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2018

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#### Recommended Citation

Jamal Greene, *A Private Law Court in a Public Law System*, 12 L. & ETHICS HUM. RTS. 37 (2018).

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Jamal Greene\*

# A Private Law Court in A Public Law System

<https://doi.org/10.1515/lehr-2018-0005>

**Abstract:** The U.S. Supreme Court’s approach to human rights is a global outlier. In conceiving of rights adjudication in categorical terms rather than embracing proportionality analysis, the Court limits its ability to make the kinds of qualitative judgments about rights application required to adjudicate claims of disparate impact, social and economic rights, and horizontal effects, among others. This approach, derivative of a private-law model of dispute resolution, sits in tension with the rights claims typical of a pluralistic jurisdiction with a mature rights culture, in which litigants more often disagree, reasonably, about the scope of rights rather than deny that others have them at all. In order to overcome the mismatch between the nature of the rights claims the Court faces and its anachronistic technology of adjudication, it will need not only to adopt a form of proportionality analysis but it will also need to adjust the ways in which it receives and assesses empirical social facts and it will need to broaden its remedial toolkit to include, for example, suspensions of invalidity. While proportionality is far from perfect, its flaws are anticipated by the challenges of constitutional democracy itself under conditions of pluralism.

**Keywords:** proportionality, rights, social facts, remedies, supreme court, constitutional court

## Introduction

It is at best premature, and at worst, simply wrong to speak of an emerging global consensus on the scope and content of rights. Even if we were to place on one side autocratic states, theocracies, and states with single-party rule or weak mechanisms of political accountability, the United States would remain as a rather large elephant in a rather small room. The United States Supreme Court does not recognize social and economic rights,<sup>1</sup> horizontal effects or positive

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<sup>1</sup> See *Dandridge v. Williams*, 397 U.S. 471 (1970); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

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state duties,<sup>2</sup> or group rights,<sup>3</sup> and in many instances, it rejects the very idea of context sensitivity in adjudicating disputes between conflicting rights holders or between rights and the public good.<sup>4</sup> To varying degrees, this posture places the Supreme Court out of step with the constitutional and apex courts of Europe and Canada, among others.

Many explanations have been offered for the Supreme Court's resistance to harmonizing its rights jurisprudence with that of other Western democracies. Perhaps the Court's putative devotion to "originalism," or at least the gravitational pull of constitutional history, hampers any effort to understand rights in progressive terms or to look to foreign courts for guidance.<sup>5</sup> Perhaps the failure of the U.S. Constitution to enumerate textually the power and scope of judicial review has led the Court constantly to question the legitimacy of its political interventions and therefore to resist a jurisprudence that requires it to conduct balancing as a matter of course.<sup>6</sup> Perhaps the institution of life tenure, a global anomaly, fosters a fatal disconnect between federal judges and contemporary problems and values.<sup>7</sup>

Without necessarily rejecting these explanations, this article explores three broad ways in which the Supreme Court's institutional practices imperil its entry into the global rights discourse. First, it is well-trodden ground in the comparative constitutional law literature that the Court is one of the few prominent apex or constitutional courts that lacks any trans-substantive commitment to proportionality analysis, preferring instead to understand rights in bespoke, categorical terms.<sup>8</sup> The Court's approach results from an historical path dependence rather than any considered judgment. While it is not necessary for the Court to adopt any particular version of proportionality analysis, the Supreme Court must soften its commitment to categorical adjudication—as it has already done, but *sub rosa* and ad hoc—if it is to engage transparently with modern rights conflicts.

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<sup>2</sup> See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

<sup>3</sup> See *Regents of the University of Calif. v. Bakke*, 438 U.S. 265 (1978).

<sup>4</sup> See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Snyder v. Phelps*, 562 U.S. 443 (2011).

<sup>5</sup> See Antonin Scalia, *Foreign Legal Authority in the Federal Courts, Keynote Address at the Ninety-Eighth Annual Meeting of the American Society of International Law*, 98 AM. SOC'Y INT'L L. PROC. 305 (2004).

<sup>6</sup> See Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3122–23 (2015).

