Introduction: on the limitation of rights

What is the relationship between freedom of expression and libel, pornography and political speech? Between the right to life and abortion, euthanasia and assisted suicide? Between the freedoms of religion and conscience and State-funding for religious schools, an official State church, and conscientious objections to military service? With few exceptions, international, constitutional and legislative charters of rights leave the relationship between rights and these (and other) moral–political questions open and unresolved. It is indeed a feature of charters of rights that they proceed largely in abstractions, seeking agreement on grand formulations in a way that avoids the great debates (and disagreements) animating rights. Constitutional rights are for the most part proposed and adopted without being wholly worked out and with their scope and content still to be determined. They are, perhaps, examples of incompletely theorized agreements on a general principle despite the absence of further agreement on the more specific moral–political questions.[1]

Constitutional rights are formulated in a way that finesses reasonable disagreement about what should be within the scope and content of the right. In this way, those who disagree, for example, on the permissibility of libel and pornography, abortion and euthanasia, State-funded religious schools and conscientious objections can nevertheless agree on freedom of expression, the right to life, and the freedoms of religion and conscience. Through these underdeterminate formulations, constitutional rights can be taken to represent a free and democratic society's commitment to rights all the while concealing the extent of reasonable disagreement about how to specify these rights in relation to the great moral–political debates alive in the community.

With the notable exception of the US Bill of Rights, most domestic and international charters of rights mediate (without resolving) the

[1] This is one of three genres of incomplete theorized agreements developed by Cass R. Sunstein in 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733 and *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996).

relationship between underdeterminate rights and debates about their specified scope and content. They do so by way of a limitation clause that sets out the conditions according to which the limitation of a right will be evaluated. These clauses are familiar to students of international instruments, including the Universal Declaration of Human Rights[2] and the European Convention on Human Rights;[3] constitutional charters of rights, including the Canadian Charter of Rights and Freedoms[4] and the South African Bill of Rights;[5] and statutory bills of rights, including the British Human Rights Act[6] and the New Zealand Bill of Rights.[7] Some charters of rights provide a single overarching limitation clause applicable to all rights, whereas others provide a series of right-specific limitation clauses. In turn, some stipulate the permissible ends according to which a right may be limited (public health, morals, the prevention of disorder or crime) whereas others rely on an open-ended reference to a 'free and democratic society' without further specification. But beyond these and other slight differences, all limitation clauses seek to mediate the relationship between the charter of rights and the moral–political questions animating reasonable disagreement about what the rights require. In this way, a limitation clause acknowledges the underdeterminacy of constitutional rights all the while framing a process according to which the limitations of rights can be justified in a free and democratic society.

Despite differences in legal and political cultures and despite different answers to the reasonable disagreements animating what rights require, a general approach to limitation clauses and to the limitation of rights can be discerned from the work of scholars and judges in jurisdictions ranging from Germany, Canada, Israel, the United Kingdom and New Zealand, among others, including at the level of the European Court of Human Rights. These jurisdictions have all converged on what could be termed the *received approach to the limitation of rights*. The received approach takes the underdetermined guarantee 'everyone has a right to φ' as providing an encompassing right for all to all that is related to φ. Limitless instances of activity are said to be protected by the right, with the result that the charter of rights extends everywhere and to everything. For example, it is often contended that the open-ended guarantee 'everyone has freedom of expression' grants to 'everyone' the freedom to express anything anytime,

[2] Universal Declaration of Human Rights, art. 29(2).
[3] European Convention on Human Rights, arts. 8(2), 9(2), 10(2), 11(2).
[4] Canadian Charter of Rights and Freedoms, s 1.
[5] Constitution of the Republic of South Africa, s 36(1).
[6] Human Rights Act 1998 c 42 (United Kingdom) (incorporating the European Convention).
[7] New Zealand Bill of Rights Act 1990 no 109, s 5.

including the freedom to perjure oneself, publicly to advocate and privately to incite and to give instructions for the violent overthrow of the government, and to disclose State secrets of the highest order. The all-encompassing meaning of constitutional rights is said to be settled by the constitution itself – subject to interstitial judicial updating under the guise of re-interpreting the meaning of a 'living constitution'. The constitution's meaning is fixed and not subject to challenge or completion by the political process. In turn, the received approach evaluates whether any of the all-encompassing rights are limited by an Act of the legislature (or other State action). The political process, and the Acts of the legislature in particular, may comply with or limit a right – there is no in-between. And in so proceeding, the received approach insists that the question of a right's *definition* and the question of a right's *limitation* are held distinct.

