organ of governance whose mission is to supervise compliance with the UPR. The Court (i) evaluates the rights-regarding acts of all other public officials, (ii) issues authoritative interpretations of the content, scope, and application of the charter, (iii) certifies that officials act according to the UPR, and (d) invalidate acts that violate rights.

Delegation theory is directly relevant to this situation.⁸ Kant elaborates an abstract, functionalist claim to the effect that the move to omnilateral governance must take place if the polity is to progress toward a Rightful civil condition. The written constitution, a formalised act of delegation by the sovereign People, authorises public officials to make and enforce law in order to realise a Rightful civil condition. In pursuing this same tack, one confronts an obvious agency problem: how do the People ensure that officials will act according to the UPR? At the very least, allowing legislators to sit in judgement of their own statutes would make it impossible for citizens to distinguish a proper public act from one that pursues a private or an illicit interest.⁹ Citizens would also not know if an act violates the UPR. The constitutional court is the institutional solution to this problem.

⁸ Scholars have standardised the theory, as a general approach to delegated governance, in the guise of Principle-Agent models (Thatcher and Stone Sweet 2002).

⁹ When state officials act in the absence of authorisation, Ripstein (2009: 173) demonstrates, there is no way to make sense of their actions as public acts, as opposed to private exercises of coercive power.

Yet the problem that generates the demand for a constitutional court runs deeper still. Correlative to the state's duty to govern in a manner consistent with the UPR is the Innate Right of each person to freedom. Rights-as-freedom will be illusory unless each person subject to the state's authority is entitled to challenge state action. For Kant, a right is a moral power held by each citizen, a juridical title to act or be in a condition. If he is correct, then citizens can invoke a right in order to justify their acts or positions. But qualified rights are more than that: they authorize state officials to coerce.¹⁰ It follows that for Innate Freedom, and its positive determinations in explicit constitutional guarantees, individuals must have a legal power to constrain wrongdoing on the part of state officials. A right against the state requires as much.

This creates a *prima facie* difficulty for constitutional rights. The power to coerce state officials into compliance with the UPR cannot be operationalised through private acts of resistance, on pain of rendering the omnilateral will of the state subject to the unilateral say-so of each person. Put differently, if Innate Freedom transmutes into a sequence of justiciable positive rights held by each person, then each person also possesses a title to constrain officials from wrongfully interference with their freedom.¹¹ Once activated, the constitutional court determines the scope and application of a pleaded right; but its ruling will not be based on the unilateral judgment of the claimant, but on the constitution itself, the foundational act of the will of the People.

No other institution could perform this crucial, adjudicative function. In a system of parliamentary sovereignty, notwithstanding the commitment of the legislature to respecting rights (an empirical not a juridical state of affairs), individuals possess no entitlement to demand legislative compliance with the UPR. Rather, such a system recognises only a *collective* power to hold the legislature accountable, through voting and public deliberation (Weinrib 2014). Where no one possesses an individualised title to require the state to comply with the terms of the UPR, no one holds a genuine right, and the legitimacy of the law can not be assured.

Consider the 'new commonwealth model' of constitutionalism (Gardbaum 2012), which purports to reconcile legislative supremacy with rights protection. That model features (i) a charter of rights, (ii) some form of judicial

¹⁰ Qualified rights both authorise action and license the constraint of wrongdoing. For Kant, what justifies a coercive act in the first place is the necessity of 'hindering ... a hindrance to freedom' (MM 6: 231).

¹¹ The mechanism is a lawsuit brought by an individual rights claimant. We take no position on any other grant of authority to a constitutional court here.

power to review legislation and other government acts for consistency with the charter, trumped by (iii) a legislative ‘final word’ that will determine whether law judged to be inconsistent with a right provision will nonetheless remain in force. While the model gives standing to individuals to challenge wrongful state action, the legislature can choose to maintain a statute that violates rights. This is a version of what Kant called despotism: ‘the autonomous execution by the state of the laws which it has itself decreed’. In such a situation, ‘the public will’ expressed in the constitution is ‘administered by the ruler at his own will’ (PP 8: 352). A majority within the legislature, rather than pre-existing constitutional rules, determines the resolution of the conflict.

As a practical matter, the capacity of the constitutional court to render justice will depend upon an extensive grant of power and jurisdiction. The authority to review the conformity of statutes with rights and the UPR is required. Prohibited are arrangements that (i) restrict the binding authority of legal statements in judicial opinions to the parties of the judgment, or (ii) ascribe to the legislature the competence to make determinations regarding the scope and content of rights, but withhold them from the judge, or (iii) require judges to defer to non-judicial officials in rendering such determinations. Rights must be justiciable with respect to all public acts. In a system designed to achieve Public Right, the Court will oversee, and therefore participate in, omnilateral law-making. But its primary role is to adjudicate constitutional disputes that arise from the omnilateral law-making of officials. Put in the language of delegation theory, although the Court is an ‘agent’ of the People, the situation is one of *trusteeship* (Thatcher and Stone Sweet 2002: 7).

In sketching a simple model of trusteeship, we can express more formally the role to be played by the constitutional court.¹² Through legislating a rights-based constitution, the People have placed the ultimate value – their freedom – in trust. The constitution confers judicial review powers on the court, for the purpose of enforcing rights as positive requirements of legality. It places officials under the constitutional obligation to act according to the UPR, as a means of constructing Public Right; and it tasks the constitutional court with monitoring their compliance with this obligation. The court can only properly perform its mission if it possesses the authority to invalidate any public act that violates a right provision, and its decisions are effectively insulated from override on the part of the public officials whose decisions it controls.¹³

¹² On the concept of the trustee court, see Stone Sweet (2002, 2012b), and Stone Sweet and Brunell (2013).

