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Rights as Trumps?

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HARVARD LAW REVIEW

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THE SUPREME COURT
2017 TERM

FOREWORD:
RIGHTS AS TRUMPS?

Jamal Greene

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I. INTRODUCTION

Rights are more than mere interests, but they are not absolute. And so two competing frames have emerged for adjudicating conflicts over rights. Under the first frame, rights are absolute but for the exceptional circumstances in which they may be limited. Constitutional adjudication within this frame is primarily an *interpretive* exercise fixed on identifying the substance and reach of any constitutional rights at issue. Under the second frame, rights are limited but for the exceptional circumstances in which they are absolute. Adjudication within this frame is primarily an *empirical* exercise fixed on testing the government's justification for its action. In one frame, the paradigm cases of rights infringement arise as the consequences of governing poorly. In the other, the paradigm cases arise as the costs of governing well.

The first frame describes the approach of the U.S. Supreme Court over roughly the last half century. The second frame describes the approach of the rest of the developed world over the same period. Neither frame is perfect; many of their flaws track the inherent limits of judicial review in a democracy. The two frames might indeed produce similar results in particular cases. But across time and space, the choice of frame has profound consequences for constitutional law and for its subjects. In particular, the first frame, the one that dominates U.S. courts, has special pathologies that ill prepare its practitioners to referee the paradigmatic conflicts of a modern, pluralistic political order.

To wit, two men, Charlie Craig and Dave Mullins, wanted a cake for their wedding.¹ They visited a bakery, Masterpiece Cakeshop, in

* Dwight Professor of Law, Columbia Law School. For helpful comments and criticism, I thank Jessie Allen, Akhil Reed Amar, Nicholas Bagley, Randy Barnett, Seyla Benhabib, Evan Bernick, Deborah Brake, Samuel Issacharoff, Vicki Jackson, Jeremy Kessler, Suzanne Kim, Gillian Metzger, Henry Monaghan, David Pozen, Jedediah Purdy, Jack Rakove, Russell Robinson, Fred Schauer, Sarah Seo, Reva Siegel, Yvonne Tew, students at the Georgetown Advanced Constitutional Law symposium, participants at workshops at Columbia Law School and the University of Pittsburgh School of Law, and the editors of the *Harvard Law Review*. I owe special thanks to Katherine Yon Ebright, Michael Lemanski, Zach Piaker, Swara Saraiya, and Sophie Schuit for indispensable research assistance.

¹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1724 (2018).

Lakewood, Colorado, where they were told by the owner and chef, Jack Phillips, that his Christian religious beliefs prevented him from baking custom cakes for same-sex weddings.² Discrimination on the basis of sexual orientation violates Colorado’s public accommodation law,³ and Craig and Mullins sued to require that the law be enforced against Phillips.⁴ Phillips answered that, for him, designing cakes was a form of artistic expression, and so requiring him to do so for a same-sex wedding violated his constitutional rights not just to freedom of religion but to freedom of speech as well.⁵

In the artistic spirit, consider two portraits of the dispute that became *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.⁶ Within one frame we observe a dispute among friends, citizens who share a core set of values but who are quibbling — vigorously, to be sure — over how those values apply to a particular set of facts. That core includes the view that art is a protected form of expression that the state may not compel an artist to produce against his will.⁷ What’s more, conditioning Phillips’s ability to operate a bakery on the state’s controlling the content of his art would count, *prima facie*, as a forbidden compulsion.⁸ Both sides likewise agree that a free speech defense would not permit Phillips to refuse to sell cakes to Craig and Mullins simply because they are gay men.⁹ Phillips’s argument was not grounded in a generalized right of association or autonomy that would allow him to engage consensually with whomever he chooses and on whatever terms. His was a subtler claim, a pinpoint in the canvas, and the couple’s rebuttal was equally so. Phillips has his rights, so do Craig and Mullins, and, crucially, so do the people of the State of Colorado in whose name its public accommodation law speaks. This is a portrait of rights on all sides, reconcilable only at retail, if at all.

Within the other frame rests a darker portrait, a legal *Guernica* cluttered with slippery slopes, law school hypotheticals, and assorted horrors on parade. At oral argument, Justice Gorsuch asked David Cole, representing the couple for the ACLU, whether the Colorado law would require a baker to sell a cake with a cross on it to a member of the Ku

² *Id.*

³ COLO. REV. STAT. § 24-34-601(2)(a) (2017).

⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1725.

⁵ *Id.* at 1726.

⁶ 138 S. Ct. 1719.

⁷ See Transcript of Oral Argument at 63, 78, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf [<https://perma.cc/Y4HB-ZM6M>].

⁸ See *id.* at 78.

⁹ See Reply Brief for Petitioners at 14, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); Brief for Respondents Charlie Craig and David Mullins at 2–3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111); Brief for Respondent Colorado Civil Rights Commission at 3, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

Klux Klan.¹⁰ Justice Alito asked the State's Solicitor General whether the law could force the baker to provide a cake honoring the anniversary of *Kristallnacht*.¹¹ Justice Breyer and Justice Kagan both compared Masterpiece Cakeshop to Ollie's Barbecue, the "whites only" Alabama restaurant that challenged the public accommodation provisions of the Civil Rights Act of 1964.¹² One does not align another with Nazis and segregationists to be friendly or subtle. Rather, these pathological cases signal the outlandishness of the position they are recruited to support.¹³ This is a portrait of rights on one side, bad faith on the other, and powerful disagreement about which is which. This conflict is reconcilable only at wholesale, and without mercy to the loser.

This categorical, zero-sum frame reflects a noble instinct. Professor Ronald Dworkin gave the most articulate expression to the idea that rights are best conceived as "trumps."¹⁴ Dworkin argued that to subject rights to balancing against the public good is to deny them altogether.¹⁵ But one consequence of rarely subjecting rights to balancing is that the rights themselves must be articulated with care and specificity. The line demarcating those who hold rights and those who do not becomes a momentous one that merits the attention of lawmakers, citizens, and adjudicators. Dworkin emphasized that, inasmuch as it is concerned with rights, the Constitution's attention should be rewarding; it follows that its attention must likewise be precious.

This frame creates many problems for constitutional law. For one thing, it is ill-equipped to address the core conflicts that populate the constitutional dockets of U.S. courts. Within a mature rights culture, the typical cases that reach deep into the appellate courts and up to the Supreme Court do not arise from the wholesale denials of citizenship that preoccupied Dworkin but rather from workaday acts of governance from which individuals seek retail exemption: a zealous licensing scheme, a questionable automobile search or dog sniff, a novel or annoying time, place, or manner restriction on speech or gun possession. The paradigm cases that might once have been thought to justify judicial review — racial segregation, McCarthyism, and the like — are no longer paradigmatic, if they ever were.

Less momentous cases sit uneasily within a rights-as-trumps frame. The frame induces our identification of rights to track the categories

¹⁰ Transcript of Oral Argument, *supra* note 7, at 87.

¹¹ *Id.* at 70.

¹² *Id.* at 18–19, 37; *see also* Katzenbach v. McClung, 379 U.S. 294, 296–98 (1964) (describing the discriminatory practice at Ollie's Barbecue).

¹³ *See* Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 462 (1985) (defining "pathologies" to which Blasi argues First Amendment doctrine ought to respond).

¹⁴ *See* RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977).

¹⁵ *Id.* at 192.

judges are able to access, articulate, and delimit rather than the moral, political, or even constitutional justice the rights mean to promote. And so Americans have a right to market pharmaceuticals to doctors¹⁶ or to parlay the corporate form into electioneering expenditures,¹⁷ both of which the Court categorizes as “speech,”¹⁸ but no federal constitutional right to food, shelter, or education, which are harder to corral. The Court’s two major partisan gerrymandering cases this Term model the constitutional distortion rights as trumps produces. Judges fear holding that they can adjudicate partisan gerrymandering claims not because such claims are fallacious or frivolous — most members of the Court seem to agree that partisan gerrymandering is antidemocratic — but rather because such claims are intuitive and inviting.

The tension between judges’ intuitions about justice and their understandings of the bounds of inherited categories leads to a second problem: typically tacit (and therefore baffling) distortions of the categories themselves. We all have our favorite examples of the Court pretending to apply rational basis review but instead applying a heightened form of scrutiny,¹⁹ or vice versa.²⁰ When an *ex ante* choice of category largely determines the *ex post* decision, manipulation of that choice is to be expected: to deny a rights claim within this framework is to say the right does not exist.²¹ And so these cases do not reflect lawlessness *tout court*, a standard accusation,²² so much as a breakdown in legal form, not so unlike resort to equity to surmount the limits of common law pleading. Still, lack of transparency about the basis for decision is a rule-of-law problem that the rights-as-trump frame invites.

A third problem has been less recognized but might be most damaging. The costs of the rights-as-trumps frame extend beyond substantive constitutional justice and legal form and into a relational register. Constitutional law is not just a set of foundational rules and standards that govern the structure of the constituted government and the behavior of its actors. It is also a style of — a grammar for — political argument.²³

¹⁶ See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

¹⁷ See *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010).

¹⁸ *Sorrell*, 564 U.S. at 552; *Citizens United*, 558 U.S. at 310.

¹⁹ See, e.g., *Romer v. Evans*, 517 U.S. 620, 631–35 (1996); *id.* at 640–43 (Scalia, J., dissenting); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 447–50 (1985); *id.* at 456 (Marshall, J., concurring in the judgment in part and dissenting in part); *Plyler v. Doe*, 457 U.S. 202, 227–30 (1982); *id.* at 244 (Burger, C.J., dissenting); *Reed v. Reed*, 404 U.S. 71, 76–77 (1971).

²⁰ See, e.g., *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2208, 2211–14 (2016); *id.* at 2215 (Alito, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 327–43 (2003); *id.* at 350 (Thomas, J., concurring in part and dissenting in part).

²¹ See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies — And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 635–37 (2006).

²² See, e.g., Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 481–84 (2004).

²³ PHILIP BOBBITT, *CONSTITUTIONAL FATE* 5–6 (1982); J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 TEX. L. REV. 1771, 1782–84 (1994).

Every case begins, by Article III hypothesis, as a narrow one between adversaries.²⁴ A legal claim socializes their enmity and, by submitting it to public scrutiny, generalizes it as well. Forcing rights into prefabricated modules flattens litigants' gazes and encourages them to tie each other to the most pathological case. Because the rights-as-trumps frame cannot accommodate conflicts of rights, it forces us to deny that our opponents have them. When rights are trumps, they favor rhetoric over judgment, simplicity over context, homogeneity over diversity. The frame requires us to formulate constitutional politics as a battle between those who are of constitutional concern and those who are not. It coarsens us, and by leaving us farther apart at the end of a dispute than we were at the beginning, it diminishes us.²⁵

It is sometimes said that a special, if not unique, feature of U.S. constitutional law is that it *constitutes* us, not just as a nation, but as a people as well.²⁶ Ours is not an ethno-national or religious project but a political one, dedicated to the audacious idea that liberalism and pluralism are mutually constituted. Needless to say, it has not always been so. The early history of the United States required reconciling an unprecedented commitment to liberty for and equality among whites with an equally impressive commitment to chattel slavery for Africans and their descendants and domination of indigenous people.²⁷ The civil rights movement coincided with a rights explosion that has challenged the movement's priority of place within the constitutional culture. The paradigmatic rights conflict of the twenty-first century has involved multiple principles that must be jointly maximized or else selectively abandoned. Respect for the nation's complexity requires that rights recognition be a jurisgenerative rather than a jurispthic process. Our rights culture cannot constitute us unless all rights count, and all rights cannot count if all rights are absolute.

This Foreword charts a path forward. The claim that the rights-as-trumps, or categorical, frame describes U.S. constitutional law will encounter resistance, and so Part II defines the terms of reference and makes the positive case for fitting the Court's jurisprudence into those terms. The U.S. Supreme Court balances pervasively, and what categories it maintains are riddled with exceptions. What is distinctive about the American position, and what aligns it with Dworkin, comes into view only in comparison to the dominant alternative: proportionality. Categoricalism and proportionality reflect different orientations

²⁴ U.S. CONST. art. III, § 2.

²⁵ See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991).

²⁶ See AKHIL REED AMAR, *AMERICA'S CONSTITUTION* 5 (2005).

²⁷ See AZIZ RANA, *THE TWO FACES OF AMERICAN FREEDOM* 5-7 (2010); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. GENOCIDE RES. 387, 394 (2006).

toward what Professors Moshe Cohen-Eliya and Iddo Porat describe as the dyad of legal authority versus legal justification.²⁸ Whether balancing is viewed as exceptional or instead as inherent in the task of rights adjudication affects the constitutional imagination in ways that the Term's rights cases make vivid.

What follows from the U.S. approach to constitutional adjudication forms the subject of Part III. Categorical adjudication is rule-like in its orientation, and rules by their nature distort the underlying norm they are designed to implement. The frame deprives constitutional decisionmakers of the resources necessary to adjudicate conflicts of rights, as in abortion, affirmative action, or religious exemption cases, and obscures the constitutional dimension of governmental interests, which derive from a constitutionally protected right of political participation. The benefit of rule-like decisional norms lies in the promise of transparency and predictability, but in a society in which rights claims are both ubiquitous and reasonable, this benefit turns out to be elusive. We disagree — reasonably — about the rights that we have,²⁹ and so a categorical frame burdens the categories with more pressure than they can bear. The result is the worst of both worlds: a dogmatic but capricious devotion to categorical rules.

To be sure, that this state of affairs is problematic does not mean remedies avail themselves, but the Court's approach is less autochthonous than we might suppose. Part IV corrects the common but misplaced view that conceiving of rights as trumps is some kind of American birthright or is baked into U.S. constitutional arrangements. It is true that the U.S. Constitution does not typically attach limitations clauses to rights, but that fact neither explains the emergence of the U.S. approach nor justifies its continuation. Proportionality analysis is more congenial to the way the lawyers and statesmen of the Founding generation understood rights than the presumptive absolutism that characterizes the modern frame. That frame is rather an artifact of the second half of the twentieth century, when U.S. constitutional lawyers constructed the categorical frame as a way of reconciling the post-*Lochner*³⁰ regime of deference to government actors with the unique place of race in the American constitutional order. Countries whose constitutional courts lack the historical baggage and the inherited doctrinal architecture of the U.S. Supreme Court have structured their adjudicative frameworks to match the fecundity of modern rights claims.

²⁸ See MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 111–12 (2013); see also Etienne Mureinik, *A Bridge to Where?: Introducing the Interim Bill of Rights*, 10 S. AFR. J. ON HUM. RTS. 31 (1994).

²⁹ See JEREMY WALDRON, LAW AND DISAGREEMENT 12 (1999).

³⁰ *Lochner v. New York*, 198 U.S. 45 (1905).

Part V applies the Foreword's insights to some of the Term's First Amendment, Fourth Amendment, and partisan gerrymandering cases, with special reference to the lessons of foreign experience in these areas. The constitutional jurisprudence of other countries is of course peculiar to their own histories, constitutional structures, and institutional arrangements. But the considered views of foreign legal experts confronting similar problems and drawing on analogous conceptual frames nonetheless have some power to persuade, if lacking power to control.³¹

The Court views freedom of speech as a classic trump, inviting a good lawyer to formulate a state requirement to bake a cake for a same-sex wedding,³² to pay union dues,³³ to give women accurate information about available health services,³⁴ or even to engage in partisan gerrymandering as speech infringements.³⁵ The tidiness of a speech frame pulled the Court into the case, but *Masterpiece Cakeshop* was never really about freedom of expression. What made Phillips's claim constitutionally interesting was not that he bakes especially awesome cakes but rather that his motivation for refusing to make one for Craig and Mullins was grounded in his religious beliefs. A "disparate impact" freedom of religion claim was off the table in the case because the Court — fearing the need for balancing — had declared such claims to be beneath constitutional concern.³⁶ Other jurisdictions handle religious discrimination claims with subtler instruments.

Unlike the apparently absolute language of the First Amendment — "Congress shall make no law"³⁷ — the Fourth Amendment's text seems to invite an adjudicator precisely to evaluate the reasonableness of a search at retail, on a case-by-case basis.³⁸ And yet, because most searches must be conducted pursuant to warrants supported by probable cause, the weight of analysis in many Fourth Amendment cases resembles an ontological inquiry into the nature of a search.³⁹ The resulting doctrinal Byzantium requires the Court's constant care, as rules built against the limits of human attention and cognition are jerry-

³¹ See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 71–72 (2010).

³² *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1728 (2018).

³³ *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2462 (2018).

³⁴ *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2368–70 (2018).

³⁵ See Brief for Appellees at 36, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-11161); see also *Gill*, 138 S. Ct. at 1934, 1937–38 (Kagan, J., concurring).

³⁶ *Emp't Div. v. Smith*, 494 U.S. 872, 882–83 (1990). Phillips's claim of *intentional* religious discrimination remained in the case and eventually proved decisive. See *Masterpiece Cakeshop*, 138 S. Ct. at 1730–31.

³⁷ U.S. CONST. amend. I.

³⁸ See Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994).

³⁹ See *id.* at 762–85; Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 358–60 (1974).

rigged onto panoptic digital technology, omniscient DNA evidence, and countless other unforeseen circumstances. *Carpenter v. United States*⁴⁰ well illustrates the costs of sidelining reasonableness as the Fourth Amendment's über-value.

In partisan gerrymandering cases, the Court has searched in vain for a categorical frame to save it from the social science needed to assess the effects of a politically biased districting map.⁴¹ At oral argument, Chief Justice Roberts referred to the statistical evidence offered to resolve such cases as “sociological gobbledygook.”⁴² The rights-as-trumps frame takes as a premise that judges are better suited to resolve interpretive disagreement over the stylized content of the law rather than empirical uncertainty about facts in the world. Along with the Court's decision upholding the President's ban on travel from a set of mostly Muslim-majority countries,⁴³ the gerrymandering cases show how the categorical frame's fixation on policing the borders of political authority can deny the protection of rights at just the point when protection is most urgent.

More broadly, the partisan gerrymandering cases offer a poignant example of what can be gained in reimagining the relationship between constitutional law and constitutional politics. Professor William Eskridge has identified “lowering the stakes of politics” as the overriding end of judicial review within a pluralist democracy.⁴⁴ A rights-as-trumps frame makes hash of that goal, for it saps the losing side in constitutional disputes of the leverage to deliberate toward political consensus. The states not only urged a hands-off approach to partisan gerrymanders but also insisted that allowing the controlling political party to insulate itself from political competition is uniquely consistent with the judicial role.⁴⁵

It is in fact quite the opposite. The best justification for judicial review in a pluralist democracy with a mature rights culture is that judges have the unique capacity to call partisans to the table, to enable them to see the dignity in each other's commitments. That trusty footnote in *United States v. Carolene Products Co.*,⁴⁶ especially as Professor

⁴⁰ 138 S. Ct. 2206 (2018).

⁴¹ See *Vieth v. Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).

⁴² Transcript of Oral Argument at 40, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-11161), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-11161_mjno.pdf [<https://perma.cc/S9PW-2CBE>].

⁴³ See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

⁴⁴ See William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 *YALE L.J.* 1279, 1293–94 (2005).

⁴⁵ See Brief for Appellants at 39–40, *Gill*, 138 S. Ct. 1916 (No. 16-11161); Brief of Amici Curiae States of Michigan et al. in Support of Appellees at 3–8, *Benisek v. Lamone*, 138 S. Ct. 1942 (2018) (No. 17-333).

⁴⁶ 304 U.S. 144, 152 n.4 (1938).

John Hart Ely famously envisioned it, sought to reserve judicial review for instances in which the ordinary political process was unworthy of trust.⁴⁷ If the measure of such a politics is a systematic disregard of the interests of, and a refusal to negotiate with, those not currently holding power, then courts today should be very busy indeed.⁴⁸

Rights are constantly at stake. And while we take rights seriously enough, we do not do so reasonably enough. Therein lies the path to rebuilding American politics, a feat that is, if I may, worthy of Hercules.

II. OUR ABSOLUTISM

The first task is to spell out what “rights as trumps” means, connect this idea to categorical adjudication, and defend the claim that these labels fit U.S. constitutional jurisprudence. Section A begins inductively by showing how the U.S. Supreme Court adjudicates a set of standard rights claims. I use a series of cases to identify the core features of the categorical approach: analysis is weighted toward threshold interpretive questions rather than the application of law to fact, and so balancing is notionally understood as exceptional rather than inherent. Section B describes the features and the global ascendancy of proportionality analysis, the leading competitor to the categorical approach. Section C generalizes the conceptual differences between the two approaches, which may be stated in terms of at least four different frames: rules and standards; universalism and particularism; interpretation and empiricism; and legal authority and justification.

A. Taking Rights Reasonably

In 2000, Stephen Harper, the future Canadian Prime Minister who was then president of a conservative lobbying group called the National Citizens Coalition, challenged Canada’s campaign finance laws.⁴⁹ Under section 350 of the Canada Elections Act,⁵⁰ a third party could not spend more than \$150,000 overall or more than \$3000 in a given electoral district in relation to a general election.⁵¹ Freedom of political expression is a fundamental freedom under the Canadian Charter of Rights and Freedoms,⁵² and so Harper claimed that section 350 and related provisions violated the Charter.⁵³

⁴⁷ See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 75–77 (1980).

⁴⁸ Cf. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (“[If] all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”).

⁴⁹ *Harper v. Canada (Attorney Gen.)*, [2004] 1 S.C.R. 827 (Can.).

⁵⁰ S.C. 2000, c 9 (Can.).

⁵¹ *Id.* § 350.

⁵² Canadian Charter of Rights and Freedoms § 2(b), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

⁵³ *Harper*, [2004] 1 S.C.R. para. 50.

This claim would be perfectly intelligible under U.S. constitutional law. It was the precise claim, differing only in the dollar amounts, that doomed the expenditure limits set forth in the Federal Election Campaign Act Amendments of 1974⁵⁴ in *Buckley v. Valeo*.⁵⁵ A similar claim as applied to corporations and unions drawing on their general treasury funds doomed Title II of the 2002 Bipartisan Campaign Reform Act⁵⁶ (BCRA) in *Citizens United v. FEC*.⁵⁷

The Supreme Court of Canada upheld the Act, but the outcome is less relevant for our purposes than the Court’s reasoning. The majority held that the Act’s advertising restrictions infringed the right to political expression, and indeed the government conceded the point.⁵⁸ But the Court found that the Act was nonetheless valid because it was “justified” under section 1 of the Charter,⁵⁹ through which certain freedoms are guaranteed “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁶⁰

The Canadian Supreme Court implements this constitutional command by asking a series of questions first memorialized in the Court’s decision in *R. v. Oakes*.⁶¹ The Court first discerns whether the law has in view a “pressing and substantial” purpose, typically a deferential inquiry, and one that was satisfied in *Harper* by the goals of “promot[ing] equality in political discourse,” “protect[ing] the integrity of the financing regime applicable to candidates and parties,” and “ensur[ing] that voters have confidence in the electoral process.”⁶² The *Oakes* test continues with an inquiry into means-end fit: Is the government’s action rationally related to that goal?⁶³ In the case of section 350, the Court concluded that advertising-expense limits were rationally connected to the goal of preventing those with financial advantages from dominating the electoral discourse.⁶⁴ The third step is to ask whether the act is necessary, in the sense of whether it minimally impairs the right.⁶⁵ The majority held that section 350 satisfied this step because the restriction on third-party advertising was limited to a particular period before the election and to messages that were associated with a candidate or

⁵⁴ Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended in scattered sections of the U.S. Code).

⁵⁵ 424 U.S. 1, 6–7, 58 (1976) (per curiam).

⁵⁶ Pub. L. No. 107-155, 116 Stat. 81 (codified as amended in 36 U.S.C. § 510 (2012) and scattered sections of 52 U.S.C. (Supp. IV 2017)).

⁵⁷ 558 U.S. 310, 320–21, 365 (2010).

⁵⁸ *Harper*, [2004] 1 S.C.R. para. 66.

⁵⁹ *Id.* paras. 75, 121.

⁶⁰ Canadian Charter of Rights and Freedoms § 1, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

⁶¹ [1986] 1 S.C.R. 103, 138–39 (Can.).

⁶² *Harper*, [2004] 1 S.C.R. para. 92.

⁶³ *Oakes*, [1986] 1 S.C.R. at 139.

⁶⁴ *Harper*, [2004] 1 S.C.R. paras. 104–09.

⁶⁵ *Oakes*, [1986] 1 S.C.R. at 139.

party.⁶⁶ A final step, sometimes called balancing in the strict sense, is to weigh the marginal impairment of the right against the marginal benefit to the government to ensure that there is no gross disproportionality.⁶⁷ Here, the Court held that the value of electoral fairness and accessibility was sufficiently weighty to justify the impairment of third parties' ability to influence the election through spending.⁶⁸

A comparison between *Harper* and its U.S. analogues in *Buckley* and *Citizens United* illustrates the difference between a categorical inquiry and proportionality analysis, of which the *Oakes* test is the canonical global exemplar. First Amendment law in the United States rarely entails deciding whether the government is going too far in infringing on what the Court concedes to be protected speech. Analysis of the merits must await an answer to the antecedent question of what kind of speech restriction is at issue. This inquiry is not qualitative, as in whether the speech being regulated is of relatively low or high value, but is rather categorical, and the categories are many. Is the government discriminating on the basis of viewpoint;⁶⁹ or content;⁷⁰ or speaker's identity;⁷¹ or time, place, and manner?⁷² Is the government regulating expressive conduct?⁷³ Commercial speech?⁷⁴ Is the speech occurring in a traditional public forum?⁷⁵ A limited public forum?⁷⁶ A nonpublic forum?⁷⁷ Is the speaker the government?⁷⁸ A government employee?⁷⁹ If so, is the speech on a matter of public concern?⁸⁰ Is it false?⁸¹ Is it obscene?⁸² "Fighting words"?⁸³ A "true threat"?⁸⁴ Terrorism-related?⁸⁵ The answers to these questions motivate a responsive standard of review that calibrates how substantial or compelling the state interest must be and

⁶⁶ *Harper*, [2004] 1 S.C.R. paras. 112–14.

⁶⁷ *Oakes*, [1986] 1 S.C.R. at 139–40.

⁶⁸ *Harper*, [2004] 1 S.C.R. paras. 119–21.

⁶⁹ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983).

⁷⁰ See *Police Dep't v. Mosley*, 408 U.S. 92, 95–96 (1972).

⁷¹ See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011).

⁷² See *Ward v. Rock Against Racism*, 491 U.S. 781, 802–03 (1989).

⁷³ See *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

⁷⁴ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

⁷⁵ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (opinion of Roberts, J.).

⁷⁶ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

⁷⁷ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983); *Adderley v. Florida*, 385 U.S. 39, 41 (1966).

⁷⁸ See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015); *Salazar v. Buono*, 559 U.S. 700, 715 (2010) (plurality opinion).

⁷⁹ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573 (1968).

⁸⁰ See *Connick v. Myers*, 461 U.S. 138, 146–47 (1983).

⁸¹ See *United States v. Alvarez*, 567 U.S. 709, 731–35 (2012) (Breyer, J., concurring in the judgment).

⁸² See *Miller v. California*, 413 U.S. 15, 23–24 (1973).

⁸³ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

⁸⁴ See *Virginia v. Black*, 538 U.S. 343, 359 (2003).

⁸⁵ See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 35 (2010).

how closely tailored to that interest the regulation must be to pass muster. Implicitly, the Court understands that regulation of speech is necessarily sensitive to context, but rather than assess the regulation in light of its context directly, it disciplines the inquiry by placing it into one of an ever-expanding set of boxes.

The *Buckley* opinion was accordingly less about whether a \$1000 limit on individual campaign expenditures was a reasonable way of leveling influence over the political process (a question the Court never entertained) than about whether such a limit was — in its essence — a restriction on either “symbolic speech” or the “time, place, and manner” of speech.⁸⁶ Having decided that the limit fit neither box, the Court placed it into the box of a content restriction, which therefore required the strictest scrutiny.⁸⁷ Once there, a good-government reform designed in response to the Watergate scandal⁸⁸ found itself surrounded by laws of a very different character. The Court compared the expenditure limit to laws requiring newspapers to give space to reply to critical editorial content⁸⁹ or criminalizing the publication of election-day advocacy.⁹⁰ The *Buckley* Court took the cases invalidating such practices to stand for the proposition, apparently applicable in *Buckley* itself, that “no test of reasonableness can save [such] a state law from invalidation as a violation of the First Amendment.”⁹¹ It was not enough, it seems, simply to decide that those statutes were unreasonable.

A quarter century after *Buckley*, in an effort to respond to perceived imbalances in political financing exacerbated by the decision’s cleaving of contribution limits from expenditure limits, Congress passed a law prohibiting corporations and unions from spending general treasury funds on independent advocacy in the run-up to a federal election.⁹² Corporations and unions could still spend money on electioneering, but they had to do so through the artifice of a separate political action committee (PAC), or else more than two months before a general election or one month before a primary.⁹³

In 2007, an incorporated nonprofit called Citizens United wanted to advertise and make available through video-on-demand *Hillary*:

⁸⁶ *Buckley v. Valeo*, 424 U.S. 1, 15–21 (1976) (per curiam).

⁸⁷ *See id.* at 44–45.

⁸⁸ *See* J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1003 (1976).

⁸⁹ *Buckley*, 424 U.S. at 50–51; *see also* *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 243 (1974).

⁹⁰ *Buckley*, 424 U.S. at 50–51; *see also* *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

⁹¹ *Buckley*, 424 U.S. at 50 (emphasis added) (quoting *Mills*, 384 U.S. at 220).

⁹² Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 203, 116 Stat. 81, 91–92 (2002) (codified as amended at 52 U.S.C. § 30118 (Supp. IV 2017)).

⁹³ *Id.* § 201(a), 116 Stat. at 88–90 (codified as amended at 52 U.S.C. § 30104).

The Movie, a takedown of then-Senator Hillary Clinton, who was a candidate for the Democratic nomination for President.⁹⁴ Writing for a 5–4 majority, Justice Kennedy concluded that any speech restriction based on the speaker’s identity (here, its status as a corporation or union) receives the highest level of judicial scrutiny,⁹⁵ a categorical determination that dramatically narrowed the justifications available to the government. The Court then efficiently dispensed with any suggestion that restricting corporate electioneering speech funded through general treasury funds was narrowly tailored to a compelling interest in avoiding quid pro quo corruption or its appearance, or in mitigating the fundraising and tax advantages conferred by use of the corporate form.⁹⁶

Citizens United presented the Court with an unusual number of grounds on which to avoid so blunt a holding. As noted, the Act did not prohibit corporate speech but rather required that a small fraction of such speech be funded through a separate PAC. In addition, the Court had previously limited the definition of corporate electioneering ads to those that are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.”⁹⁷ From the outset, then, the field of regulation was far narrower than it might be for other instances of speaker-based restrictions; the prospect of this expenditure limit having a chilling effect on clearly protected speech was dim.⁹⁸ *Hillary: The Movie*, a feature-length film, was obviously more than just an electioneering ad, and *Citizens United* was not a for-profit or shell corporation but rather an ideological organization funded primarily through individual contributions.⁹⁹ It sought to release its film through video-on-demand, a customized service that — unlike traditional television advertising — does not risk overwhelming a captive audience with campaign propaganda.¹⁰⁰

Any of these points could have proven decisive to a Court that trained its analysis less on the threshold question of whether the legal regime triggered strict scrutiny and more on downstream questions of how burdensome that regime was in light of *Citizens United*’s particular situation.¹⁰¹ Instead, Justice Kennedy suggested, for example, that the government’s litigation position would support a ban on the printing of

⁹⁴ *Citizens United v. FEC*, 558 U.S. 310, 319–20 (2010).

⁹⁵ *See id.* at 340–41, 364–65.

⁹⁶ *Id.* at 351–56, 360–61.

⁹⁷ *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (opinion of Roberts, C.J.).

⁹⁸ *Citizens United*, 558 U.S. at 402, 415–19 (Stevens, J., concurring in part and dissenting in part).

⁹⁹ *See id.* at 406–07.

¹⁰⁰ *Id.* at 326 (majority opinion).

¹⁰¹ *See id.* at 404–05 (Stevens, J., concurring in part and dissenting in part).

books, a topic that dominated oral argument both times *Citizens United* — a case about neither books nor a ban — was argued.¹⁰²

It is tempting to attribute the differences between *Harper* and the U.S. cases to ideological diversity. It is well documented that the United States is a global outlier in its courts' zeal for freedom of speech.¹⁰³ Moreover, *Citizens United* was decided by a more conservative Court than the one that reached contrary earlier decisions in *Austin v. Michigan State Chamber of Commerce*¹⁰⁴ and *McConnell v. FEC*.¹⁰⁵ Treating free speech as a trump might be the epiphenomenon rather than the primary one, which is more banal and outcome oriented.