Because of the all-encompassing scope of constitutional rights and because free and democratic societies pursue a complex range of conflicting ends, rights are limited everywhere. And because a right is limited by legislation (or other State action) and by the constitution itself, the received approach at times seems to read 'limitation' as synonymous with 'infringement' or 'violation'. As a consequence, the legislature (and the State more generally) is constantly infringing or violating constitutional rights; each legislative Act is bound to conflict with one or more of the limitless rights of the constitution. The legislature is thus identified as the antagonist of constitutional rights, even as it seeks to determine whether pornography or libel should be regulated and whether euthanasia and abortion should be prohibited; for each instance of regulation or prohibition conflicts with the constitutional rights to expression and to life which are understood to encompass all possible questions of expression or life. A free and democratic society is thus understood to be both a protector of rights and the site for the unavoidable infringement and violation of these same rights.

By mediating the relationship between constitutional rights and legislation regulating or prohibiting an instance of constitutionally protected activity, a limitation clause opens up the possibility that legislation, despite infringing or violating a right, can be upheld as valid. In this way, the received approach views limitation clauses as authorizing restrictions on the otherwise expansive scope of rights or as allowing for important exceptions to otherwise limitless rights.[8] A limitation clause allows for the

[8] See generally S. Greer *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing, 1999); G. Letsas *A Theory of Interpretation of the European Convention on Human Rights* (New York: Oxford University Press, 2007).

legislature's infringement or violation of a right to be 'saved' or 'defended' in the pursuit of some justifiable end in a free and democratic society, such as national security, public health or morals. As a result, many look upon limitation clauses as causes for some regret; these clauses are, in the words of Dworkin, 'political compromises' that burden rights with 'important qualifications'.[9] But for limitation clauses, all rights would enjoy the expansive scope and application provided by the constitution and would not be constrained by legislation pursuing the public interest in violation of constitutional rights. As a result, courts have come to require a 'high' burden of justification before legislation infringing or violating a right can be upheld, because any limitation clause 'inquiry must be premised on an understanding that the impugned limit violates constitutional rights'.[10] Indeed, a limitation clause serves as an unfortunate reminder that constitutional rights, despite being all-encompassing at the constitutional level, are not absolute in practice: a limitation clause may sanction their infringement and violation.

Although limitation clauses provide little direction on the mode of justification for a right's infringement or violation, the received approach to the limitation of rights has settled on the regulative ideas of *proportionality* and *balance* between harm and benefit to assess legislation (and other State action). Legislation may be valid, despite violating a constitutional right, so long as it satisfies the principle of proportionality and achieves a balance between the good it brings about and the harm caused to the right.[11] In this way, despite the long reach of rights, they are controlling only if legislation is disproportional or unbalanced. As against proportional violations and balanced infringements, a constitutional right offers no guarantee. Indeed, according to this methodology, constitutional rights hold no special status. They are, for the most part, relegated to the status of premises in reasoning about proportionality and balance, with the result that the entire constitutional rights-project could be simplified by replacing the catalogue of rights with a single proposition: The legislature shall comply with the principle of proportionality.

[9] R. Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton: Princeton University Press, 2006) 48–9.
[10] *R* v. *Oakes* [1986] 1 SCR 103 [63] (Supreme Court of Canada).
[11] See R. Alexy *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002); D. M. Beatty *The Ultimate Rule of Law* (New York: Oxford University Press, 2004).