¹³ As a matter of institutional design, a court that meets these criteria is a trustee.

We recognise that this part of our argument – that Kantian imperatives generate a powerful functional demand for the structural supremacy of a ‘trustee court’ – will be controversial. The claim, however, does not conflict with Kant’s own pronouncements, sparse as they are, on legislative power and justice. As noted, Kant defined the state as a ‘union of a multitude of human beings under laws of Right’, and asserted that ‘it is only in conformity with the conditions of freedom and equality that [the] people can become a state and enter into a civil constitution’ (MM 6: 313, 315). Under this constitution, the people govern themselves collectively:

The legislative authority can only belong to the united will of the people. [O]nly the concurring and united will of all, insofar as each decides the same thing for all and all for each, and to only the united, general will of the people, can be legislative (MM 6: 315).

Today, we no longer have to understand the idea of an ‘original contract’ as a purely regulative ideal; the People typically manifest themselves when they enact new constitutions, say, through a referendum. The rights-based constitution delegates law-making authority to various organs and officials, while the charter of rights constrains the exercise of that authority. Given a conflict between a rights provision and any legislative act, the former prevails.

In such a situation, neither parliamentarians nor executives are principals in relation to the constitutional court; instead, they are agents of the People, and the People have commanded the court to supervise the decision-making of all officials. Kant himself equated judicial authority with *justice*:

A Rightful condition is that relation of human beings among one another that contains the conditions under which alone everyone is able to *enjoy* his rights, the formal condition under which this is possible in accordance with the idea of a will giving laws for everyone is called public justice. [A] court is itself called the *justice* of the country, and whether such a thing exists or does not exist is the most important question that can be asked about any arrangements having to do with rights (MM 6: 305–6). [Emphases in the original.]

Today, when it comes to rights-based constitutionalism, the People, as primary lawmakers, have legislated judicial supremacy. Parliamentarians are secondary lawmakers, agents of the People, and subject to the decisions of the trustee court. Constitutional judges are caretakers, stewards, of the regime.

It should be obvious that a system that features the supremacy of an authoritative constitutional court fatally undermines the usual presumptions

of delegation theory, which are exemplified by the simpler Principal–Agent models of the social scientist. In ‘agency-control’ models, a unified Principle possesses the means to control the acts of her Agent on a continuous basis. A trustee, however, is a special type of agent. In this instance, the court is entrusted with promoting the values placed in reserve by the People: their freedom. The People, as the constituent legislative power, are also the beneficiaries of the trust going forward. The constituent power alone possesses the authority to alter the terms of the trust, which it may do through revising the constitution (Stone Sweet (2012b: 820–5)).

Trust law offers further analogies that are appropriate to our argument, notably, in its emphasis on fiduciary duties. Because both citizens and officials are vulnerable to the Trustee court’s judgments, the judges are bound by a set of robust obligations. The most important of these fiduciary duties – typically formalised as (i) *loyalty*, (ii) *accountability*, and (iii) *deliberative engagement* – apply to the trustee judge (Leib, Ponet and Serota 2013; Stone Sweet and Brunell 2013). As Leib *et al.* (2013) argue, loyalty refers to the judge’s duty to protect rights in ways that ensure that public officials act in accordance with the UPR. The duty of accountability requires the Court to justify its rulings with reasons. And the obligation of deliberative engagement requires the judge ‘to engage in dialogue’ with those who are vulnerable to her rulings, which includes both rights claimants and officials. The latter entails ‘an authentic effort to uncover preferences rather than a mere hypothetical projection of what beneficiaries might want’ (Leib, Ponet and Serota 2013: 699).

In Kantian terms, a robust fiduciary construction of trusteeship will underwrite reasons individuals have to accept state coercion. As a matter of positive law, each person retains the right to challenge any decision that would infringe upon their rights, and every official is placed under a duty to justify acts under review in terms that are comprehensible under the Doctrine of Public Right. In our view, the *right to justification*¹⁴ cannot be optional. Instead, it comprises a meta-rule that commits the polity to procedures that are conducive to the construction of Public Right. Arguably, in *Perpetual Peace*, Kant implied such a right in short but important remarks on ‘publicity’:

[Publicity] is implied in any legal claim, since without it there would be no justice (which can only be thought of as publicly proclaimable), and thus no Right, since Right can be conferred only by justice. Any legal claim must be capable of publicity (PP 8: 381).

¹⁴ For a broader account of the ‘right to justification’, see Forst (2011).

Kant goes on to pronounce a ‘transcendental formula of Public Right’, according to which ‘all actions that affect the rights of other human beings which are incompatible with publicity are unjust’ (PP 8: 381). Scholars differ on how best to interpret Kant’s insistence on the principle of publicity (Davis 1991; Laursen 1986). For present purposes, we understand it as presumptive support for a right to justification (held by all citizens) and its corollary, a reason-giving requirement (binding on officials). More generally, a reason-giving requirement is a functional necessity for any system of constitutional justice, if it is to develop effectiveness (Stone Sweet (2012b)). In any event, the right to justification must be reflected in rules of adjudication, including standing (access to justice), the fiduciary duties of the Trustee court (accountability and deliberative engagement), and in constraints on the exercise of public authority by officials (reason-giving, as disciplined by the UPR).

In this same spirit, we now address the question of why the trustee court ought to embrace the proportionality principle, or some (currently unknown) principle that performs better than proportionality, if it is to fulfil its mission.