The U.S. approach to rights is eclectic, but it is nonetheless possible to generalize beyond *Buckley* and *Citizens United*. Consider, briefly, five areas of doctrine that further show the problem: antidiscrimination law, social and economic rights, abortion, school integration, and the Second Amendment.

I. Antidiscrimination Law. — The Supreme Court maintains that both the Equal Protection Clause and the Free Exercise Clause require a finding that the defendant specifically intended to discriminate on the basis of a protected ground.¹⁰⁶ The Court further maintains that its most rigorous, least deferential, most skeptical form of analysis is triggered by any racial classification by the government, no matter the background history, minority status, or evident motivations of the groups or actors involved.¹⁰⁷ In disparate impact cases across both race and religion, and in affirmative action cases as well, the Court has defended its formalistic approach explicitly on the ground that it could not otherwise modulate its jurisprudence. That is, the Court has claimed that its approach was required because it could not otherwise adjudicate extreme but hypothetical cases that were not then before the Court.

¹⁰² Transcript of Oral Argument *passim* (Sept. 9, 2009), *Citizens United*, 558 U.S. 310 (No. 08-205), [https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205\[Reargued\].pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205[Reargued].pdf) [<https://perma.cc/T6TP-2PZG>]; Transcript of Oral Argument *passim* (Mar. 24, 2009), *Citizens United*, 558 U.S. 310 (No. 08-205), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2008/08-205.pdf [<https://perma.cc/CA6M-4CEF>].

¹⁰³ See, e.g., Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1523 (2003).

¹⁰⁴ 494 U.S. 652, 654–55 (1990) (upholding a state prohibition on spending corporate treasury funds on independent expenditures supporting or opposing candidates for state office).

¹⁰⁵ 540 U.S. 93, 224 (2003) (upholding the majority of BCRA).

¹⁰⁶ E.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532–33 (1993) (free exercise); *Emp't Div. v. Smith*, 494 U.S. 872, 878–79 (1990) (same); *Pers. Adm'r v. Feeney*, 442 U.S. 256, 271–72 (1979) (equal protection); *Washington v. Davis*, 426 U.S. 229, 244–46 (1976) (same).

¹⁰⁷ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 215–18, 226–27 (1995).

Thus, in *Washington v. Davis*,¹⁰⁸ in which the Court first declared that an equal protection violation required a claimant to show intentional discrimination and not just disparate impact, Justice White wrote for the majority:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.¹⁰⁹

A decade later, the Court applied a similar principle again. In *McCleskey v. Kemp*,¹¹⁰ it had to determine the constitutional relevance of statistics showing that black defendants with white victims were more likely to receive capital sentences than white defendants or defendants whose victims were not white.¹¹¹ Writing for the Court, Justice Powell registered his concern that an equality or Eighth Amendment claim of this sort, “taken to its logical conclusion, throws into serious question the principles that underlie our entire criminal justice system.”¹¹² “Thus,” the opinion continued, “if we accepted McCleskey’s claim that racial bias has impermissibly tainted the capital sentencing decision, we could soon be faced with similar claims as to other types of penalty.”¹¹³ The assumption that such claims are — like claims of an indirectly discriminatory tax or welfare statute — judicially unmanageable reflects a predisposition against balancing and in favor of rights as trumps.¹¹⁴

The Court has adopted the same posture in religious discrimination cases. *Employment Division v. Smith*¹¹⁵ presented the Court with the question of whether members of an indigenous tribe for whom sacramental peyote use held religious significance could be denied unemployment compensation after being fired for violating company drug policy.¹¹⁶ In an opinion by Justice Scalia, the Court rejected the claim on the ground that a neutral and generally applicable law — here, the state’s criminal law outlawing peyote — does not violate the Free Exercise Clause just because it disproportionately burdens a religious

¹⁰⁸ 426 U.S. 229.

¹⁰⁹ *Id.* at 248.

¹¹⁰ 481 U.S. 279 (1987).

¹¹¹ *Id.* at 286–87.

¹¹² *Id.* at 314–15.

¹¹³ *Id.* at 315.

¹¹⁴ See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3172–79 (2015).

¹¹⁵ 494 U.S. 872 (1990).

¹¹⁶ *Id.* at 874.

practice in some of its applications.¹¹⁷ Justice Scalia assumed that constitutional recognition of burdens of that sort would require a demanding “compelling interest” test that would potentially require “religious exemptions from civic obligations of almost every conceivable kind.”¹¹⁸ Rather than needing to rule on claims for exemption from military service and tax payments and manslaughter laws and compulsory vaccination and traffic laws and minimum wage laws and child neglect and animal cruelty laws and environmental protection and antidiscrimination laws — all of which Justice Scalia’s opinion carefully enumerated — it is better, he said, that the Court cut off these claims at the root.¹¹⁹ It would otherwise be “courting anarchy.”¹²⁰

Equating disparate impact regimes with a lawless dystopia where all is permitted — dogs and cats living together and the like — ignores strategies of claim management that have proven resilient in the context of adjudication under numerous antidiscrimination statutes that broaden liability beyond the constitutional baseline. Under the Civil Rights Act of 1991,¹²¹ a showing that an employment practice has a disparate impact on members of a protected class shifts the burden to the employer to show not a “compelling interest” but rather that the practice is job-related and consistent with business necessity.¹²² That standard codifies the case law as the Court had developed it prior to its outlying decision in *Wards Cove Packing Co. v. Atonio*.¹²³ What counts as disparate impact in the first place is not left to caprice but generally follows the Equal Employment Opportunity Commission’s 1978 rule of thumb: “A selection rate for any race, sex, or ethnic group which is less than four-fifths . . . of the rate for the group with the highest rate.”¹²⁴

Similarly directive but flexible doctrinal heuristics have developed under disparate impact statutes passed in the areas of voting rights and religious exercise. The Voting Rights Act,¹²⁵ as amended in 1982, does not subject claims of racial vote dilution to an intent requirement,¹²⁶ but since 1986 the Court has combined a threshold analysis to identify the conditions under which racial vote dilution is theoretically possible with

¹¹⁷ *Id.* at 878–80, 882.

¹¹⁸ *Id.* at 888.

¹¹⁹ *Id.* at 888–89.

¹²⁰ *Id.* at 888.

¹²¹ Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of the U.S. Code).

¹²² *Id.* § 105(a), 105 Stat. at 1074 (amending § 703 of the Civil Rights Act of 1964 by adding § 703(k) regarding the burden of proof in disparate impact cases); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

¹²³ 490 U.S. 642 (1989) (increasing the burden on plaintiffs bringing disparate impact cases), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

¹²⁴ Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(D) (2017).

¹²⁵ Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

¹²⁶ 52 U.S.C. § 10301 (Supp. III 2016).

a totality of the circumstances test to find ultimate liability.¹²⁷ And just as the “strict” scrutiny for disparate impact religious claims was rather famously muted and case specific prior to *Smith*,¹²⁸ case law under the Religious Freedom Restoration Act¹²⁹ (RFRA) has courted no anarchy to date. To wit, in *Burwell v. Hobby Lobby Stores, Inc.*,¹³⁰ several religiously motivated employers sought exemptions from a Department of Health and Human Services (HHS) requirement, implementing the Affordable Care Act,¹³¹ that they provide their employees with health insurance plans that included birth control coverage.¹³² Justice Kennedy’s decisive concurring opinion refused to reduce the statute to any generalizable, rule-like accommodation requirement but instead noted that in the case itself, the government had simply not shown that it was unable to both meet the employer’s wishes and provide its employees with birth control coverage within HHS’s existing accommodation framework.¹³³ The case was decided on its facts.¹³⁴

Categorical constitutional analysis also of course motivates the Court’s tiers-of-scrutiny framework, wherein the nature of the protected classification determines the Court’s standard of review. Under the black letter rules, race gets strict scrutiny, gender intermediate scrutiny, and most other classifications rational basis review, under which any rational justification in support of a legitimate state objective suffices to withstand constitutional scrutiny, even if the justification is entirely hypothetical.¹³⁵

Matters are considerably more complicated, however, than this hornbook sketch allows. Strict scrutiny in cases in which the state is reinforcing social hierarchy does not look quite like strict scrutiny in

¹²⁷ See *Thornburg v. Gingles*, 478 U.S. 30, 43–44 (1986).

¹²⁸ See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1306–08 (2007) (arguing that because before *Smith* any substantial burden on religion triggered strict scrutiny, the test was “little more than a balancing test,” *id.* at 1308); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 548–53 (1983) (criticizing the Court’s inconsistent approach to religious exemptions pre-*Smith*). Compare *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963) (holding that South Carolina could not withhold unemployment benefits from a Seventh-day Adventist on the basis of her religiously grounded refusal to work on Saturdays), with *Braunfeld v. Brown*, 366 U.S. 599, 606–07 (1961) (plurality opinion) (upholding Pennsylvania’s Sunday-closing law despite its disparate impact on shopkeepers who observe a Saturday sabbath).

¹²⁹ Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. §§ 2000bb to 2000bb-4 (2012)), *invalidated in part by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹³⁰ 134 S. Ct. 2751 (2014).

¹³¹ Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

¹³² *Hobby Lobby*, 134 S. Ct. at 2764–66.

¹³³ *Id.* at 2786 (Kennedy, J., concurring).

¹³⁴ *Id.* at 2759–60 (majority opinion).

¹³⁵ See *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487–88 (1955).

cases in which it seeks to combat that hierarchy.¹³⁶ Some groups whose defining characteristics are said to trigger rational basis review — the children of undocumented immigrants, gays and lesbians, the disabled — have at times seemed to benefit from more rigorous scrutiny of the government’s motives and methods.¹³⁷ Departures from the framework are invariably exposed in dissenting or concurring opinions, often with little or no rebuttal from the majority.¹³⁸

The Justices have not been forthcoming about their obvious inclinations to moderate strict scrutiny in affirmative action cases or beef up rational basis review in other discrimination cases involving important social categories, but they have been forthright about their reasons for caution. In his controlling opinion in *Regents of the University of California v. Bakke*,¹³⁹ Justice Powell saw no “principled” basis on which to distinguish which minority groups should and should not receive the benefit of heightened scrutiny: “Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality,” he wrote, “for then the only ‘majority’ left would be a new minority of white Anglo-Saxon Protestants.”¹⁴⁰ Likewise, in determining that rational basis review would continue to be the standard for claims of discrimination against the intellectually disabled, Justice White worried openly that if the Court applied a higher standard, it would face the difficult task of finding “a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, . . . [such as] the aging, the disabled, the mentally ill, and the infirm.”¹⁴¹ Notably, the Court went on to invalidate the zoning ordinance at issue in the case, signaling that rational basis review need not entail abdication of judicial review.¹⁴² In doing so, the Court undermined the legal clarity it had sought to preserve in declining to apply heightened scrutiny.

¹³⁶ Compare *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984) (striking down a judgment denying a white mother custody of her infant because she had remarried a black man), with *Fisher II*, 136 S. Ct. 2198, 2214–15 (2016) (upholding the University of Texas’s race-based affirmative action policy).

¹³⁷ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 227–30 (1982) (holding that Texas lacked a sufficient rational basis to deny free public education to undocumented immigrant children); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (finding no rational basis for amendment to state’s constitution that would deny gays and lesbians the protection of antidiscrimination laws); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448–50 (1985) (finding no rational basis for permit requirement imposed upon a home for people with intellectual disabilities).

¹³⁸ See, e.g., *Fisher II*, 136 S. Ct. at 2238 (Alito, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 380 (2003) (Rehnquist, C.J., dissenting); *United States v. Virginia*, 518 U.S. 515, 559–62 (1996) (Rehnquist, C.J., concurring in the judgment); *Romer*, 517 U.S. at 640–41, 644 (Scalia, J., dissenting); *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting).

¹³⁹ 438 U.S. 265 (1978).

¹⁴⁰ *Id.* at 295–96 (opinion of Powell, J.).

¹⁴¹ *Cleburne Living Ctr.*, 473 U.S. at 445–46.

¹⁴² See *id.* at 446–47, 450.

2. *Social and Economic Rights*. — With limited exceptions,¹⁴³ the Court has not allowed claims sounding in social and economic rights to get off the ground. That reluctance follows directly from understanding rights as trumps. Social and economic rights claims imply affirmative duties on the part of the government. Such duties must always compete with other governmental imperatives and financial constraints, and so they cannot be absolute. Thus, the International Covenant on Economic, Social and Cultural Rights¹⁴⁴ obligates states to “take steps . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights” the covenant protects.¹⁴⁵ “Progressive realization” has also been an influential and much-discussed remedial standard for social and economic rights protected under national constitutions.¹⁴⁶

The possibility that the positive obligations that paradigmatically attach to social and economic rights might be both justiciable and susceptible to moderating constructs such as progressive realization seems to have escaped the Court’s recognition. All such rights claims receive minimum scrutiny, largely out of concern that the Court is incapable of making contextual judgments or engaging in balancing. When, in *Dandridge v. Williams*,¹⁴⁷ the Court denied that Maryland was constitutionally obliged to calibrate welfare payments to family size, it refused to distinguish between cases involving “regulation of business or industry” and those involving “the most basic economic needs of impoverished human beings.”¹⁴⁸ The most deferential form of review was deemed appropriate in either kind of case, notwithstanding what the Court itself described as a “dramatically real factual difference” between the two cases.¹⁴⁹

In *San Antonio Independent School District v. Rodriguez*,¹⁵⁰ in which the Court rejected the notion of a fundamental right to education, Justice Powell wondered how education could be “distinguished from

¹⁴³ See *Shapiro v. Thompson*, 394 U.S. 618, 621–22 (1969) (invalidating residency requirements for welfare assistance); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (invalidating poll taxes); *Douglas v. California*, 372 U.S. 353, 355 (1963) (requiring appellate counsel for indigent criminal defendants); *Gideon v. Wainwright*, 372 U.S. 335, 343–45 (1963) (requiring trial counsel for indigent criminal defendants); *Griffin v. Illinois*, 351 U.S. 12, 18–19 (1956) (invalidating fee for trial transcript).

¹⁴⁴ *Adopted* Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁴⁵ *Id.* art. 2(1).

¹⁴⁶ See, e.g., S. AFR. CONST., 1996 ch. 2, § 26(2) (housing); *id.* § 27(2) (health care, food, water, and social security); see also KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS 101–04 (2012).

¹⁴⁷ 397 U.S. 471 (1970).

¹⁴⁸ *Id.* at 485.

¹⁴⁹ *Id.*

¹⁵⁰ 411 U.S. 1 (1973).

the significant personal interests in the basics of decent food and shelter,”¹⁵¹ which had already been held to be outside constitutional protection in cases such as *Dandridge*. As with welfare rights, the Court’s argument was not grounded in the substantive value these rights might hold for the rights-bearer or for society.¹⁵² The problem, rather, was the perceived absence of any judicial capacity for translating obvious factual distinctions into a manageable adjudicative standard.

In a related vein, the Court insists that, in the usual case, constitutional rights apply only against state actors.¹⁵³ The language of the First and Fourteenth Amendments supports that limitation,¹⁵⁴ but the text would be little more than a pleading constraint were the Court to entertain the notion that some rights require affirmative state action to be realized. Claims against private actors could be reformulated as claims of the government’s duty to protect or to supervise. In *DeShaney v. Winnebago County Department of Social Services*,¹⁵⁵ Joshua DeShaney’s unsuccessful argument was, in substance, that he had a right not to be beaten senseless by his father, though it was styled as a duty on the part of state social workers to protect him.¹⁵⁶ In *Town of Castle Rock v. Gonzales*,¹⁵⁷ Jessica Gonzales would have had less need of a constitutional claim against her estranged husband for murdering their three children if she had won her substantive due process claim against the police for failure to enforce a restraining order against him.¹⁵⁸ Notably, the Inter-American Commission on Human Rights later found the United States liable for the state’s failure to protect the Gonzales children,¹⁵⁹ relying on the European Court of Human Rights’s understanding of such a duty in progressive terms, as a question “of reasonable means, and not results.”¹⁶⁰ Rigid application of the state

¹⁵¹ *Id.* at 37.

¹⁵² Several influential theories of human rights, not to mention widely shared moral intuitions, understand these entitlements to be at least as valuable to human flourishing as basic civil and political rights. See Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 13–16 (1969); Martha Nussbaum, *Aristotelian Social Democracy*, in LIBERALISM AND THE GOOD 203, 208–26 (R. Bruce Douglass et al. eds., 1990); Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30, 31–42 (Martha Nussbaum & Amartya Sen eds., 1993); Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 334–36, 345–48 (2004).

¹⁵³ See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005); *United States v. Morrison*, 529 U.S. 598, 620–21 (2000); *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195–97 (1989); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

¹⁵⁴ See U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1.

¹⁵⁵ 489 U.S. 189.

¹⁵⁶ *Id.* at 193.

¹⁵⁷ 545 U.S. 748.

¹⁵⁸ *Id.* at 751.

¹⁵⁹ *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11, ¶ 199 (2011).

¹⁶⁰ *Id.* ¶ 134.

action doctrine is as much a matter of the categorical frame as it is a matter of any textual hook.

3. *Abortion*. — It is not difficult to describe abortion conflicts as implicating competing rights: that of the woman to autonomy over her body and that of the fetus to life. Abortion rights further implicate the equality of women, whose lives are uniquely disrupted by the physical, social, and economic demands of motherhood.¹⁶¹ The reigning approach to disparate impact cases obscures the equality dimension of abortion rights,¹⁶² and the categorical frame impedes the Court from recognizing the state's interest in fetal life as sounding in rights. Justice Blackmun's *Roe v. Wade*¹⁶³ majority opinion said as much. He wrote that a fetus is not a "person" within the meaning of the Fourteenth Amendment, and that a contrary decision would mean that regulation of abortion was constitutionally required.¹⁶⁴ For Justice Blackmun, the threshold question of fetal personhood acted as a constitutional on/off switch: if a fetus is a person, all abortion must be forbidden; if not, abortion on request must, to a point, be permitted.¹⁶⁵

The joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁶⁶ is less categorical than *Roe* — famously so — and goes some way toward acknowledging, at least rhetorically, the reasonable disagreement that sits at the heart of abortion politics.¹⁶⁷ Still, *Casey* lacks the resources either to recognize the rights dimension of the state's position or to more fully recognize the equality dimension of the woman's. One of *Casey*'s innovations was to permit the state to pursue an interest in the potential life of the fetus from the moment of conception and not just in the third trimester.¹⁶⁸ In doing so, the joint opinion repudiated the *Roe* Court's suggestion that first- and second-trimester abortion restrictions must be directed solely at the preservation of the woman's health.¹⁶⁹ At the same time, the Court shied away from itself treating fetal life as a matter of moral or constitutional significance. For the *Casey* joint opinion, fetal life is simply an important and legitimate

¹⁶¹ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 927–28 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382–83 (1985).

¹⁶² See Serena Mayeri, *A New E.R.A. or a New Era? Amendment Advocacy and the Reconstitution of Feminism*, 103 NW. U. L. REV. 1223, 1274–80 (2009).

¹⁶³ 410 U.S. 113 (1973).

¹⁶⁴ *Id.* at 156–58.

¹⁶⁵ See *id.* at 156–57, 162–63.

¹⁶⁶ 505 U.S. 833.

¹⁶⁷ See *id.* at 872 (plurality opinion); see also Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 428–30 (2007).

¹⁶⁸ See *Casey*, 505 U.S. at 869–75 (plurality opinion).

¹⁶⁹ See *Roe*, 410 U.S. at 164–65; *Casey*, 505 U.S. at 869–75 (plurality opinion).

interest the state might (or might not) pursue,¹⁷⁰ no different analytically from its interest in, say, diverse broadcast television programming.¹⁷¹

As much as the joint opinion fails to express the full weight of the state's interest in fetal life, it fails also to express the full weight of the woman's interest in equality. Abortion restrictions of course affect men, but we can be confident that no state has ever required a man to bear or beget a child. It cannot escape notice, moreover, that society places different demands of support and responsibility on mothers than on fathers, a phenomenon supported by, but only marginally accounted for by, the physiology of pregnancy, childbirth, and lactation.¹⁷² Constitutional equality law fails to recognize the additional burdens that abortion restrictions place on women inasmuch as such burdens result not from a woman's sex alone but from her status as a woman seeking an abortion.¹⁷³ It is accordingly a "disparate impact" claim that, thanks to the categorical nature of such inquiries, receives rational basis review regardless of how burdensome it is.

4. *School Integration.* — The binary, categorical nature of the U.S. frame has been a subject of self-reflection in school integration cases. The Court's remedial commitment in the wake of *Brown v. Board of Education*¹⁷⁴ focused on school systems whose racial mixture had resulted from de jure rather than simply de facto segregation.¹⁷⁵ It remains the case that systems whose segregated schools are notionally attributable to the decisions of private individuals or institutions are of no constitutional moment; indeed, the Court's decision in *Parents Involved in Community Schools v. Seattle School District No. 1*¹⁷⁶ suggested that the state is presumptively forbidden from taking race into account in order to remedy segregation of this sort.¹⁷⁷ By stark contrast, it also remains the case that trial courts that find de jure racial segregation of public schools are empowered to put in place and enforce the most coercive remedies known to constitutional law: busing of children across county lines and retaining jurisdiction over local educational decisions for decades.

The distortion this binary has visited upon desegregation efforts was becoming increasingly clear into the 1970s. In a case out of Charlotte-

¹⁷⁰ See *Casey*, 505 U.S. at 869–75.

¹⁷¹ See, e.g., *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990), *overruled on other grounds by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

¹⁷² See Ginsburg, *supra* note 161, at 382–83.

¹⁷³ Cf. *Geduldig v. Aiello*, 417 U.S. 484, 494–97 (1974) (employing rational basis review in upholding the exclusion of pregnancy coverage from a state disability insurance program).

¹⁷⁴ 347 U.S. 483 (1954).

¹⁷⁵ See, e.g., *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 211–13 (1973).

¹⁷⁶ 551 U.S. 701 (2007).

¹⁷⁷ See *id.* at 747–48 (plurality opinion); see also *id.* at 783 (Kennedy, J., concurring in part and concurring in the judgment).

Mecklenburg County in North Carolina, the Court unanimously approved a district court-ordered busing plan, premised on a history of de jure segregation, between the mostly black areas of central Charlotte and the mostly white outlying suburbs.¹⁷⁸ In distinction to other southern jurisdictions that had been required to take affirmative steps to integrate their schools,¹⁷⁹ Charlotte-Mecklenburg was a large urban county whose existing patterns of racial segregation were caused largely by nominally private housing decisions and government policies that did not relate specifically to public schools.¹⁸⁰ Racial segregation in Charlotte-Mecklenburg schools resembled segregation in many northern jurisdictions that did not have state policies requiring or permitting segregated schools.¹⁸¹ The de jure/de facto regime therefore mandated radically different treatment for jurisdictions that were, arguably, similar in relevant ways.

Two years after the Charlotte-Mecklenburg case, faced with a northern school district in Denver,¹⁸² Justice Powell proposed to Justice Brennan a compromise, the essential terms of which are described in his concurring opinion: eliminate the de jure/de facto distinction and impose a nationwide standard that obligates public authorities not to bus students to individual schools but rather to operate a “genuinely integrated school system.”¹⁸³ Justice Brennan rejected Justice Powell’s overture.¹⁸⁴ Whatever we think of that move strategically or politically, it perpetuated a system whereby courts are disempowered from addressing school segregation without making an antecedent and increasingly difficult factual finding of de jure segregation. Those jurisdictions that have failed to achieve unitary status are selectively ostracized for decisions made by their predecessors even as their school systems are demographically similar to others that escape public and judicial attention.

5. *Second Amendment.* — Even without its conspicuous reference to a “well regulated” militia,¹⁸⁵ it would be obvious that the Second Amendment does not and cannot support an unqualified right of individual Americans to keep and bear arms. Restrictions on who may bear weapons, of what types, and where cannot, ipso facto, violate the constitution of a functioning society. Marrying that reality to the rights-as-trumps frame has produced considerable confusion.

¹⁷⁸ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22–32 (1971).

¹⁷⁹ *See, e.g., Green v. Cty. Sch. Bd.*, 391 U.S. 430, 441–42 (1968); *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 233–34 (1964).

¹⁸⁰ *See Keyes*, 413 U.S. at 222–23 (Powell, J., concurring in part and dissenting in part) (describing the basis of the holding in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1).

¹⁸¹ *See id.*

¹⁸² *Id.* at 191 (majority opinion).

¹⁸³ *Id.* at 223–25 (Powell, J., concurring in part and dissenting in part).

¹⁸⁴ *See JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.* 303–04 (1994).

¹⁸⁵ U.S. CONST. amend. II.

For decades, the constitutional common sense was that the Second Amendment did not protect individual gun rights but only the right of a state to keep an armed militia or, at best, the right of an individual to bear arms for the purpose of militia service. As Justice McReynolds wrote in the 1939 case of *United States v. Miller*,¹⁸⁶ the Amendment must be interpreted in view of its “obvious purpose to assure the continuation and render possible the effectiveness” of the militia.¹⁸⁷ In 1968, after the New Jersey Supreme Court relied upon the “collective right” view to uphold a state law imposing certain permitting, identification, and fitness requirements on gun purchasers,¹⁸⁸ the U.S. Supreme Court dismissed the plaintiffs’ appeal “for want of a substantial federal question.”¹⁸⁹ In 1980 the Court applied rational basis review to provisions of the Omnibus Crime Control and Safe Streets Act of 1968¹⁹⁰ that forbade convicted felons from possessing firearms, reasoning that the Act did not “trench upon any constitutionally protected liberties.”¹⁹¹

The upshot of the “collective rights” or “individual militia rights” view of the Second Amendment would be to make the right a nonstarter in the modern world, essentially inaccessible to present-day citizens.¹⁹² Thus, the former Solicitor General and Harvard Law School Dean Erwin Griswold wrote in a 1990 op-ed titled “Phantom Second Amendment ‘Rights’” that the proposition that the Second Amendment poses “no barrier to strong gun laws is perhaps the most well-settled proposition in American constitutional law.”¹⁹³ Former Chief Justice Burger later said the Amendment “doesn’t guarantee the right to have firearms at all”¹⁹⁴ and called the argument “one of the greatest pieces of fraud, I repeat the word ‘fraud,’ on the American public by special interest groups that I have ever seen.”¹⁹⁵

Whatever the pedigree of this view of the Second Amendment, its prominence has helped distort the debate over the Amendment’s reach.

¹⁸⁶ 307 U.S. 174 (1939).

¹⁸⁷ *Id.* at 178.

¹⁸⁸ *Burton v. Sills*, 248 A.2d 521, 526–29, 531 (N.J. 1968).

¹⁸⁹ *Burton v. Sills*, 394 U.S. 812, 812 (1969) (per curiam).

¹⁹⁰ Pub. L. No. 90-351, 82 Stat. 197 (codified as amended in scattered sections of the U.S. Code).

¹⁹¹ *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980).

¹⁹² See H. RICHARD UVILLER & WILLIAM G. MERKEL, *THE MILITIA AND THE RIGHT TO ARMS, OR, HOW THE SECOND AMENDMENT FELL SILENT* 11–12 (2002); Carl T. Bogus, *The Hidden History of the Second Amendment*, 31 U.C. DAVIS L. REV. 309, 408 (1998); Calvin Massey, *Guns, Extremists, and the Constitution*, 57 WASH. & LEE L. REV. 1095, 1097 (2000).

¹⁹³ Erwin N. Griswold, *Phantom Second Amendment “Rights,”* WASH. POST (Nov. 4, 1990), <https://www.washingtonpost.com/archive/opinions/1990/11/04/phantom-second-amendment-rights/f4381818-fed9-4e63-8d62-f62056818181/> [https://perma.cc/36AK-REW3].

¹⁹⁴ David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1367 n.9 (quoting Warren Burger, *Press Conference Concerning Introduction of the Public Health and Safety Act of 1992*, FED. NEWS SERV., June 26, 1992).

¹⁹⁵ *The MacNeil/Lehrer NewsHour* (PBS television broadcast Dec. 16, 1991).

Proponents of constitutional gun rights devoted tremendous energy to rebutting the collective rights position and relatively little energy to discussing standards of review or what regulations would or should survive scrutiny under the individual rights position.¹⁹⁶ Many on both sides of the constitutional question have appeared to assume that the individual rights view would require strict scrutiny or some analogously exacting standard.¹⁹⁷ Justice Scalia's majority opinion in *District of Columbia v. Heller*¹⁹⁸ opens with fifty pages excavating the "meaning" of the Second Amendment,¹⁹⁹ followed by three paragraphs discussing potential exceptions to the individual right announced.²⁰⁰ The basis for those exceptions — laws restricting possession of firearms by convicted felons or the mentally ill, forbidding the bearing of arms "in sensitive places such as schools and government buildings,"²⁰¹ and restrictions on gun sales²⁰² — is left unexplained in the opinion. The opinion treats the scope and substance of gun rights as an interpretive question to be determined by legalistic sources such as original meaning and precedent,²⁰³ not as an empirical question subject to qualitative analysis or a weighing of costs and benefits.

That focus is even more explicit in the *Heller* majority's brief discussion of the D.C. handgun ban itself. The Court rejected Justice Breyer's suggestion, discussed below, that the right to bear arms might be subject to the state's ordinary police powers:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. . . . We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. The Second Amendment is no different.²⁰⁴

This remarkable passage reveals an ideology of rights absolutism that this Part has argued is broadly shared at the Court. It perpetuates the myth that interest balancing is never conducted, notwithstanding

¹⁹⁶ See Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 685–87 (2007); see also Randy E. Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237 (2004) (book review).

¹⁹⁷ See Winkler, *supra* note 196, at 690–92.

¹⁹⁸ 554 U.S. 570 (2008).

¹⁹⁹ *Id.* at 576–626.

²⁰⁰ *Id.* at 626–28.

²⁰¹ *Id.* at 626.

²⁰² *Id.* at 626–27.

²⁰³ See *id.* at 626 (suggesting that "exhaustive historical analysis" should determine the reach of the Second Amendment).

²⁰⁴ *Id.* at 634–35 (citation omitted).

its use, for example, in cases involving the Contracts Clause, the Due Process Clause, and the Takings Clause.²⁰⁵ Its suggestion that the enumeration of a right is inherently inconsistent with interest balancing or case-by-case adjudication could have been written by Dworkin himself, as Part III develops further. Finally, the Court compared the Second Amendment to its next-door neighbor the First Amendment. By seeking refuge in a category of rights the Court has already deemed sacred, the *Heller* opinion reinforces the view that sacredness is in the nature of rights themselves.

Proportionality and balancing approaches to rights have long found favor with Justice Breyer. Nearly two decades ago, concurring in *Nixon v. Shrink Missouri Government PAC*,²⁰⁶ he wrote that “where constitutionally protected interests lie on both sides of the legal equation,” a balancing of interests rather than “a strong presumption against constitutionality” is appropriate.²⁰⁷ In his recent book, *The Court and the World*, Justice Breyer describes the appeal of proportionality as lying in the transparency it brings to balancing, which is implicit within but disclaimed by proponents of the categorical approach.²⁰⁸

It is not surprising, then, that Justice Breyer saw in *Heller* an opportunity to promote an alternative to the ideology of rights absolutism. Rather than linger on the threshold question of the “meaning” of the right the Second Amendment protects, as both the majority and Justice Stevens’s dissent did,²⁰⁹ he placed the weight of his analysis on what the government may do in virtue of the presence of an individual right to bear arms and in light of the state’s persistent and legitimate interest in public safety.²¹⁰ In justifying that approach, Justice Breyer referred specifically to proportionality as desirable in a case in which “important interests lie on both sides of the constitutional equation.”²¹¹ In that context, rights cannot coherently be deemed even presumptively absolute. The Court’s role is not to assess their application in the abstract but rather to assess, at a remove, “whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute’s salutary effects upon other important governmental interests.”²¹² This assessment is largely empirical in nature, and one in which the legislature’s factfinding expertise is owed a degree of deference.²¹³

²⁰⁵ See, e.g., *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

²⁰⁶ 528 U.S. 377 (2000) (upholding state limits on contributions to political candidates).

²⁰⁷ *Id.* at 400 (Breyer, J., concurring); see also *United States v. Alvarez*, 567 U.S. 709, 730–31 (2012) (Breyer, J., concurring in the judgment).