<sup>7</sup> See Vicki C. Jackson, *Congressional Standing and the Institutional Framework of Article III: A Comparative Perspective*, 91 NOTRE DAME L. REV. 1783, 1800 (2016).

<sup>8</sup> See MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE (2013); Jackson, *supra* note 6.

Second, the Court was designed primarily to handle common law diversity suits between private litigants, and many of its procedures assume, implicitly, that these remain the Court's paradigm cases. But modern public law litigation is different in numerous respects. Most significantly, the Court's answers to the questions presented are of great interest not just to the litigants but to similarly situated individuals, public officials, lower courts, and concerned citizens throughout the country. Moreover, the answers political actors have offered to those questions reflect competing constitutional judgments rather than simply the pursuit of private interests. We also should not assume that in the mine run of constitutional rights controversies, the litigants who reach the court have better access to relevant information or greater incentive to develop the factual record than do various third parties. This assumption is particularly unlikely to hold in cases that turn on legislative or social rather than judicial or historical facts.<sup>9</sup>

Accordingly, if the Court is to remain in the business of public law adjudication, and to do so honestly, it must develop mechanisms for receiving factual information more effectively. These mechanisms might include relaxing or eliminating constraints on third-party standing; permitting third parties otherwise to intervene more fluidly at either the trial or appellate stages; openly altering the standard of review of trial court findings of legislative fact; lengthening the argument stage before the Supreme Court in order to permit more transparent evaluation of outside evidence; or appointing a special master or creating a judicial research service to conduct relevant empirical research.

Finally, the public law character of the Court's rights docket means that remedies that narrowly grant a single plaintiff's requested relief toggle between being wholly inadequate to vindicate the right at issue and creating serious problems of public administration. Concerns about the Court's remedial competence put negative pressure on the recognition of rights in the first instance.<sup>10</sup> The basic problem is that modern rights adjudication inevitably conflicts with legitimate acts of self-governance; the government's obligation to respect a positive right, for example, does not *ipso facto* entail that the government may not act in ways that prevent the right's full realization. Within such a regime, remedial orders must be sensitive both to the individual's right and to the polity's first-order entitlement to govern itself.

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<sup>9</sup> See Brianne J. Gorod, *The Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 DUKE L.J. 1 (2011).

<sup>10</sup> See Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999).

There are numerous ways of fashioning remedial orders to be more responsive to democratic concerns. At the broadest level, the literature has identified what has been alternatively called weak-form judicial review or, in Stephen Gardbaum's parlance, the "new commonwealth" model.<sup>11</sup> Models of this sort assign to the legislature a formal role in responding to the constitutional pronouncements of the apex or constitutional court. A more pragmatic alternative for the U.S. Supreme Court that requires no legislative or constitutional intervention would be to incorporate particular elements of the weak-form model or other instrumentalities of political dialogue into the Court's remedial toolkit. For example, the mechanism of suspending the invalidity of unconstitutional laws, used in the Canadian, German, and South African high courts (among others), is often a better fit for modern rights adjudication than the Supreme Court's typically all-or-nothing approach to case disposition. A more radical—and also more problematic—reform would be a limited abstract questions jurisprudence, which could prevent the need for drastic remedial orders in advance.

The U.S. Supreme Court cannot sensibly resolve modern rights conflicts without recognizing the deep sense in which it is, in practical terms, a constitutional court. Its procedures do not accord with the Kelsenian model: It is an apex court within a decentralized system, its jurisdiction is activated only by a litigant with standing to raise an actual case or controversy, and its pronouncements notionally bind the litigants alone. But the presence of these features does not prevent a sober assessment of broadly compatible institutional choices that are prevalent among the world's constitutional courts. This article is a call for reform.

A point of clarification is necessary before proceeding to the merits. This article is not, in its essence, a substantive defense of proportionality, inquisitorial adjudication, or remedial flexibility. The essential claim is not that proportionality is the best all-things-considered method for resolving conflicts over rights. That proposition would require a lengthier defense than this article attempts. Rather, the claim is that proportionality and its attendant additional institutional *fit* the rights environment of a mature constitutional democracy. It is in the nature of such a democracy that rights are respected in general terms but that their specification prompts reasonable disagreement. Proportionality's warts—and it has many—are but the warts of modern judicial review.