VII. The new constitutionalism and the proportionality principle

Since 1950, the gradual consolidation of rights-based constitutionalism has transformed the global political and legal landscape. The precepts of this ‘new constitutionalism’ can be simply stated:

- (i) state organs are established by, and derive their authority from, a written constitution;
- (ii) the constitution assigns ultimate power to the People by way of elections or referenda;
- (iii) the exercise of public authority, including legislative, is lawful only insofar as it conforms with the constitutional law;
- (iv) the constitution provides for a catalogue of rights and a mode of judicial review to defend those rights; and
- (v) the constitution is entrenched, specifying how it may be revised.

As an empirical matter, virtually every new constitution adopted over the past three decades established systems of justice in line with this template.¹⁵ These developments make Kant’s theory of Public Right directly relevant to constitutional practice.

One can treat our model of Kantian justice as an ideal type for heuristic comparative purposes. The model bears more than a surface resemblance

¹⁵ Stone Sweet (2017) reports data on constitutions adopted since 1985.

to the most important domestic systems of justice operating in the world today; in these, certain norms and stipulations are treated as necessary determinants of more specific rights, and of constitutional legality itself. Well-known examples include the case of the right to dignity in the German Basic Law,¹⁶ the requirements of ‘equal citizenship’ in ‘a free and democratic society’ found in the Canadian Charter of Rights and Freedoms,¹⁷ or the values of ‘human dignity, equality, and freedom’ that are synthesised in Constitution of the Republic of South Africa.¹⁸ These formulations come before the listing of more specific rights and, in most contemporary constitutions,¹⁹ the catalogue of rights comes before the constitution of state organs. In post-World War II constitutions,²⁰ almost all rights are qualified by limitation clauses, yet another Kantian gloss. Omnilateral, law-making organs operate under a continuous obligation to generate a determinate legal ordering that conforms to rights; and a trustee court resolves legal disputes within that ordering.

Under the Doctrine of Public Right, law’s legitimacy is subjected to the dictates of a covering principle – the UPR – which, in turn, is rooted in the principles of Innate Freedom and Rightful Honour. Indeterminacy is built into both rights provisions and the UPR. The fraught question – ‘under what circumstances does an absolute right apply?’ – bedevils even the most refined systems of constitutional justice. Qualified rights are indeterminate, incomplete norms by definition and design. Whether officials have abused powers delegated to them by a derogation clause is a question that cannot be settled by referring to, or conceptualising dogmatically, the right, or the public interest that lawmakers pursue. Further, because the limitation clause incorporates the public interest into the right, the usual conflict rules are useless. One cannot appeal to hierarchy or the primacy of the right or the public interest in the abstract, since both parties are, in fact, pleading the same norm. Applying the *lex posterior derogat legi priori*

¹⁶ German Basic Law, art 1(1).

¹⁷ Canadian Charter of Rights and Freedoms, section 1, Part I of the Constitution Act, 1982.

¹⁸ Constitution of the Republic of South Africa (Act 108 of 1996) section 7; section 1.

¹⁹ The Canadian Charter of Rights, a standalone text that applies to the 1867 British North America Act, being a notable exception.

²⁰ We will not address the American debate between advocates of ‘originalism’ and ‘living constitutionalism’, except to make the following point. Originalists argue that courts are bound by whatever interest balancing has already been undertaken by the sovereign People, when that balancing is expressed in a specific rights provision; Justice Scalia, *District of Columbia v Heller* (2008) 554 U.S. 570, 634–645. Under this approach, balancing in adjudication would still be appropriate if the inquiry establishes that the right was understood as qualified rather than absolute when the people adopted it. In many post-World War II systems, where provisions establishing qualified rights impose an implied duty of dynamic interpretation on judges, an originalist approach is broadly compatible with ‘living constitution’ notions.

rule is also prohibited, since the adoption of any new statute would automatically eviscerate the rights claim, the basis of which dates from the adoption of the constitution. In a situation in which a rights claim comes into conflict with a legitimate public interest, the best constitutional judges can do is to embrace proportionality analysis [PA].

In fact, over the past 50 years, the world's most powerful constitutional courts have institutionalised PA as the dominant, 'best-practice' doctrinal framework for adjudicating qualified rights (Stone Sweet and Mathews 2008; Mathews and Stone Sweet 2011; Kumm 2004; 2010; Barak 2012a). PA belongs at the very centre of a Kantian system of constitutional justice, for three interrelated reasons. First, it permits judges to give broad scope to any qualified right being pleaded, mirroring Kant's argument that all positive rights held against public officials give concrete expression to a single unitary right to Innate Freedom, rather than a succession of discrete rights whose scope might, in principle, be quite limited. Most contemporary rights-based constitutions proclaim a general right to liberty, to which the qualified rights give specific content. The trustee court, in accepting the validity of a *claim* based on a qualified right, does not thereby resolve the case but, rather, requires the official to *justify* the act that has burdened the claimant.²¹ Second, PA commits judges to the systematic evaluation of such justifications. Under PA the crucial question is always, as Kumm (2010: 42) puts it, 'whether a public action can be demonstratively justified by reasons that are appropriate in a liberal democracy', given the paramount importance of rights in modern constitutionalism. Third, a trustee court that deploys PA consistently and in good faith will fulfil the fiduciary duties discussed above (Stone Sweet and Thomas Brunell (2013: 69), of loyalty (to constitutional values), accountability (through reason-giving), and deliberative engagement (with rights-holders and officials). PA thus gives procedural structure to the right to justification, strongly implied by Kant himself (discussed above), 'in terms of public reason' (Kumm 2010: 144, 150).

We now provide a brief summary of PA, and sketch how a Kantian trustee court would presumptively deploy it.