²⁰⁸ STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 257 (2015).

²⁰⁹ *Heller*, 554 U.S. at 576–626; *id.* at 640–62 (Stevens, J., dissenting).

²¹⁰ See *id.* at 681–87 (Breyer, J., dissenting).

²¹¹ *Id.* at 689.

²¹² *Id.* at 689–90 (citing *Shrink Mo. Gov’t PAC*, 528 U.S. at 402 (Breyer, J., concurring)).

²¹³ See *id.* at 690.

* * *

The examples sketched above show the vitality of the categorical frame within American constitutional law. At least four generalizable elements are apparent. First, the Court resorts casually to slippery slope, hypothetical arguments to silence claims made in the here and now, as in disparate impact and positive rights cases. Second, the Court struggles to reconcile potential rights conflicts with existing doctrinal architecture, as in the abortion area. Third, the Court maintains thin heuristics to temper its entry into complex social problems, as in the school integration context. Finally, the Court adopts a romantic vision of doctrinal simplicity and coherence, as in *Heller*.

A rights-as-trumps ideology does not *cause* these features of U.S. constitutional law, at least not uniquely. They are overdetermined within the cases discussed, all of which implicate rich and unruly social conflicts that constitutional law could not fully discipline even if we wanted it to. The point, though, is that a rights-as-trumps ideology makes these doctrinal moves *necessary*. To the degree these features of U.S. constitutional law are a problem, which Part III addresses directly, the U.S. approach denies courts the resources to be part of the solution. The following section fleshes out what an alternative vision of rights looks like outside our borders, where it has become dominant.

B. Proportionality

In the city of Mönchengladbach in the West German State of North Rhine-Westphalia, a woman wanted to feed pigeons in a public square.²¹⁴ A local ordinance forbade her from doing so, and so she raised a constitutional challenge.²¹⁵ Specifically, she argued that denying her the right to feed pigeons implicated her right to “free development of [her] personality,” which the German Basic Law protects.²¹⁶ Like substantive due process in the United States, the right to personality provides some residual protection for liberty interests that implicate human dignity but that other provisions of the Basic Law do not specifically cover, including freedom of action in recreational and economic spheres.²¹⁷

²¹⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 23, 1980, 54 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 143 (Ger.), <http://www.servat.unibe.ch/dfr/bv054143.html> [<https://perma.cc/XQ6Q-6WMR>] (translation on file with the Harvard Law Library).

²¹⁵ *Id.* ¶¶ 2(b), 2(d).

²¹⁶ GRUNDGESETZ [GG] [BASIC LAW] art. 2(1), *translation at* http://www.gesetze-im-internet.de/englisch_gg/index.html [<https://perma.cc/32EU-UC9M>] (Ger.).

²¹⁷ See DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 399–400 (3d ed. 2012).

Faced with this claim, the Federal Constitutional Court conceded, without analysis, that the right to free development of one's personality "includes the feeding of pigeons on streets and in public places as an expression of love of animals."²¹⁸ The fact that the applicant had a right to feed pigeons did not, however, require the government to articulate a "compelling interest" or a "narrowly tailored" policy in support of limiting that right. For the German court, the right to feed pigeons does not implicate the "sacrosanct" (*unantastbare*) area of private life; as such, "everyone as a citizen who relates and is bound to a community must accept government measures executed in the prevailing interest of the community as a whole while strictly complying with the principle of proportionality."²¹⁹ Accordingly, it was sufficient for the court to note that feral pigeons gathered in flocks can cause significant property damage and that banning their feeding on public streets or in public facilities was a "very limited interference with the freedom to exercise the love of animals."²²⁰ The court added that this measure was the mildest way to achieve the desired public benefit and suggested that the ban may have already led to a migration of pigeons to other areas.²²¹

The Pigeon-Feeding Case has come in for serious criticism, even ridicule.²²² I do not use it as an advertisement for proportionality, which is far from perfect.²²³ The case is useful, rather, as a contrast dye that helps to illuminate the significant framing difference between this style of analysis and what Americans are familiar with. A U.S. court would likely place the weight of its analysis on a question that gave the German Constitutional Court no pause: whether the Constitution protects even a *prima facie* right to feed pigeons. A claim of this sort would likely be pleaded under the rubric of substantive due process, which would require a showing that the feeding of pigeons implicated a "fundamental" right, one involving "personal choices central to individual dignity and autonomy"²²⁴ or "fundamental to our scheme of ordered liberty"²²⁵ or "deeply rooted in this Nation's history and tradition."²²⁶ A court unwilling to place the right to education within this august category is most

²¹⁸ 54 BVERFG 143 ¶ 2(d).

²¹⁹ *Id.* ("[M]uß jedermann als gemeinschaftsbezogener und gemeinschaftsgebundener Bürger staatliche Maßnahmen hinnehmen, die im überwiegenden Interesse der Allgemeinheit unter strikter Wahrung des Verhältnismäßigkeitsgebotes erfolgen." (citation omitted)).

²²⁰ *Id.*

²²¹ *Id.*

²²² See, e.g., Andrés Sajó, *Abuse of Fundamental Rights or the Difficulties of Purposiveness*, in *ABUSE: THE DARK SIDE OF FUNDAMENTAL RIGHTS* 30, 50–51 (Andrés Sajó ed., 2006).

²²³ See *infra* section III.E, pp. 85–96.

²²⁴ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

²²⁵ *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) (emphasis omitted) (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968)).

²²⁶ *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

unlikely to be in the bag for pigeon feeders.²²⁷ Without a right to cling to, the claimant could win only if there was no conceivable rational basis for the pigeon-feeding law,²²⁸ a standard that is at least notionally quite distant from “strictly complying with the principle of proportionality,” which the German court said was required.²²⁹

The Pigeon-Feeding Case thus models a contrasting vision that places the weight of analysis and attendant scrutiny on the nature of the government’s interest in and justification for limiting the right rather than on the essence, provenance, and scope of the right at stake. As Professor Kai Möller observes, many proportionality regimes feature what has been called “rights inflation,” or “the increasing protection of relatively trivial interests as (prima facie) rights.”²³⁰ A certain promiscuity in declaring rights to exist is accompanied by a certain austerity in elevating interference with rights into violations of them.²³¹

Proportionality seeks to achieve this calibration through a structured approach to limitations on rights,²³² in the style of the Canadian Supreme Court’s opinion in *Oakes*. It is not just another word for “balancing,” and indeed there are proponents of proportionality who believe balancing as such should play at most a limited role.²³³ Proportionality is better understood as a transsubstantive analytic frame, a kind of intermediate scrutiny for all,²³⁴ that is designed to discipline the process of rights adjudication on the assumption that rights are both important and, in a democratic society, limitable.

Some form of proportionality is practiced in courts throughout the world, such that even some of its critics have called it “the *jus cogens* of human rights law.”²³⁵ It is ubiquitous within the domestic constitutional courts of Europe, the European Court of Human Rights, and the European Court of Justice.²³⁶ It is, as noted, the Canadian Supreme

²²⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

²²⁸ See, e.g., *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955).

²²⁹ 54 BVERFG 143 ¶ 2(d) (Ger.).

²³⁰ KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* 3 (2012).

²³¹ See *id.* at 4–5.

²³² See Jackson, *supra* note 114, at 3098–99.

²³³ See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 259–61 (William Rehg trans., MIT Press 1996) (1992); Bernhard Schlink, *Proportionality (1)*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 718, 734–35 (Michel Rosenfeld & Andrés Sajó eds., 2012).

²³⁴ Jamal Greene, *The Rule of Law as a Law of Standards*, 99 GEO. L.J. 1289, 1292 (2011); see also *United States v. Alvarez*, 567 U.S. 709, 730 (2012) (Breyer, J., concurring in the judgment).

²³⁵ Grant Huscroft et al., *Introduction*, in *PROPORTIONALITY AND THE RULE OF LAW* 1, 3 (Grant Huscroft et al. eds., 2014) [hereinafter *RULE OF LAW*]; see also NIELS PETERSEN, *PROPORTIONALITY AND JUDICIAL ACTIVISM* 6 (2017) (“[S]ome form of proportionality test is used by most courts exercising judicial review outside of the United States today.”).

²³⁶ Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere but Here?*, 22 DUKE J. COMP. & INT’L L. 291, 296, 298 (2012); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 74, 139–52 (2008).

Court's default mode of analysis under the Canadian Charter of Rights and Freedoms.²³⁷ The last decade has seen a convergence on the use of proportionality in Latin American courts, including especially in the influential jurisdictions of Colombia, Brazil, and Mexico.²³⁸ It is the basic approach in the courts of South Korea, Taiwan, Hong Kong, and Malaysia.²³⁹ It is a standard tool of adjudication in South Africa and in Israel.²⁴⁰ Even in Australia, whose constitution has no bill of rights and which has a long history of interpretive “legalism,”²⁴¹ the high court has applied proportionality analysis in limiting the implied right to freedom of political communication.²⁴²

Typical proportionality formulations comprise either three or four ordered steps in the analysis: (1) some discernment of the nature of the claimed right; (2) an assessment of the means-ends fit between the law or act and some legitimate governmental objective; (3) a “least-restrictive means” or “minimal impairment” test that asks whether the government has less rights-impairing alternatives it could have pursued; and (4) balancing in the strict sense, which requires the adjudicator to assess whether there is significant disproportionality between the marginal benefit to the government and the marginal cost to the rights-bearer.²⁴³ Different jurisdictions place different weights on the various steps in the analysis,²⁴⁴ and, in the nature of things, proportionality analysis, while notionally transsubstantive, can take different shape for different kinds of rights.²⁴⁵

²³⁷ See *supra* pp. 39–40.

²³⁸ See Juicio de amparo en revisión, Pleno de la Suprema Corte de Justicia de la Nación [SCJN], *Semanario Judicial de la Federación y su Gaceta*, Novena Época, tomo XXIII, Febrero de 2006, 1659/2006 (Mex.); AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 201–02 (Doron Kalir trans., 2012); CARLOS BERNAL PULIDO, *EL DERECHO DE LOS DERECHOS* (3d ed. 2006).

²³⁹ Alec Stone Sweet & Jud Mathews, *Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan — Whither Singapore?*, 29 *SING. ACAD. L.J.* 774, 782 (2017).

²⁴⁰ See BARAK, *supra* note 238, at 197–98, 208–10; Stone Sweet & Mathews, *supra* note 236, at 74.

²⁴¹ See Jeffrey Goldsworthy, *Australia: Devotion to Legalism*, in *INTERPRETING CONSTITUTIONS* 106, 109, 115–36 (Jeffrey Goldsworthy ed., 2006).

²⁴² See *Lange v Austl Broad Corp* (1997) 189 CLR 520 (Austl.).

²⁴³ See *R. v. Oakes*, [1986] 1 S.C.R. 103, 138–40 (Can.); BARAK, *supra* note 238, at 131–33.

²⁴⁴ See Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 *U. TORONTO L.J.* 383, 393–95 (2007); Jackson, *supra* note 114, at 3098–101.

²⁴⁵ See Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 *MICH. L. REV.* 391, 418–19 (2008); see also Clare Ryan, *Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights*, 56 *COLUM. J. TRANSNAT'L L.* 467, 488 (2018) (noting that the margin of appreciation can enable a gradation in proportionality analysis).

C. A Broader View

A commitment to proportionality does not suppose a commitment to any particular model or formulation, such as Canada's *Oakes* test.²⁴⁶ For the purposes of this Foreword, it is useful simply to identify the relative positions of the categorical approach and proportionality within some of the conceptual frames that have been applied to the structure of legal norms. This section identifies four such frames: rules and standards; universalism and particularism; interpretation and empiricism; and authority and justification. Each frame can accommodate a spectrum of approaches, some of which may combine elements of proportionality and categorical adjudication. The plea of this Foreword will be to move U.S. constitutional adjudication closer than it is now to the proportionality end of those frames.

1. *Rules and Standards.* — The distinction between rules and standards or, alternatively, rules and principles, is familiar in the law, and is the dichotomy to which the categorical/proportionality binary most obviously corresponds.²⁴⁷ Legal norms formulated as rules identify legally relevant facts *ex ante* and direct responsive legal conclusions.²⁴⁸ Professors Henry Hart and Albert Sacks describe a “rule” as “a legal direction which requires for its application nothing more than the determination of the happening or non-happening of physical or mental events — that is, determinations of *fact*.”²⁴⁹ The categorical approach is rule-like insofar as it identifies the facts relevant to placing a rights dispute into a particular category (the various tiers of scrutiny, paradigmatically), and the result largely follows from that initial identification.

Legal norms formulated as standards (or principles) identify a set of purposes or values and rely on downstream decisionmakers to conform the law to those purposes or values. Hart and Sacks write that a standard is “a legal direction which can be applied only by making, in addition to a finding of what happened or is happening in the particular situation, a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspect of general human experience.”²⁵⁰ Proportionality retains some rule-like elements,

²⁴⁶ See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, 7 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 377 (Ger.), <http://www.servat.unibe.ch/dfr/bv007377.html> [<https://perma.cc/6QHZ-K8LV>] (applying proportionality analysis to a law regulating the choice or practice of an occupation).

²⁴⁷ See Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 730–31 (1995).

²⁴⁸ See Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

²⁴⁹ HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 139 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

²⁵⁰ *Id.* at 140.

but its affinity to standards results from its essential injunction that adjudicators make qualitative judgments about the law's requirements in light of competing values and social facts.²⁵¹

The German political theorist Robert Alexy has been influential in suggesting that proportionality is necessary to adjudication of legal norms that take the form of principles. He is most focused on the rights to liberty, equality, and dignity protected by the German Basic Law,²⁵² but his work has been influential outside Germany both because of its cogency and because many constitutional systems, including the U.S. system, protect rights that appear to share this structure. Alexy's core insight is that while rules are norms that must either be fulfilled or not fulfilled, principles are best understood as "optimization requirements," that is, "norms which require that something be realized to the greatest extent possible given the legal and factual possibilities."²⁵³ Those possibilities are determined both by empirical reality and by other rules and principles that mutually constitute the legal system. Because principles "lack the resources to determine their own extent in light of competing principles and what is factually possible,"²⁵⁴ principles must, inherently, be subject to weighing. It is possible to optimize a principle even without vindicating it in a particular case, so long as the policy embraced by the competing principle is suitable, necessary (as in not gratuitously burdensome), and pursued proportionately.²⁵⁵

On this view, understanding rights purely as rules would sever their link to proportionality, and so Alexy's intervention requires a premise that some will contest. I am sympathetic to Alexy's framework and to its application to the U.S. Constitution: most of the rights Americans care about are grounded in norms best described as standards or principles. Still, as Part III explores more fully, this Foreword's call for proportionality in the United States does not depend on ascribing a particular ontology to the Constitution's rights provisions.

2. *Universalism and Particularism.* — Academics tend to be especially prone to distinguishing "splitters" from "lumpers." Splitters, the historian Jack Hexter observes, "like to point out divergences, to perceive differences, to draw distinctions."²⁵⁶ By contrast, "[i]nstead of

²⁵¹ See Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in *EUROPEAN AND U.S. CONSTITUTIONALISM* 49, 53–54 (Georg Nolte ed., 2005).

²⁵² See ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 2–5, 13 (Julian Rivers trans., 2002).

²⁵³ *Id.* at 47 (emphasis omitted).

²⁵⁴ *Id.* at 57.

²⁵⁵ See *id.*

²⁵⁶ J.H. HEXTER, *The Historical Method of Christopher Hill*, in *ON HISTORIANS* 227, 242 (1979).

noting differences, lumpers note likenesses; instead of separateness, connection."²⁵⁷ Lumpers are universalists. They search for systems that can be constructed out of the mess of observable norms. Splitters are particularists. More comfortable with a multiplicity of systems, or with a highly variegated single system, they are apt to draw distinctions and emphasize difference.

Universalism is often associated with the rule of law,²⁵⁸ which requires the law to be general, transparent, and free from exceptions, the same qualities that characterize rule-based decisionmaking.²⁵⁹ The categorical approach to adjudication seeks to homogenize the law in just this way and thereby both to streamline and to regularize the administration of justice. Universalism in constitutional adjudication tends to emphasize the law's major premises²⁶⁰: restrictions on speech are dangerous; racial discrimination is wrong; the state may (or, depending on one's view, may not) enact morals legislation. It tends to overlook potential variation within the law's minor premises: not all speech is equally valuable; not all racial discrimination is morally equivalent; not all morals legislation is equally burdensome or justifiable. Conflicts of rights present special problems for universalists because the major and minor premises are indistinguishable a priori.²⁶¹

Particularism places great weight on whether the law's minor premises can complete the syllogism. The danger, of course, is that too much contextualism can undermine the major premise, and adjudicators and legislators might not know enough to draw the necessary distinctions. Universalists prefer heuristics that reduce the error costs involved in permitting adjudicators to assess directly the fit between the law's overarching values and particular conflicts. Particularists are more confident in the adjudicator's ability to perform that assessment than they are in the law's ability to develop a reliable heuristic. For the particularist, the Constitution's substantive norms cannot be realized without significant specificity in their application. Slippery slopes are standard rhetorical tropes for universalists. For the particularist, the slippery slope is not a problem "while this Court sits."²⁶²

3. *Interpretation and Empiricism.* — The rights-as-trumps position frames rights adjudication as predominantly an interpretive exercise.

²⁵⁷ *Id.*

²⁵⁸ See James L. Gibson, *Changes in American Veneration for the Rule of Law*, 56 DEPAUL L. REV. 593, 597 (2007).

²⁵⁹ See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989); see also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

²⁶⁰ See DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 7, 169 (2004).

²⁶¹ *Id.* at 172.

²⁶² *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting) (arguing that "[t]he power to tax is not the power to destroy while this Court sits").

The Constitution contains rights, and the question for the Court is what those rights *mean*, both at their core and at their margins. Courts may excavate that meaning using the traditional tools of constitutional analysis: text, history, structure, precedent, and prudential considerations.²⁶³ Those tools are used to mine the historical and precedential markers — determined in advance of the particular controversy — that will instruct the adjudicator as to the correct outcome. In light of this frame, it is not surprising that debates over the right way to conduct constitutional analysis in these terms have dominated U.S. constitutional discourse for several decades, and without interruption since the rights explosion that began under the Warren Court.²⁶⁴

Proportionality frames rights adjudication as predominantly an empirical exercise. The question for the adjudicator is not primarily what the rights in the Constitution “mean.” Rather, in light of rights inflation, the question is whether the facts of the particular dispute form a sufficient basis for the government to have acted as it did. Is it responding to a genuine and cognizable problem? Is it doing so through genuinely responsive instruments? Are there other instruments available that would be less burdensome to rights-holders? Is the benefit to be gained out of proportion to the harm inflicted? Answering these questions does not require extensive analysis of constitutional text, history, or precedent. Rather, it requires reliable access to social facts.²⁶⁵

None of the above is to suggest that proportionality is purely technocratic or does not require value judgments.²⁶⁶ It is rather that proportionality rejects the assumption that submitting policy judgments to judicial review requires that they be submitted to distinctively juridical technologies of dispute resolution — textual, historical, and case analysis, for example. Proponents of proportionality are relatively comfortable with transparent judicial second-guessing of policy judgments on the ground that those judgments were qualitatively inadequate in light of facts about the world.

²⁶³ See BOBBITT, *supra* note 23, at 7; Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194–209 (1987).

²⁶⁴ See Jamal Greene, *Interpretation*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 887, 888–89 (Mark Tushnet et al. eds., 2015).

²⁶⁵ See BEATTY, *supra* note 260, at 57, 169–70; Jamal Greene, *A Private Law Court in a Public Law System*, 12 LAW & ETHICS HUM. RTS. 37, 60 (2018). Tellingly, as section IV.C discusses at greater length, *see infra* pp. 115–19, the U.S. Supreme Court has not confronted its basic inability to reliably acquire and adjudicate disputes over social facts. See Caitlin E. Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185, 1188 (2013). European and Latin American constitutional courts tend to emerge from a civil law tradition that incorporates interrogatory modes of information gathering better suited to the kinds of empirical questions proportionality invites. See, e.g., Jula Hughes & Vanessa MacDonnell, *Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations*, 32 NAT’L J. CONST. L. 23, 44 (2013).

²⁶⁶ See COHEN-ELIYA & PORAT, *supra* note 28, at 108.

4. *Authority and Justification.* — The previous discussion gestures at a defense of rights as trumps rooted in separation of powers. Judges have a distinct role morality and institutional competence that orient them toward tasks suited to private law dispute resolution and criminal adjudication: textual exegesis in applying a statute; divining the will of the parties, for example, to a will or contract;²⁶⁷ judging an actor's intent in order to determine his or her legal culpability. Rebalancing the government's reasons for passing a law seems to exercise legislative power, especially in the absence of a clearly delineated right.

Migrating judicial review from private to public law puts some pressure on this model. In a public law dispute, engaging in textual exegesis or divining the intentions of the parties often entails direct confrontation with the contrary political and even constitutional judgments of public authorities. A legal culture committed to the justiciability of public law disputes can respond to the problem of overlapping jurisdiction either by seeking to draw clear lines of authority or by subjecting the actions of the political branches to substantive demands for rationality. And so Cohen-Eliya and Porat, borrowing loosely from the South African scholar Etienne Mureinik,²⁶⁸ contrast what they describe as the American legal tradition's "culture of authority" with what they call an emerging global legal "culture of justification."²⁶⁹ Within a culture of authority, public law "focuses on delimiting the borders of public action and on ensuring that decisions are made only by those authorized to make them."²⁷⁰ Within a culture of justification, on the other hand, the legitimacy of governmental action "is justified in terms of its cogency and persuasiveness, that is, its rationality and reasonableness."²⁷¹

On Cohen-Eliya and Porat's view, the U.S. political question doctrine and high barriers to standing are symptomatic of the U.S. legal culture's continued policing of lines of institutional political authority.²⁷² Proportionality jurisdictions tend to have muted or nonexistent political question doctrines and often have much lower standing requirements than would be conceivable in U.S. federal courts.²⁷³ Many such jurisdictions permit review by governmental bodies, or subsets thereof, and permit preenforcement (or even preenactment) challenges to legislation.²⁷⁴ These jurisdictions are less concerned with separation of powers

²⁶⁷ See RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 265 (2004).

²⁶⁸ Mureinik, *supra* note 28, at 32.

²⁶⁹ COHEN-ELIYA & PORAT, *supra* note 28, at 103–04.

²⁷⁰ *Id.* at 112.

²⁷¹ *Id.*

²⁷² See *id.* at 114–15.

²⁷³ See *id.* at 115–16.

²⁷⁴ See Ran Hirschl, *The Judicialization of Politics*, in *THE OXFORD HANDBOOK OF POLITICAL SCIENCE* 253, 264 (Robert E. Goodin ed., 2011).

in the style envisioned by Montesquieu and more concerned with reason-giving as the ultimate source of governmental power.²⁷⁵

III. CONSEQUENCES

There is no perfect technology of judicial review. Public law disputes require judges with relatively little accountability to evaluate political judgments premised on competing and often reasonable assessments of constitutionality made by government officials. The core claim of this Foreword is that a proportionality-like approach is better suited to adjudication of rights disputes within a rights-respecting democracy. This Part substantiates that claim by highlighting the costs of rights as trumps.

Section A engages with Dworkin's well-known critique of balancing and shows how his approach can emasculate rights as much as it can protect them. Dworkin believed rights should be free of infringement except in the face of contrary rights or genuine emergency. Proportionality does not concede that lack of meaningful review is the only alternative to rights as trumps or that other kinds of personal interests that are not "rights" are left to legislative prerogative. In a complex society, Dworkin's binary view of rights puts too much pressure on the threshold interpretive question of whether a right is at issue.

Section B discusses two broad ways in which rights as trumps distorts constitutional law. First, the frame frustrates the law's ability to align rights recognition with our collective sense of justice. Second, the rights-as-trumps view encourages judges either to stretch doctrinal frameworks that do not fit or to ignore such frameworks whenever they feel inconvenient.

Section C argues that rights as trumps dulls the constitutional conscience of political actors by refusing to account for the *constitutional* right of the community to embody its political vision in the law.

Section D then turns to a different and under-explored kind of cost. Rights as trumps does not just coarsen our constitutional claims; it coarsens us as citizens. A world in which a litigant is either a rights-bearer whose situation trumps contrary government action, or is not a rights-bearer and is therefore at the mercy of the state, is a world of enemies. In such a world, submitting a dispute to constitutional adjudication is a declaration that there is no space for negotiation between the competing positions. The government's claim is necessarily that the rights-bearer is wholly beneath constitutional concern, and the rights-bearer's claim is that the government is a bad actor and not just a clumsy one. In a rapidly polarizing world, the judicial department must do better than this.

²⁷⁵ See COHEN-ELIYA & PORAT, *supra* note 28, at 115.

Section E discusses some of proportionality's own problems and offers some responses. The section highlights four in particular. First, proportionality might ignore positive constitutional law, which might not countenance rights inflation and which might condemn the rights *deflation* implicit in proportionality. Second, proportionality does not adequately distinguish between rights and interests. Third, proportionality makes judicial activism more transparent, which has both costs and benefits. Finally, apex courts in systems in which constitutional jurisdiction is decentralized have some duty to articulate legal rules in order to promote coherence and uniformity.

A. Dworkin's Critique

This Foreword's title is a phrase and a concept commonly linked to the legal philosophy of Ronald Dworkin. This section identifies the points of departure from Dworkin's ideas. At bottom, the critical point of departure is that the claim this Foreword advances is not, as Dworkin's was, a deontological one about the nature of rights and the moral duties the state owes to rights-bearers. It is, rather, a consequentialist argument that rests on a set of empirical assumptions about how judicial review is practiced in U.S. courts. Varying those assumptions varies the argument. Volumes have been written on Dworkin's thought, including his thinking about rights in particular.²⁷⁶ The inductive method introduced above shows that this Foreword's argument means to be less a criticism of Dworkin than of the Court.²⁷⁷

Still, given that Dworkin's defense of rights as trumps remains canonical, it is worth articulating why it does not meet, much less defeat, the argument made here. Dworkin's basic argument is that holding a right limits the reasons that may be advanced for the government to deprive the rights-bearer of whatever it is that the right protects.²⁷⁸ Those reasons may be grounded in the need to protect conflicting rights, to prevent catastrophe, or perhaps to secure some other unusually significant public benefit, but they may not be grounded in a utilitarian argument that the public is better off if the right is violated than if it is honored.²⁷⁹ To hold a right that can be balanced away against the public good is not to hold one at all; it is, rather, to be at the majority's

²⁷⁶ See, e.g., EXPLORING LAW'S EMPIRE: THE JURISPRUDENCE OF RONALD DWORKIN (Scott Hershovitz ed., 2006).

²⁷⁷ For this reason, it is unnecessary here to parse important variations in Dworkin's views over time. See, e.g., Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309, 309–11 (2000); Paul Yowell, *A Critical Examination of Dworkin's Theory of Rights*, 52 AM. J. JURIS. 93, 109 (2007).

²⁷⁸ DWORKIN, *supra* note 14, at 191.

²⁷⁹ *Id.* at 191–92.

mercy notwithstanding good reasons to suppose the majority has denied the putative rights-holder equal concern and respect.²⁸⁰

Dworkin's use of the term "right" is a specific one, as it must be for him to endorse the dramatic consequences of identifying an abridgment. Dworkin's concern is neither with mere interests nor even with legally or constitutionally protected entitlements, even those subjectively experienced as intense.²⁸¹ Dworkin's interest is in those rights "necessary to protect [a person's] dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence."²⁸² Moreover, the right to be governed by laws enacted by democratically chosen representatives — which is to say, the right of a citizen to the fruits of participation in self-governance — cannot count as a right in Dworkin's sense.²⁸³ Sustaining an individual right has the inevitable consequence of infringing upon a "right" of a people to self-governance, at least in a narrow sense. As Dworkin writes, "[a] right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done."²⁸⁴

Because Dworkin is focused on rights that by his definition are of fundamental importance, he is eager to say that abridging them on utilitarian grounds works an intense and certain dignitary harm. He is less focused on the serious consequences of declaring that every *other* interest is *not* a right.²⁸⁵ To understand the consequences of treating people in this way, consider the case of affirmative action, which Dworkin addresses in *Taking Rights Seriously*.²⁸⁶ The book was first published three years after the Court decided *DeFunis v. Odegaard*,²⁸⁷ its first foray into what was then commonly referred to as "reverse discrimination." Marco DeFunis sued various public officials, alleging racial discrimination, after he was denied admission to the University of Washington Law School.²⁸⁸ The case made its way to the Supreme Court, which held that DeFunis's suit, which sought injunctive relief, was moot in light of the fact that, having won at various stages below, he was already approaching graduation.²⁸⁹

²⁸⁰ See *id.* at 239–40, 277.

²⁸¹ See *id.* at 191.

²⁸² *Id.* at 199.

²⁸³ *Id.* at 194.

²⁸⁴ *Id.*

²⁸⁵ See Kai Möller, *Proportionality and Rights Inflation*, in *RULE OF LAW*, *supra* note 235, at 155, 160; Joseph Raz, *Professor Dworkin's Theory of Rights*, 26 *POL. STUD.* 123, 127–28 (1978).

²⁸⁶ DWORKIN, *supra* note 14, at 223–39.

²⁸⁷ 416 U.S. 312 (1974).

²⁸⁸ *Id.* at 314.

²⁸⁹ *Id.* at 319–20.

Addressing the merits, Dworkin argued that DeFunis had no constitutional right to race-neutral admission to a public law school.²⁹⁰ Because law schools discriminate in admissions as a matter of course, discriminating on the basis of race did not, without more, deprive DeFunis of equal concern or respect.²⁹¹ Of course, a black applicant denied admission to a public law school on the basis of racial animus does have a constitutional claim,²⁹² and so some theory is needed to explain why accepting that claim but not DeFunis's treats him as an equal. Dworkin answers this concern with an elaborate argument: In the United States, discrimination against blacks relies on "external" preferences (preferences regarding others rather than regarding ourselves) about human virtue, whereas discrimination against whites in the form of affirmative action relies mainly on ideal arguments about justice.²⁹³ Counting external preferences in a utilitarian calculus stacks the deck against the targets of prejudice.²⁹⁴

Dworkin's argument functions reasonably well as a cause for skepticism about utilitarian justifications for discrimination against racial minorities. It does little to justify treating racial discrimination against DeFunis as *of no constitutional moment*. If DeFunis has no rights, then the school's basis for discriminating against him need satisfy no more than minimal rationality. The University of Washington had rejected him through a two-track admissions program that subjected white students to a different and independent process from the one used for minority students.²⁹⁵ Under rational basis review, whether the university's racially selective policy was created with meticulous care or with nearly maximal clumsiness should be irrelevant to a reviewing court. Whether the policy classified applicants on the basis of test scores or geography or race — if (and only if?) whites were disadvantaged — it would receive no meaningful constitutional scrutiny.

Whatever the ultimate result, that analysis would be blind to at least two different (and related) social facts, both of which should matter to constitutional adjudication. First, an analysis that treats some racial classifications as beneath constitutional concern would not resonate with Americans' social experience of racial classification. The history and continuing salience of race in the United States ensure that governmental racial classification is a sensitive practice, one that feels

²⁹⁰ DWORKIN, *supra* note 14, at 227–29.

²⁹¹ *See id.* at 227.

²⁹² *See Sweatt v. Painter*, 339 U.S. 629, 634–36 (1950).

²⁹³ DWORKIN, *supra* note 14, at 237–39.

²⁹⁴ *See id.* Dworkin complicated this view in later work in ways not germane here. *See* RONALD DWORKIN, *LAW'S EMPIRE* 381–97 (1986); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 361–69 (1985); RONALD DWORKIN, *SOVEREIGN VIRTUE* 409–26 (2000).

²⁹⁵ *See DeFunis v. Odegaard*, 416 U.S. 312, 321–25 (1974) (Douglas, J., dissenting).

different to its objects than, say, classification by census tract, and one that citizens have good reason to scrutinize.

Second, race is different as a matter of positive constitutional law. The Constitution singles out race as an invidious ground for discrimination, explicitly in the Fifteenth Amendment and implicitly through the text and history of the Thirteenth and Fourteenth Amendments.²⁹⁶ For Dworkin, that observation begs the question. The Constitution's ban on discrimination implements an abstract principle,²⁹⁷ and Dworkin is telling us, normatively, how to translate that principle into a rule of decision in the specific instance of race-based affirmative action. Again, Dworkin's interest is in why invidious discrimination against blacks is different from — and qualitatively worse than — race-based affirmative action. One can reach the same conclusion and nonetheless believe that a race-based affirmative action program requires greater justification and must be implemented with greater care than a government program that classifies individuals on other grounds. The Constitution compels the latter view, and no Justice has ever contested it.²⁹⁸ Dworkin does not provide us with the resources to know what to make of such a claim.