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<sup>11</sup> See Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003); STEPHEN GARDBAUM, *THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE* (2012).

## I A Life Cycle of Rights

The Court's canonical 1973 decision in *San Antonio Independent School District v. Rodriguez* well illustrates the problem.<sup>12</sup> Parents of students in the Edgewood Independent School District in San Antonio brought a class action lawsuit against various state officials challenging the state's system of financing public education. Because of Edgewood's relatively low property tax base, its primary and secondary public schools had a much lower level of per pupil expenditure than the schools in wealthier areas of San Antonio.<sup>13</sup> The plaintiffs brought a challenge under the Equal Protection Clause of the Fourteenth Amendment, alleging that wealth discrimination in this context was unconstitutional.

The Court rejected the challenge in a 5-to-4 decision. Understanding the Court's reasoning in the case requires some background on the categorical nature of U.S. rights jurisprudence, an orientation that was in relative infancy in 1973 but has since blossomed into blackletter U.S. constitutional law. The default standard of constitutional review for ordinary legislation, whether at the local, state, or federal level, is rational basis review. Under this deferential standard, a law is upheld by a reviewing court if it bears a rational relationship to a legitimate state purpose. A government act is removed from this default category only if the plaintiff can demonstrate that special conditions apply: either the plaintiff has been deprived of a fundamental right or the plaintiff has been subjected to discrimination based on a categorically protected ground, prominently including race, gender, or national origin. By design, these categories are modular and discrete rather than fluid and continuous.

The *Rodriguez* Court, adopting this categorical approach, atomistically divided its equal protection clause analysis into a series of steps. First, is the plaintiff part of a "suspect" class, i. e., one that is subject to discrimination along a protected ground? Writing for the majority, Justice Powell refused to place the plaintiffs into a category of indigent persons (which some of them likely were not) or relatively poor persons (which he rejected on evidentiary grounds), and he argued that categorizing them as residents of relatively poor school districts could not support the application of a heightened standard of review because it constituted a "large, diverse, and amorphous class."<sup>14</sup>

The other way Justice Powell believed the plaintiffs could escape rational basis review would be to argue successfully that they were deprived of a fundamental right. The Court refused to declare a right to education

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<sup>12</sup> 411 U.S. 1 (1973).

<sup>13</sup> See *id.*, at 11–14.

<sup>14</sup> *Id.*, at 28.

fundamental. The plaintiffs had argued that, much in the way a right to privacy was held to be fundamental 8 years earlier in *Griswold v. Connecticut* because of the nexus between privacy and various enumerated constitutional rights,<sup>15</sup> there was a strong connection between education and values of political participation that animate the First Amendment. Justice Powell worried openly about the slippery slope towards which that theory would lead the Court:

[T]he logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment.<sup>16</sup>

For the Court, individual, case-by-case assessments of the importance of particular interests affected by state action would “be assuming a legislative role, and one for which the Court lacks both authority and competence.”<sup>17</sup> The Court said further that, even assuming a fundamental right to some level of education, a heightened standard of review was inappropriate in the absence of a total deprivation.<sup>18</sup>

Finally, having precluded heightened scrutiny, the Court rejected the claim that Texas's school financing system was arbitrary and irrational, reasoning that it was one rational way to vindicate the State's legitimate interest in local control over public education.<sup>19</sup> Justice Powell again relied on a “slippery slope” argument, writing:

[I]f local taxation for local expenditures were an unconstitutional method of providing for education, then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions.<sup>20</sup>

The Court argued, in other words, that accepting the plaintiffs' claims would commit it to accepting other, hypothetical claims that would interfere with other domains of civil society.

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<sup>15</sup> 381 U.S. 479 (1965).

<sup>16</sup> 411 U.S. at 37.

<sup>17</sup> *Id.*, at 31.

<sup>18</sup> *See id.*, at 36–37.

<sup>19</sup> *See id.*, at 42.

<sup>20</sup> *Id.*, at 54.