VIII. Proportionality and qualified rights

PA is tailor-made for resolving disputes that involve a conflict between a rights claim and a public act whose constitutional legality, officials alleged,

²¹ 'In institutional terms, these features of human rights practice require a re-characterization of what courts do when they assess whether public authorities have violated rights. Courts are not simply engaged in applying rules or interpreting principles. They assess justifications. Call this *the turn from interpretation to justification*' (Kumm 2010: 144).

is covered by a limitation clause. In the latter, paradigmatic, situation, the analysis proceeds step by step, as follows.

In a preliminary phase, the judge considers whether a *prima facie* case has been made to the effect that a government act burdens the exercise of a right. By convention, the judge will use this occasion to discuss the jurisprudential theories that underpin the pleaded right, as well as prior rulings and other legal materials that will bear upon the court's determination of the right's scope and application in the case at hand. In its most developed form, PA then proceeds through a sequence of four tests: (i) 'legitimacy,' or 'proper purpose'; (ii) 'suitability'; (iii) 'necessity'; and (iv) balancing in the strict sense. A government measure that fails any one of these tests violates the proportionality principle and is therefore unconstitutional.

The first stage of PA mandates inquiry into the 'legitimacy' of the measure under review: the judge confirms that the constitution authorises the government to take such a measure, typically, under a limitation clause (express or implied). In most jurisdictions, judges effectively treat the proper purpose prong of PA in the style of a threshold inquiry: if the constitution has not authorised the state to pursue such a purpose, then the rights claimant must prevail. In the second step – 'suitability' – the government must show that a rational relationship exists between the *means chosen* and the *ends pursued*, such that the former is 'suitable' to achieving the end (which, the first test has already confirmed, constitutes a legitimate public purpose). In most systems, few laws are struck down on grounds that the official purpose is illicit (*per se* illegitimate), or that the act is irrational or arbitrary (the means being unsuitable).²²

The third phase – 'necessity' – has far more bite than the suitability inquiry. At its core is a least-restrictive-means (LRM) test,²³ through which the judge ensures that the measure under review does not curtail the right being pleaded more than is necessary for the government to achieve its declared purpose. In practice, judges do not invalidate a measure simply because they can imagine one less restrictive alternative. Instead, most PA-adept courts insist that policymakers have a duty to consider a range of *reasonably available* alternatives, and to refrain from selecting the most restrictive among them. These courts also typically require, as a pleading matter, that the rights claimant identify less restrictive alternatives; and the judges will never strike down a law as unnecessary without comparing it to at least one reasonably available alternative.

²² Some versions of PA collapse legitimacy and suitability into one stage.

²³ Canadian and American judges consider LRM under, respectively, a 'minimal impairment' and a 'narrow tailoring' requirement.

An act that fails either the legitimacy or suitability tests is one that contributes nothing to the realisation of Public Right. Ends must meet the dictates of the UPR, and any limitation of a right through means that are not rationally connected to a legitimate end must constitute a *per se* infringement of freedom. These same considerations suggest that the use of means other than those that are least restrictive on freedom must also qualify as a violation of the UPR: no official possesses the authority to restrict freedom further than is necessary to secure the external freedom of all. Thus, irrespective of the importance of the end being pursued, a public act that fails a LRM test is one that can not be justified under a system of Public Right.

In the proportionality world, the analysis cannot end with necessity. If it did, a law that imposed an unjustifiable burden on the rights holder, but was nonetheless narrowly tailored, would prevail. A fourth stage, balancing in the strict sense, is required. In it, the court assesses, in light of the facts or policy context, the act's marginal addition to the realisation of Public Right against the marginal injury incurred by infringement of the right. Thus, one core function of balancing is to ensure that a relatively small or even trivial addition to the public weal does not, say, curtail a right in a significant way. Judges that rely heavily on this stage (e.g., members of the GFCC and the Israeli Supreme Court), also emphasise that balancing allows them to 'complete' the analysis, in order to check that no factor of significance to either side has been overlooked in previous stages (Grimm 2007: 393–5; Mathews and Sweet Stone 2011: 106–8).

Consider the US Supreme Court's ruling in *United States v O'Brien* (1968).²⁴ Mr O'Brien had burned his draft card, in violation of federal statutes, while protesting the Vietnam War and military conscription. The Court took no firm position on the question of whether O'Brien's 'wordless' act was protected by the First Amendment; the answer to that question was left incomplete in comparison to what is required under PA. Instead, the Court formulated the following test:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

²⁴ 391 U.S. 367 (1968).

On the basis of this test, the Court upheld O'Brien's conviction, since the draft card fulfilled various administrative functions. The judgment, however, concluded in deafening silence on the question of the relative importance of government's interest and O'Brien's 'alleged' speech right. Under PA, the judge would have been required to give an answer to that question, in the balancing stage. The Court, however, marched through the test just announced – which embodies the first three stages of PA – while saying virtually nothing about the First Amendment. It is worth emphasising that O'Brien still may have lost the case under a full-fledged version of PA. But an additional layer of reasons would have been added, thereby completing the analysis.²⁵

It makes little sense to discuss the balancing stage without invoking, from the outset, the formulations of Robert Alexy (2002) and Aharon Barak (2010, 2012b). Alexy (2002: Postscript, 390–425), synthesising the jurisprudence of the GFCC, proposed the *Law of Balancing*:

The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.

For his part, Barak (2012b: 746) elaborates the *Rule of Balancing*:

As the importance of avoiding the marginal limitation on the constitutional right and the likelihood of the limitation coming to pass increase, so do the required importance of the marginal benefit of the public interest or the competing private right and the required likelihood of that benefit being realised.