Despite commanding large-scale consensus in Europe and the Commonwealth and beyond, the received approach to the limitation of rights discloses a failure to achieve a proper understanding of rights and their limitation. Through the overzealous definitions of limitless rights which result in rights-claims to everything, the received approach allows a prematurely defined right to trade on the higher prestige of properly defined rights, with the consequence that genuine rights, such as the right of a citizen to criticize government, are put on the same level as exaggerated and unjustifiable claims of right. As a result, the infringement or violation of constitutional rights becomes a common, even unsurprising occurrence – expected, unavoidable, and at times encouraged because obviously justified. Given that the definition of rights is evaluated in abstraction of the other requirements of a free and democratic society, almost all legislation infringes a right and it has become an accepted premise of rights-reasoning that no right is absolute. Any infringement or violation is eligible for validation, so long as it is proportionate and balanced with the good it brings about. Rights are generally opposed to the requirements of public health and morals, national security, and the regulation of disorder and crime; they are defined in abstraction of a free and democratic society, with the consequence that rights-talk has come to impoverish political and moral discourse and to promote expectations so unrealistic that they must (indeed, in many instances, *should*) fail.[12] Constitutional rights are put in relation to a free and democratic society only once infringed or violated and only then by appealing to a 'balancing of competing interests' or to the proportionality of 'values in conflict'. Otherwise, so far as the received approach to the limitation of rights is concerned, rights are reified and abstracted from the context in which they are claimed and the possible justification (or not) for such claims.

But this is not as it should be. Perhaps the first indication that the received approach to the limitation of rights proceeds erroneously is disclosed by its lexicon. Despite the key word *limitation*, the received approach substitutes the vocabulary of 'limitation' for 'infringement', 'impairment', 'breach' and 'violation', among other similar terms.[13] Though strict adherence to constitutional text and recourse to dictionary

[12] M. A. Glendon *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 1991).

[13] See Alexy *A Theory of Constitutional Rights*; Beatty *The Ultimate Rule of Law*; Greer *The Exceptions to Articles 8 to 11 of the European Convention on Human Rights*; Letsas *A Theory of Interpretation of the European Convention on Human Rights*.

definitions will seldom if ever exhaust the journey into constitutional meaning, it is clear that the key words employed by the received approach do not belong to the same set as the synonyms of 'limit', which include 'border', 'boundary', 'confines', 'demarcation line', 'perimeter', 'circumscribe' and 'define'.[14] The words 'infringement', 'impairment' and 'violation' all assume what the synonyms of 'limit' seek to determine: namely, *the boundary of a right*. In other words, the infringement of a right cannot adequately be ascertained until and unless the boundary of the right has been specified. And despite the claim by the received approach that the definition of the underdeterminate constitutional right to φ encompasses all activities relating to φ, a limitation clause, properly understood, directs one to make determinate that which is underdeterminate with regards to what is justifiable in a free and democratic society. It invites one to question, for example, whether perjury and violence-inciting speech really should be considered to be within the scope and content of freedom of expression merely because they are instances of 'expression'.

Despite the consensus surrounding the received approach to the limitation of rights, limitation clauses and the limitation of rights more generally remain understudied and, if the argument defended in this book is valid, they also remain poorly understood. The widely held assumptions that 'limitation' can be equated with 'infringement' and 'violation', that the justification of a right's limitation proceeds by way of proportionality and balancing, that rights are not absolute and are in opposition to the components of a free and democratic society, and that the court should be the institution responsible for determining the definition of underdeterminate constitutional rights will all be challenged.

The status of underdetermined constitutional rights will be interrogated. The received approach considers the scope and content of a constitutional right to be settled at the moment of the constitution's founding, subject only to such 'updating' in meaning as the courts may allow under the guise of a 'living constitution'. The vocabulary of constitutional discourse is replete with references to a constitution – and constitutional rights – as 'entrenched', 'enshrined', 'supreme' and 'higher law'. Beyond speaking to the hierarchy of a constitution within the legal order, this vocabulary suggests a certain permanence or unchanging character. Yet, the underdeterminacy of constitutional rights – the

[14] *Oxford Dictionary of Synonyms and Antonyms* (Oxford: Oxford University Press, 2005) 'limitation', 'limit'.

decision to formulate the guarantee of rights at a level of abstraction sufficient to avoid resolving the very moral–political questions that they bear on – should invite one to question just how complete and how finished a constitution really is. A limitation clause assists one in appreciating how constitutional rights are proposed and adopted with contours not wholly worked out. But a limitation clause does more: it invites the authorities constituted by the constitution – and the legislature in particular – to continue the process of a right's limitation begun by, but ultimately left open in, the constitution. In this way, it signals that the constitutional project is incomplete.