The San Antonio case models the American style of rights adjudication in several ways. First, as noted, it is categorical. Justice Thurgood Marshall suggested in his *Rodriguez* dissent that the Court should jointly account for the relative importance of education and the relative arbitrariness of district wealth discrimination rather than require each ground for heightened scrutiny to clear an independent hurdle.<sup>21</sup> Justice Potter Stewart, concurring in *Rodriguez*, described this view, which would fit comfortably into much of the global rights discourse, as “imaginative.”<sup>22</sup> The notional analytic structure of American constitutional cases relies upon an ex ante assessment of whether the claimant belongs to a category of presumptive rights holders. That assessment motivates the ex post determination of whether the government has behaved appropriately.

Second, the American approach resists qualitative and factually sensitive inquiry. Twice in the course of his majority opinion, Justice Powell rejected specific claims in part on the ground that doing so would commit the Court to invalidating other governmental acts or omissions that he assumed were unobjectionable: in one instance, the failure to accommodate ill-fed or homeless people, and in another, the use of local taxation to finance public services such as police and fire protection. It is not productive to compare, in the abstract, a discriminatory educational financing scheme with discriminatory financing of other government services. Distinguishing these practices would require the Court to understand, with some granularity, how they function, what alternative approaches look like, and how they affect social welfare. Rather than reserve judgment unless and until it is called upon to evaluate these downstream hypothetical cases, the Court instead assumed away its ability to make complex qualitative assessments of broadly similar cases.

Third, and relatedly, the approach taken in *Rodriguez* seems to preclude any role for the Court in adjudicating cases involving social and economic rights. The tiers-of-scrutiny paradigm reflexively assigns such rights to the black hole of rational basis review, in effect on the ground that their recognition disables the society from engaging in workaday acts of self-governance. The Court’s hostility to positive rights owes a significant debt to the progressive response to accusations made in the 1960s that support for reproductive rights entailed a resurrection of the infamous case of *Lochner v. New York*.<sup>23</sup> Distinguishing reproductive rights from *Lochner* on the basis of privacy reinforced arguments that rights that materially affected others in concrete ways must succumb to legislative

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<sup>21</sup> *Id.*, at 109 (Marshall, J., dissenting).

<sup>22</sup> *Id.*, at 59 (Stewart, J., concurring).

<sup>23</sup> 198 U.S. 45 (1905).

prerogative. In emphasizing the importance of local governance to its resolution of the case, *Rodriguez* reflects those assumptions precisely.

The San Antonio schooling case is not, of course, the sole instance in which the Court has adopted a categorical approach to rights adjudication, abided aggressive slippery slope arguments, or assumed that qualitative inquiry exceeded its competence. The categorical approach remains blackletter law in equal protection and substantive due process cases, even as the claims of gay and lesbian plaintiffs and others have applied significant pressure to that model in specific instances.<sup>24</sup> Slippery slope concerns appear to have motivated the Court's reluctance to entertain "disparate impact"—known elsewhere as "indirect"—discrimination claims,<sup>25</sup> claims that race had infected capital punishment determinations,<sup>26</sup> and claims that particular prison terms were disproportionate and therefore "cruel and unusual" under the Eighth Amendment.<sup>27</sup> Fear of intrusion into democratic governance has led the Court categorically to reject the very notion of positive constitutional duties, notwithstanding the Fourteenth Amendment's injunction to states to protect persons equally.<sup>28</sup> The Court has also shied away from identifying and adjudicating instances of conflicting rights, as in its ongoing refusal to understand abortion, hate speech, or affirmative action cases in those terms.

The U.S. Supreme Court's limited imagination when it comes to rights adjudication is not just an idiosyncrasy or a benign variation in global judicial practice. Nor is it dictated by the Constitution; modern rights adjudication in the United States is not guided by the constitutional text.<sup>29</sup> It is a *pathology* that, left untreated, will prevent the Court from sensibly engaging in modern rights adjudication. Human rights scholars sometimes speak in terms of first, second, and third generation rights, which respectively span civil and political rights, social and economic rights, and group and cultural rights. We need not adopt this particular taxonomy, which has been much dissected and criticized, to recognize that a maturing society should expect to confront different kinds of rights claims over time even with respect to the same basic set of norms.