Barak (2010: 10) insists that the balancer must take account of the significance of the right in context:

The weight that is attached to the side of the rights on the scale is derived not only from the importance of the right but also from the extent of its limitation, its intensity, and its dimensions. A limitation nearing the margins of the right differs from a limitation nearing its core. A temporary limitation is less severe than a permanent one. Thus, consequences of limitation of a human right and its effect on those entitled to the right affect the weight of the right itself.

Both formulations stress the duty of the judge to engage in relational analysis of the values in tension, in the context of a specific dispute. And both will drive the judge toward an answer to the dispositive question: does the law under review burden liberties too much, given our constitutional commitment to rights?

²⁵ Ibid.

A Kantian reading would convert these formulations into strictures for ensuring that the law can be justified under the UPR.²⁶ As Barak (2012b: 745) suggests, ‘balancing’ is only a metaphor for what judges do at this stage:

To speak of ‘balancing’ is to speak metaphorically, but the mode of thought is normative. It is based on legal rules that determine when a proper purpose may be realized despite the limitation on a constitutional right.

Balancing in the strict sense bears no relation to cost–benefit analysis in a crude utilitarian sense which, in our view, would be anathema to a Kantian approach. Proportionality balancing involves assessing the relationship between the most important requirements of the constitutional order, both of which are Kantian values: (i) the freedom of every individual, embodied in the individual right at issue, and (ii) the duty of state officials to achieve Public Right, to be (partially) effectuated through the realisation of the governmental purpose at stake. In the Kantian model, these requirements are not strictly incommensurate: both are subsumed by the UPR, that is, by the concept of freedom within a Rightful civil condition. Balancing comprises a holistic evaluation of whether, given the circumstances and our constitutional commitments, officials are justified in taking a measure, given their duty to create a system of reciprocal constraints on freedom.

The ‘balancing’ inquiry attends to the propriety of a particular means of advancing public interests – of constituting Right – not a consequentialist operation of weighing interests against one another. Rather than relying on a metric of evaluation exogenous to the system of Right, or attributing atomistic weights to principles, the Kantian account we have developed considers all dimensions of importance within a single universal system of freedom. A law that is judged to be proportional comports with the UPR, and can thus be credited as a contribution to Public Right. A law that is disproportionate makes no such contribution, and is therefore invalid.

²⁶ A sceptic might deny that (i) balancing and (ii) the progressive elaboration of rights can have any place in a Kantian system of justice. If, as Kant famously claimed, the fundamental content of morality is given *a priori*, then why do we need judges to fill out rights, across time, through judicial elaboration? Our response is twofold. First, Kant follows a larger natural law tradition in understanding the *a priori* component of morality (or natural legality) as inherently abstract and indeterminate, when considered alongside concrete cases; see Stone (2011). The very purpose of public law, the philosopher insists, is to constitute a Rightful condition, by giving those *a priori* standards determinate content (MM 6: 312). Second, Kant explicitly recognises that abstract norms do not interpret and apply themselves in the myriad contexts that could give rise to a legal conflict, while arguing that neither a legislator nor head of state should be the judge of its own law. See also n 28.

Kant insisted that a system of Public Right could only be produced through a sustained process of practical reasoning, to render the determinable more determinate, not to discover answers to questions that are beyond the realm of reasonable disagreement (PP 8: 366–7, 386; and MM 6: 230–1, 317–20, 340–9, 354–5). In Barak’s formulation, the judge’s task is to determine whether a law falls within *a zone of proportionality*; in Kantian terms, the question is whether the law can be justified under the UPR, which is *coterminous with that zone*. The outcome will depend on an assessment of the severity of the infringement in context, whether the activity or condition covered by the right falls within the right’s core or periphery, and the availability of alternative measures, all of which demand sensitivity to empirical circumstances, as they change over time (Barak (2012b)). We find Barak’s exposition of balancing Kantian-congruent. Its function is to adjust the aspects of the constitutional order in relation to one another, on an ongoing basis, so that they fit together into a coherent whole.

PA has many critics. Some see potential dangers: judges may use PA as a cover for deferring to legislators and executives, or for balancing rights away. Others see PA as being too restrictive of policy discretion, inevitably casting judges as masters of the policy processes under review. Proponents defend proportionality against attacks from both sides (Stone Sweet and Mathews 2008; Mathews and Stone Sweet 2011). It is important to emphasise that PA is an *analytical procedure*. PA does not, in itself, produce substantive outcomes; and it does not tell judges how important are any two contending values and interests. Instead, PA organises the systematic review of justifications for government measures that would burden the exercise of a right. Judges also use PA to build secondary doctrine: the argumentation and justification frameworks that will govern adjudication (and hence policymaking) in any domain covered by a specific right. As we argued in the last section, a meta-rule – melding the entitlement to justification and the reason-giving requirement – is a necessary component of any effective system of constitutional justice. Adopting PA places this meta-rule at the very heart of adjudicating rights, and the enforcement of the UPR.

IX. Excluded reasons and absolute rights

PA neatly fits the demands of the UPR and structures how judges will fulfil their fiduciary obligations. Yet, with regard to the first stage of the framework – legitimate purpose – Kant’s ideas arguably point away from necessity analysis and balancing, and towards a mode of decision-making in which the judge’s principal task is to exclude *illegitimate* justifications for limiting freedom, thereby determining the scope of the right.