Nothing in the theory of rights as trumps obligates courts to treat all mere interests in the same way. A constitutional law that treats *rights* as trumps and subjects other governmental infringements on liberty to a balancing test is intelligible, even if it does not describe the American case. But once it is conceded that searching judicial review is sometimes appropriate for mere interests, then Dworkin's point of departure from proportionality becomes a semantic one. It is consistent with proportionality to assume that certain rights infringements require an unusual degree of justification above and beyond what might be required for others.²⁹⁹ Whether all rights retain the name or whether some are relegated to "interests" or "values" or "bananas" is rhetorical.

Thus, Dworkin's second conceptual point, that rights that are not trumps are not rights at all, must be reevaluated. Majoritarianism entails that those policies that, on balance, improve the general welfare more than they infringe on individual interests prevail. To call something a right, on Dworkin's view, is to remove it from this stoic calculus. It is simply wrong, though, to suggest that there is no analytic space between rights as trumps and utilitarian balancing. Proportionality is a

²⁹⁶ U.S. CONST. amends. XIII, XIV, XV; *see also* *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race.").

²⁹⁷ *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 60–61, 63–64 (1955).

²⁹⁸ *See* *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 356–59 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part); *DeFunis*, 416 U.S. at 341–44 (Douglas, J., dissenting).

²⁹⁹ *See* BARAK, *supra* note 238, at 359–61.

technology of justice that speaks precisely to Dworkin's concern that the "right" of a majority to see its policies enacted into law not be conflated with the rights of individuals. For just as an individual may have mere interests that do not implicate equal concern in the way that rights do, so too do groups of citizens have rights to self-governance that may be distinguished from mere interests in seeing to it that certain policies are enacted.³⁰⁰

Proportionality analysis is an ordeal that requires the government to justify its actions with evidence or good faith assumptions and to act with restraint. In putting the government through its paces, proportionality sharpens the government's ends and means to those that are necessary to vindicate its interests and are respectful of the impact on individuals. Proportionality does not treat rights as trumps, but neither does it simply subject them to utilitarian balancing. Its aim is to take individual rights, the government's reasons, and the government's methods for no more and no less than they are worth.

B. *Trumps as Distortions*

Rights as trumps disfigures constitutional law. Section III.B.1 argues that it dissociates rights from notions of substantive justice. Section III.B.2 argues that it encourages judges to blur the edges of the categories they construct.

1. *Too Little Justice.* — Federal courts are not staffed by revolutionaries, philosophers, or divine heroes. Both as a matter of their temperament and the appointment strategy of those who appoint them, judges are typically mainstream lawyers well attuned to the selfsame role morality that sustains the rights-as-trumps ideology. If the implication of declaring an interest to be a right is that the right is immune from virtually any legislative or executive interference, judges socialized in this way will be cautious in issuing such declarations, and appropriately so. Dworkin himself performs that caution in reaching the improbable conclusion that white applicants denied admission to a public university in part on the basis of race have no constitutional claim at all.

Without more, rights as trumps disturbs the relationship between constitutional law and justice.³⁰¹ Thus, while substantive due process empowers the Fourteenth Amendment to recognize fundamental rights

³⁰⁰ See Stephen Gardbaum, *Proportionality and Democratic Constitutionalism*, in *RULE OF LAW*, *supra* note 235, at 259, 271 (arguing that proportionality is attentive to the "demand[] of . . . politically accountable legislative decision making as the normal implication of democracy's foundational principle of political equality").

³⁰¹ See Jackson, *supra* note 114, at 3147.

notwithstanding the lack of textual specification, there is no constitutional right to education, to food, to shelter, or to health care.³⁰² But drug companies have a right to receive pharmacy records so as to market pharmaceuticals to doctors with greater precision.³⁰³ Private individuals have the right to keep loaded handguns within blocks of the White House and the Capitol,³⁰⁴ in one of the most violent cities in America.³⁰⁵ One need not dispute the justice of these rights to believe that they are not more fundamental or vital to human flourishing than many other rights not recognized by the Court.

The difference between these rights and the many social and economic rights the Court has refused to entertain is not that they are necessarily better specified within the Constitution. It is rather that the Court satisfied itself that it was able to articulate their limits. Dissenting in *McCleskey v. Kemp*, the death penalty disparate impact case discussed in Part II,³⁰⁶ Justice Brennan called the concern over the generativity of rights a “fear of too much justice.”³⁰⁷ In the absence of a technology for managing this fear, judges will act upon it. Proportionality is such a technology.

One special application of this problem is conflicts of rights. American courts rarely identify such conflicts even when their existence is patent.³⁰⁸ Abortion presents no conflict because fetuses are not persons.³⁰⁹ Victims of hate speech or women objecting to pornography are seeking to curtail speech, not seeking to vindicate their rights or the rights of others.³¹⁰ Victims of affirmative action claim rights against racial discrimination, but beneficiaries are not viewed as claiming rights to equal opportunity in elite education or government contracting. *Lochner v. New York*³¹¹ is criticized for elevating the right to contract rather than for failing to see embodied within the Bakeshop Act the

³⁰² See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973); Jennifer Prah Ruger et al., *The Elusive Right to Health Care Under U.S. Law*, 372 *NEW ENG. J. MED.* 2558, 2558 (2015).

³⁰³ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

³⁰⁴ *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

³⁰⁵ Based on 2016 FBI crime statistics, the District of Columbia ranked seventeenth in murders and fourteenth in robberies among American cities that reported crime data. U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES tbl.4 (2016), <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-4> [<https://perma.cc/VBC8-HL9K>].

³⁰⁶ See *supra* p. 44.

³⁰⁷ *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

³⁰⁸ *But see Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400–01 (2000) (Breyer, J., concurring) (identifying a conflict between political expression and the integrity of the electoral process).

³⁰⁹ *Roe v. Wade*, 410 U.S. 113, 158 (1973).

³¹⁰ See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* 53, 71–72 (Mari J. Matsuda et al. eds., 1993); ANDREA DWORKIN & CATHARINE A. MACKINNON, *PORNOGRAPHY AND CIVIL RIGHTS* 26–27 (1988).

³¹¹ 198 U.S. 45 (1905).

right to adequate working conditions. The couple in *Masterpiece Cakeshop* present to the Court not as rights-bearers but merely as the beneficiaries of a state “interest” in nondiscrimination against gay people.

This lack of recognition reflects, in part, a reluctance to understand legislation or other state action as furthering rather than sitting in opposition to constitutional rights.³¹² The problem is conceptual and not just semantic. Adjudicating rights conflicts requires a balancing of rights. The U.S. tiers-of-scrutiny framework is sometimes described as a balancing test,³¹³ but that description is accurate only in an attenuated sense. Strict and intermediate scrutiny require a decisionmaker to assess the motivations and internal logic of the government’s actions, but that inquiry is sequestered from any assessment of the nature of the burden imposed on the litigant. The U.S. framework tests the adequacy *simpliciter* of the government’s action, not its adequacy *in light of* the right at stake. It is a stepwise approach that leaves no room for the relative quality or value of the rights at stake to inform the ultimate issue. The best a court can do within this framework is to declare that the government has a compelling or important interest in protecting a competing right; it cannot assess the relative weights of the competitors.³¹⁴

It must be acknowledged that using the presence of potential rights conflicts to shorten the reach of rights has a dispiriting history in American constitutional law. The best known academic response to *Brown v. Board of Education* appeared in Professor Herbert Wechsler’s 1959 Holmes Lecture at Harvard Law School, which later became the article *Toward Neutral Principles of Constitutional Law*.³¹⁵ Wechsler called for judges to issue “genuinely principled” judgments,³¹⁶ by which he meant those “that rest[] on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”³¹⁷

So stated, Wechsler’s admonition seems unremarkable, almost an axiomatic restatement of the rule of law. Where he ran into trouble was in his specific application of this universalist creed to *Brown*. For Wechsler, the notion that state-enforced racial segregation, race-neutral

³¹² See *infra* section III.C, pp. 77–79.

³¹³ See, e.g., Mario L. Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine?*, 43 CONN. L. REV. 1059, 1079–80 (2011).

³¹⁴ A rights-as-trumps frame is likewise unable to account for the presence of variations on the same right that populate both sides of a political conflict. See, e.g., ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* 79 (2014); David E. Pozen, *Privacy-Privacy Tradeoffs*, 83 U. CHI. L. REV. 221, 221 (2016).

³¹⁵ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

³¹⁶ *Id.* at 15.

³¹⁷ *Id.* at 19.

on its face, worked a special kind of injury on blacks was not sustainable as a ground for judicial decision.³¹⁸ Instead, the real issue was that it infringed on the freedom of association, but so too did its remedy: “[I]f the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant. Is this not the heart of the issue involved, a conflict in human claims of high dimension . . . [?]”³¹⁹ On this view, *Brown* was a conflict of rights, with no principled basis for judicial resolution.

Wechsler was wrong, but it is important to say why. To call the right sought by black students and parents “freedom of association” misses the Jim Crow laws’ meaning for their text.³²⁰ But that is not to say *Brown* did not present a conflict of rights. Supporters of segregation did indeed believe their freedom of association was at stake,³²¹ and they had a prima facie right to protect that freedom through the law.³²² The problem is that, in this instance, that right was invested with racial animus and conflicted with the far stronger rights of their fellow citizens to equal treatment. It is perfectly sensible — and judicially manageable — for the positive constitutional law of a jurisdiction to privilege rights of equal treatment, especially on the basis of race and especially at scale, over rights of association. That is just what the *Brown* Court did, without saying so. But to deny that any associational interests are at issue *at all* invites just the Wechsler response: an accusation of unprincipled decisionmaking.

Wechsler saw very clearly, and with trepidation, that in order for modern constitutional law to move beyond the deference regime encapsulated in *United States v. Carolene Products*, it would have to resolve value conflicts.³²³ It faces three basic options in the face of such conflicts. First, it can stand down and let the democratic process play out. This was Wechsler’s answer: “When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive.”³²⁴ Second, it can assume away any conflict. This is the modern Court’s

³¹⁸ *Id.* at 33.

³¹⁹ *Id.* at 34.

³²⁰ See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424–27 (1960).

³²¹ See, e.g., 102 CONG. REC. 4459–61 (1956) (statement of Sen. George) (presenting the Southern Manifesto); see also Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 508 n.34 (1997).

³²² It is worth noting, though, that black citizens were widely disenfranchised in most jurisdictions that had de jure segregated schools. See Gabriel J. Chin, *Jim Crow’s Long Goodbye*, 21 CONST. COMMENT. 107, 129 (2004); Suresh Naidu, *Suffrage, Schooling, and Sorting in the Post-Bellum U.S. South* 19 (Nat’l Bureau of Econ. Research, Working Paper No. 18129, 2012), <http://www.nber.org/papers/w18129> [https://perma.cc/85L9-CQWW].

³²³ Wechsler, *supra* note 315, at 15–17.

³²⁴ *Id.* at 19.

answer. Third, it can acknowledge the interests on all sides and nonetheless resolve the conflict. This is proportionality.

The disjunction between rights and justice that rights as trumps encourages makes some sense of the surprising lack of any constitutional duty on the part of the government to protect its citizens from private violence. The Supreme Court has affirmed with admirable clarity that there is no such duty.³²⁵ And yet we not unreasonably tend to conceive of our interest in physical safety in rights terms, whether as a natural entitlement to security or as part of a solemn bargain as law-abiding and taxpaying members of a political community.³²⁶ Conceiving of such rights as absolute would put on the table arguments for a radical judicial reordering of budgetary priorities and local government law.³²⁷ The infeasibility of that outcome should not, however — and does not logically — carry with it the dystopian corollary that the state bears no constitutional responsibility to its citizens at all.³²⁸

2. *Judicial Subterfuge.* — Rights as trumps obscures the stakes of constitutional conflict not just by substantively ignoring or erasing inconvenient constitutional values but also by slipping those values into ill-fitting garments. Consider *Walker v. Sons of Confederate Veterans, Inc.*³²⁹ The Texas Department of Motor Vehicles (DMV) offers specialty license plates to drivers, who may choose among an assortment of designs that have met the approval of its Board.³³⁰ The state division of the Sons of Confederate Veterans (SCV) submitted a design that included an image of the Confederate battle flag.³³¹ The Board rejected the design and the SCV sued, claiming a violation of its freedom of speech.³³²

The DMV discriminated against the SCV on the basis of viewpoint. The DMV Board did not approve of the message the rebel flag embodied, or perhaps feared the reactions of others who might disapprove, and

³²⁵ See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005); *United States v. Morrison*, 529 U.S. 598, 620–21 (2000); *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 195–96 (1989).

³²⁶ See, e.g., TO SECURE THESE RIGHTS: THE REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS 20 (1947) (“Vital to the integrity of the individual and to the stability of a democratic society is the right of each individual to physical freedom, to security against illegal violence, and to fair, orderly legal process.”).

³²⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 53–54 (1973).

³²⁸ See Robin L. West, *Tragic Rights: The Rights Critique in the Age of Obama*, 53 WM. & MARY L. REV. 713, 736 (2011) (noting that the rights protected within the U.S. constitutional culture tend to be “defensive rights” that enable us to “withdraw from those bonds of citizenship, and [which] presuppose a state incapable of performing basic functions”).

³²⁹ 135 S. Ct. 2239 (2015).

³³⁰ *Id.* at 2243.

³³¹ *Id.* at 2245.

³³² *Id.*

so it refused to permit a design including that message.³³³ As presently understood, the First Amendment almost never permits the government to discriminate on the basis of viewpoint.³³⁴ And yet the State won, in a 5–4 decision that improbably united Justices Thomas, Ginsburg, Breyer, Sotomayor, and Kagan.³³⁵ How?

Put to one side the legally correct outcome in the case, about which reasonable minds can (and did) differ, and consider instead where first principles might lead. Ritual incantation of “viewpoint discrimination” fails to capture the complexity of the case. The State’s relationship to the Confederate “message” is ambiguous — Texas celebrates Confederate Heroes Day as a state holiday every January 19, and a visitor to the state capitol can buy replica stars and bars in the gift shop³³⁶ — and so one might reasonably question why the SCV was singled out. The SCV has a substantial interest in freedom of expression, but its speech was not of particularly high value. It was not, in context, intended to contribute to political debate (or so the SCV claimed³³⁷), though the possibility that others would perceive the message as having political content is inarguable. More importantly, the sanction here — denial of state license plate real estate — was not exactly pillory and the stocks. Above all, perhaps, Texas was once a Confederate state, and the message the flag conveys — to some, and reasonably — is advocacy of treason in the name of racial subordination.

Rights as trumps makes it difficult for an adjudicator to appreciate these nuances. Viewpoint discrimination is equally unconstitutional no matter the content of the message, and First Amendment law is remarkably insensitive to the nature of the sanction.³³⁸ But to escape the strictest scrutiny requires a leap into some doctrinal space that blinds itself entirely to the legitimate speech interests in the case and the somewhat suspicious way in which Texas curtailed them here. The frame the U.S. approach encourages is prone to devastating hypotheticals from both directions. What if an applicant wanted to display a dismembered fetus, or a burning cross, or a swastika (Justice Ginsburg’s example at oral argument)?³³⁹ Ah, but what if the government permitted Republican

³³³ *Id.*

³³⁴ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

³³⁵ *Walker*, 135 S. Ct. at 2243.

³³⁶ See Respondents’ Brief on the Merits at 1, *Walker*, 135 S. Ct. 2239 (No. 14-144).

³³⁷ *Id.* at 33–34.

³³⁸ See Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 994 (2012).

³³⁹ Transcript of Oral Argument at 32, *Walker*, 135 S. Ct. 2239 (No. 14-144), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2014/14-144_2034.pdf [<https://perma.cc/WM7M-2XTV>].

messages but not Democratic ones (Justice Kagan's example at oral argument)?³⁴⁰

The actual majority opinion in the *Walker* case sought refuge in the government speech doctrine. Government speech is not restricted — *at all* — by the First Amendment in its ability to engage in content or viewpoint discrimination.³⁴¹ What this rubric gained in convenience it lost in credibility, however, and Justice Alito made quick work of it in dissent. The DMV had approved specialty plates with the names of dozens of private organizations, with favorite soft drinks and burgers, with state colleges from other states, with a tribute to the NASCAR driver (and native Californian) Jeff Gordon, and with whimsical slogans such as “Rather Be Golfing.”³⁴² To call these license plates “government speech” is to stretch the category beyond recognition. But under current doctrine, not to do so would have meant that Texas must either permit swastikas or abandon its specialty license plate program.

The sleight of hand the *Walker* majority performed is endemic to U.S. constitutional law. Section II.A.1 above discusses the breakdown of the tiers-of-scrutiny regime in disability and affirmative action cases. The same has occurred in cases implicating the rights of gays and lesbians, where there has been much hand-wringing over the standard of review the Court is applying.³⁴³ Outside of antidiscrimination law, cross burning, abortion clinic protests, and refusals to accommodate religious organizations have routinely been shoehorned into categories that do not match.³⁴⁴ When the boxes that structure American constitutional law do not fit or would lead to inconvenient outcomes, judges (consciously or not) grab hold of the closest one that will do. Wechsler's critique goes as much to this practice as it does to proportionality, but it misses what his contemporary Professor Alexander Bickel saw more clearly: the

³⁴⁰ *Id.* at 7.

³⁴¹ See *Walker*, 135 S. Ct. at 2245–46; *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009).

³⁴² *Walker*, 135 S. Ct. at 2255 (Alito, J., dissenting).

³⁴³ See, e.g., Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 530 (2014); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 180 (2016).

³⁴⁴ See, e.g., *Virginia v. Black*, 538 U.S. 343, 363 (2003) (holding that a state may ban cross burning as an act of intimidation rather than viewpoint discrimination); *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 763–64 (1994) (explaining that an injunction prohibiting anti-abortion protests was content-neutral because it banned not a viewpoint, but rather the conduct of protestors); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830–31 (1995) (holding that a state university's refusal to use its student activities fund to pay for an independent student organization's religious publication was impermissible viewpoint discrimination, rather than a permissible content-based decision of fund allocation).

alternative to “unprincipled” — I prefer “particularist” — judicial decisionmaking is not simply principled decisionmaking; it is as often abdication of judicial review.³⁴⁵

C. *Political Constitutionalism*

It is common for public law scholars to lament the demise of any serious ethic of political constitutionalism in U.S. constitutional discourse. These calls typically promote the capacity of legislatures or agencies either to attend to the popular engagement or to perform the moral deliberation that, on these accounts, rights discourse demands. Some are in the “popular constitutionalist” mode, emphasizing the constitutional judgments that reside within nonjudicial political and social institutions.³⁴⁶ Thus, Professor Jeremy Waldron faults the U.S. mode of judicial review for devolving rights identification to the distracted modalities of judicial opinions.³⁴⁷ Professors Robert Post and Reva Siegel distinguish the Court’s regnant “enforcement” model of Section 5 of the Fourteenth Amendment from a “policentric” approach that imagines Congress as implementing views about rights that reside within the constitutional culture.³⁴⁸ Professor Cass Sunstein finds judicial minimalism especially useful when it serves to “promote political accountability and political deliberation.”³⁴⁹

Another, dovetailing critique emerges from a critical legal studies (CLS) tradition that views rights as dampening or distracting from progressive politics and undermining the bonds of social solidarity. Professor Mark Tushnet views rights as unstable, indeterminate, and often useless or worse.³⁵⁰ Professor Roberto Mangabeira Unger describes as a “dirty little secret[.]” of contemporary jurisprudence a “discomfort with democracy” evident in, for example:

the ceaseless identification of restraints upon majority rule, rather than of restraints upon the power of dominant minorities, as the overriding responsibility of judges and jurists . . . [and] opposition to all institutional reforms, particularly those designed to heighten the level of popular political engagement, as threats to a regime of rights.³⁵¹

³⁴⁵ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 69–71 (1962).

³⁴⁶ See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2005).

³⁴⁷ WALDRON, *supra* note 29, at 15; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1380–84 (2006).

³⁴⁸ Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 2022–23 (2003).

³⁴⁹ Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 *HARV. L. REV.* 4, 8–9 (1996).

³⁵⁰ See Mark Tushnet, *An Essay on Rights*, 62 *TEX. L. REV.* 1363, 1363–64 (1984).

³⁵¹ ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 72–73 (1996).

That regime, as Professor Robin West describes, is not always “comedic,” but has significant elements of tragedy, of individuals “who want very much to connect in meaningful ways with others, but who find those desires for connection frustrated” by a liberal, individualistic rights culture.³⁵²

The challenge these projects confront is not simply to describe how rights are articulated within an explicitly political discourse. It is also to account for the separation between judicial and political constitutionalism that has developed over time. The root of declining constitutional conscience within the political branches does not lie just in the Court’s self-aggrandizing pretensions of judicial supremacy³⁵³ or, as Professor Keith Whittington has suggested, in the strategic self-interest of political actors.³⁵⁴ It lies as well in the *way* in which judges and others within the constitutional culture conceptualize rights.

Understanding rights as trumps limits political actors’ points of entry into adjudication. Constitutional law becomes less about the particulars of the government’s behavior, the acts it passes, the players’ motivations, the evidence the legislature or agencies gather, or the policy objectives they pursue, and more about the abstracted right the government is alleged to have violated. The contours of that right are treated as predetermined by text, structure, history, and precedent, its contact with the imperatives of modern life artificially severed. Shifting policy goals, updated empirical investigation, or renewed moral or political deliberation — in short, the things democratic actors do — are only interstitially relevant to the scope and substance of rights within such a regime. “Rights” become solely the province of judges; when identified, the government loses unless its “interests” are especially compelling or important and its laws or practices well tailored to those interests. One should expect any political institutional capacity for developing constitutional rights to atrophy in such an environment, and it has.

The idea that rights are not a proper subject of politics is deeply felt, but misguided. As section IV.B discusses below, it is quite opposite the predominant view of rights both at the U.S. constitutional founding and during Reconstruction. We tend not to question the pathological roots of the proposition that the political branches cannot be trusted to protect the rights of those who are not in power.³⁵⁵ Proportionality’s emphasis on justification and instrumental rationality can accommodate mistrust, but it does so in a way that is consistent with the proposition that, in a pluralistic environment, rights are destined to be in tension with each

³⁵² West, *supra* note 328, at 742.

³⁵³ See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (declaring that the Supreme Court, not Congress, is the ultimate arbiter of the Fourteenth Amendment’s meaning); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

³⁵⁴ See KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 4–5 (2007).

³⁵⁵ See Waldron, *supra* note 347, at 1376–79.

other. Politics is the place where the citizens of a mature democracy negotiate that tension.

D. Relational Injury

The consequences of the rights-as-trumps frame are not limited to bloodless doctrinal formulae, or even to substantive constitutional decisions. Recall Dworkin's view that an African American student has a right not to have race used against him in admissions to the University of Washington Law School, but that Marco DeFunis had no such right.³⁵⁶ A dual commitment to rights as trumps and to the constitutional validity of race-based affirmative action requires this conclusion. No Supreme Court Justice has ever argued that rational basis review is appropriate in cases of race-based affirmative action,³⁵⁷ but for clarity of argument let us assume that, in some Socratic sense, Dworkin is correct about DeFunis's rights, or lack thereof.

This proposition communicates to DeFunis not simply that he has lost but that he does not matter.³⁵⁸ Much is at stake when constitutional law tells people who advance reasonable rights claims that they have no rights the law is bound to respect.³⁵⁹ For one thing, this legal posture affects how the parties relate to each other. If the University owes nothing to DeFunis, it has no incentive beyond the mechanics of electoral accountability to moderate its practices to accommodate his interests. It need not negotiate with similarly situated citizens except insofar as those citizens have the power, in line with their compatriots, to effect democratic change. Awarding a broader array of prima facie rights would help to vindicate the insight, memorialized in footnote four of *United States v. Carolene Products Co.*,³⁶⁰ that *because* we protect our rights through ordinary politics, the role of courts is to ensure that those politics are amenable to mutual accommodation.³⁶¹ The use of adjudicatory tools that force politics is even more significant when decisionmaking bodies operate subject to relatively weak mechanisms of political accountability such as those governing admissions officers or law enforcement personnel.

A second relational consequence of telling those holding plausible constitutional rights claims that such claims are not even prima facie

³⁵⁶ See *supra* p. 68.

³⁵⁷ See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 356–58 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

³⁵⁸ See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533–45 (2000) (discussing the expressive dimensions of equal protection doctrine).

³⁵⁹ Cf. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (arguing that, at the time of the adoption of the Constitution, blacks “had no rights which the white man was bound to respect”).

³⁶⁰ 304 U.S. 144, 152 n.4 (1938).

³⁶¹ See *id.*

valid is that it places us in an adversarial rather than a cooperative posture vis-à-vis other members of the polity.³⁶² If my assertion of rights depends strictly on your lack thereof, and vice versa, it is natural for me to see you not as a friend whose different commitments must be reconciled with mine but rather as an enemy who is, in too real a sense, out to destroy me. In making judges the gatekeepers of political membership rather than simply the adjudicators of disputes, the categorical frame tends to raise rather than lower the stakes of politics.³⁶³ Losers come to see their political charge as producing a sea change sufficient to overwhelm or marginalize the position of the median Justice, or else replace him or her entirely.

Recall *Masterpiece Cakeshop*. We have already chronicled some of the polemical ways in which the Justices framed the case at oral argument. The briefs by both the parties and the amici are likewise littered with slippery slope arguments that purport to demonstrate the dystopian universe the other side's position contemplates and invites. If those briefs are to be believed, a holding in favor of the same-sex couple, Craig and Mullins, would mean that "the compelled speech doctrine would cease to exist,"³⁶⁴ that the Thirteenth Amendment would be violated,³⁶⁵ and that the government could "compel attendance at religious rituals."³⁶⁶ It could disbar Christian lawyers and strip Christian doctors of their medical licenses.³⁶⁷ It could force Jehovah's Witness children to salute the flag, or force Virginia Baptists to pay to support mainstream Christian teaching.³⁶⁸ It would be consistent with the Spanish Inquisition,³⁶⁹ akin to forcing Christians to bow before Roman gods,³⁷⁰ to forcing Jews to submit to the golden statue of Nebuchadnezzar,³⁷¹ to the beheading of Sir Thomas More for refusing to affirm the annulment of Henry VIII's marriage to Catherine of Aragon and sign the Oath of

³⁶² See GLENDON, *supra* note 25, at 171–73; West, *supra* note 328, at 721; see also David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 887 (2016) ("[I]nsinuations of others' bad faith suffuse constitutional debates . . .").

³⁶³ See Eskridge, *supra* note 44, at 1293–94.

³⁶⁴ Petition for a Writ of Certiorari at 18, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-1111).

³⁶⁵ Brief *Amicus Curiae* of the Foundation for Moral Law in Support of Petitioners at 22, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-1111); Brief *Amicus Curiae* of Public Advocate of the United States et al. in Support of Petitioners at 31, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-1111).

³⁶⁶ Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Petitioners at 24, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-1111).

³⁶⁷ Brief *Amicus Curiae* of Public Advocate of the United States et al. in Support of Petitioners, *supra* note 365, at 15–16.

³⁶⁸ Brief of *Amici Curiae* 34 Legal Scholars in Support of Petitioners at 17, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-1111).

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

Succession confirming Anne Boleyn's place as Queen of England.³⁷² As one brief put it, "the gay marriage movement 'has moved from tolerance to totalitarianism.'"³⁷³

A win for Phillips, the baker, would likewise be dismal (though perhaps not equally so) according to the briefs in support of the couple. Arguments of Phillips's sort have been used "to justify anti-miscegenation laws"³⁷⁴ and "school segregation."³⁷⁵ "Landlords could refuse to rent to interracial couples, employers could refuse to hire women or pay them less than men, and a bus line could refuse to drive women to work . . ."³⁷⁶ "[A] racist baker could refuse to sell 'Happy Birthday' cakes to African-American customers, a screen printer could refuse to sell a banner announcing a Muslim family's reunion, and a tailor could refuse to sell a gay man a custom suit for a charity gala."³⁷⁷ "[A] family portrait studio could enforce a 'No Mexicans' policy. A banquet hall could refuse to host events for Jewish people. A hair salon could turn away a lesbian woman who wants a new hair style"³⁷⁸ or refuse to help a teenage girl prepare for her quinceañera out of opposition to Mexican immigration.³⁷⁹

Of course, lawyers in an adversarial system often characterize their opponents' cases in negative terms. The categorical frame does not create this practice.³⁸⁰ But in denying both courts and litigants any resources for moderating the potential reach of their claims, it almost requires it. Lawyering of this sort is both interpersonally alienating and misleading. The objection to slippery slope arguments of this kind mirrors successful hermeneutic objections to original intent arguments in the 1980s.³⁸¹ Placing oneself into the decisional posture of a long-ago historical actor requires leaps of imagination that corrupt the exercise.

³⁷² *Id.* at 6.

³⁷³ Brief *Amicus Curiae* of Public Advocate of the United States et al. in Support of Petitioners, *supra* note 365, at 16 (quoting *The O'Reilly Factor* (Fox News Channel television broadcast Apr. 1, 2015) (statement of John Stossel)).

³⁷⁴ Brief of *Amicus Curiae* NAACP Legal Defense & Educational Fund, Inc. in Support of Respondents at 9, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

³⁷⁵ *Id.* at 10.

³⁷⁶ Brief in Opposition at 25, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111).

³⁷⁷ Brief for Respondent Colorado Civil Rights Commission, *supra* note 9, at 4.

³⁷⁸ *Id.* at 16.

³⁷⁹ Brief for Respondents Charlie Craig and David Mullins, *supra* note 9, at 48.

³⁸⁰ See generally DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* 3-4 (2008).

³⁸¹ See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 221-22 (1980); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793 (1983); see also BOBBITT, *supra* note 23, at 24 (noting that certain modes of historical argument depend on the assumption that "we, from our very different lives, can know what [the Founders] would have thought in situations within which they would have been, of course, very different people").

A society that permits the beheading of religious dissenters or that prohibits interracial marriage is one whose legal, political, and social norms are so different from our own that performing the hypothetical is not a controlled experiment. The social meaning of practices that people do not in fact engage in is different from the meaning of practices they engage in pervasively.

The benefit of proportionality done well is to force litigants and their fellow citizens to match their claims to *this* world, and to acknowledge the mutual and legitimate presence within it of others who hold contrary values and commitments. On this view, constitutional law should seek not to police the boundaries of the political community but rather to structure politics so that those within that community are able to see, hear, and speak to each other.

A darker conception of the nature of the political is available, indeed familiar. Carl Schmitt famously described politics as grounded in the distinction between friend and enemy.³⁸² For Schmitt, what defines a group as a *political* community as opposed to a community aligned along some substantive set of commitments is that its members conceive of outsiders as enemies and are willing to fight for the group's preservation.³⁸³ In conspicuously sequestering rights, presumptively absolute, from interests, which are of no constitutional concern, the rights-as-trumps frame invites us to understand political communities in Schmittian terms, where political conflict is, in its nature, existential. Our constitutional fate might well lie in Schmittian democracy,³⁸⁴ but whether the judicial branch hastens or arrests that development is a choice.

As damaging as the adversarial relation the rights-as-trumps frame encourages among citizens is the distance it enforces between individual rights claimants and the constitutional system itself. As Professor Robert Cover once suggested in these pages, we all hold dear our own constitutions in exile.³⁸⁵ Abolitionists such as Lysander Spooner and Frederick Douglass imagined a constitutional law that prohibited (or at least did not support) chattel slavery.³⁸⁶ Suffragists such as Virginia

³⁸² See CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 26 (George Schwab trans., Univ. of Chi. Press expanded ed. 2007) (1932).

³⁸³ See *id.* at 32–33.

³⁸⁴ See Jamal Greene, *Trump as a Constitutional Failure*, 93 *IND. L.J.* 93, 95 (2018).

³⁸⁵ See Robert M. Cover, *The Supreme Court, 1982 Term — Foreword: Nomos and Narrative*, 97 *HARV. L. REV.* 4, 15–18 (1983) (“The precepts we call law are marked off by social control over their provenance, their mode of articulation, and their effects. But the narratives that create and reveal the patterns of commitment, resistance, and understanding — patterns that constitute the dynamic between precept and material universe — are radically uncontrolled.” *Id.* at 17 (footnote omitted).)