Human rights norms are typically born out of their customary and most egregious applications. Thus, laws against racial discrimination begin by

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<sup>24</sup> See Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151 (2016).

<sup>25</sup> See *Washington v. Davis*, 426 U.S. 229, 248 (1976).

<sup>26</sup> See *McCleskey v. Kemp*, 481 U.S. 279, 314 (1987).

<sup>27</sup> See *Ewing v. California*, 538 U.S. 11, 23 (2003).

<sup>28</sup> See *DeShaney*, 489 U.S. at 186.

<sup>29</sup> See generally David A. Strauss, Foreword, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015).

targeting open or otherwise intentional derogation from norms of racial equality: chattel slavery, apartheid regimes, and so forth. If the society adopts the norm, we should expect instances of overt derogation to decline. New claims arise on what initially appear to be norm's margins: indirect discrimination, horizontal effects, additional categories of rights bearers such as women, gays, or people with disabilities, and so forth. Because these new claims are contested, they invariably confront contrary claims grounded either in competing individual rights or in broader rights of self-governance. The contrary claim holders do not reject the norm itself, as the apartheid-era South African government rejected the norm of racial equality. Rather, they reject some particular application or extension based on a competing right or entitlement that is *prima facie* legitimate. They disagree as to how the norm should be understood, and their disagreement is *reasonable*.<sup>30</sup>

Treating rights as categorical or binary, in effect in “rule” rather than “standard” terms, fits early-stage rights claims far better than these later-stage claims. An overt segregationist, *ipso facto*, does not respect rights of racial equality, and so we have no cause to solicit his reasons or commitments in this domain. The fact that the rights-holder wins must, again *ipso facto*, entail that the segregationist loses. The facts relevant to this dispute are judicial facts—did the segregation occur?—rather than legislative facts relating to the empirical context. The remedy is just as straightforward as it would have been for the Supreme Court to have ordered that Linda Brown be enrolled immediately in a newly integrated elementary school in Topeka, Kansas.

When the segregation is unintentional or nonobvious, matters are more complicated. It is no longer the case that the state actor's commitments, in this case to a well-functioning school system, are irrelevant. Those commitments are valid, and they sound in a constitutional register: values of self-determination, federalism, and separation of powers exert pressure, again reasonably, on the outcome. It is no longer sufficient to ascertain solely judicial facts, for the nature of the plaintiff's injury or the viability and effectiveness of particular remedies might require empirical assessment. Other private actors, such as parents who wish to send their children to geographically proximate schools, and those who have made investments on the premise that such schools are available to their children, have competing entitlements—and perhaps rights—that are *prima facie* valid. In short, it is simply not possible to fit more mature rights cases into prefabricated doctrinal categories, to adjudicate them without accounting for social facts, to assume away or casually disregard the presence of

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<sup>30</sup> See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1368 (2005).

other rights-bearers whose commitments are constitutionally salient, or to pre-judge—wholesale—downstream cases that raise similar issues.<sup>31</sup>

An adjudicator confronted with this problem faces three basic options. First, she can attempt to squeeze the new set of claims into old anachronistic categories. The *Rodriguez* Court attempted to jerry-rig claims of wealth discrimination in public schooling into established categories born of the ideology of white supremacy. It failed in that attempt, but not because no rights were at stake in *Rodriguez*, and not because educational rights were a poor fit for a constitutional system that, less than two decades earlier, had called education “perhaps the most important function of state and local governments “ and “the very foundation of good citizenship.”<sup>32</sup> It is rather that a rights regime designed to combat overt racism may treat rights as essentially absolute, whereas the recognition of a right cannot be dispositive of a rights claim within a mature, cosmopolitan political order.