As noted, when adjudicating qualified rights, most skilled judges treat the legitimacy prong of PA in the style of a threshold inquiry: if the constitution has not authorised the state to pursue such a purpose, then the claimant must prevail on the basis of little more than a *prima facie* demonstration that a right is in play. Except in the most egregious cases, the law under review will pass this prong of PA without much ado. After all, the competence to regulate is conferred on officials by the rights provision itself, through a limitation clause. Without further contextual clarification, the outcome conforms to Kantian dictates: officials may hinder the freedom of any rights holder, but only to secure the external freedom of all. If a system contains a general right to liberty, then officials may act only to secure the external freedom of all.²⁷ Further, officials may also routinely claim that the act under review had been designed to fulfil a right, thrusting the court into a balancing posture. In the proportionality world, judges and scholars typically downplay the importance of proper purpose inquiry, deploying it most often to pay their respects to officials' good faith efforts in pursuit of valid public interests, saving any censure for later stages.

This *de facto* insouciance deserves more scrutiny. Simplifying a complex issue, a more robust, sustained inquiry into legitimate purpose could well subsume the types of reasoning found in subsequent stages. Concrete constitutional guarantees can only be limited for the sake of freedom; and ends that are exogenous to the system of Right are impermissible bases for restricting freedom. Because the Kantian judge is under a clear duty to filter out such ends, one should ask why the legitimate purpose test is not sufficient in itself, that is, why supplement it with three subsequent stages?

If judges focused more attention on proper purpose, treating the legitimacy prong as a general test of legality, then it would likely evolve as the privileged site for the elaboration of categorical, means-based restrictions. As it is, suitability and necessity analysis (both which help courts 'smoke out' illicit motives), and balancing (through which courts assess the proportionality of marginal benefits and harms) do the work that, arguably, could be done in proper purpose analysis. In the proportionality world, one typically asks (i) whether a purpose is constitutionally legitimate in the sense that the aim pursued can be subsumed under a legal power that state officials rightfully possess. But one could also wonder (ii) if a purpose is

²⁷ In a widely copied formulation, the German Basic Law announces a general right to liberty in the guise of 'the right to freely develop one's personality' (art 2.1 GG) which, the German Federal Constitutional Court [GFCC] insists, covers virtually anything an individual would want to do. The leading case is *Elfes*, 6 BVerfGE 32 at 36 (1957), which affirms a right to a 'general human freedom of action' that encompasses all activities consistent with the rights of others.

constitutionally legitimate only once the judge finds that the end is itself a sufficient reason for restricting a right in the first place. The latter situation requires categorical reasoning, not just *pro forma* box ticking.

To bring the point into focus, consider the well-known trolley problem, which involves two scenarios (Jarvis Thomson 1985). In the first, a runaway trolley will kill five people unless a bystander switches the trolley onto another track where, foreseeably, it will kill only one person. In the second, a runaway trolley will kill five people, unless a bystander pushes an enormous man in front of it, as a means of triggering the emergency break. The standard intuition associated with this pair of cases is that diverting the trolley is permissible, but pushing the man in front of the trolley is impermissible (Cushman, Young and Hauser 2006).

A robust legitimate purpose test would ask whether saving the lives of the five could constitute a legitimate reason for violating the right of the man against being used as a means. On the Kantian view, the answer to this question is clearly ‘no’: each person possesses an entitlement to be one’s own master, and not to be used for another’s ends. This secures the man’s right against being conscripted into the purposes of the five, no matter how urgent their situation. The crucial point is that the analysis proceeds by way of categorical reasoning, not through assigning weights to benefits and harms, and then balancing.

One powerful defence of PA, however, rests on the distinction between absolute and qualified rights.²⁸ Once the constitution or judge classifies a right in absolute terms, it is removed from the domain of proportionality. Famously, the GFCC refuses to apply PA to dignity, on grounds that are strikingly Kantian. In the *Life Imprisonment Case* (1977), adjudicating whether life imprisonment is lawful under the banners of retribution and deterrence, the Court held that:

It is contrary to human dignity to make the individual the mere tool (*blosses Objekt*) of the state. The principle that ‘each person must always be an end in himself’ applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality.²⁹

²⁸ A second defence would emphasise the advantages of ‘as-applied’ review: judges are often called upon to judge statutes in light of circumstances that the legislature had not fully contemplated. In such situations, it would be needlessly provocative to assert that legislature had pursued an improper purpose. In proportionality-based systems, courts typically run each case based on new facts and circumstances through PA; past acts and decisions are typically treated as relevant but not dispositive.

²⁹ *Life Imprisonment Case*, 45 BVerfGE at 228.

The GFCC sidesteps the issue raised here – whether the policy reflects an improper purpose – by categorising the dispute as directly involving the individual’s dignity, which prohibits PA altogether. In another full-fledged dignity ruling, *Aviation Security* (2006), the GFCC invalidated, on dignity grounds, a statute that would have authorised the interior minister to shoot down an airliner that had been hijacked by terrorists with the intention of using it as a weapon against the population.³⁰ The Court’s rationale is overtly neo-Kantian: to allow an official to intentionally terminate the lives of the innocent persons on board would convert those persons into objects of the state.³¹ In cases in which dignity is directly and fully implicated, the Court applies PA.

The issue of whether courts should develop a more robust application of the legitimate purpose test deserves more consideration. In the proportionality world, however, no court has moved in this direction in any consistent way. Such a move might very well lead to the migration of balancing considerations into deliberations on proper purpose, a type of ‘hydraulic effect’.³² While the US Supreme Court sometimes adopts a categorical posture, for example, it often engages in balancing to produce the categorical rule (Aleinikoff 1987; and Mathews and Stone Sweet 2011). Put in terms of PA, balancing and necessity reasoning would likely flow into the analysis of proper purpose. Such an outcome would undermine transparency, as well as the tribunal’s capacity to express respect for officials precisely where it is due.