³⁸⁶ See LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* 54–114 (1845); Frederick Douglass, *The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery?* (Mar.

Minor and Susan B. Anthony viewed the Fourteenth and Fifteenth Amendments as giving women the right to vote.³⁸⁷ Progressive Era labor advocates saw in the Thirteenth Amendment a right to strike and to bargain collectively.³⁸⁸ Charles Hamilton Houston, Thurgood Marshall, and their soldiers-in-arms saw an end to separate but equal schools and public accommodations. The National Rifle Association saw an individual right to bear arms hiding in plain sight in the words of the Second Amendment. Modern libertarians heap scorn on *Williamson v. Lee Optical*³⁸⁹ and modern progressives give like treatment to *Citizens United*.

These alternative constitutional visions do not represent sour grapes or bad faith so much as a shadow constitutional law, a coherent set of normative orderings that await the social and political conditions needed to summon them from the front (or even the back) bench. Any pluralistic society will include, indeed will be constituted by, a mosaic of competing and contested visions of constitutional meaning and application. In Cover's evocative, Foucauldian terms, decisional law is fundamentally jurispathic, seeking to kill off these alternatives and reinforce the state's monopoly on coercive authority.³⁹⁰ But Cover emphasizes that there are more and less final ways of doing so. Leaving alternative visions of the constitutional good the space — *some* space — to flower and to cultivate responses to the current regime is necessary if we are to reconcile justice with law's immanent violence.³⁹¹

The early CLS critics of rights were concerned with law's jurispathic tendencies, but they generally lacked the benefit of any practical exposure to alternative technologies of rights adjudication. Foreign court experiences with proportionality were nascent and not in wide circulation among judges and scholars. So long as we take the business of courts to be declaring the substance and reach of rights, as the rights-as-trumps ideology envisions, the inadequacies of rights that CLS critics identified translate quite directly into the inadequacies of courts. The most trenchant pushback against that critique, from critical race and feminist legal theorists who emphasized the differential importance of

26, 1860), in 2 PHILIP S. FONER, *THE LIFE AND WRITINGS OF FREDERICK DOUGLASS* 467 (1950).

³⁸⁷ See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 163–64 (1874); *United States v. Anthony*, 24 F. Cas. 829, 829 (C.C.N.D.N.Y. 1873) (No. 14,459).

³⁸⁸ See James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 COLUM. L. REV. 1, 47–50 (2002).

³⁸⁹ 348 U.S. 483 (1955).

³⁹⁰ Cover, *supra* note 385, at 40; see generally MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 16 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

³⁹¹ See Sunstein, *supra* note 349, at 20–21 (emphasizing the usefulness of judicial decisions based on “incompletely theorized agreements,” *id.* at 20, in cases of intense theoretical disagreement).

rights to the agency of dispossessed people relative to white men,³⁹² in turn becomes a defense of courts taking rights just as seriously as Dworkin urged. We see a similar dynamic between judicial minimalists and their critics.³⁹³ A frame that nests rights in opposition to majoritarianism structures a further set of oppositions that keep the law reviews busy but are short on consensus.³⁹⁴

Proportionality invites parties with a diverse set of commitments to remain invested in the constitutional system rather than alienated from it.³⁹⁵ It assures them that if they do not win today, they might win tomorrow on different facts. That assurance can be subversive in seeking to submit a totalitarian or white supremacist state to basic human rights law. But it is indispensable where the paradigm case is one of reasonable, good faith disagreement over the scope of individual rights and government powers.

This Foreword presents a proportionality frame as an aspiration for judicial review within a mature constitutional democracy. There are two related propositions that it is important to disclaim before moving forward. First, to say that rights as trumps is ill-suited to retail denials of rights is not to say that proportionality is necessarily ill-suited to wholesale denials. Indeed, as Part V discusses in the context of specific cases, proportionality and the remedial discretion that often accompanies it can in some instances further a court's resolve in addressing such denials. Second, to say that rights as trumps contributes to social alienation and political polarization is not to say that it is the sole or even a significant cause, nor is it to say that proportionality will substantially alleviate these ills. Indeed, the prevailing polarization itself likely contributes to the rights-as-trumps instinct, producing a cycle from which escape will be challenging. But even if judicial method plays a minor role in our relational problems, aspirational thinking remains valuable here, as for normative legal scholarship more generally. As Dworkin

³⁹² See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404-05 (1987).

³⁹³ Compare KRAMER, *supra* note 346, at 8 (advocating for judicial minimalism as an element of "popular constitutionalism"), with Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1380 (1997) (criticizing judicial minimalism and arguing for judicial supremacy).

³⁹⁴ Cf. Post & Siegel, *supra* note 167, at 374 (seeking an account of democratic constitutionalism that occupies this liminal space).

³⁹⁵ There is good reason to think that legal procedures individuals experience as fair have a significant effect on participants' assessments of the legitimacy and performance of legal authorities, including courts. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 94-97 (1990). Procedural justice also strongly influences attitudes toward other kinds of organizations. See Sheldon Alexander & Marian Ruderman, *The Role of Procedural and Distributive Justice in Organizational Behavior*, 1 SOC. JUST. RES. 177, 192-93 (1987).

once said of constitutional interpretation, the only alternative to aiming at happy endings is to aim at unhappy ones.³⁹⁶

E. The Costs of Proportionality

Proportionality is not perfect, still less in practice than in theory. It has been blamed for lawlessness in Brazilian courts;³⁹⁷ for a too-casual attitude toward the rights of minorities, as for example in religious freedom cases arising out of France, Italy, and Turkey;³⁹⁸ and more generally for blurring the line between law and politics, especially at the final balancing stage.³⁹⁹ This section discusses some of these costs and defends the place of proportionality in modern systems of judicial review, including the United States.

i. Proportionality as Construction. — To the degree proportionality is associated with rights inflation, it relates uncomfortably to what were once referred to as “interpretivist” methods of constitutional interpretation and construction. These methods view constitutional interpretation as grounded in an excavation of legal meaning from the text, structure, and history of the Constitution rather than in more dynamic or pragmatic methods that weigh precedent, practical consequences, or assessments of modern values more heavily in deciding constitutional questions.⁴⁰⁰

This objection, such as it is, is simply a restatement of the problem. That is, the project is just to expose the tension between the categorical frame’s marriage to interpretivist methods and the role constitutional courts play in modern democratic governance. Still, the objection has real force within U.S. constitutional culture. To someone committed — whatever the reason — to the view that the Constitution’s meaning and application are fairly well specified by its historically determined text and structure, and also that that meaning is discoverable and binds judges, the Foreword’s project is poorly conceived. It mounts a consequentialist challenge to a deontological ethic.⁴⁰¹

³⁹⁶ RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 38 (1996).

³⁹⁷ See Ronaldo Porto Macedo Junior, *Freedom of Expression: What Lessons Should We Learn from U.S. Experience?*, 13 *REVISTA DIREITO GV* 274, 281–82 (2017).

³⁹⁸ See *S.A.S. v. France*, 2014-III Eur. Ct. H.R. 341, paras. 142–59 (upholding France’s ban on the full-face veil as reasonably proportionate to the aim of “living together,” *id.* para. 142); *Lautsi v. Italy*, 2011-III Eur. Ct. H.R. 61, 99–102 (Rozakis, J., concurring) (upholding Italy’s law requiring crucifixes to be displayed in public school classrooms based on proportionality analysis); *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, paras. 116–23, 157–62 (finding that Turkey’s ban on university students wearing headscarves was a justified interference with the rights to freedom of religion and education).

³⁹⁹ See PETERSEN, *supra* note 235, at 38–49, 58–59.

⁴⁰⁰ See ELY, *supra* note 47, at 1; JACKSON, *supra* note 114, at 3166.

⁴⁰¹ See Grant Huscroft, *Proportionality and the Relevance of Interpretation*, in *RULE OF LAW*, *supra* note 235, at 186, 187–88 (“Whether a particular right is protected by a bill of rights, and what

The Supreme Court has never viewed rights adjudication so narrowly. The Court has long adopted a presumptively originalist posture in cases of first impression having to do with relatively specific structural provisions,⁴⁰² but it has never viewed constitutional rights through the kind of originalist lens that would resist transsubstantive proportionality analysis. In equal protection, fundamental rights, free speech, and criminal procedure cases alike, the Court has relied on heuristics and balancing tests derived through common law iteration rather than textual analysis.⁴⁰³ The Court's refusal to recognize certain rights has often been grounded in the kinds of pragmatic concerns that proportionality would help to allay,⁴⁰⁴ but rarely has its austerity in identifying new rights been rooted simply in respect for the Constitution's text, structure, and history.

It is true that some scholars and the occasional judge have gestured at the kind of narrow textualist originalism that would jettison existing rights precedents.⁴⁰⁵ Many modern originalists, however, adopt a distinction between the practice of gauging the semantic meaning of legal terms and the practice of adjudicating or otherwise resolving conflicts that are constrained but not determined by those terms. Professors Keith Whittington, Jack Balkin, Randy Barnett, and Lawrence Solum, among others, have described the former as "interpretation" and the latter as "construction."⁴⁰⁶ Relatedly, Professor Christopher Green has emphasized the sense-reference distinction, which, derived from the philosophy of language, distinguishes the meaning a word expresses from the outcomes it accomplishes through that expression.⁴⁰⁷ One detects

its protection entails, are questions prior to the authority of courts to engage in proportionality analysis." *Id.* at 188.)

⁴⁰² See Jamal Greene, *Rule Originalism*, 116 COLUM. L. REV. 1639, 1658–80 (2016).

⁴⁰³ See David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 883–84, 888 (1996); David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 28–52 (2015).

⁴⁰⁴ See *supra* Part II, pp. 38–65.

⁴⁰⁵ See *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 835 (2011) (Thomas, J., dissenting) (arguing based on original understanding that laws regulating speech directed at minors are not protected by the First Amendment); *McDonald v. City of Chicago*, 561 U.S. 742, 812, 837–38 (2010) (Thomas, J., concurring in part and concurring in the judgment) (arguing that the Second Amendment applies to the states because of the Privileges and Immunities Clause, rather than the Due Process Clause); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980, 998–99 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that the right to abortion is not constitutionally protected because the Constitution says nothing about it); cf. John O. McGinnis, *The Duty of Clarity*, 84 GEO. WASH. L. REV. 843, 917–18 (2016) (arguing for a limited role for constitutional construction to supplement interpretation).

⁴⁰⁶ See KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 5–7 (1999); JACK M. BALKIN, *LIVING ORIGINALISM* 5 (2011); BARNETT, *supra* note 267, at 123; Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 272 (2017).

⁴⁰⁷ See Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 559 (2006); see also Ronald Dworkin, *Comment*, in ANTONIN SCALIA, *A MATTER OF*

an echo to the difference between what a word connotes and what it denotes, a Millian idea that the High Court of Australia has been known to deploy to prevent its own well-known originalism from becoming an interpretive straitjacket.⁴⁰⁸

These strategies seek to preserve the relevance of textualist originalism to a Constitution whose original meaning can be fixed at only a broad level of generality. As a matter of original textual meaning, an American has no less a right to feed pigeons in a square than to use birth control, have an abortion, marry, or attend a racially integrated public school. Which is to say that refusing to recognize pigeon-feeding claims results from consequentialist considerations of administrability, value judgments about the worth of the activity, historical arguments about judicial precedents, and so forth, not from the text and history of the Constitution. Proportionality analysis brings these kinds of considerations to bear forthrightly. It indeed may be redescribed as a stepwise, transsubstantive framework for constitutional *construction*. Buying into proportionality requires the lawyer, scholar, judge, or citizen to concede that the Constitution's text gives scant instruction as to how rights may be limited. It does not require him or her to disclaim that the Constitution limits the rights we have or to deny that some constitutional rights may be burdened more than others.

2. *Rights and Interests*. — Proportionality has drawn criticism for failing to distinguish rights from mere interests. Professor Grégoire Webber argues, for example, that proportionality analysis disaggregates rights from justice, and in doing so alters the suite of duties and obligations that rights supply.⁴⁰⁹ What a community owes its rights-bearers in virtue of having a right is a question of justice, grounded in the moral equality of humans.⁴¹⁰ Treating rights as trumps ensures that we treat them *righteously*,⁴¹¹ that we affirm them even in the face of compelling arguments for interference.⁴¹²

This perspective suffers from an epistemic problem that Professor Waldron succinctly articulates: “There are many of us, and we disagree about justice.”⁴¹³ And not just that. In the usual case, that disagreement

INTERPRETATION 115, 116 (Amy Gutmann ed., 1997) (differentiating between “what some officials intended to say in enacting the language they used, and what they intended — or expected or hoped — would be the *consequence* of their saying it”).

⁴⁰⁸ See *Street v. Queensl Bar Ass'n* (1989) 168 CLR 461, 537–38 (Austl.) (Dawson, J.); JOHN STUART MILL, *A SYSTEM OF LOGIC: RATIOCINATIVE AND INDUCTIVE* 19 (Longmans, Green & Co. 1911) (1843).

⁴⁰⁹ See Grégoire Webber, *On the Loss of Rights*, in *RULE OF LAW*, *supra* note 235, at 123, 126–31.

⁴¹⁰ See *id.* at 143.

⁴¹¹ I am grateful to Professor Jessie Allen for this evocative formulation.

⁴¹² See Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468, 490 (2009).

⁴¹³ WALDRON, *supra* note 29, at 1; see also GLENDON, *supra* note 25, at 16.

is reasonable and in good faith. “It is not,” Waldron writes in *Law and Disagreement*, “a case of there being some of us who are in possession of *the truth* about rights — a truth which our opponents wilfully or irrationally fail to acknowledge because they are blinded by ignorance, prejudice or interest.”⁴¹⁴ Rather, he offers, “[t]he issues that rights implicate . . . are simply hard questions — matters on which reasonable people differ.”⁴¹⁵ In *Law and Disagreement* and elsewhere, Waldron marshals the fact of reasonable, good-faith disagreement about rights against what he describes as “American-style judicial review,”⁴¹⁶ the subject and target of this Foreword. He does not believe that the institution of judicial review has much to recommend it in resolving conflicts over rights in a functioning, rights-respecting democracy, given that the varying moral and philosophical commitments that divide citizens over rights also divide judges and direct their opinions.⁴¹⁷

One need not adopt Waldron’s skepticism about judicial review *tout court* to believe that his insight carries serious implications for the practice of judicial review. Constitutional adjudication is a decision procedure for resolving disagreements implicating rights, but it is not the best — or even a good — decision procedure for getting at the underlying truth of the matter. As Waldron emphasizes, judges resolve rights disputes in just the way their training and comparative expertise recommend: not through philosophical analysis or moral inspection but through the bloodless jargon of precedents and doctrinal tests.⁴¹⁸ The distinctly legalistic way in which judges purport to resolve rights disputes has its advantages, but — and here’s the point — helping society to distinguish rights from interests is not one of them.

We can assume there is value in distinguishing rights from interests without assuming that doing so is the judiciary’s predominant task. Indeed, one way of describing the enduring difference between rights as trumps and a proportionality framework is that the former tends to assimilate rights adjudication to the existential question of whether an individual claims a right or an interest, whereas the latter reserves judgment on the weight of the interest until the final stage of adjudication. If and when the proportionality court reaches that final stage of balancing in the strict sense, it may be empowered to assess the weight of the interest directly rather than through the smoke of precedent and doctrinal formulae. And so rights as trumps front-loads questions of rights definition that judges, justifiably fearful of their own capacity and legitimacy, address mechanistically. Practiced well, proportionality does not

⁴¹⁴ WALDRON, *supra* note 29, at 12.

⁴¹⁵ *Id.*

⁴¹⁶ *Id.* at 15; *see also* Waldron, *supra* note 347, at 1366–69.

⁴¹⁷ Waldron, *supra* note 347, at 1393–95.

⁴¹⁸ *Id.* at 1383.

avoid those questions altogether but back-loads them, reserving a constitutional court's primary analysis for empirical questions that lend themselves to the kind of dispassionate inquiry to which judges are indeed better suited than are politicians.

3. *The Perils of Transparency.* — A third significant criticism of proportionality cuts somewhat against the grain of the last. It is that proportionality is a bit too on the nose. Forcing arguments about rights into boxes that cannot accommodate the messiness of modern life but that seem to lend themselves to juridification enables a constitutional culture to maintain the fiction of a depoliticized judiciary. On this view, it is just because judges seem to bring an elite lawyer's toolkit to rights disputes that we rely upon them to defuse those disputes. Proportionality instead requires judges more forthrightly to mimic the decisional processes of legislatures, which risks decreasing the legitimacy of courts and undermining their dispute resolution capacity. The opiate of the masses is not religion on this view, but law.

I must take this criticism seriously not least because it appears to implicate some of my own previous work.⁴¹⁹ Constitutional judges need, in Professor Neil Siegel's formulation, to safeguard the conditions of their own legitimacy.⁴²⁰ When such judges write opinions and issue judgments, they have a duty to offer reasoned arguments articulated in the conventional language of constitutional discourse.⁴²¹ The case must draw, to varying degrees, on constitutional text, structure, history, precedent, or prudential judgment rather than, say, on partisan politics, the judge's personal financial stakes, Zen sutras, or the drawing of lots. But I have emphasized that judicial duty extends beyond simply the form the opinion takes; judges also have a duty to try to persuade colleagues on the bench, the parties to the case, public officials, and the citizenry more generally that what they are doing is consistent with their role.⁴²² Attending to the forms of argument is designed to serve that end, but it should not be confused with the end itself.⁴²³

In short, judges have to exaggerate or obfuscate sometimes.⁴²⁴ Professor Charles Black gestured in this direction in his discussion of

⁴¹⁹ See Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1395 (2013) [hereinafter Greene, *Pathetic Argument*]; Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 284–89 (2016) [hereinafter Greene, *Meming*].

⁴²⁰ Neil S. Siegel, *The Virtue of Judicial Statesmanship*, 86 TEX. L. REV. 959, 963 (2008).

⁴²¹ See BOBBITT, *supra* note 23, at 5–6.

⁴²² See Greene, *Meming*, *supra* note 419, at 290.

⁴²³ See Greene, *Pathetic Argument*, *supra* note 419, at 1420–22.

⁴²⁴ See GLENDON, *supra* note 25, at 44 (“What’s wrong with a little exaggeration, one might ask, especially in furtherance of something as important as individual rights?”); Amsterdam, *supra* note 39, at 350 (“[T]he Court cannot always state openly all of the considerations that affect its decisions.”); cf. Henry P. Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 16–25 (1979) (suggesting reasons why Supreme Court opinions might not fully reflect the collective views of those who join them).

Justice Black, the Justice most associated with the idea of rights as trumps. In his inaugural James Madison Lecture at New York University School of Law in 1960, Justice Black had argued that “there are ‘absolutes’” in the Bill of Rights, “and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be ‘absolutes.’”⁴²⁵ Like many of his contemporaries in the academy and at the bar,⁴²⁶ Professor Black was skeptical (in a way) of this claim. The determination of what counts as a right in the first place requires some balancing,⁴²⁷ and in any event, “[n]o right, however defined, ever turns out to be really ‘absolute,’ if you think about it long enough.”⁴²⁸ The point was obvious — Dworkin, too, conceded it⁴²⁹ — but it led Professor Black to reason that what was really at stake in the Justice’s posture was not the substance of rights but rather what he called “attitude.”⁴³⁰ He wrote:

On the whole it seems clear . . . that the man who prefers to look on the Bill of Rights guarantees, once they are defined, as “absolutes” will see them as more broadly defined and enforce them with more resolution than will the man who prefers to stress their character as invitations to start “balancing.”⁴³¹

For Professor Black, whether Justice Black was truly being misleading in professing that rights are absolute depended on “where we want to be led.”⁴³² There is value in a posture of viewing rights as not merely convenient, and indeed the Bill of Rights is faithfully read as embodying that value.⁴³³

There is likewise value, Professor Black emphasized, in insisting that judges and not just legislatures play a critical role in upholding the protections of the Bill of Rights. “To insist upon generalizing the ‘balancing’ process, and extending it beyond the stage of definition,” Professor Black wrote, “will tend to force the Court to abdicate its protective role, under the guise of deference to the legislative branch.”⁴³⁴ Affirming the significance of constitutional rights and affirming the Court’s role in

⁴²⁵ Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960).

⁴²⁶ See Michael Paris & Kevin J. McMahon, *Absolutism and Democracy: Hugo L. Black’s Free Speech Jurisprudence*, in JUDGING FREE SPEECH: FIRST AMENDMENT JURISPRUDENCE OF U.S. SUPREME COURT JUSTICES 75, 75 (Helen J. Knowles & Steven B. Lichtman eds., 2015) (“The speech struck some of America’s legal cognoscenti as quaintly naïve, at best.”); see also Charles L. Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER’S MAG., Feb. 1961, at 63, 63.

⁴²⁷ See Black, *supra* note 426, at 65.

⁴²⁸ *Id.* at 67.

⁴²⁹ DWORKIN, *supra* note 14, at 191.

⁴³⁰ Black, *supra* note 426, at 66 (emphasis omitted).

⁴³¹ *Id.*

⁴³² *Id.* at 68.

⁴³³ *Id.*

⁴³⁴ *Id.* at 66–67.

identifying those rights, both vital to the Court’s safeguarding of its legitimacy, might require some loose talk about the nature and scope of rights themselves. Rights are not, of course, absolute in a sense of “imagined chemical purity,”⁴³⁵ but Justice Black’s call was not for utopianism but “for a feasible program of thought and action.”⁴³⁶

Judges must persuade citizens that courts are needed and worth listening to. Doing so might at times require them to gloss over the fact of continuity between their task and the tasks of elected officials and administrators. At times. At other times, preserving the legitimacy of courts might require other strategies. Where we “want[ed] to be led” in the early 1960s, when Justice Black and Professor Black were writing, might well be different from where we want to be led today. Justice Black’s lecture centered, in full, on the dangers that motivated the framers of the Bill of Rights, “the ancient evils which forced their ancestors to flee to this new country” and “the dangers of tyrannical governments” that they “knew firsthand.”⁴³⁷ Let us grant that many of the dangers to rights with which a jurist in 1960 might reasonably have been concerned — the apartheid conditions of the Jim Crow South, McCarthyite Communist purges, kangaroo criminal trials that presaged the revolution in constitutional criminal procedure — amount to the kind of oppression that bears a family resemblance to that with which the framers were familiar.

We might yet maintain that “tyranny” is simply not at stake in assessing the residual affirmative action program at the University of Texas at Austin,⁴³⁸ or a law restricting corporate electioneering in the two months before a general election to funds generated through a political action committee,⁴³⁹ or a measure requiring a trigger lock on long arms held within the sixty-one square miles of the nation’s capital.⁴⁴⁰ Whether or not one agrees with laws of this sort, whether or not one thinks them constitutionally prohibited, they represent the workaday products of democratic governance. If challenges to these legislative acts describe paradigmatic rights conflicts, then it is not at all obvious that we should want to be “led” to the attitude of skepticism toward the government that Professor Black rightly identifies with rights absolutism.⁴⁴¹ Not because government regulation is good as such, but because we live in a society that we expect, in the first instance, to govern itself. The judiciary’s role in that setting is to take both government and rights

⁴³⁵ *Id.* at 68.

⁴³⁶ *Id.*

⁴³⁷ Black, *supra* note 425, at 867.

⁴³⁸ See *Fisher II*, 136 S. Ct. 2198 (2016).

⁴³⁹ See *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁴⁴⁰ See *District of Columbia v. Heller*, 554 U.S. 570 (2008).

⁴⁴¹ See Black, *supra* note 426, at 66.

seriously. Whether it does so successfully is a reasonable measure of its legitimacy.

Diffuse public support for courts is notoriously difficult to disaggregate from public support for specific decisions.⁴⁴² We soldier on, though, and available data does not support the notion that proportionality jurisprudence delegitimizes courts or would necessarily do so in the United States. A 2011 study by Professors James Gibson and Gregory Caldeira found, for example, that Americans do not generally subscribe to the myth of mechanical jurisprudence, and that the institutional legitimacy of the Supreme Court does not depend on assuming the absence of discretion, so long as judges are principled in exercising it.⁴⁴³ That finding tends to confirm earlier studies suggesting that, across numerous jurisdictions around the globe, knowledge of high courts, and by assumption, exposure to their standard modes of adjudication, correlates positively with support for them.⁴⁴⁴ More generally, studies of diffuse public support for the constitutional or apex courts of jurisdictions that practice proportionality as a matter of course, such as Canada and Germany, do not report substantial differences from support for the U.S. Supreme Court among the American public.⁴⁴⁵

That said, to the degree relative alignment between judicial and political modes of decisionmaking proves disquieting to judicial review, that is as it should be. If most rights disputes are between parties who disagree reasonably and in good faith about the reach of constitutional rights, then most such disputes should be determined through overtly political processes.⁴⁴⁶ The insight is continuous with that of Professor Ely, who argued that judges should intervene when, and to the degree that, the political process is not deserving of trust.⁴⁴⁷ He grounded his view in observations about the process values he believed the U.S. Constitution protected as a matter of positive law and in the

⁴⁴² See James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 357 (2003).

⁴⁴³ James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 213 (2011).

⁴⁴⁴ James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 350, 356 (1998).

⁴⁴⁵ Compare Gibson et al., *supra* note 442, at 364–65 (noting the high degree of institutional legitimacy perceived at the U.S. Supreme Court), with Joseph F. Fletcher & Paul Howe, *Canadian Attitudes Toward the Charter and the Courts in Comparative Perspective*, 6 CHOICES 4, 15–16 (2000) (comparing data from Gibson et al., *supra* note 444, with new data on Canada and finding the level of support in Canada similar, if not greater), and Vanessa A. Baird, *Building Institutional Legitimacy: The Role of Procedural Justice*, 54 POL. RES. Q. 333, 341–42, 351–52 (2001) (similar for Germany).

⁴⁴⁶ See WALDRON, *supra* note 29, at 243–44.

⁴⁴⁷ See ELY, *supra* note 47, at 102–03.

institutional capacity of judges, which he associated with regulation of procedure.⁴⁴⁸

But generations of political thought and common experience have demonstrated that the threats to regular political order do not come solely from the pathologies that Ely, drawing on footnote four of *United States v. Carolene Products*, identified⁴⁴⁹: blockages of the channels of political change or “prejudice against discrete and insular minorities.”⁴⁵⁰ Anonymous and diffuse majorities might be unable to form the coalitions or register the intensity of preference needed to capture the attention of legislators.⁴⁵¹ National party polarization might nullify the checks and balances designed to hem in an extreme legislative program or executive initiative.⁴⁵² Well-organized lobbyists and wealthy donors can dominate the legislative agenda out of proportion to their representation in the population. Political actors can simply make errors in measuring certain social facts or in recognizing their constitutional significance. The presence of these kinds of slippages in representative politics may not call for the placing of the political process in judicial receivership,⁴⁵³ but it calls for a kind of qualified vigilance designed to protect minorities and majorities alike in the exercise of their rights.⁴⁵⁴

And so transparency is indeed a promise of proportionality.⁴⁵⁵ Rather than placing our hands on each other’s jugulars, alienating us from politics or else giving those politics a Schmittian cast, proportionality at its best helps us to see when a dispute is better resolved through politics than through juridification. The true risk to the legitimacy of the Court would be if, sensitive to the political dimensions apparent in its constitutional docket, it were to insist on categorical adjudication or blunt judicial remedies. The costs in legitimacy are the wages of self-understanding.

4. *Lower Court Guidance.* — The most significant theoretical concern with importing proportionality jurisprudence into U.S. courts stems

⁴⁴⁸ See *id.* at 101–02.

⁴⁴⁹ *Id.* at 75–77.

⁴⁵⁰ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); see also Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718 (1985) (“[J]udges can no longer expect these familiar concepts to operate in a way that will allow courts to solve the problem of counter-majoritarianism.”).

⁴⁵¹ See Ackerman, *supra* note 450, at 724–31.

⁴⁵² See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2347–49 (2006). See generally DANIEL J. HOPKINS, *THE INCREASINGLY UNITED STATES: HOW AND WHY AMERICAN POLITICAL BEHAVIOR NATIONALIZED 1–19* (2018).

⁴⁵³ See JUDITH N. SHKLAR, *ORDINARY VICES* 237–38 (1984); see also David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. PA. L. REV. 1097, 1130 (2017) (arguing, in the context of the Freedom of Information Act, that the need to keep vigilance over bureaucrats varies with the bureaucracy’s degree of professionalism).

⁴⁵⁴ See UNGER, *supra* note 351, at 72–73; Jackson, *supra* note 114, at 3151–52.

⁴⁵⁵ See BARAK, *supra* note 238, at 462–63.

from the nature of the Supreme Court as an apex court within a system of highly decentralized constitutional jurisdiction.⁴⁵⁶ It is tempting to map categorical versus proportionality frameworks onto the two leading models of constitutional jurisdiction. Both lower federal courts and state courts in the United States are empowered to engage in federal constitutional review. This decentralized jurisdiction proceeds from the *Marbury v. Madison*⁴⁵⁷ conception of judicial review: courts must follow the law, including the Constitution, and so they must resolve any inconsistency between ordinary and constitutional law that arises in the course of adjudication.⁴⁵⁸ By contrast, under the Kelsenian model dominant in Europe, a specially created constitutional court holds exclusive constitutional jurisdiction.⁴⁵⁹ Insofar as proportionality relies heavily on case-by-case adjudication, it gives less guidance to other courts, public officials, and citizens than does a categorical approach.

Lack of guidance, to lower courts especially, is a more serious problem in a system of decentralized constitutional jurisdiction than in one with a centralized constitutional court. We might think the problem more serious still in a federal system, in which relatively uniform federal law is the glue that holds the legal system together. Indeed, the felt need to establish uniform federal law is perhaps the most compelling justification for the U.S. Supreme Court's appellate jurisdiction over state courts,⁴⁶⁰ and it remains the leading motivation behind the Court's certiorari decisions.⁴⁶¹

This criticism of proportionality is genuine. Even on the least generous view of categorical adjudication, one that sees the categories as weak approximations that distort constitutional law, the approach would retain the benefit of promoting uniformity in the law. Recall that that's the problem. The more rule-like and unforgiving the doctrinal formulation, the greater the error in subsuming cases the rule does not contemplate and the better the law is able to promote uniformity. Uniformity in the law relates positively to the kinds of distortions this Foreword singles out as problematic.

Uniformity, while holding some clear benefits, is neither a trump nor even an unvarnished good, however. Where federal law is certain, "Our Federalism" seems to require that it be consistent across states.⁴⁶² But

⁴⁵⁶ See Jackson, *supra* note 114, at 3155; Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543, 560-61 (1996).

⁴⁵⁷ 5 U.S. (1 Cranch) 137 (1803).

⁴⁵⁸ *Id.* at 177-78.

⁴⁵⁹ ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 34 (2000).

⁴⁶⁰ *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816).

⁴⁶¹ SUP. CT. R. 10(a)-(b).

⁴⁶² See *Younger v. Harris*, 401 U.S. 37, 44 (1971).

where federal law is uncertain, it is not obvious, a priori, that some variation in the law across states is undesirable. Such variation offers the usual benefits of legal pluralism. It can provide data about the consequences or workability of a particular approach to rights, permitting states or federal circuits to provide the laboratories of innovation that are sometimes said to motivate federalism in the first instance.⁴⁶³

Relatedly, the Supreme Court tolerates significant disuniformity in the law.⁴⁶⁴ Although its rules for certiorari suggest a concern with divisions of authority among lower courts, it is common for the Court to allow circuit splits to “percolate” until multiple courts have weighed in on the merits in published opinions that can inform the Court’s reasoning.⁴⁶⁵ The Court’s docket has conspicuously shrunk from routinely reaching over 150 cases in the 1980s to fewer than half that number today.⁴⁶⁶ The Court heard arguments in just sixty-three cases in the 2017 Term,⁴⁶⁷ fewer than in either of the previous two Terms.⁴⁶⁸

It is, in any event, easy to overstate the disuniformity proportionality invites. Proportionality is fully consistent with a devotion to precedent, indeed with a dogged insistence that courts be less casual about the level of generality with which they approach prior cases. It better approximates the common law method than does the categorical frame, for it makes relevant the kinds of comparative factual assessments that motivate common law reasoning; like cases are to be treated alike and different cases are to be treated differently.⁴⁶⁹ It is telling that the Supreme Court of Canada is an apex court in a federal system with decentralized constitutional jurisdiction that employs proportionality analysis with no apparent crisis of disuniformity in federal constitutional law.⁴⁷⁰

More broadly, over time, through constant exposure to the lived experience of constitutional law, we can expect substantial convergence between the categorical and proportionality approaches. Treating like

⁴⁶³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴⁶⁴ See Jackson, *supra* note 114, at 3155–56; Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095 (1987).