Drawing on two principles of political legitimacy – the principle of human rights and the principle of democracy – we will see that a constitution contributes to the political legitimacy of the democratic constitutional State by prescribing democratic rules, procedures and institutions (including legislative assemblies, voting systems and rights of political participation) and by guaranteeing human rights (including the right to life, the right to liberty and freedom of religion). Yet, because citizens negotiating their constitutional arrangements do so in the circumstances of politics – that is, circumstances in which there is 'the felt need among the members of a certain group for a common framework or decision or course of action on some matter, *even in the face of* disagreement about what that framework, decision or action should be'[15] – they will recognize the contingency and contestability of whatever arrangements they ultimately agree on. The guarantee of constitutional rights is perhaps a paradigmatic case of the recognition and acknowledgement of the circumstances of politics in constitutional negotiations, given that citizens the world-over have tended to avoid settling too much in bills of rights. This is, after all, perhaps one of the reasons why we spend so much time talking about rights, engaging in various theories of 'interpretation' to uncover what they have always meant or to prescribe what they should now mean. Indeed, citizens frame and adopt constitutional rights in a manner that leaves the resolution of rights-disputes to a *later day*. They do so, not in the hope that these disputes will not arise or require resolution, but precisely on the understanding that answers to these disputes will be required; answers that will invite reasonable and persistent disagreement. Moreover, the resolution of these disputes, because they are uncertain, will invite reconsideration with the passage of time,

[15] J. Waldron *Law and Disagreement* (New York: Oxford University Press, 1999) 102 (emphasis added).

such that they should remain within the citizens' grasp. For these reasons, citizens have tended to avoid resolving these disputes at the *constitutional level* and rather left it to the framers' posterity to evaluate how best to define – that is, to specify, to limit – constitutional rights in relation to the moral–political questions of the day. They have sought, in short, to allow the constitution to allow for a subsequent constitutional settlement.

In these many ways, a constitution – and perhaps especially constitutional rights – should not be understood to be a final destination. Democratic arrangements may need to be revisited and changing understandings of human rights may compel different conclusions. In this way, a constitution should be understood to be both *architecture* (the constituting, distributing, and constraining of governmental power) and *activity* (the re-negotiating of that which is settled). This viewpoint celebrates the potentially conflicting claims made by the principle of democracy and the principle of human rights and seeks to address them through constitutional activity rather than constitutional settlement. Drawing on the idea at the heart of constitution-making and rounds of constitutional amendments – *constitutional negotiating* – we will see how the principles of political legitimacy require a constitution (and especially constitutional rights) to remain open for re-negotiating. A constitution should both frame, and be framed by, political activity and a limitation clause provides this portal.

A limitation clause confirms that the guarantee of constitutional rights is an unfinished project. By failing to specify which instances of φ are within the constitutional guarantee of a right to φ, a constitution can be understood as leaving to subsequent decision-makers the responsibility for exercising that judgment. A limitation clause confirms that the constitution is open with respect to underdeterminate rights. And by requiring that the limitation of constitutional rights be prescribed by law, a limitation clause can be taken to recognize that, in a democracy, the legislature is the central politically legitimate source of law-making and the legitimate authority for undertaking the constitutional negotiating necessary to complete the specification of rights. In this way, by partaking in the limitation of constitutional rights, the legislature – itself constituted in part by the constitution – completes the constitutional project. By undertaking the limitation of underdeterminate constitutional rights, the legislature continues the unfinished constitutional negotiations.