The second option a modern adjudicator faces is overt abdication. If the choices between the sides are between competing rights-holders, or require an adjudicator to make qualitative and not just categorical judgments about the necessary expenditure of government resources, or necessitate that she weigh values that on their face appear to be incommensurable, it might seem that the conflict falls outside judicial competence. This position approximates the one taken by judicial review skeptics such as Jeremy Waldron.<sup>33</sup> Waldron brackets societies that lack a culture of respect for rights, which is another way of saying that his universe is limited to those in which the paradigm cases that inspire rights identification arise infrequently. For Waldron, once we posit that the society at issue is one that takes rights seriously and has a well-functioning democratic political system, it is difficult to justify relying on unelected and unaccountable judges to adjudicate rights claims. The political branches are competing arbiters of disagreement over the scope of rights, they have democratic credentials—which matters in a democracy—and judges are frequently drawn to the technical and morally uninspired vernacular of doctrinal tests.<sup>34</sup>

Waldron’s argument is complex, and this is not the space to defend judicial review as such. Three points bear mention, however. First, Waldron’s caveats conceal some nuance that requires further exploration. Many societies that are

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<sup>31</sup> It is telling that application of strict scrutiny has become rare at the Supreme Court level. See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

<sup>32</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>33</sup> See Waldron, *supra* note 30.

<sup>34</sup> See *id.*, at 1383.

democratic and rights-respecting at a wholesale level might suffer from periodic episodes that test those credentials at a retail level. Judicial review both deters those episodes and enables an institutionalized response to them when they occur. Indeed, in the 1938 case of *United States v. Carolene Products*,<sup>35</sup> in which the U.S. Supreme Court articulated its rational basis approach to most legislation, Justice Harlan Fiske Stone famously included a footnote that identified the conditions under which legislation would not enjoy a presumption of constitutionality. Two of those conditions—the enactment of laws that impede processes of political change and laws that discriminate against discrete and insular minorities<sup>36</sup>—are but shorthand for the notion that judges should intervene aggressively when, and just to the degree that, Waldron’s conditions of democracy and respect for rights do not obtain. A commitment to democracy and respect for rights are dynamic rather than static features of a political order.

A second point in response to Waldron is to note that judicial review is a persistent feature of modern constitutional systems that does not appear to be going away. The proliferation of constitutional courts around the world suggests at least an implicit mass rejection of his arguments. That rejection might not move Waldron, whose interest is normative rather than descriptive, but the ubiquity of constitutional courts does provide a canvas that may be used to test Waldron’s insights regarding rights contestation. In a world that is second-best from Waldron’s perspective, we have good reason to ask whether and how existing institutions of judicial review could be modified so as better to meet his objections.

The third point, which is related, is that Waldron explicitly brackets mechanisms of weak-form judicial review that enable some form of legislative response to a judicial finding of unconstitutionality. What we might call formal weak-form review, in which ordinary legislative majorities have a constitutionally prescribed authority to supercede or limit judicial interpretations of the Constitution, is uncommon. But many constitutional courts adopt adjudicative procedures, such as proportionality review, or remedial mechanisms, such as suspensions of invalidity, that invite political engagement.

The adaptability of such mechanisms to the strong-form review that characterizes American practice is the subject of Part II below. The key takeaway for now is that the presence or absence of these mechanisms is endogenous to a court’s capacity to adjudicate rights cases under conditions of reasonable disagreement. As scholars such as Richard Fallon and Daryl Levinson have emphasized, justiciability, the merits, and remedial doctrines are deeply interdependent at the

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35 304 U.S. 144 (1938).

36 *Id.*, at 152 n.4.

Supreme Court.<sup>37</sup> It is nearly tautological to say that mature, rights-respecting democracies that do not take concrete measures to soften their forms of review have a harder time justifying rights review at all: a mature rights jurisprudence is simply incompatible with the strongest forms of judicial review in a democracy.

The life cycle of rights that I allude to above motivates the practices of many modern and respected constitutional courts in pluralistic societies, what Kai Möller calls “the global model of constitutional rights.” By this he means “rights inflation”<sup>38</sup>—that is, understanding rights as “protecting an extreme range of interests”<sup>39</sup>—along with “positive obligations and socio-economic rights, horizontal effect, and balancing and proportionality.”<sup>40</sup> Adopting, or at least approaching, this model is the third option available to courts adjudicating mature rights in a pluralistic society.