⁴⁶⁵ See *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting).

⁴⁶⁶ Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES (Sept. 28, 2009), <https://nyti.ms/2pauFPH> [<https://perma.cc/H4GQ-U853>].

⁴⁶⁷ See Kedar Bhatia, *Stat Pack for October Term 2017, Opinions by Sitting*, SCOTUSBLOG (June 29, 2018), http://www.scotusblog.com/wp-content/uploads/2018/06/SB_opinionsbysitting_20180629.pdf [<https://perma.cc/BKN8-UL3H>].

⁴⁶⁸ See Kedar Bhatia, *Stat Pack for October Term 2016, Opinions by Sitting*, SCOTUSBLOG (June 28, 2017), http://www.scotusblog.com/wp-content/uploads/2017/06/SB_opinionsbysitting_20170628.pdf [<https://perma.cc/5FUD-WYA6>] (64 arguments); Kedar Bhatia, *Stat Pack for October Term 2015, Opinions by Sitting*, SCOTUSBLOG (June 29, 2016), http://www.scotusblog.com/wp-content/uploads/2016/06/SB_opinionsbysitting_OT15.pdf [<https://perma.cc/7SWP-3EGT>] (69 arguments).

⁴⁶⁹ See BEATTY, *supra* note 260, at 170.

⁴⁷⁰ See Jackson, *supra* note 114, at 3110 n.75, 3120.

cases alike gives rise to evidentiary presumptions and rules of thumb that calcify into an array of ex ante categories. From the opposite direction, applying ex ante categories to real rather than hypothesized facts tends to birth the exceptions, and the exceptions to the exceptions, that are familiar, for example, from First and Fourth Amendment jurisprudence. Every system combines elements of both categoricalism and more ex post approaches. We can expect proportionality to reach inductively in the direction categoricalism aims for deductively.⁴⁷¹

What happens in the long meantime matters. For one thing, building out rights inductively reflects a humility about judges' capacity for knowledge and forethought that is appropriate in a complex regulatory environment. For another, and following Professor Black, the perspective from which the convergence begins affects the *attitude* that courts and legal and political elites take toward the constitutional system. Is the baseline attitude that governments are constituted to solve social problems so long as they do so reasonably, or is it that rights are implemented to limit government, unless government is necessary? The latter view indeed takes rights seriously, but it thereby encourages judges to limit the definition of rights just for the sake of limits rather than in response to actual facts about the world.

All of which is to say that the costs of proportionality, in departing from interpretivism, in forcing judges to resolve values conflicts, in fostering legal uncertainty, are simply the costs of judicial review. Those costs can be obscured out of anxiety over the court's legitimacy, they can be assessed and mitigated forthrightly, or we can abandon judicial review.

IV. THE CONTINGENT ORIGINS OF RIGHTS AS TRUMPS

In a November 1964 essay published in *Harper's*, the historian Richard Hofstadter told Americans they were paranoid. "American politics," he began, "has often been an arena for angry minds."⁴⁷² The essay, later published as part of an influential book,⁴⁷³ identified in U.S. politics across the political spectrum what Hofstadter called a "sense of heated exaggeration, suspiciousness, and conspiratorial fantasy"⁴⁷⁴ that he traced anecdotally across abolitionists, Know Nothings, the anti-

⁴⁷¹ See Frederick Schauer, *The Convergence of Rules and Standards*, 2003 N.Z. L. REV. 303, 311-12.

⁴⁷² Richard Hofstadter, *The Paranoid Style in American Politics*, HARPER'S MAG., Nov. 1964, at 77, 77.

⁴⁷³ See RICHARD HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 3 (1965).

⁴⁷⁴ Hofstadter, *supra* note 472, at 77.

Masonry movement, McCarthyites, and “both sides of the race controversy” of the 1960s.⁴⁷⁵ Hofstadter’s casual conflation of, say, White Citizens’ Councils and Black Muslims,⁴⁷⁶ the paranoia of the oppressor and that of the oppressed, less discredits Hofstadter than it reveals the truth in the old adage that just because you’re paranoid doesn’t mean they aren’t out to get you.

Americans had a fair amount to be paranoid about in the fall of 1964. Hofstadter was writing in the wake of the Cuban Missile Crisis, the apex of the Cold War and its attendant existential threat.⁴⁷⁷ President Kennedy had been assassinated, no telling by whom exactly, a year before Hofstadter’s essay. Less than two decades had passed since the fall of the Axis powers. The Second World War had not only killed some seventy million people, including more than 400,000 Americans,⁴⁷⁸ but it had been perpetrated by a regime that was somehow able to mobilize millions to participate in an ideologically motivated project of world domination and ethnoreligious genocide. The Nazi puzzle prompted the Frankfurt School sociologist Theodor Adorno and his coauthors to seek to identify the roots of what they called the “potentially fascistic individual.”⁴⁷⁹ Their Freudian conclusion that such a personality could develop out of the kind of “hierarchical, authoritarian, exploitive parent-child relationship”⁴⁸⁰ with which many Americans could identify, and that a fascist-in-waiting could be activated through a brew of propaganda and economic self-interest,⁴⁸¹ was downright terrifying.⁴⁸²

Black and brown Americans had special reason for both anxiety and hope. Jim Crow was under assault — both the Republican and Democratic national convention platforms included antisegregation planks in 1960⁴⁸³ — but it remained resilient.⁴⁸⁴ Freedom Summer had just come and gone, and with it the beatings and murders of at least

⁴⁷⁵ *Id.* at 78; *see also id.* at 77–78.

⁴⁷⁶ *See id.* at 78.

⁴⁷⁷ Stanley Kubrick’s masterpiece, *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb*, had recently been released. DR. STRANGELOVE OR: HOW I LEARNED TO STOP WORRYING AND LOVE THE BOMB (Columbia Pictures & Hawk Films 1964).

⁴⁷⁸ PETER DOYLE, WORLD WAR II IN NUMBERS 9, 29 (2013).

⁴⁷⁹ *See* T.W. ADORNO ET AL., THE AUTHORITARIAN PERSONALITY 1 (1950) (emphasis omitted).

⁴⁸⁰ *Id.* at 971.

⁴⁸¹ *Id.* at 7–8.

⁴⁸² As Professor David Sklansky notes, the association of this personality type with “[r]igid adherence to conventional, middle-class values” and with low or moderate education levels contributed to elite distrust of mass politics. DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE 29–30 (2008) (quoting ADORNO ET AL., *supra* note 479, at 228); *see also* Sarah A. Seo, *Democratic Policing Before the Due Process Revolution*, 128 YALE L.J. (forthcoming 2018) (manuscript at 12–13) (on file with the Harvard Law Library) (arguing that, to Americans at the time, police officers in particular seemed to fit the description of an authoritarian personality).

⁴⁸³ C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW 171 (2d rev. ed. 1966).

⁴⁸⁴ *See generally id.* at 149–91.

seven civil rights workers and their supporters in Mississippi. The Civil Rights Act passed in the middle of that summer, but its reach and enforceability remained uncertain. *Brown v. Board of Education* was a decade old, but in 1964 only 30,800 of the 2.9 million black schoolchildren in the eleven states of the Deep South attended a school with any white classmates.⁴⁸⁵ Millions of southern blacks remained disenfranchised. Mississippi had been chosen as the site for Freedom Summer because, through discriminatory practices and intimidation, only 6.7% of its black voting-age population was registered to vote, as opposed to 70.2% of white voting-age citizens.⁴⁸⁶

The criminal justice system remained authoritarian and deeply racist. Many of the constitutional protections we associate with the Warren Court — *Miranda's*⁴⁸⁷ bar on admissions of confessions obtained without an enumeration of the defendant's rights against self-incrimination,⁴⁸⁸ *Brady's*⁴⁸⁹ requirement that prosecutors disclose exculpatory evidence in their possession,⁴⁹⁰ *Gideon's*⁴⁹¹ assurance that indigent state criminal defendants have a right to appointed counsel,⁴⁹² and more — had not yet materialized. The Criminal Justice Act of 1964,⁴⁹³ which paved the way for a federal public defender system, had only just been passed. Blacks were disproportionate victims of police brutality, a major impetus for the Watts riots that terrorized Los Angeles five days after the Voting Rights Act was signed into law.

A. Griswold, *Lochner*, and the Right to Privacy

The fragile state of the world as it looked through the eyes of many Americans in the mid-1960s provides important context for the pivotal jurisprudential choices that U.S. judges and lawyers would make over the decade that followed the publication of Hofstadter's essay. The decade that began with the Civil Rights Act, which effectively ended Jim Crow, would also see the enactment of the Voting Rights Act, which fundamentally reoriented U.S. politics; second-wave feminism and the emergence of the modern women's movement; the sexual revolution, which resulted in wholesale changes in public morality around sex and

⁴⁸⁵ Helen B. Shaffer, *School Desegregation: 1954-1964*, in 1 EDITORIAL RESEARCH REPORTS 301, 305-06 (1964), <http://library.cqpress.com/cqresearcher/cqresrre1964042900> [<https://perma.cc/99GS-ZHQ7>].

⁴⁸⁶ John Lewis & Archie E. Allen, *Black Voter Registration Efforts in the South*, 48 NOTRE DAME L. REV. 105, 112 (1972).

⁴⁸⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴⁸⁸ *Id.* at 467.

⁴⁸⁹ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁴⁹⁰ *Id.* at 86-88.

⁴⁹¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁴⁹² *Id.* at 341-42.

⁴⁹³ Pub. L. No. 88-455, 78 Stat. 552 (1964) (codified as amended at 18 U.S.C. § 3006A).

the family; and the Immigration and Nationality Act of 1965,⁴⁹⁴ which shifted the demographics of U.S. migration by abolishing statutory preferences for Western Europeans. It was also in 1964 that Charles Reich published *The New Property*,⁴⁹⁵ identifying the many ways in which individual flourishing depended (newly, so to speak) on government largesse — from social welfare to government employment, contracts, and licensing — which exerted tremendous pressure on traditional boundaries of public and private, and of rights and privileges.⁴⁹⁶

The flowering of rights that characterized the era did not just respond to anxiety but also produced it. The American constitutional imagination had never before been so vivid or so threatening. In a flash, and almost simultaneously, appeared the very real possibilities of constitutional rights to substantive racial and sexual equality, to undiluted voting and unprecedented judicial supervision of electoral mechanics, to a degree of economic equality and public welfare, to abortion on request, and to restrained interactions with police and prosecutors. The forms of oppression and the levers of inequality that Americans had come to associate with ordinary governance were under assault. It was the enlightened despotism of the *Rechtsstaat*.

And so consider *Griswold v. Connecticut*,⁴⁹⁷ which came down in June 1965. To understand its significance to modern constitutional law — and its role in seeding the categorical frame — requires a reckoning with what the *Griswold* majority sought to avoid: *Lochner v. New York*.⁴⁹⁸

In *Lochner*, the Supreme Court invalidated a unanimously passed New York law that regulated the working hours of bakers, on the ground that it unduly interfered with the bakers' and bakeries' freedom of contract.⁴⁹⁹ In broad brushstrokes, at least two criticisms of *Lochner* have emerged. On one view, the problem is that, in protecting the right to freedom of contract, which the Constitution does not specifically enumerate, the majority read its own politicized views of healthy economic life — Mr. Herbert Spencer's *Social Statics* and all that — into our higher law.⁵⁰⁰ This criticism aligns roughly with the dissenting opinion of Justice Holmes.⁵⁰¹ On another view, the problem was not any exalted status granted the freedom of contract (which was well established⁵⁰²)

⁴⁹⁴ Pub. L. No. 89-236, 79 Stat. 911 (codified as amended in scattered sections of 8 U.S.C.).

⁴⁹⁵ Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

⁴⁹⁶ *Id.* at 733.

⁴⁹⁷ 381 U.S. 479 (1965).

⁴⁹⁸ See *id.* at 481–82 (distancing the Court's opinion from *Lochner*).

⁴⁹⁹ *Lochner v. New York*, 198 U.S. 45, 53 (1905).

⁵⁰⁰ See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 418 (2011).

⁵⁰¹ See *Lochner*, 198 U.S. at 75–76 (Holmes, J., dissenting).

⁵⁰² See, e.g., *Holden v. Hardy*, 169 U.S. 366, 391 (1898); *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

but rather the Court's insufficient respect for the government's justifications for the law, which were grounded in the apparent health and safety dangers of bakery work.⁵⁰³ This criticism aligns roughly with the dissenting opinion of Justice Harlan.⁵⁰⁴

Returning to Professor Black's useful provocation, the Holmes and Harlan critiques of *Lochner* adopt different *attitudes* toward the New York Bakeshop Act. Justice Holmes barely mentioned the statute or its aims; that they did not concern him was just the point.⁵⁰⁵ Reflecting Justice Holmes's own (somewhat ironic) social Darwinism,⁵⁰⁶ his opinion announces a theory of jurisprudence:

[T]he word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.⁵⁰⁷

By contrast, Justice Harlan's opinion "[grant[s]] that "there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment."⁵⁰⁸ His focus was not on constitutional theory or the identification of constitutional rights but rather on a workaday inquiry that combined empirical assessment with qualitative judgment: "[W]hether the means devised by the State are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons . . . engaged in bakery and confectionery establishments."⁵⁰⁹

The Brandeis Brief was yet a twinkle in Louis Brandeis's eye, but there was Justice Harlan in *Lochner* basing his analysis in part on German doctor Ludwig Hirt's 1871 treatise calling the work of bakers "among the hardest and most laborious imaginable" and quoting another author's conclusions that "[t]he constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes," the long hours bakers work "produce rheumatism, cramps and swollen legs," and "[n]early all bakers are pale-faced and of more delicate health than the

⁵⁰³ See Greene, *supra* note 500, at 418; Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 877-78 (1987).

⁵⁰⁴ See *Lochner*, 198 U.S. at 65-74 (Harlan, J., dissenting).

⁵⁰⁵ *Id.* at 75 (Holmes, J., dissenting) ("I strongly believe that my agreement or disagreement [with laissez-faire economics] has nothing to do with the right of a majority to embody their opinions in law.").

⁵⁰⁶ See Oliver Wendell Holmes, Jr., *The Gas-Stokers' Strike*, 7 AM. L. REV. 582, 583 (1873) ("The more powerful interests must be more or less reflected in legislation; which, like every other device of man or beast, must tend in the long run to aid in the survival of the fittest."); see also *Buck v. Bell*, 274 U.S. 200, 207 (1927); Mary Dudziak, *Oliver Wendell Holmes as a Eugenic Reformer: Rhetoric in the Writing of Constitutional Law*, 71 IOWA L. REV. 833, 835-36 (1986).

⁵⁰⁷ *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

⁵⁰⁸ *Id.* at 68 (Harlan, J., dissenting).

⁵⁰⁹ *Id.* at 69.

workers of other crafts.”⁵¹⁰ Justice Harlan’s dissent also cited statistics showing that the average daily working time was shorter than the Bakeshop Act’s ceiling in a number of Western countries and cited findings in a New York Bureau of Statistics of Labor report that endorsed shorter work hours and noted that bakers in particular are exposed to “conditions that interfere with nutrition.”⁵¹¹ The attitude that this opinion enabled is one of not just deference to the legislature but basic respect for its work in seeking to address a social problem.

When the Court abandoned *Lochner* and related cases in 1937, it implicitly adopted the Holmes rather than the Harlan critique.⁵¹² The most succinct statement of the new rights regime appears in *Carolene Products* and footnote four. Justice Stone appended the footnote to his statement that “legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.”⁵¹³ Footnote four then pitches three categorical exceptions to the rational basis standard: specifically enumerated constitutional rights, laws restricting the process of political change, and laws directed at “discrete and insular minorities.”⁵¹⁴

This statement and footnote are the prototype for the tiers-of-scrutiny framework⁵¹⁵: a law is upheld against a rights attack if it is rationally related to a legitimate state interest unless the right asserted falls into a protected category, delimited *ex ante*. Importantly, the rational basis test may rely on hypothetical motivations,⁵¹⁶ betraying its notional premise that what drives the constitutional inquiry is not the nature of the social problem the legislature seeks to address but rather, and predominantly, the decontextualized nature of the right infringed. The Court, like Justice Holmes, does not care about a statute’s substance except in those presumptively rare instances in which the legislature’s brazen violation of the Bill of Rights, political self-dealing, or racial or religious bigotry is, for some peculiar reason, justified.⁵¹⁷

⁵¹⁰ *Id.* at 70.

⁵¹¹ *Id.* at 71.

⁵¹² *See, e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 381–82 (1937) (upholding a state minimum wage law and acknowledging that “[t]his Court does not inquire into the wisdom of the Act, nor the economic conditions of the State which induced its passage”).

⁵¹³ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938).

⁵¹⁴ *Id.* at 152 n.4.

⁵¹⁵ *See* Fallon, *supra* note 128, at 1270, 1288.

⁵¹⁶ *Carolene Products*, 304 U.S. at 152; *see also* *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–88 (1955).

⁵¹⁷ *See* *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).

There is no reason to treat this categorical regime as specially tied to American history or enduring values. The *Lochner* era was, after all, many decades long and it was in important ways continuous with prior periods.⁵¹⁸ In the waning days of the Great Depression, as President Franklin D. Roosevelt began his second term and his third New Deal,⁵¹⁹ with the top federal income tax rate approaching eighty percent,⁵²⁰ and on the eve of the Second World War, the paradigmatic mischief to which the Fourteenth Amendment was directed seemed more obviously to be racial and religious discrimination and infringements on political speech, not economic regulation. The *Lochner*-era regime was believed to be an obvious failure,⁵²¹ and *Carolene Products* reflected reasonable views about the unfinished business of U.S. constitutional law. That unfinished business would require the Court to confront the system-wide pathologies that Jim Crow, religious bias, and red-baiting reflected. The contrast with the *Lochner* era, in which the Court self-consciously second-guessed particularized legislative judgments about economic policy, made it easy to essentialize pathology as what constitutional law was rightly *about*.

More broadly, *Carolene Products* conspicuously, and artificially, segregated the race question from questions of political economy. Leaving the government free to pursue “social and economic” measures but not those that target racial minorities incompletely theorizes what social and economic regulation might entail. *Carolene Products* itself suppressed the right of a business to enter a market,⁵²² and the roughly contemporaneous decision in *United States v. Darby*⁵²³ suppressed a right to contract that would have prevented wage and hour legislation.⁵²⁴ But the *Carolene Products* regime was on its own terms indifferent to whether the rights suppressed in the future were, for example, rights to welfare, to education, to unionization, or to collective bargaining, including contractual rights that can preserve a union’s gains.⁵²⁵ And second-generation claims by racial and religious minorities are not easily distinguished, a priori, from claims to social or economic justice advanced by others. And so in cases like *Washington v. Davis*, *McCleskey v. Kemp*,

⁵¹⁸ See Fallon, *supra* note 128, at 1285–86.

⁵¹⁹ See John W. Jeffries, A “Third New Deal”?: Liberal Policy and the American State, 1937–1945, 8 J. POL’Y HIST. 387, 387 (1996).

⁵²⁰ MARK H. LEFF, THE LIMITS OF SYMBOLIC REFORM: THE NEW DEAL AND TAXATION, 1933–1939, at 91 (1984).

⁵²¹ Fallon, *supra* note 128, at 1287.

⁵²² See *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938).

⁵²³ 312 U.S. 100 (1941).

⁵²⁴ *Id.* at 125–26.

⁵²⁵ See Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1, 4 (2011).

and *Employment Division v. Smith*, it appeared to the Court that it could not give an inch without giving a mile.

Consider *Griswold*, then, in this light. By 1965, the Court had come to define its mandate in significant part through *Brown* and southern efforts to resist desegregation. Even its most significant freedom of speech case of the decade, *New York Times Co. v. Sullivan*,⁵²⁶ may be viewed as an effort to arm civil rights advocates to resist southern juries.⁵²⁷ But *Griswold* seemed not to involve any of the *Carolene Products* categories. The right to use birth control was not specifically enumerated in the Constitution. It did not in any obvious way implicate channels of political change.⁵²⁸ And the women burdened by laws regulating birth control were neither discrete and insular nor, as such, members of a minority group.⁵²⁹ The options available to the *Griswold* Court were at least three,⁵³⁰ and they mirrored those available to the *Lochner* Court. The Court could uphold the Connecticut law, as Justices Black and Stewart urged.⁵³¹ It could carefully weigh the State's moral (or whatever other) interest in banning contraceptives against basic freedoms of marital privacy and reproductive autonomy — both simply applications of the *liberty* protected by the Due Process Clause — and strike the law down. Justice Harlan would have so held, conjuring his grandfather.⁵³² Or, the Court could invalidate the law by creating a new category, *privacy*, in effect the forgotten fourth paragraph of *Carolene Products*.

The first option — abdication — ran contrary to the political winds, the constitutional instincts of seven members of the *Griswold* Court, and

⁵²⁶ 376 U.S. 254 (1964).

⁵²⁷ See, e.g., Anders Walker, "Neutral" Principles: Rethinking the Legal History of Civil Rights, 1934–1964, 40 LOY. U. CHI. L.J. 385, 427–30 (2009).

⁵²⁸ It did so indirectly by restricting the ability of women to participate in civic life. See Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J.F. 349, 355–56 (2015).

⁵²⁹ Women as a class of course faced significant disadvantages that the Connecticut law reflected, see *id.* at 353–54, and the fact that birth control restrictions were far more likely to be enforced against clinics and to affect poor women meant that *Griswold* was shot through with class issues, see Cary Franklin, *Griswold and the Public Dimension of the Right to Privacy*, 124 YALE L.J.F. 332, 335–37 (2015).

⁵³⁰ The Court also could have taken a different doctrinal route and invalidated the law under the First Amendment or the Equal Protection Clause. The former ground would have relied on the Court's nascent freedom of association cases. See *NAACP v. Alabama*, 357 U.S. 449, 460–66 (1958); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* 245–46 (Univ. of Cal. Press 1998) (1994) (describing Justice Douglas's first draft of the *Griswold* decision, which would have decided the case on the basis of freedom of association). The latter might have relied on unfairness to the poor women served by *Griswold*'s clinic, along the lines suggested by John Hart Ely, Chief Justice Warren's law clerk on the case. See GARROW, *supra*, at 237.

⁵³¹ *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Black, J., dissenting); *id.* at 528–29 (Stewart, J., dissenting).

⁵³² See *Poe v. Ullman*, 367 U.S. 497, 541–45, 549–54 (1961) (Harlan, J., dissenting); *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment) (incorporating *Poe* dissent by reference).

the personal views of all nine.⁵³³ As Justice Harlan emphasized in a related case, the Connecticut law was unusually obnoxious in outlawing the *use* of contraceptives as opposed to simply their distribution.⁵³⁴ Contraceptives were used, in some cases, to prevent life-threatening pregnancies,⁵³⁵ and so the law seemed at least problematic — and substantive due process therefore viable — as applied to those cases.⁵³⁶ The law was virtually unenforceable and was triggered in the case itself only because of Estelle Griswold's calculated effort to have herself arrested.⁵³⁷ A 1962 Gallup poll found that seventy-two percent of respondents, and fifty-six percent of Roman Catholics, favored birth control information being openly available.⁵³⁸ The *Griswold* case was an effect, not a cause, of the sexual revolution; it was scarcely imaginable, still less in retrospect, that the Warren Court would have upheld the law.

The second option, to conceive of the right at stake as simply an aspect of constitutionally protected liberty and balance it against the State's interest, rushed headlong into *Lochner*. Without creating an additional and sharply delineated category, the Court could distinguish *Lochner* only on its facts. But having the Court distinguish valid from invalid statutes solely on the facts was itself the discredited *Lochner* approach. Viewing *Lochner* and *Griswold* through a proportionality lens could have illuminated a distinction that, familiar as the cases are, the received wisdom obscures. The conventional narrative of *Lochner* is that no rights were at issue. There is no right to contract, and so, following Justice Holmes, the legislature should be free to pursue its interests, themselves uninteresting to the Constitution or the Court. But the Bakeshop Act might better be understood as creating a *conflict* of rights. Bakers had not merely an *interest in* but a *right to* safe, healthy working conditions, a right protected through legislation rather than juridification. Bakery owners and dissenting bakers also had rights to contract that entitled them to the attention of a constitutional court. The Court's job was to sort out whether the statute was justified in light

⁵³³ See *Griswold*, 381 U.S. at 485–86 (majority opinion); *id.* at 497 (Goldberg, J., concurring); *id.* at 500 (Harlan, J., concurring in the judgment); *id.* at 506–07 (White, J., concurring in the judgment); *id.* at 507 (Black, J., dissenting); *id.* at 527 (Stewart, J., dissenting).

⁵³⁴ *Poe*, 367 U.S. at 554 (Harlan, J., dissenting).

⁵³⁵ This was the set-up of *Poe v. Ullman*, 367 U.S. 497. See Oral Argument at 1:25:21, *Poe*, 367 U.S. 497 (No. 60), <https://www.oyez.org/cases/1960/60> [<https://perma.cc/MTD4-5KV6>] (Justice Stewart: “[I]t’s like permitting a doctor to tell a patient that he has appendicitis, if he doesn’t have it removed, he’s going to die, but — but they’re not allowing . . . any surgeon to remove the appendix, isn’t it?”).

⁵³⁶ See GARROW, *supra* note 530, at 176 (quoting a memo from Richard Arnold, Justice Brennan’s law clerk, arguing that the possibility of “physical harm and possible death” meant the law could not be applied to medically indicated birth control).

⁵³⁷ See *id.* at 201–07.

⁵³⁸ *Id.* at 216.

of those contractual rights, a task to which the rights dimensions of the law should have been relevant but weren't.⁵³⁹ It is far more difficult to conceive of the Connecticut birth control law as sounding in rights, and that should matter to a reviewing court.

The influence of legal process thinking likely helped doom this kind of approach in *Griswold*. Legal process emphasizes acoustic separation between the roles of judges and of legislatures. As Ely once put it, legal process scholars share the “starting assumption that those who would justify judicial invalidation of legislation must do so on the basis of some characteristic that courts possess in greater measure than ordinary political officials.”⁵⁴⁰ Embedded within legal process theory is a view of the Court's role that is continuous with the fundamentally private law vision of judicial review handed down from Chief Justice Marshall in *Marbury*.⁵⁴¹ On this view, judges are on firmest ground when they are interpreting legal documents using modes of analysis that transparently limit their discretion. Modern, stepwise proportionality analysis is not necessarily inconsistent with legal process and indeed shares its emphasis on case-by-case adjudication, but the open-ended balancing of Justice Harlan's *Poe v. Ullman*⁵⁴² dissent was less than edifying.⁵⁴³ Indeed, as a law clerk to Chief Justice Warren the Term *Griswold* was decided, Ely told his boss that “Harlan's opinion in *Poe* boils down to a statement that he does not like the Conn[ecticut] law. This vague, ‘outrage’ approach to the 14th Amendment comprises, in my opinion, the most dangerous sort of ‘activism.’”⁵⁴⁴

The third option available to the *Griswold* Court — to create a new category for heightened scrutiny around the fundamental right to privacy — ultimately commanded a Court.⁵⁴⁵ The difference between an approach that exalted the right to privacy as a distinct category and one that, like Justice Harlan's *Poe* dissent, saw it as simply one aspect of liberty, was not merely rhetorical. Those made anxious by the flowering of rights in the 1960s could find more comfort in a categorical approach that appeared to exclude downstream consequences considered troublesome.

⁵³⁹ It would also have been relevant to a proportionality analysis whether the law was indeed motivated, as Professor David Bernstein has suggested, by a wish to harm the economic interests of immigrant bakers rather than a (non-exclusive) desire to protect the working conditions of bakers. See DAVID E. BERNSTEIN, REHABILITATING *LOCHNER* 26, 33 (2011).

⁵⁴⁰ John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 834 n.4 (1991).

⁵⁴¹ See Greene, *supra* note 265, at 48–49.

⁵⁴² 367 U.S. 497 (1961).

⁵⁴³ See ELY, *supra* note 47, at 60–61.

⁵⁴⁴ GARROW, *supra* note 530, at 237 (alteration in original) (quoting Ely's bench memo to Chief Justice Warren in *Griswold*).

⁵⁴⁵ *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965); *id.* at 486–87 (Goldberg, J., concurring).

Consider, for example, Chief Justice Warren, who was uneasy with *Griswold* from the start of the case and indeed before, when it came to the Court in the guise of *Poe*.⁵⁴⁶ He confided in Ely after oral argument, and later told his colleagues at conference, that he could not “say the state has no legitimate interest” (as Justice White would argue in his separate concurrence⁵⁴⁷) because it would “lead me to trouble on abortions.”⁵⁴⁸ He also could not “balance the interest of the state against that of the individual,” nor could he “use the substantive due process approach,” nor did he “believe the equal protection argument [was] sound,” nor did he “accept the privacy argument.”⁵⁴⁹ After initially joining Justice White’s opinion⁵⁵⁰ — which he thought would be difficult to reconcile with abortion restrictions — he ultimately joined Justice Goldberg’s concurrence to give Justice Douglas a majority.⁵⁵¹

Griswold’s sprint away from *Lochner*’s methodology complicated the constitutional law that would follow. Abortion is the most conspicuous area in which it might matter whether a right to privacy is itself fundamental or is instead an application of less well-defined liberty interests. To speak of abortion as a private matter begs the question, for many abortion rights opponents see it as filicide. The law sometimes regards the killing of others as justified or excused, as for example in war, in self-defense, or in defense of others; U.S. law also generally grants laypersons a right to allow others to die even if we were uniquely situated to save their lives.⁵⁵² We can therefore speak of one’s liberty to abort a fetus without violating the conditions of public reason.⁵⁵³ It is more difficult to hold such a conversation in the language of privacy, for one side simply rejects the premise. As noted, the privacy rights frame led Justice Blackmun to the otherwise unnecessary provocation that fetuses were not constitutional persons.

Abortion is the leading example but not the only one. As social understandings of rights broadened in the 1960s and 1970s, the Court faced

⁵⁴⁶ Chief Justice Warren began the conference by saying the Court could not invalidate the Connecticut law on its face because it would mean a return to the abandoned substantive due process of the *Lochner* era. GARROW, *supra* note 530, at 181.

⁵⁴⁷ *Griswold*, 381 U.S. at 505–06 (White, J., concurring in the judgment).

⁵⁴⁸ GARROW, *supra* note 530, at 240.

⁵⁴⁹ *Id.* at 240–41.

⁵⁵⁰ *See id.* at 251–52.

⁵⁵¹ Justice Goldberg’s opinion stated that it joined Justice Douglas’s opinion. *Griswold*, 381 U.S. at 486–87 (Goldberg, J., concurring).

⁵⁵² *See* MODEL PENAL CODE §§ 3.04, 3.05 (AM. LAW INST. 1985); Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1452 (2008).

⁵⁵³ *See* JOHN RAWLS, POLITICAL LIBERALISM 212–13, 217 (1993); *see also* John Finnis, *Commensuration and Public Reason*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 215 (Ruth Chang ed., 1997).

recurrences of the choices discussed above: rejection of the right outright, balancing, or trying to work within modular categories. And rather than feel empowered to confront a world of heretofore audacious claims to gender equality, social welfare, equal public education, “reverse” racial discrimination, disparate impact, vote dilution, and intimate freedom for sexual minorities with care and attention to context, the Court repeatedly has rested on *ex ante* categories.

Thus, in *Rodriguez*, the Court considered not whether an important entitlement was being arbitrarily rationed but whether, as an interpretive matter, “there is a right to education explicitly or implicitly guaranteed by the Constitution.”⁵⁵⁴ In *Bowers v. Hardwick*,⁵⁵⁵ upholding Georgia’s anti-sodomy law,⁵⁵⁶ and *Washington v. Glucksberg*,⁵⁵⁷ upholding the State’s ban on assisted suicide,⁵⁵⁸ the majority, concurring, and dissenting opinions fought incommensurably about the appropriate level of generality at which to assess a right’s connection to U.S. traditions rather than arguing commensurably about the State’s justifications for obvious limits on autonomy.⁵⁵⁹ Affirmative action opinions try to cram an obvious remedial measure aimed at a genuine social problem into the ill-fitting, stylized box of strict scrutiny. The dissents cry bad faith,⁵⁶⁰ and they have a point.