When the legislature specifies constitutional rights, it translates underdeterminate rights into determinate rights. In this way, legislation

is enabling and constitutive of a right – not, as is generally assumed, merely either in compliance with or in violation or infringement of that right. The concept of a constitutional mandate to implement – that is, to give further effect to – constitutional rights allows for the possibility of an all-embracing account of constitutional rights without expecting that exercise to be undertaken in the constitution itself. Conceived as an activity undertaken and sustained by the legislature, the constitution is not finished at the moment of its founding, framing, ratification or subsequent amendment. It is, rather, forever negotiable through regular democratic channels. And because a constitutional right's limitation provided by legislation is never beyond re-consideration, the constitution is never beyond re-negotiation. In this way, legislative activity is likened to constitutional activity, but not only when legislation limits (and re-limits) a constitutional right. Because legislation articulating the limitation of a constitutional right is never removed from the possibility of change, the continuing existence of a constitutional right's legislated limitation is an activity. It is an activity of virtual, even if not actual (but not merely hypothetical) continuing consent to the limitations of constitutional rights now prescribed by legislation. This account of the limitation of constitutional rights seeks to illustrate how, at the *constitutional level*, rights can (and, indeed, in many respects, *should*) be underdeterminate while, at the *legislative level*, rights can be fully determinate.

The following chapters progressively build the argument presented here. Chapter 1 articulates the claim that a constitution, and especially constitutional rights, should remain open to re-negotiating. The argument is structured around the idea of political legitimacy in a democratic constitutional State. Drawing on the principle of democracy and the principle of human rights, it is argued that a constitution seeks to approximate a reconciliation of these principles. But because a constitution's purported reconciliation of political legitimacy is never secure, a constitution should not be conceived of as an end-state; it, and especially constitutional rights, should remain open to challenge through re-negotiation. This sets the stage for the argument that a limitation clause leaves constitutional rights open for such re-negotiating and provides, *within* the constitution itself, a gateway for political activity to shape the constitutional project.

Chapter 2 reviews the received approach to the limitation of rights and provides a précis of how limitation clauses, and the limitation of rights more generally, have been approached in Europe and the Commonwealth. It reviews the two stages to constitutional rights

reasoning: the overly generous definition of a constitutional right coupled with the conclusion that the right has been infringed, followed by an evaluation of the justification of the infringement under a limitation clause. In turn, Chapter 3 challenges the received approach, arguing that the discourse of balancing and proportionality camouflages much of the scholar's and the court's thinking underlying rights. This chapter aims to illustrate that proportionality and balancing are overall detrimental to the rights-project, arguing that incommensurability denies balancing and proportionality the accuracy they claim and that the received approach to the limitation of rights attempts (albeit ultimately unsuccessfully) to depoliticize constitutional rights by transforming moral–political debates about the scope and content of rights into claims of measurement and balance.

Drawing on the challenge to the received approach initiated in Chapter 3, Chapter 4 defends a conception of rights as conclusions to practical reasoning. It maintains that rights are constituted by their limitation, such that once a right is properly defined – that is, once it is delimited by taking into account all of the moral–political reasons that bear on what the right requires of us and others in a free and democratic society – it is not subject to further evaluations of proportionality or balancing. This draws attention to the fact that the underdeterminate rights of charters of rights are in need of further determination by limitation, without which they are unrecognizable (because unjustifiable) as claims. It is maintained that one should not make claim to a right unless one seeks *to conclude* an argument as to whether another is under a duty (or disability) with respect to one's claim of right.

Chapter 5 introduces the legislature as the institutional actor responsible for articulating the limitation of underdeterminate constitutional rights. When understood as a constitutional directive for the legislature to specify constitutional rights, a limitation clause requires the legislature to engage with the difficult questions involved in the limitation of constitution rights. In doing so, the legislature must, *by legislating*, both exercise its legislative authority *and* establish the constitutional contours of its own political authority. This situates the legislature in a subtle relationship with constitutional rights, which it must both respect and define. In this way, the constitution – and especially constitutional rights – will be shown to be 'both an independent and a dependent variable in political development'.[16]

[16] K. E. Whittington *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence, Kansas: University Press of Kansas, 1999) 214.