X. Proportionality and judicial supremacy

The mission of the Kantian trustee is to supervise the rights-regarding acts of all other officials, to assess reasons officials give when they burden any right, and to invalidate laws when these reasons are insufficient. Insulating the court’s rulings from override – by those over whom the court exercises authority – will be an important determinant of the system’s effectiveness (Stone Sweet 2012b).

Judicial supremacy raises well-worn legitimacy concerns, including the so-called ‘counter-majoritarian difficulty’: the capacity of the trustee to generate policy outcomes that elected officials would not have produced

³⁰ BVerfGE, 1 BvR 357.

³¹ This is not to say that the GFCC reached the conclusion that Kant would have reached in either case. We do not offer a general excursus on the casuistic side of Kant’s legal philosophy.

³² Hydraulic dynamics emerge when a court shifts burdens within balancing frameworks. As Han (2014: 1716) puts it, ‘legal doctrine is often hydraulic in nature; whenever the rigidity in one doctrinal area exerts pressure on courts’ decisionmaking, that pressure often seeks release in other areas of the doctrine’.

on their own, but which are difficult or impossible to reverse. Under such conditions, the override or revision of important rulings on constitutional rights is, in practice, only possible through subsequent rounds of adjudication. The court that adopts PA – a highly intrusive standard of review – makes its formal supremacy a mundane fact. Indeed, the necessity and balancing prongs position a trustee court to be the supreme lawgiver, albeit through the adjudication of disputes that arise within parameters set by prior acts of law-making and the constitution.

While we recognise that supremacy raises deep normative issues, Kantian theory is largely immune to counter-majoritarian objections.³³ Kant gives freedom – rights – pride of place, not the will of a transient, political majority. For Kant, representation and accountability demands more than occasional consultation of the People as an electoral body. It requires accountability to the People considered *as individual citizens*, whose entitlements to rights are unimpeachable, and to the People as constitutional legislators. To the extent that the People have legislated supremacy, placing the parliament under the control of a constitutional court, normative arguments grounded in the dogmas of legislative sovereignty are beside the point. We have not argued that courts are the repository of some type of special wisdom when it comes to enforcing rights. We do claim that trusteeship – supremacy constrained by robust fiduciary obligations – will optimise the polity's capacity to progress in its goal of achieving a Rightful constitutional condition.

As an empirical matter, modern systems of constitutional justice are, in fact, characterised by judicial supremacy (Stone Sweet 2012b). How effective systems of constitutional justice actually operate should bear on the normative debate. Three points, each of which is based on strong empirical findings, deserve strong emphasis. First, the most effective constitutional courts are those able to draw other policymakers, and at times the citizenry, into the discourse they constitute and curate as a jurisprudence of rights (Stone Sweet 2000). If officials and citizens ignore, or conspire to undermine the consequences of, its rulings, then trustee courts will fail. Second, the ongoing use of PA creates an interface for deliberative engagement between the constitutional court and all other officials who make and enforce law (Stone Sweet and Mathews 2008: 104–60). Successful trustee courts use PA not to bludgeon officials into submission, but to construct (often intricate) 'dialogues' with legislatures, executives, and the ordinary courts concerning the scope of their own

³³ For example, those marshalled by Waldron (2004; 2006), and by those who worry that supremacy institutionalises the so-called 'majoritarian difficulty' (surveyed by Friedman 1998).

law-making authority. These same courts have strongly embraced PA, an operating system for dialogue, which shapes the evolution of policy and the content of the rights-based constitution (Stone Sweet 2000; Hiebert 2011). Third, legislatures and executives are unlikely to render a charter of rights effective on their own, without having their decision-making placed in the shadow of a trustee court. This last point firmly applies to the new commonwealth model.³⁴

XI. The multi-level architecture of right

Right, Public Right, International Right, and Cosmopolitan Right share certain micro-foundations in common, and each purports to resolve the same generic problem. Flikschuh puts the point neatly:

Kant does not share the widespread view that we can turn our attention to the issue of cosmopolitan Right only *after* we have settled the matter of domestic justice. The grounds of cosmopolitan justice are identical with those of domestic justice: both follow from the claim to external freedom of each other under conditions of unavoidable empirical constraints. Instead of distinguishing between different theories of justice for the

³⁴ The main proponent of the argument to the contrary is Waldron (2004), who rests his case on one UK episode, involving the regulation of abortion. In contrast, compare the situation under the Canadian Charter of Rights (1982–present) with that under the Canadian Bill of Rights (1960–1982). As Gardbaum (2012: 99) puts it: ‘the Canadian Bill of Rights is almost universally thought to have been ineffective because of the courts’ tendency to interpret its impact and their power through the traditional lens of parliamentary sovereignty, thereby limiting the scope and effectiveness of the rights protected’. Under the ‘New Commonwealth Model’, the legislator is given the ‘final word’ when it comes to the enforceability of any statutory provisions that supreme courts declare to violate the Charter of Rights (Canada), or to be incompatible and/or inconsistent with human rights statutes (New Zealand, the UK). Gardbaum and Hiebert have undertaken the most intensive empirical research on the effects of these new rights instruments. Gardbaum (2010: 172–3) argues that ‘there is consensus that rights have been better protected’ in these countries ‘since adopting the new model and abandoning traditional parliamentary sovereignty’. But he also states that the ‘record suggests that judicial supremacy is not necessary for such protection’, insofar as there is ‘no significant sacrifice’ of rights protection to pay for democratic legitimacy. Leaving aside the indeterminacy of ‘significant sacrifice’ standard, this type of argument is not available in a Kantian system; either a statute complies with the UPR or it does not. Hiebert, who has focused on the capacity of parliament to debate rights meaningfully on their own, sums up the empirical record as follows (2011: 61): ‘Research in all three jurisdictions suggests that the legal costs [the risk of judicial censure] are more persuasive than parliamentary criticism when encouraging governments to take rights seriously ... Unless parliamentary pressure is sufficient to threaten defeat of a bill, governments have generally been unwilling to amend bills.’ With regard to the UK Human Rights Act (HRA), Hiebert (2012: 44) concludes that, ‘the idea of [the HRA] facilitating a culture of rights, at least as it pertains to Westminster, is likely wishful thinking’.