Nor is the rights-as-trumps response simply the epiphenomenon for the ascendancy of conservative judicial politics. Justice Black, the *ne plus ultra* of judicial absolutists, was politically liberal. In *Keyes v. School District No. 1*,⁵⁶¹ the Denver school desegregation case, it was the conservative Justice Powell who pushed for an approach more akin to proportionality while Justice Brennan and Justice Marshall, fearing the pathology of separate but equal, embraced the formalistic distinction between *de jure* and *de facto* segregation.⁵⁶² We can assume that, to the degree the courts are becoming more conservative, any methodology is going to be used to reach more conservative results on the margins. It follows that any effort to resist that methodology will be accused of seeking more progressive outcomes — some readers no doubt will level

⁵⁵⁴ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1973) (emphasis added).

⁵⁵⁵ 478 U.S. 186 (1986).

⁵⁵⁶ *Id.* at 189.

⁵⁵⁷ 521 U.S. 702 (1997).

⁵⁵⁸ *Id.* at 705–06.

⁵⁵⁹ Compare *Bowers*, 478 U.S. at 192–93, and *Glucksberg*, 521 U.S. at 722–28 (defining the contested right narrowly), with *Bowers*, 478 U.S. at 217–18 (Stevens, J., dissenting), and *Glucksberg*, 521 U.S. at 773–82 (Souter, J., concurring in the judgment) (defining the relevant right more expansively).

⁵⁶⁰ See *Fisher II*, 136 S. Ct. 2198, 2216 (2016) (Alito, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 366 (2003) (Thomas, J., concurring in part and dissenting in part).

⁵⁶¹ 413 U.S. 189 (1973).

⁵⁶² See *id.* at 213–14; *id.* at 224–26 (Powell, J., concurring in part and dissenting in part); *supra* pp. 51–52.

the same charge at this Foreword. But categorical adjudication is not inherently conservative, nor is proportionality inherently progressive. Either can be used to help or hurt the government, with whatever valence doing so entails.

And so it is not quite right to reject global approaches solely based on the politics of the U.S. judiciary. But it is instructive to note that proportionality in its modern form did not develop until the 1960s and 1970s. Indeed, most constitutional courts did not develop their rights jurisprudence until that era or later. The German Constitutional Court was established in 1951, and that Court's initial foray into proportionality dates to the 1958 *Pharmacy Case*.⁵⁶³ Throughout the 1970s the German Court, Swiss courts, and the European Court of Justice were the only courts with well-developed doctrinal proportionality frameworks.⁵⁶⁴ The adoption of judicially recognized proportionality analysis in the European Court of Human Rights in the late 1970s and early 1980s served as a catalyst for other Council of Europe jurisdictions.⁵⁶⁵ Canada's Supreme Court did not have constitutional jurisdiction in most rights cases until 1982,⁵⁶⁶ and *Oakes* came down in 1986.⁵⁶⁷ Israel had no enforceable "constitutional" rights until *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*⁵⁶⁸ was handed down in 1995.⁵⁶⁹ Most Latin American and African courts that engage in constitutional rights review have done so for not much longer.⁵⁷⁰ While the general idea of proportionality as justified government has roots in nineteenth-century German administrative law,⁵⁷¹ proportionality doctrine as a technology of constitutional review is no older than the rights revolution itself.

Unlike the U.S. Supreme Court, constitutional courts in other countries were created with complex public law disputes at the forefront of

⁵⁶³ 7 BVERFGE 377 (Ger); see also KOMMERS & MILLER, *supra* note 217, at 670.

⁵⁶⁴ See Stone Sweet & Mathews, *supra* note 236, at 103 n.79, 148.

⁵⁶⁵ *Id.* at 148.

⁵⁶⁶ The Constitution Act of 1982 declares the Canadian Constitution to be the supreme law. Part VII of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 (U.K.). The Charter is part of the Constitution Act. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11 § 2 (U.K.).

⁵⁶⁷ [1986] 1 S.C.R. 103 (Can.).

⁵⁶⁸ CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* 49(4) PD 221 (1995) (Isr.).

⁵⁶⁹ *Id.* Israel does not have a written constitution, but the *United Mizrahi Bank* case enabled judicial review of ordinary statutes for conformity with certain of the country's Basic Laws. See *id.* at 5.

⁵⁷⁰ See Joseph M. Isanga, *African Judicial Review, the Use of Comparative African Jurisprudence, and the Judicialization of Politics*, 49 GEO. WASH. INT'L L. REV. 749, 751 (2017); Rodrigo Uprimny, *The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges*, 89 TEX. L. REV. 1587, 1601 (2011).

⁵⁷¹ COHEN-ELIYA & PORAT, *supra* note 28, at 24–32; Stone Sweet & Mathews, *supra* note 236, at 97.

their jurisdiction,⁵⁷² with relative transparency about the range of claims sounding in rights that litigants might advance.⁵⁷³ The U.S. Supreme Court had a nearly 200-year-old well of inertia, with the baggage of the *Lochner* era slowing its march toward modern adjudication. The Second World War, moreover, had been predicated on a genuine crisis in rights recognition. European constitutional and human rights courts built from the ashes of that conflict were likely better primed to match their rights jurisprudence to the lived experience of litigants. Proportionality's promise is that few claims are wholly beneath constitutional concern, a message that the German Court and others have explicitly, indeed solemnly, endorsed.⁵⁷⁴ Americans took a very different lesson from the war, one that reinforced beliefs about the exceptional strength of American institutions.⁵⁷⁵ All of which is not to say that the categorical approach is determined but rather that change will require a shift, so to speak, in attitude.

B. Rights at the Founding

Rights as trumps is not an American birthright. It is fair to say that the U.S. political culture tends to be more classically liberal-minded than many of its counterparts around the world. But that orientation bears less responsibility for the rights-as-trumps ideology than we might suppose. At a minimum, it is difficult to locate the ideology in the U.S. Founding-era history. There is plenty of evidence that citizens of the Founding generation would see modern Canada as more closely approximating their vision of rights recognition and enforcement than the United States. That proposition is at best an incomplete argument against rights as trumps on the merits, but it tends to refute the view that the ideology of rights absolutism is an inheritance from Madison or is otherwise baked into the Constitution.

Originalists have stressed the many ways in which the Warren and Burger Courts departed from Founding-era expectations about the substance of constitutional rights.⁵⁷⁶ They have been less vocal about the

⁵⁷² See STONE SWEET, *supra* note 459, at 37–38.

⁵⁷³ *Id.* at 40–41, 42–43.

⁵⁷⁴ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 25, 1975, 39 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1, <http://www.servat.unibe.ch/dfr/bvo39001.html> [<https://perma.cc/FZV5-8PH5>] (Ger.), translated in Robert E. Jonas & John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 605 (1976).

⁵⁷⁵ See Jed Rubenfeld, Commentary, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1985–86 (2004).

⁵⁷⁶ See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 338–39 (1977); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 69–74, 101, 169–70 (1990).

ways in which those Courts also departed from Founding-era expectations about how rights disputes would be resolved. There is now a decades-long debate over the degree to which the lawyers of that age were themselves originalist or would have expected constitutional interpretation to be originalist as well.⁵⁷⁷ This focus reflects the U.S. fixation on rights adjudication as an interpretive exercise. The literature is by comparison razor thin on the crucial questions of what Founding-era lawyers would have thought infringement of a right entailed and how it should be remedied. And yet the symbiosis between rights absolutism and rights definition that section III.E.3 observed in Justice Black's position runs in both directions: what the Founders thought citizens had a right to do is intelligible only if we know what they thought followed from that right.

Two crucial differences between rights understandings of that era and our own confound this historical inquiry. First, modern Americans associate rights reflexively with adjudication, whereas citizens of the Founding generation associated them with political representation. Second, and relatedly, the rights recognized in the modern Constitution typically apply against all levels of government, whereas the Bill of Rights was primarily a federalism measure designed to protect state representative institutions — juries most prominently — from federal encroachment. No constructive discussion of rights at the Founding can ignore either of those factors.

I. Rights as Representation. — The American colonists were British subjects who inherited British understandings of rights. The central feature of British constitutionalism was parliamentary sovereignty, what Professor Jack Rakove calls “the single most profound consequence of the Glorious Revolution.”⁵⁷⁸ Within the British tradition, rights were secured through representation in the legislature and on juries, not through judicial review of legislation, which would have put subjects' rights in the hands of the King's judges.⁵⁷⁹ The 1689 Declaration of Rights was accordingly directed at the Crown, *on behalf of* rather than in opposition to the legislature.⁵⁸⁰

⁵⁷⁷ Compare H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 915–23 (1985) (arguing that the framers did not believe “original intent,” as the term is currently used, was an appropriate interpretive tool), with John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 758–80 (2009) (arguing that the Constitution should be interpreted using the interpretive tools used by the Founders).

⁵⁷⁸ JACK N. RAKOVE, *DECLARING RIGHTS* 33 (1998).

⁵⁷⁹ *Id.*

⁵⁸⁰ An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights) 1689, 1 W. & M. (Eng.), reprinted in RAKOVE, *supra* note 578, at 41, 41–45; see also GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 272 (1969).

The colonists broke from that tradition, of course, but not cleanly. The Declaration of Independence famously announces the “self-evident” truths of the “unalienable” rights to “Life, Liberty and the pursuit of Happiness,” but it crucially adds “[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”⁵⁸¹ Eight of the eleven states that drafted new constitutions in the early years of independence included declarations or bills of rights.⁵⁸² But like in the Declaration of Independence, the liberties asserted were inseparable from the representative institutions meant to enforce them. As Gordon Wood writes of the state constitutions, “the American legislatures in the seventies and eighties . . . acted as the principal interpreters of the fundamental laws they sat under.”⁵⁸³

As foxes guarding henhouses will, state legislatures frequently succumbed to the temptation to act with functional impunity, and their susceptibility to overreaching and factional capture was a significant motivation behind the Philadelphia Convention.⁵⁸⁴ The U.S. constitutional response to legislative abuses of power was not, however, judicial review, but rather checks and balances.⁵⁸⁵ “Judges were historically regarded not as independent arbiters of justice but as agents (even lackeys) of the executive branch,” Rakove writes. To imagine a special judicial role in enforcing a bill of rights “thus anticipated the new enlarged role that this third branch of government would now come to play. It was in fact a prediction of the course that American constitutionalism would take, not a description of its initial status.”⁵⁸⁶

The historical relationship between legislatures and bills of rights puts into perspective James Madison’s well-known description of bills of rights as “parchment barriers.”⁵⁸⁷ Madison did not believe that a bill of rights had much to say to “interested majorities,” who would always act to promote those interests.⁵⁸⁸ Indeed, although he believed that judges would play a role in enforcing the Bill of Rights against the federal government,⁵⁸⁹ part of Madison’s defense of the view that a national

⁵⁸¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also Jud Campbell, *Republicanism and Natural Rights at the Founding*, 32 CONST. COMMENT. 85, 97–98 (2017) (book review) (explaining that a *representative* government could still pass laws implicating “unalienable” rights per a theory of social contract).

⁵⁸² RAKOVE, *supra* note 578, at 36.

⁵⁸³ WOOD, *supra* note 580, at 274.

⁵⁸⁴ See James Madison, Vices of the Political System of the United States (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON 345, 353–57 (Robert A. Rutland et al. eds., 1975).

⁵⁸⁵ See THE FEDERALIST NO. 10 (James Madison).

⁵⁸⁶ RAKOVE, *supra* note 578, at 164.

⁵⁸⁷ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 295, 297–300 (Robert A. Rutland et al. eds., 1975).

⁵⁸⁸ *Id.*

⁵⁸⁹ James Madison, Amendments to the Constitution (June 8, 1789), in 12 THE PAPERS OF JAMES MADISON 196, 206–07 (Charles F. Hobson et al. eds., 1979) (“If they are incorporated into

Bill of Rights might be enforceable in a way that state declarations were not was that state legislatures, as “sure guardians of the people’s liberty,” would hold the national government’s feet to the fire.⁵⁹⁰

In coming around to the utility of the Bill of Rights, Madison put forward two central rationales. First, articulating the aspirational values of the people helps them to internalize those values over time.⁵⁹¹ Second, when in unusual cases the government oppression emerges *independent of* the majority will, “a bill of rights will be a good ground for an appeal to the sense of the community.”⁵⁹² For Madison, what separated a popular government from a monarchy was that in the former, “the political and physical power . . . [are] vested in the same hands, that is in a majority of the people.”⁵⁹³ The structural checks Madison envisioned would make it difficult for oppressive majorities to control too many levers of government, but he viewed the Bill of Rights as — if anything — congenial to rather than an obstacle to the majority community.

It is crucial, of course, to distinguish the majority as represented in legislatures from the administration. As noted, the sense that rights were good as against the King was a crucial inheritance of the Glorious Revolution. But the mode of representation that would best resist the Executive was less the legislature than the jury, which the Founding generation saw as an essential vehicle for articulating the rights of the community.⁵⁹⁴ “In these two powers consist wholly, the liberty and security of the people,” John Adams wrote of voting for the legislature and of trial by jury. “They have no other fortification against wanton, cruel power: no other indemnification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds: No other defence against fines, imprisonments, whipping posts, gibbets, bastenadoes and racks.”⁵⁹⁵

Adams was writing in 1766, against the Stamp Act, but the view of juries as bound up crucially with rights recognition and enforcement motivated the Bill of Rights.⁵⁹⁶ In criticizing the 1787 Constitution, the

the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights . . .”).

⁵⁹⁰ *Id.* at 207.

⁵⁹¹ Letter from James Madison to Thomas Jefferson, *supra* note 587, at 297.

⁵⁹² *Id.*

⁵⁹³ *Id.*

⁵⁹⁴ See JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 48–52 (1986); Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 528 (1970) (“As a bearer of majority sentiments, the jury served as a powerful and effective vehicle for preventing governmental repression of majority views.”).

⁵⁹⁵ John Adams, *The Earl of Clarendon to William Pym*, BOS. GAZETTE & COUNTRY J., Jan. 27, 1766, reprinted in RAKOVE, *supra* note 578, at 55, 60.

⁵⁹⁶ See AKHIL REED AMAR, THE BILL OF RIGHTS 83–84 (1998).

influential antifederalist Federal Farmer called the jury trial and legislative representation “the wisest and most fit means of protecting [the people] in the community.”⁵⁹⁷ Jurors were drawn from that very community and had vast powers of investigation, via the grand jury, and adjudication, via the petit jury.⁵⁹⁸ As Professor Akhil Reed Amar emphasizes, jury service was commonly viewed as analogous to service in the legislature itself.⁵⁹⁹

2. *Rights as Federalism.* — Viewing the Bill of Rights through an eighteenth-century lens illuminates its focus on institutional form. A remarkable number of its amendments seek to preserve the role of the jury and other local representative institutions in federal administration.⁶⁰⁰

There is the obvious language of the Fifth Amendment grand jury requirement,⁶⁰¹ the Sixth Amendment criminal jury trial guarantee and its accompanying vicinage command,⁶⁰² and the Seventh Amendment right to a civil jury and preservation of that jury’s factfinding.⁶⁰³ But consider as well that the First Amendment was initially understood primarily as a restriction on prior restraints.⁶⁰⁴ Prior restraints were more problematic than speech infringements enforced through ex post liability because licensing fell within the purview of executive rather than judicial processes, and so the jury was cut out of determining the underlying validity of the regulation.⁶⁰⁵ The Second Amendment protected militias — another form of local rights enforcement⁶⁰⁶ — from disarmament at the hands of the federal government.⁶⁰⁷ The Fourth Amendment’s reference to “unreasonable” searches and seizures put a classic jury question at the heart of its protections and erected an obstacle — a warrant requirement and the probable cause standard — to searches justified ex ante before judges.⁶⁰⁸ The Fifth Amendment protected the petit jury’s judgment via the Double Jeopardy Clause.⁶⁰⁹ The Eighth Amendment aimed to restrict federal judges who might depart from community sentencing standards.⁶¹⁰

⁵⁹⁷ Letters from the Federal Farmer, Letter IV (Oct. 12, 1787), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 245, 250 (Herbert J. Storing ed., 1981).

⁵⁹⁸ AMAR, *supra* note 596, at 85.

⁵⁹⁹ *See id.* at 94–96.

⁶⁰⁰ *See id.* at 96.

⁶⁰¹ *See* U.S. CONST. amend. V.

⁶⁰² *See id.* amend. VI.

⁶⁰³ *See id.* amend. VII.

⁶⁰⁴ *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 168–70 (1985).

⁶⁰⁵ *See* AMAR, *supra* note 596, at 23–24.

⁶⁰⁶ *See id.* at 46–59.

⁶⁰⁷ *See* U.S. CONST. amend. II.

⁶⁰⁸ *See* Amar, *supra* note 38, at 759; *see also* U.S. CONST. amend. IV.

⁶⁰⁹ *See* AMAR, *supra* note 596, at 96; *see also* U.S. CONST. amend. V.

⁶¹⁰ *See* AMAR, *supra* note 596, at 87; *see also* U.S. CONST. amend. VIII.

Amar makes the important observation that the origin of the Bill of Rights in federalism — in the rights of local communities against external or minority usurpation — complicates the incorporation story.⁶¹¹ Collective rights to local self-governance do not seamlessly translate into individual interests in avoiding oppression from that same self-governance. Confusion over the best way to understand the Second Amendment is most emblematic of this complication, but it applies more broadly.⁶¹² Amar’s solution is to choose whether and how to incorporate based on which elements of a right were best understood in the 1860s in private rather than federalism-related terms.⁶¹³ Whether or not one accepts Amar’s “refined incorporation,”⁶¹⁴ the relevant point for our purposes is his recognition that this inquiry must be contextual.⁶¹⁵

The federalism core of the Bill of Rights might affect not only the degree to which one believes a right incorporated but also how to adjudicate the right when it arises. It made some sense to say, with Madison, that “absolute restrictions [on rights] in cases that are doubtful . . . ought to be avoided” when, as Madison maintained, any such restrictions could not overcome “the decided sense of the public” in whose name they speak.⁶¹⁶ It might make less sense when, as Dworkin argued, the overriding purpose of identifying a right is to prevent that “decided sense” from interfering with it. This Foreword has accordingly emphasized that how a constitutional community adjudicates rights should follow not from any mysticism about the particular rights at stake or about rights in general but rather from the paradigmatic forms of mischief the community wishes to confront. A well-intentioned but shortsighted majority, a minority that has captured policy levers, a local majority outlying from a hierarchically superior majority, and a tyrannical national majority acting in bad faith all require different forms of intervention when they infringe rights.

Madison’s reference to “doubtful” cases gestures further at the important distinction between core violations of a right and more marginal ones. U.S. courts sometimes draw this distinction and sometimes do not,⁶¹⁷ with little or no attention paid to the criteria that should motivate

⁶¹¹ See AMAR, *supra* note 596, at 215–16; see also Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 984–85 (2012).

⁶¹² See AMAR, *supra* note 596, 216–18.

⁶¹³ See *id.* at 221.

⁶¹⁴ *Id.* at 218.

⁶¹⁵ See *id.* at 222.

⁶¹⁶ Letter from James Madison to Thomas Jefferson, *supra* note 587, at 297.

⁶¹⁷ Compare, e.g., *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (“[T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.”), with *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.”).

it or that have motivated it in the past. Proportionality analysis necessarily differentiates between big and small rights violations, a sensitivity that seems precisely appropriate to the Due Process Clause, the doctrinal avenue U.S. courts use to apply the Bill of Rights and other substantive rights against state governments. The word “due” invites a decisionmaker to calibrate the degree of judicial intervention to the egregiousness, all things considered, of the government’s interference with liberty.⁶¹⁸

These pages are not the place for a comprehensive history of rights enforcement in the United States. Before leaving this topic, however, it is well to point out the affinities between Founding-era rights understandings and those characteristic of the proto-proportionality of the *Lochner* era. For both Madison and Justice Peckham, the great threat to liberty was not intentional oppression of discrete and insular minorities but rather factionalism: interested majorities acting for the benefit of a motivated and resourced minority rather than for the greater good.⁶¹⁹ Nineteenth-century state court decisions repeatedly interpreted their own state constitutions to prohibit factional legislation,⁶²⁰ not because the particular rights at issue were sacrosanct or absolute but because interference with liberty should be for good reasons. For state laws, both before and after the Fourteenth Amendment, the primary issue for U.S. courts was not authority but justification.

C. On Facts and Remedies

This Part has emphasized the contingencies that have led the U.S. culture of rights adjudication to adopt a rights-as-trumps ideology rather than proportionality. The many ways in which elements of proportionality creep into U.S. law, often *sub rosa*, suggest that shifting to proportionality across the board would be less disruptive than it might seem. Still, two stubborn tendencies of U.S. courts bear mention as lingering obstacles that frustrate proportionality analysis and the reasoning behind it. First, U.S. courts do not have reliable mechanisms for adjudicating empirical disputes over the facts on which effective proportionality analysis depends. Second, U.S. courts tend to disfavor the kind of

⁶¹⁸ See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162–63 (1951) (Frankfurter, J., concurring) (“Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, ‘due process’ is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess.”).

⁶¹⁹ See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 20, 32 (1993).

⁶²⁰ See *id.* at 49–60; see also, e.g., *Franklin Bank v. Cooper*, 39 Me. 542 (1855); *Portland Bank v. Apthorp*, 12 Mass. (12 Tyng) 252 (1815); *Wally’s Heirs v. Kennedy*, 10 Tenn. (2 Yer.) 554 (1831); *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260 (1829).

remedial discretion that goes hand in hand with treating cases contextually. This section discusses each in brief, incorporating by reference more elaborate comments I have offered elsewhere.⁶²¹

I. Facts. — U.S. courts possess few resources independent of the parties to gather and evaluate facts.⁶²² The kinds of facts relevant to constitutional disputes on a proportionality model are those going to the government's motivation for a law or practice, the state of the world to which the government purports to be responding, the availability of alternative means of achieving its ends that are less costly in rights terms, the law's policy benefits, and the marginal burden on the rights claimant and those similarly situated. These are what Professor Kenneth Culp Davis identified as "legislative" facts,⁶²³ those facts that "help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take."⁶²⁴ Legislative facts are to be distinguished from adjudicative facts, those "concerning the immediate parties — who did what, where, when, how, and with what motive or intent" — that are typically adduced via documentary evidence and witness testimony.⁶²⁵

When a constitutional decision turns on legislative facts, as proportionality urges, those facts become "constitutional facts."⁶²⁶ Because they determine the law's content and not just its application, constitutional facts are appropriately subject to *de novo* rather than deferential review by appellate courts.⁶²⁷ The problems with *de novo* appellate review of facts in the U.S. system are many, and they become worse at the Supreme Court. The Court relies on party presentation at the trial court level to develop the record on appeal. When it wishes to supplement the record — as it does routinely — the Court relies on biased amici whose claims have not typically been subject to adversarial testing,⁶²⁸ or else it conducts its own research, say at the Mayo Clinic⁶²⁹ or on the World Wide Web.⁶³⁰ A case ripe for certiorari often has multiple district court records, developed by parties of varying degrees of sophis-

⁶²¹ See generally Greene, *supra* note 265.

⁶²² See Frederick Schauer, *Our Informationally Disabled Courts*, DAEDALUS, Summer 2014, at 105, 111.

⁶²³ Legislative facts are sometimes called "social facts." Borgmann, *supra* note 265, at 1187.

⁶²⁴ Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

⁶²⁵ *Id.*

⁶²⁶ See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 230–31 (1985).

⁶²⁷ *Id.* at 238–39.

⁶²⁸ Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1800–02 (2014).

⁶²⁹ See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 82–83 (2005).

⁶³⁰ See William R. Wilkerson, *The Emergence of Internet Citations in U.S. Supreme Court Opinions*, 27 JUST. SYS. J. 323, 325 (2006).

tication. The Federal Rules of Civil Procedure impose significant constraints on third-party intervention,⁶³¹ and the Court itself imposes strict limits on third-party standing that might permit more knowledgeable organizations or individuals to help prosecute or defend a case.⁶³² By contrast, courts born of civil law traditions often rely on an inquisitorial model that can enable a constitutional court to supplement the record through independent inquiry.⁶³³

It may be that this objection proves too much. The Court's wanting approach to legislative facts, though understudied, is pervasive.⁶³⁴ It lingers as a limitation whether the Court adopts proportionality wholesale or, as now, adopts ad hoc variants or avoids it altogether. To the degree the Court is unbothered by its current approach to legislative facts, it might be equally unbothered under proportionality, even if a few pedants in the academy insist it should be more attentive. That said, taking this challenge seriously would prompt a reconsideration of rules of intervention and standing, perhaps a loosening of oral argument procedures to permit parties or amici to present and respond to evidence, the increased use of special masters,⁶³⁵ or perhaps even the creation and use of a judicial research service akin to the one that assists Congress in developing its own factual record.⁶³⁶

2. *Remedies.* — In the 2016 case of *Zubik v. Burwell*,⁶³⁷ a group of primarily nonprofit organizations sued for religious exemptions from federal requirements, implementing the Affordable Care Act, that they provide their employees with health insurance plans that covered certain contraceptives.⁶³⁸ The nonprofits argued that, even though they could exempt themselves from the requirement by noting their religious objections on a form submitted to their insurer or to the government, signing the form would result in their employees receiving coverage and

⁶³¹ See FED. R. CIV. P. 24 (generally limiting intervention to those holding a claim that shares “a common question of law or fact”).

⁶³² See, e.g., *Kowalski v. Tesmer*, 543 U.S. 125, 127 (2004) (holding that a group of attorneys suing on behalf of indigent potential clients lacked standing); *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (per curiam) (holding that a physician did not have standing to challenge the constitutionality of a state statute that did not affect his Fourteenth Amendment rights, but rather his patients’).

⁶³³ See *Hughes & MacDonnell*, *supra* note 265, at 40–41 (describing how the German Constitutional Court may use its investigatory powers).

⁶³⁴ See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1, 43–50 (2011); Borgmann, *supra* note 265, at 1186–89.

⁶³⁵ See generally FED. R. CIV. P. 53 (outlining the existing rules regarding the appointment and authority of masters).

⁶³⁶ See Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 15–17 (1986); Gorod, *supra* note 634, at 73.

⁶³⁷ 136 S. Ct. 1557 (2016) (per curiam).

⁶³⁸ *Id.* at 1559.

was therefore a religious burden sufficient to trigger the protections of the Religious Freedom Restoration Act.⁶³⁹

Rather than award victory to either side in the conflict, the Court instead acted as a mediator. It requested supplemental briefing on whether the government could accommodate the organizations.⁶⁴⁰ Satisfied that the briefing clarified the parties' amenability to such a solution, the Court remanded to the lower courts to give the parties a chance "to arrive at an approach going forward that accommodates petitioners' religious exercise while at the same time ensuring that women covered by petitioners' health plans 'receive full and equal health coverage, including contraceptive coverage.'"⁶⁴¹ This unusual disposition owes almost certainly to Justice Scalia's death a few weeks before oral argument. Rather than split 4-4, which seemed reasonably likely at the time, the Court punted instead.

Bracketing whether this disposition was appropriate in *Zubik* itself, the Court could do with more dispositions that offer the parties an opportunity to respond to the Court's direction or concerns. Thus, the Court could make use of what is sometimes called a "suspension of invalidity," a common disposition around the world that gives a period of time for the government to apply its own fix to a constitutional infirmity before judicial invalidation of an act.⁶⁴² The Court itself deployed a remedy of this sort in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*⁶⁴³ After holding that the scope of jurisdiction Congress had granted to bankruptcy courts violated Article III,⁶⁴⁴ the Court suspended its judgment for several months to give Congress a chance to reconstitute the bankruptcy courts without disrupting ongoing proceedings.⁶⁴⁵ There, a suspension of invalidity was deemed appropriate because of fear of administrative disorder, but there is good reason for courts also to suspend invalidity out of deference to the ordinary priority of political decisionmaking and respect for a complex regulatory scheme that may be unconstitutional but not invidious.⁶⁴⁶ A remedy of that sort

⁶³⁹ *Id.*; see also *Geneva Coll. v. Sec'y of U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 427 (3d Cir. 2015).

⁶⁴⁰ *Zubik*, 136 S. Ct. at 1559-60.

⁶⁴¹ *Id.* at 1560 (quoting Supplemental Brief for the Respondents at 1, *Zubik*, 136 S. Ct. 1557 (No. 14-1418)).

⁶⁴² See Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 43-58 (2016) (discussing the Constitutional Court of South Africa's and Supreme Court of Canada's discretion to suspend a declaration of invalidity in order to allow executive or legislative intervention).

⁶⁴³ 458 U.S. 50 (1982).

⁶⁴⁴ *Id.* at 87 (plurality opinion).

⁶⁴⁵ *Id.* at 88.

⁶⁴⁶ The Court in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), cast doubt on the constitutionality of purely prospective civil remedies in constitutional cases. *Id.* at 94-99. The Court potentially could implement suspensions of invalidity by withholding its mandate as needed.

might have been apt, for example, in *Shelby County v. Holder*,⁶⁴⁷ when the Court gutted the preclearance provisions of the Voting Rights Act without giving Congress a chance to respond to its opinion with the Act still in place by, for example, creating a new preclearance formula prior to the abolition of the old one.⁶⁴⁸ Or in *Parents Involved in Community Schools v. Seattle School District No. 1*, rather than striking down Seattle's voluntary school integration plan, the Court could have requested a letter brief proposing a solution to the only constitutional problem the controlling opinion identified: a too-blunt taxonomy of racial groups.⁶⁴⁹

The respect for the legislature's work and the epistemic modesty implicit in a suspension of invalidity fits proportionality's governing assumption that, in the usual case, a constitutional rights problem results from reasonable disagreement about the scope of rights rather than from bad faith or from willful denial of equal citizenship. The legislature has not just an interest in but a right to address social problems in the first instance, a right that it should not relinquish simply because five judges think it got things wrong. On the flip side, proportionality in the absence of remedial flexibility tends to replicate, and even exacerbate, one of the pathologies of rights absolutism. When rights are trumps, constitutional validity can turn on a contested interpretive judgment that flattens a rich set of empirical questions and normative judgments into a dull heuristic. Proportionality analysis is more sensitive to the complexity of the merits, but ending the analysis with a binary remedy can place more weight on the Court's answer to the question than is appropriate to the sensitivity of the inquiry. Facts can change, even the constitutional sort, and lawmaking can be difficult. Courts should not in the usual case invalidate a law while legislative remedial options remain on the table.

V. FORWARD

It is time at last for brass tacks. Where do we go from here? The previous Part sought to emphasize that we need not go as far as the shock of a case like the Pigeon-Feeding Case might suggest.⁶⁵⁰ Lower court judges are bound by the Supreme Court's doctrinal frames, but the Court itself is not. Individual Justices have rejected the rights-as-trumps ideology,⁶⁵¹ and the Court already abandons its rule-like doc-

⁶⁴⁷ 570 U.S. 529 (2013).

⁶⁴⁸ *Id.* at 556–57.

⁶⁴⁹ 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment).

⁶⁵⁰ *See supra* pp. 56–58.

⁶⁵¹ *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 730–31 (2012) (Breyer, J., concurring in the judgment); *Craig v. Boren*, 429 U.S. 190, 211–12 (1976) (Stevens, J., concurring) (“There is only one

trines selectively, including in *Carpenter v. United States*, discussed below.⁶⁵² The Court could justify a transition to proportionality as a means of providing needed coherence to what already occurs in disjointed, ad hoc, and unreflective ways.

Rejecting a rights-as-trumps ideology can affect real cases, three instances of which are highlighted below. In the first, *Masterpiece Cakeshop*, proportionality analysis might well have changed the case's framing, and the case would have been a meet candidate for the remedial flexibility just discussed. The second case, *Carpenter*, shows how categorical adjudication has bogged down Fourth Amendment doctrine and led courts consistently to ask the wrong set of questions — about what constitutes a search, instead of about what makes a search unreasonable. Finally, the Court's partisan gerrymandering cases illuminate the distortion rights as trumps produces: confronted with an actual pathology, the Court has retreated to a discourse of manageability that is better suited to its standard constitutional docket.

A. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*

Masterpiece Cakeshop is a misguided case from soup to cake. First, the soup: the case was a flawed candidate for certiorari as it was framed. Reconciling antidiscrimination law with religious freedom raises important constitutional and legal questions, but this case was a poor vehicle for addressing those questions. As noted, the parties agreed that, as a general matter, an artistic baker has a First Amendment free speech right to choose the messages he squirts onto his cakes and also that a baker in Colorado cannot refuse or modify service to people based on their sexual orientation.⁶⁵³ They disagreed about whether the baker's refusal to bake a cake for the couple's wedding (but willingness to provide other services) constituted protected freedom of speech or unprotected sexual orientation discrimination.⁶⁵⁴ The record in the case showed no epidemic of same-sex couples being refused artisanal cakes from bakers willing to provide an off-the-rack alternative.⁶⁵⁵ The dignitary injury to the couple and the psychological trauma of the baker were, by hypothesis, genuine and important, but the case offered, at best, error correction that the Colorado Court of Appeals could have handled just fine.

Equal Protection Clause. It requires every State to govern impartially. It does not direct the courts to apply one standard of review in some cases and a different standard in other cases.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98–103 (1973) (Marshall, J., dissenting).

⁶⁵² See *infra* section V.B, pp. 124–27.

⁶⁵³ See *supra* p. 31.

⁶⁵⁴ See Transcript of Oral Argument, *supra* note 7, at 4, 79.

⁶⁵⁵ The Court itself noted the insufficiency of the record, observing that the parties “disagree as to the extent of the baker's refusal to provide service.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018).

Of course, there was a reason Phillips grounded his right of refusal primarily in freedom of speech rather than freedom of religion, and it speaks to the merits. Phillips refused to bake the cake for Craig and Mullins not because he was an artist but because he was a Christian.⁶⁵⁶ A freedom of religion frame would have set the issues in the terms in which the litigants actually experienced them, but would have run into a doctrinal hurdle. Under *Employment Division v. Smith*, a religious objector has no First Amendment claim against a neutral law of general applicability, such as the Colorado public accommodations law.⁶⁵⁷ As section II.A.1 notes, Justice Scalia’s reason for so holding was precisely the fear of a slippery slope to “anarchy” that this Foreword has criticized courts for invoking.⁶⁵⁸ Prior to *Smith*, the Court was sensitive to the notion that religious objections to laws that did not target religion could not always win out, even if they had to be taken seriously.⁶⁵⁹ After *Smith*, religious objectors instead frame their arguments in the comparatively absolutist discourse of free speech and various federal and state religious freedom restoration acts.⁶⁶⁰ *Smith* does much mischief and should be overruled.

Indeed, Justice Kennedy’s narrow opinion for the Court in *Masterpiece Cakeshop* was born of the analytic distortion *Smith* produces. The conflict here called, above all, for sensitivity. As Justice Kennedy emphasized, Phillips’s religious objection to what he viewed, reasonably, as participation in a same-sex wedding was sincere and deeply held.⁶⁶¹ The State of Colorado’s commitment to nondiscrimination in public accommodations was equally sincere, deeply held, and legally significant.⁶⁶² But a free speech decision could not accommodate the sensitivity the case demanded. Either Phillips had no free speech claim — and therefore no claim at all, given *Smith* — or he had to win. And if Phillips had to win, then — given the doctrine’s insensitivity to content — so too did your average bigot. Whoever was destined to win in *Masterpiece Cakeshop*, the majority wanted to make both parties’ constitutional claims visible in a way that a free speech opinion lacked the resources to accomplish.

⁶⁵⁶ *Id.* at 1724.

⁶⁵⁷ 494 U.S. 872, 890 (1990); COLO. REV. STAT. § 24-34-601(2) (2017).

⁶⁵⁸ See *supra* section II.A.1, pp. 43–47.

⁶⁵⁹ See, e.g., *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 447–53 (1988); *Braunfeld v. Brown*, 366 U.S. 599, 605–09 (1961) (plurality opinion).

⁶⁶⁰ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760–61 (2014); *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 562–66 (Wash. 2017), *vacated and remanded for reconsideration in light of Masterpiece Cakeshop*, 138 S. Ct. 2671 (2018) (mem.); Christopher C. Lund, *RFRA, State RFRA, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 165–71 (2016).

⁶⁶¹ *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

⁶⁶² *Id.* at 1724–25 (reciting Colorado’s history of antidiscrimination laws).

The Court found itself an exit ramp. Seizing on evidence that some commissioners held Phillips's religious views against him, the Court held that the Colorado Civil Rights Commission's decision to hold him liable was not neutral after all.⁶⁶³ By deflecting the legal error away from either the Colorado legislature or Phillips and toward the stray comments of commissioners, Justice Kennedy was able to write an opinion that deftly kept aloft both religious freedom and gay rights. The dodge worked in this case, but it won't work for long. At the time it decided *Masterpiece Cakeshop*, the Court had before it the cert petition in *Arlene's Flowers, Inc. v. Washington*,⁶⁶⁴ an analogous case in which a florist is defending her refusal to produce a bouquet for a same-sex wedding in both speech and religion terms.⁶⁶⁵ The Court must confront *Smith* or face the same dilemma it deflected in *Masterpiece Cakeshop*.

Proportionality would better enable a court to recognize that *Masterpiece Cakeshop* did not involve simply a right pressed against a government interest, but in fact involved a conflict of rights. The Colorado public accommodations law deserves the double respect of being a duly passed state law and also being one that means to honor the state's constitutional obligation to respect the rights of its gay, lesbian, and bisexual citizens. A rights claimant should bear a heavy burden of persuasion in seeking to invalidate a law passed, in good faith, under those circumstances.⁶⁶⁶ A binary, rights-as-trumps frame obscures the state's interest in Craig's and Mullins's *rights*.⁶⁶⁷

Courts facing similar issues under the European Convention on Human Rights have felt liberated to recognize the multidimensional nature of the rights at issue. Most recently, in a series of cases on appeal to the Supreme Court of the United Kingdom as *Lee v. McArthur*,⁶⁶⁸ courts in Northern Ireland had to determine whether the Convention's protections for freedom of expression and religion gave Christian bakers the right to refuse to bake a non-wedding cake that had a message of

⁶⁶³ *Id.* at 1729–31.

⁶⁶⁴ *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, *cert. granted*, 138 S. Ct. 2671.

⁶⁶⁵ *Id.* at 549–51. The Court vacated the state court decision in *Arlene's Flowers* for reconsideration in light of *Masterpiece Cakeshop*. *Arlene's Flowers*, 138 S. Ct. 2671.

⁶⁶⁶ It follows that the presence of a state RFRA would also be a relevant fact in addressing a religious freedom claim brought by a claimant or defendant who discriminates on the basis of religion, though due attention would need to be paid in those circumstances to the demands of the Establishment Clause. *See City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring).

⁶⁶⁷ In holding that the Commission had violated Phillips's religious freedom, the Court relied on instances in which the Commission had found no liability for bakers who, for secular reasons, had refused to write antigay messages on cakes. *Masterpiece Cakeshop*, 138 S. Ct. at 1730. While the state should not take religious objections to a customer's request less seriously than secular ones — if anything, it should do the opposite — the presence of a state statute protecting against antigay discrimination makes the cases importantly different.

⁶⁶⁸ [2016] NICA 39 (appeal taken from N. Ir.).

support for same-sex marriage.⁶⁶⁹ Both the County Court and the Court of Appeal held for the customer, but both courts acknowledged and engaged with the claims on both sides.⁶⁷⁰ The bakers' freedom of religion was indeed implicated, those courts held, but because the relevant accommodations regulations had been passed to implement a competing obligation to protect against sexual orientation discrimination, courts owed deference to the legislature in conducting proportionality analysis.⁶⁷¹

In an earlier case, *Ladele v. London Borough of Islington*,⁶⁷² Lillian Ladele, an employee of the local registrar of births, deaths, and marriages, refused to certify civil partnerships, newly available under a 2004 statute, on the basis of her Christian religious beliefs.⁶⁷³ Following a disciplinary hearing regarding her refusal, the Registrar General gave Ladele the option of signing paperwork for, but not conducting, such ceremonies, but she refused.⁶⁷⁴ Ladele eventually resigned and brought suit claiming religious discrimination in violation of the Convention.⁶⁷⁵ The case reached the European Court of Human Rights, which held against her but not before accepting its obligation to “consider whether the [Registrar’s] policy pursued a legitimate aim and was proportionate.”⁶⁷⁶ The Registrar’s “indirect” religious discrimination against Ladele, which would not be cognizable in the United States under *Smith*, was not dispositive of her claim — indeed, she lost — but the Strasbourg Court was sensitive to it.

Ladele foregrounds an issue that should have been but was not a subject of discussion in *Masterpiece Cakeshop*: the remedy. The sloppy hypotheticals the categorical frame encouraged the *Masterpiece Cakeshop* Court to entertain obscured the path to a less coercive, less binary resolution of the conflict. The substantial agreement between the parties about the nature of each other’s rights naturally suggested a

⁶⁶⁹ *Id.* [5]–[6]; see also Convention for the Protection of Human Rights and Fundamental Freedoms arts. 9–10, Nov. 4, 1950, 213 U.N.T.S. 221, 230. The case is currently pending before the Supreme Court of the United Kingdom. Mark Simpson, “Gay Cake”: Ashers Bakery Case Heard at Supreme Court, BBC NEWS (May 1, 2018), <https://www.bbc.com/news/uk-northern-ireland-43955734> [https://perma.cc/R9T-6CTS].

⁶⁷⁰ *Lee v. McArthur* [2016] NICA 39, [61]–[67], [105]; *Lee v. Ashers Baking Co.* [2015] NICTy 2, [77]–[99].

⁶⁷¹ *Lee v. McArthur* [2016] NICA 39, [70]; *Lee v. Ashers Baking Co.* [2015] NICTy 2, [88]–[91]. I bracket whether the courts were correct in construing the bakers’ refusal in this case as constituting discrimination on the basis of sexual orientation and therefore triggering that section of the applicable antidiscrimination regulations.

⁶⁷² [2009] EWCA (Civ) 1357 (Eng.), *aff’d sub nom.* *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 215.

⁶⁷³ *Eweida*, 2013-I Eur. Ct. H.R. at 229–32 (describing Ladele’s case). *Eweida* combined Ladele’s case with three others at the European Court of Human Rights. *Id.* at 223.

⁶⁷⁴ *Id.* at 231.

⁶⁷⁵ *Id.*; *Ladele*, [2009] EWCA (Civ) 1357, [5].

⁶⁷⁶ *Eweida*, 2013-I Eur. Ct. H.R. at 260.

mediated outcome, which neither the litigants nor the Court seemed to consider. If the problem really was that a baker in Colorado has an obligation to serve customers without regard to their sexual orientation, but that for religious reasons Phillips could not personally bake the couple's cake, then the Court could have (perhaps after mediation) required Phillips to provide a customized cake to the couple that he was not personally obligated to bake.⁶⁷⁷

B. *Carpenter v. United States*

The *Carpenter* case is the latest in a string of Fourth Amendment conflicts implicated by the panoptic technologies of the digital age.⁶⁷⁸ Timothy Carpenter was a suspect in a series of armed robberies.⁶⁷⁹ At trial, the government introduced cell-tower data identifying the locations from which Carpenter's mobile phone placed and received calls over a four-month period that included the robberies at issue.⁶⁸⁰ The government had not obtained a search warrant for the call records, but the trial court denied Carpenter's suppression motion.⁶⁸¹

The Fourth Amendment reads in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ." ⁶⁸² The question in *Carpenter* was not, however, whether it was unreasonable for the police to have searched call records for Carpenter's mobile phone under the circumstances of the investigation. The question, rather, was whether examining those records constituted a search at all.⁶⁸³

⁶⁷⁷ Both France and the United Kingdom have relied, through legislation, on somewhat analogous requirements for healthcare providers raising conscience objections to performing abortions. See Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 187, 210 (Susanna Mancini & Michel Rosenfeld eds., 2018); The National Health Service (General Medical Services Contracts) Regulations 2004, SI 2004/291, art. 16, ¶ 3(2)(e) (Eng.) (requiring "prompt referral to another provider of primary medical services who does not have such conscientious objections"); Loi 75-17 du 17 janvier 1975 relative à l'interruption volontaire de la grossesse [Law 75-17 of January 17, 1975 Regarding the Voluntary Interruption of Pregnancy], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 18, 1975, p. 739, arts. L 162-3, L 162-8 (requiring objectors to supply names and addresses of alternative providers).

⁶⁷⁸ See *Riley v. California*, 134 S. Ct. 2473, 2484–85 (2014) (holding that police generally may not search digital contents of a cell phone seized at arrest); *Maryland v. King*, 569 U.S. 435, 465–66 (2013) (holding that police may generally take DNA swabs at arrest); *United States v. Jones*, 565 U.S. 400, 404–05 (2012) (holding that attaching a GPS device to a suspect's vehicle constitutes a search).

⁶⁷⁹ *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018).

⁶⁸⁰ *Id.*

⁶⁸¹ *Id.*

⁶⁸² U.S. CONST. amend. IV.

⁶⁸³ *Carpenter*, 138 S. Ct. at 2216–17.

That question might sound to lay ears as if the questioner is not an advanced English speaker, but before the Court's decision in his favor, Fourth Amendment doctrine supplied some reason for skepticism about Carpenter's argument. A simple hypothetical tells us why. Suppose Carpenter had contemporaneously told a friend where he was at the time of each robbery, and the police had put the friend on the witness stand. A Fourth Amendment suppression motion would appear frivolous under the circumstances. Here, Carpenter gave his mobile carrier his locational data, and the carrier, like the hypothetical friend, then supplied it to police.⁶⁸⁴ As Justice Kennedy wrote (in dissent) of earlier cases involving documents in the hands of third parties: "The defendants had no reason to believe the records were owned or controlled by them and so could not assert a reasonable expectation of privacy in the records."⁶⁸⁵

Still, it is at least counterintuitive to suppose that the Constitution imposes *no* obligation — not even of reasonableness — on the behavior of police in this circumstance. Most Americans carry cell phones and do not expect in doing so to have consented to unconstrained warrantless surveillance by the police. Chief Justice Roberts noted for the majority "the seismic shifts in digital technology" that allow long-term tracking of everyone's location.⁶⁸⁶ As Chief Justice Roberts wrote, "Sprint Corporation and its competitors are not your typical witnesses. Unlike the nosy neighbor who keeps an eye on comings and goings, they are ever alert, and their memory is nearly infallible."⁶⁸⁷

By now the reader has spotted the telltale distortions of rights as trumps: two opposite positions, both somehow obviously correct, producing the standard bilateral rancor that a paradox of this sort reliably generates. The Fourth Amendment states a standard — reasonableness — but it is policed by rules that flatten the inquiry.⁶⁸⁸ Fourth Amendment doctrine draws a line between searches, which generally require probable cause and a warrant or else exclusion from trial, and nonsearches, which are generally free from constitutional constraint.⁶⁸⁹ As Professor Anthony Amsterdam wrote nearly forty-five years ago,

⁶⁸⁴ *Id.* at 2212.

⁶⁸⁵ *Id.* at 2228 (Kennedy, J., dissenting).

⁶⁸⁶ *Id.* at 2219 (majority opinion).

⁶⁸⁷ *Id.*

⁶⁸⁸ See *United States v. U.S. Dist. Court*, 407 U.S. 297, 315 (1972) ("[T]he definition of 'reasonableness' turns, at least in part, on the more specific commands of the [Fourth Amendment's] warrant clause.").

⁶⁸⁹ *Carpenter*, 138 S. Ct. at 2221. *But see* *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (rejecting the idea that "the Fourth Amendment does not come into play" in cases that stop short of a "full-blown search").

“this kind of all-or-nothing approach to the amendment puts extraordinary strains upon the process of drawing its outer boundary lines.”⁶⁹⁰

Since the consequence of labeling a warrantless intrusion a “search” is loss of the acquired evidence and its fruits,⁶⁹¹ courts are understandably reluctant to expand this category without introducing a patchwork of ad hoc exceptions.⁶⁹² “It would obviously be easier and more likely for a court to say that a patrolman’s shining of a flashlight into the interior of a parked car was a ‘search,’” Amsterdam writes, “if that conclusion did not encumber the flashlight with a warrant requirement but simply required, for example, that the patrolman ‘be able to point to specific and articulable facts’ supporting a reasonable inference that something in the car required his attention.”⁶⁹³ This Term, in fact, in *Collins v. Virginia*,⁶⁹⁴ the Court invalidated a warrantless search of a motorcycle parked in a driveway that would have been nothing but good policing had the motorcycle been parked on the sidewalk in front of the house.⁶⁹⁵ Justice Alito, the lone dissenter, remarked that “[a]n ordinary person of common sense would react to the Court’s decision the way Mr. Bumble famously responded when told about a legal rule that did not comport with the reality of everyday life. If that is the law, he exclaimed, ‘the law is a ass — a idiot.’”⁶⁹⁶ He’s not wrong.

The third-party doctrine is likewise the sequela of a Fourth Amendment categoricalism that made *Carpenter* a difficult case. The doctrine provides that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”⁶⁹⁷ The Court has applied the doctrine, for example, to financial records given to banks,⁶⁹⁸ to a pen register placed by a telephone company to record the numbers a customer has dialed,⁶⁹⁹ and more generally, to observations of an individual’s public movements, including from the air.⁷⁰⁰ *Qua* rule, the third-party doctrine appears to be unique to the United

⁶⁹⁰ Amsterdam, *supra* note 39, at 388.

⁶⁹¹ See *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961); *Nardone v. United States*, 308 U.S. 338, 340–41 (1939).

⁶⁹² See Amar, *supra* note 38, at 757 (“Warrants are not required — unless they are. All searches and seizures must be grounded in probable cause — but not on Tuesdays.”); Amsterdam, *supra* note 39, at 349 (“For clarity and consistency, the law of the fourth amendment is not the Supreme Court’s most successful product.”).

⁶⁹³ Amsterdam, *supra* note 39, at 393 (quoting *Terry*, 392 U.S. at 21).

⁶⁹⁴ 138 S. Ct. 1663 (2018).

⁶⁹⁵ *Id.* at 1668; see also *id.* at 1680–81 (Alito, J., dissenting).

⁶⁹⁶ *Id.* at 1681 (quoting CHARLES DICKENS, *OLIVER TWIST* 277 (1867)).

⁶⁹⁷ *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

⁶⁹⁸ See *United States v. Miller*, 425 U.S. 435, 443 (1976).

⁶⁹⁹ *Smith*, 442 U.S. at 744.

⁷⁰⁰ See *United States v. Knotts*, 460 U.S. 276, 281–82 (1983); *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986).

States.⁷⁰¹ Not just that, but some jurisdictions have specifically and intentionally distanced themselves from U.S. case law in this area.⁷⁰²

Fourth Amendment doctrine has become a jurisprudence of warrants instead of reasonableness. There plainly are instances in which we want, and reasonably should want, police to effect searches or seizures without a warrant, and so the approach has been to set off an endless series of exceptions for exigencies, border searches, consent, *Terry*⁷⁰³ stops, and so on.⁷⁰⁴ These exceptions are arbitrary, and they produce safe harbors that do not always match our intuitions, as in *Carpenter*. We want the police to conduct certain kinds of warrantless searches sometimes but not always. Proportionality jurisdictions tend to engage these weighty questions directly rather than load them onto a definitional frame that cannot bear their weight.

There are areas of law in which a hard-edged rule is appropriate.⁷⁰⁵ Maybe the cost of legal uncertainty is too high to bear. Maybe we do not trust contextual judgment calls made by officers, judges, or jurors within certain contexts such as criminal justice. The Fourth Amendment might be an area in which rules are necessary. But in light of rapidly evolving surveillance technology, that judgment should be made with our eyes open to the relative costs and benefits. Rights as trumps builds walls that obstruct our gaze.

C. The Gerrymandering Cases

Partisan gerrymandering cases reflect the wages of crying wolf.⁷⁰⁶ A core theme of this Foreword has been that a constitutional court's frame for rights adjudication should fit its paradigm rights cases. The rights-as-trumps frame might well suit a rights regime whose paradigm cases

⁷⁰¹ See Ira S. Rubinstein et al., *Systematic Government Access to Private-Sector Data: A Comparative Analysis*, in BULK COLLECTION: SYSTEMATIC GOVERNMENT ACCESS TO PRIVATE-SECTOR DATA 5, 28–29 (Fred H. Cate & James X. Dempsey eds., 2017) (“The United States is more or less unique in affording no constitutional protection to third-party data . . .”).

⁷⁰² See, e.g., *Dist. Registrar & Collector v. Canara Bank*, (2005) 1 SCC 496, 519–23 (India); COMM’R FOR HUMAN RIGHTS OF THE COUNCIL OF EUR., THE RULE OF LAW ON THE INTERNET AND IN THE WIDER DIGITAL WORLD § 4.4.3 at 91–92 (2014); Ruth Levush, *Online Privacy Law: Israel*, LAW.GOV (June 2012), <https://www.loc.gov/law/help/online-privacy-law/2012/israel.php> [<https://perma.cc/7W9B-5QRD>] (translating the Israeli Attorney General’s 2007 Directives Regarding Transfer of Information from Telephone Companies to Bodies with Investigation Authority).

⁷⁰³ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁷⁰⁴ See Amar, *supra* note 38, at 762–70.

⁷⁰⁵ See Jackson, *supra* note 114, at 3168 (suggesting that the Fifth Amendment Takings Clause and the First Amendment’s protections of freedom of speech and association are less suited to proportionality analysis).

⁷⁰⁶ Cf. John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

are pathological, where courts must defend the very existence of individual rights against government bigotry, intolerance, or corruption. When, instead, the paradigm cases arise from the potential overreach or clumsiness of a government acting in good faith to solve actual social problems, rights adjudication must be sensitive to a democratic people's first-order right to govern itself.

For years, the constitutional discourse around partisan gerrymandering has gotten it just backward. This Term, the Court heard gerrymandering cases arising out of Maryland and Wisconsin, ultimately deferring any merits decision in both on procedural grounds.⁷⁰⁷ In Maryland, Democratic Governor Martin O'Malley testified at trial that it was "clearly [his] intent" to help Democrats win, and another Democrat said one of the districts was redrawn to "minimize the voice of the Republicans."⁷⁰⁸ The firm the Democrats hired to draw the district map was instructed only to devise one that "would produce a 7 to 1 congressional delegation" and would protect "the six incumbent Democrats."⁷⁰⁹ Evidence in the Wisconsin case likewise revealed a process designed "to secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade, in other words to entrench the Republican Party in power."⁷¹⁰

A political party that constructs district lines intentionally to maintain its own partisan advantage is simply corrupt. Its behavior falls squarely, almost comically, into the second paragraph of *Carolene Products* footnote four: "[L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."⁷¹¹ A legislature that deliberately tries to wall itself off from democratic change through the manipulation of district lines should forfeit that power, at least temporarily. Courts that find racial gerrymandering or racial vote dilution routinely order that district lines be drawn by special masters.⁷¹² Such an order would be strong medicine in a partisan gerrymandering case, but willful constitutional violations call for strong remedies.

⁷⁰⁷ *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (holding that the balance of equities and the public interest tilted against plaintiff's request for a preliminary injunction); *Gill v. Whitford*, 138 S. Ct. 1916, 1923 (2018) (holding that plaintiffs failed to prove standing).

⁷⁰⁸ *Benisek v. Lamone*, 266 F. Supp. 3d 799, 817 (D. Md. 2017) (Niemeyer, J., dissenting), *aff'd*, 138 S. Ct. 1942.

⁷⁰⁹ *Id.*

⁷¹⁰ *Whitford v. Gill*, 218 F. Supp. 3d 837, 896 (W.D. Wis. 2016), *vacated and remanded*, 138 S. Ct. 1916; see also Richard Pildes, *The Brazenness of Partisan Intent in the Court's Gerrymandering Cases*, ELECTION L. BLOG (May 15, 2018, 9:44 AM), <https://electionlawblog.org/?p=99065> [<https://perma.cc/U5HC-6BDH>] (referring to "bald evidence of partisan intent to manipulate the map" in Wisconsin).

⁷¹¹ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

⁷¹² Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131, 1148 (2005).

Legalized partisan gerrymandering is unheard of in other mature democracies.⁷¹³ That's not because of happy pluralism; it's because we're wrong. As all nine Justices affirmed in *Vieth v. Jubelirer*,⁷¹⁴ the last partisan gerrymandering case to reach the Court before this Term, the practice is plainly undemocratic.⁷¹⁵ The concerns expressed in *Vieth* and at oral argument in *Gill v. Whitford*⁷¹⁶ (the Wisconsin case) and *Benisek v. Lamone*⁷¹⁷ (the Maryland case) relate to the "manageability" of judicial intervention.⁷¹⁸ Because all redistricting involves political choices, including the appropriate basis for political representation, it can be difficult for a court to say with confidence when a state legislature has ventured too far. It should be clear by now that a court's refusal to address an egregious rights violation based on concerns about hypothetical cases not before the court is just the kind of distortion that rights as trumps produces and that motivates this Foreword.

But the problem runs deeper here because transparent partisan gerrymandering actually serves an illicit purpose. Proportionality analysis would encourage the Court to be less concerned with articulating the boundaries of the right and more concerned with a purpose that aligns, negatively, with most Americans' sense of political morality. Manageability has less of a role to play when the government is acting in bad faith. The Court's obvious avoidance strategy in *Gill* and *Benisek* is propelled by concerns that do not match the nature of the government's behavior. The Court's decision in *Trump v. Hawaii*,⁷¹⁹ in which it upheld the President's entry restrictions on nationals from certain predominantly Muslim countries, likewise leaned on the need for political deference — authority over justification — without sufficient attention to transparent religious bigotry on the part of the Executive.⁷²⁰ Rights as trumps is born of what Professor Judith Shklar calls the "liberalism of fear,"⁷²¹ but it can quickly lose its resolve on contact with the real world.

Fear of manageability should, by contrast, be a crucial consideration when rights adjudication obstructs the efforts of the political branches to address genuine social problems. It should have been a major concern in cases such as *Citizens United*, *Parents Involved*, and *Shelby*

⁷¹³ See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 789–90 (2013).

⁷¹⁴ 541 U.S. 267 (2004).

⁷¹⁵ *Id.* at 292 (plurality opinion).

⁷¹⁶ 138 S. Ct. 1916 (2018).

⁷¹⁷ 138 S. Ct. 1942 (2018).

⁷¹⁸ See *Vieth*, 541 U.S. at 281 (plurality opinion) ("[N]o judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged").

⁷¹⁹ 138 S. Ct. 2392 (2018).

⁷²⁰ See *id.* at 2435–40 (Sotomayor, J., dissenting).

⁷²¹ See SHKLAR, *supra* note 453, at 237.

County.⁷²² The absence of a discourse of manageability from those cases reflects the Court's misplaced view that what triggers the need for aggressive remediation is the identity of the right invoked rather than the egregiousness of the government's actual behavior. The ongoing search for First Amendment language with which to state the objection to gerrymandering reflects this orientation.⁷²³

The Court's approach to reapportionment further exacerbates the problem. There, the Court has applied exacting scrutiny to any departure from mathematical equality in congressional districting and to population differences of at least ten percent in state legislative districting.⁷²⁴ Treating one person, one vote as a trump has made it a problematic comparator in other cases implicating the districting process.⁷²⁵ It has lulled the Court into associating review of political pathologies with administrable remedies rather than addressing the pathology itself.

An alternative approach to both gerrymandering and apportionment cases would be to pathologize intentional vote dilution in much the way the *Brown* Court pathologized racial segregation. No serious democratic concern inheres in districts failing to achieve precise mathematical equality. There are many potential bases for representation apart from individual persons,⁷²⁶ and the census is itself an approximation that deteriorates in quality over the course of a decade. Malapportionment and partisan gerrymandering become democratic problems, rather, when they serve purely partisan or self-interested ends.⁷²⁷ Districts that follow

⁷²² In *Shelby County*, the "rights" were those of states. 570 U.S. 529, 543–44 (2013).

⁷²³ *Vieth*, 541 U.S. at 314–16 (Kennedy, J., concurring in the judgment); *Gill v. Whitford*, 138 S. Ct. 1916, 1934, 1938–40 (2018) (Kagan, J., concurring).

⁷²⁴ *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring); *Karcher v. Daggett*, 462 U.S. 725, 730–31 (1983).

⁷²⁵ For example, in *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Court held that a claim of racial vote dilution required a showing of intentionality that could tidy the judicial inquiry. *See id.* at 66 (plurality opinion). Congress promptly responded by incorporating an "effects" test into section 2 of the Voting Rights Act. *See* Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301 (Supp. IV 2016)).

⁷²⁶ Indeed, single-member districting, which remains a federal requirement for U.S. House seats, *see* Act of June 25, 1842, ch. 47, 5 Stat. 491, implicitly disclaims individuals rather than communities as the most relevant democratic unit. *See generally* Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 209–14.

⁷²⁷ *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 673–74 (1998). Intentional partisan gerrymandering is indeed more objectionable than racial gerrymandering claims recognized under *Shaw v. Reno*, 509 U.S. 630 (1993). A *Shaw* claim arises any time race is the "predominant factor" in drawing a district line, *see* *Miller v. Johnson*, 515 U.S. 900, 916 (1995), but it does not require the use of race to be invidious. By contrast, intentional partisan gerrymandering is necessarily designed to harm others. *See* Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WM. & MARY L. REV. 1993, 2030–31 (2018). As Professor Justin Levitt notes, the appropriate race-based analogue is not *Shaw* but rather the egregious Jim Crow-era racial gerrymander invalidated in *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960). *See* Levitt, *supra*, at 2031.

traditional municipal boundaries but are (to a point) unequal in size should be much preferred to those that are motivated by partisan entrenchment but are precisely equal numerically.

The susceptibility of malapportionment to a trumping rule of the sort the Court has been grasping for just means that bad actors dilute votes by gerrymandering instead of by creating unequal districts. As in other areas, proportionality analysis would help to shift the Court's gaze away from the particular abstracted right at stake — whether grounded in the Equal Protection Clause, the First Amendment, or elsewhere — and toward the government's actual behavior and motivations. When a legislator or governor tells you he is trying to alter district lines in order to make it more difficult for his political opponents to win elections, there is no need for sociological gobbledygook.⁷²⁸ This wolf comes as a wolf.⁷²⁹

VI. CONCLUSION

Lenin had a point when (it is claimed) he said liberty is “so precious that it must be rationed.”⁷³⁰ Too many individual claims of liberty would “court anarchy,”⁷³¹ and so a functioning state must either restrict the number of such claims or limit what follows from them. This Foreword has argued that the latter course fits constitutional adjudication in a mature democracy whose citizens experience themselves as rights-bearers but who nonetheless must cohabit a working ecosystem. If rights are trumps, we had better be sure we get them right. But we can't be sure, and it is costly to pretend that we are.

We live in interesting times, beset with challenges, but they are different from those of our forebears. The core case is no longer to defend downtrodden groups from organized oppression by the state, even as much of that work remains.⁷³² Increasingly, as Madison foresaw, we are called upon to defend the state against permanent capture by self-interested factions. Having more or less resolved basic normative questions of political participation, we must now construct a politics to go with it.

When this chapter of the nation's history is written, what will be said of our constitutional law? The Constitution's endurance motivates

⁷²⁸ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); see generally ELY, *supra* note 47, at 77–88.

⁷²⁹ Cf. *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

⁷³⁰ 2 SIDNEY WEBB & BEATRICE WEBB, *SOVIET COMMUNISM: A NEW CIVILISATION?* 1036 (1936).

⁷³¹ See *supra* p. 45.

⁷³² See *Trump v. Hawaii*, 138 S. Ct. 2392, 2441–42 (2018) (Sotomayor, J., dissenting); Michael D. Shear et al., *Trump Retreats on Separating Families, but Thousands May Remain Apart*, N.Y. TIMES (June 20, 2018), <https://nyti.ms/2I7wWAA> [<https://perma.cc/84SQ-SLDDL>].

its resistance to new technologies of rights adjudication, but that endurance is itself underwritten by constitutional law's amenability to change. Our constitutional tradition has resisted calls to adhere to the past for its own sake. It has resisted calls for a stubborn parochialism that ignores the lessons of others around the world who face similar social, political, and legal challenges. The latest challenge is for us to see, hear, speak to, and live with one another, and courts must find their place in surmounting it. Judges are imperfect, but they are better suited than others to view rights conflicts from a distance, to investigate the truth, and to resolve such controversies respectfully, without fear or favor.⁷³³

Constitutional law may fail us yet, but it carries within its name an implicit, and poignant, promise to the people it serves. Now is the time for redemption.

⁷³³ See Dan M. Kahan et al., "Ideology" or "Situation Sense"? An Experimental Investigation of Motivated Reasoning and Professional Judgment, 164 U. PA. L. REV. 349, 410-12 (2016); Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1259 (2005) (finding that judges have difficulty ignoring inadmissible evidence but are able to do so in cases implicating constitutional rights).