domestic and international contexts, Kant refers to different *levels* of institutionalizing his cosmopolitan conception of Right (Flikschuh 2000: 170; emphasis in original).

The implication for any Kantian system of constitutional justice should be clear: for all ‘human relations’ (Williams 2015), at every level of governance, the UPR constitutes a foundational criterion of the legitimacy of all law.

The UPR lies at the core of any Rightful constitutional condition for two reasons. First, it complies with, and flows outward from, even more primordial principles: Innate Freedom and the Internal Duty of Rightful Honour. Second, Kant casts the UPR as a meta-norm: all officials are under a duty to make, interpret and apply law in conformity with the UPR; and any act that conforms to it commands obedience. In Kelsenian terms, the UPR gives to the *Grundnorm* substantive content, in the form of a command. In Hartian terms, the duties that inhere in the UPR take primacy over all other secondary rules (Hart 1994: 92–4).

Extending our account to a transnational system of rights protection is, therefore, relatively straightforward. To illustrate, consider the European Convention on Human Rights. The states signatories placed the supreme constitutional value – freedom – in trust, in the form of a charter of human rights. As agents of (and analogous to) the People at the domestic level, they have assumed the role of the constitutional legislator. With Protocol No. 11 (1998), the Contracting States created a version of trusteeship. The European Court protects the rights of individuals within and beyond the state: a ‘justice’ function. It supervises the rights-regarding activities of all national officials: a ‘monitoring’ function. And it authoritatively determines the content and scope of convention rights on an ongoing basis: an ‘oracular’ function (Stone Sweet 2012a).

Kant does not, however, apply the ‘idea of the original contract’ with respect to inter-state relations. Instead, he asserts that states (i) are under a moral duty to pursue the construction of a Rightful condition, and (ii) will be more likely to succeed if in league with one another. In *Perpetual Peace* (8: 354–8), Kant counselled member states of leagues to retain their sovereignty, at least during the foundational period. The regime’s organs should not exercise direct, juridical authority *within* the states that make up the federation. Among other primary tasks, the Strasbourg Court enforces the absolute prohibitions contained in Articles 2 and 3 ECHR; and it adjudicates the qualified rights of Articles 7–11 ECHR according to the proportionality principle, while requiring all domestic courts in the regime to use PA. It is the authoritative interpreter of the Convention, and its rulings are strongly insulated from reversal. But the Court does not possess the power to invalidate national law that conflicts with Convention

rights, a competence that falls within the realm of domestic justice. As argued in *A Cosmopolitan Legal Order*, a multi-level system of justice was constituted in Europe through the combined effects of (i) Protocol No. 11, which conferred on all individuals the right to petition the European Court after exhaustion of national remedies, and (ii) the incorporation of the Convention in ways that enable the courts to enforce it directly, as national law (Stone Sweet (2012a)). As a result, the interface between domestic and transnational systems of justice has become increasingly articulated. At the same time, it is obvious that the European Court's effectiveness depends critically on the performance of domestic trustee courts.

Kant himself (PP 8: 356) pointed to the dynamic relationships – interactive, ‘feedback’ effects – of the different levels of Right. These effects could ‘undermine’ progress toward a Rightful condition, and might even lead the process to ‘collapse’. But they could also reinforce it. Once formerly despotic states become republican, others may choose to follow, as the benefits of doing so become apparent. And a Rightful condition beyond the state can help support the consolidation of Public Right at the domestic level. Indeed, Kant imagines the establishment of ‘a republicanism of all states, together and separately’ (MM 6: 354–5) under a shared doctrine of Public Right. In any event, the pathways through which perpetual peace and a Rightful condition can be achieved are likely to be complex, non-linear, and fraught with political obstacles. ‘As Kant was often to note’, Williams (2015) reminds us, ‘the human race does not progress the easy way. It only adopts rational principles for governing its social relations after a hard and frequently violent struggle with itself and its worst characteristics.’

Kantian constitutional theory is, therefore, powerfully integrative, requiring us to consider, simultaneously, the cosmopolitan nature of constitutional rights, and the constitutional grounds of the cosmopolitan (Brown 2009; Kumm 2016).

XII. Conclusion

This article develops an account of a Kantian system of constitutional justice, the persuasiveness of which will depend on the acceptance of an interlocking set of claims:

- (i) that the People have placed their freedom in trust, in the form of a charter of rights;
- (ii) that rights provisions instantiate, as positive law, the foundations on which the external freedom of all persons may be constructed;
- (iii) that public officials are under a duty to make and enforce law in ways that fulfil the rights of persons that come under their authority;

- (iv) that an omnilateral trustee, a constitutional court, supervises the law-making activities of officials, through the enforcement of the UPR; and
- (v) that the UPR, as operationalised through the proportionality principle, lays down the basic criterion for the legitimacy of all law.

These are the features, we have argued, that will maximise a polity's capacity to achieve a Rightful constitutional condition.

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