Modern rights claims, because contested and marginal, are by their nature susceptible to slippery slope arguments that are defeasible in a principled way only in a proportionality regime. The positive dimensions of rights that lead to government and private obligations, are not, a priori, morally distinguishable from their negative dimensions. And in a mature, rights-respecting society, we can expect rights often to populate both sides of a constitutional dispute. The approach that *Rodriguez* epitomizes—categorical, empirically impoverished, enamored with slippery slope appeals, and reflexively hostile to social and economic rights—is incompatible with such a society’s reasonable demands.

## II Reforming a Private Law Court

The U.S. Supreme Court was designed primarily to adjudicate common law diversity suits between private parties. Every American law student is taught in the first week of his or her constitutional law class that the Court’s most solemn public function—its power to nullify legislative acts—derives purely from its power to resolve disputes between quintessentially private parties. When Chief Justice John Marshall wrote in *Marbury v. Madison* that “[i]t is emphatically the province and duty of the judicial department to say what the law is,”<sup>41</sup> he

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<sup>37</sup> See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006); Levinson, *supra* note 10.

<sup>38</sup> KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* 2 (2012).

<sup>39</sup> *Id.*, at 1.

<sup>40</sup> *Id.*, at 2.

<sup>41</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

meant that the Constitution is law, and if a dispute between Mr Marbury and Mr Madison—or the Court’s capacity to hear that dispute—turns on the meaning of the Constitution, then the Court has both the power and the duty to interpret it.<sup>42</sup>

This model of adjudication aligns with what Henry Monaghan has called the “dispute resolution model,” which “focuses upon the actual dispute between the litigants.”<sup>43</sup> This model polices the Article III “case or controversy” requirement—and its implied limits on standing—rigorously and on principle. It entertains doctrines of constitutional avoidance so as to declare the nation’s basic law only when constrained to do so. It grounds its judgment in the record developed based on an adversarial presentation by the litigants. It relies on those litigants to raise and actively litigate any legal questions the court decides. Its remedies are structured to afford relief in the case before it and not in others. The nature of the effect, if any, of one judgment on the outcomes of other similar cases is *in terrorem* rather than *erga omnes*.

The alternative to the dispute resolution model approximates what Monaghan calls the “law declaration model,” whose focus is “on the judicial role in saying what the law is.”<sup>44</sup> On this model, the Court is an oracle of the law for the nation.<sup>45</sup> It backgrounds the concerns of any particular litigants, with a sharper interest in broader concerns about the state of the law. It is eager to decide issues before they arrive through a traditional dispute-resolution vehicle. Its opinions are laden with empirical data and outside research that has not necessarily been tested through adversarial litigation. It is open to remedies that address underlying political structures rather than simply the needs of the parties. Its practices inch closer to those of a legislature because it understands its function in the same quasi-legislative terms as a Kelsenian court.<sup>46</sup>

Arguably, the dispute resolution model better matches the expectations of the U.S. Constitution’s drafters and ratifiers. As noted, that model underlies Chief Justice Marshall’s *Marbury* opinion. It is telling that the *Marbury* case itself was not decided until 14 years into the Court’s life, and the Court invalidated a federal law just twice prior to the Civil War, both times in obvious dicta.<sup>47</sup> The dispute resolution model is consistent with the Constitutional Convention’s

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<sup>42</sup> See generally PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008).

<sup>43</sup> Henry Paul Monaghan, *On Avoiding Avoidance, Agenda Control, and Related Matters*, 112 COLUM. L. REV. 665, 668 (2012) [hereinafter Monaghan, *Avoidance*]. Monaghan earlier called this model the “private rights model.” Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1365–66 (1973).

<sup>44</sup> See Monaghan, *Avoidance*, *supra* note 43, at 668.

<sup>45</sup> See 1 WILLIAM BLACKSTONE, *COMMENTARIES* 69 (1765–1769).

<sup>46</sup> See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 268 (1949).

<sup>47</sup> See *Marbury*, 5 U.S. 137; *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

rejection of the Virginia Plan's proposal to empower judges to act as a Council of Revision that would hold a qualified veto over both state and congressional laws.<sup>48</sup> It is also consistent with the absence of general federal question jurisdiction prior to 1875. Some aspects of the dispute resolution model appear to have motivated the Supreme Court's refusal to advise President Washington on a set of questions proffered by Secretary of State Thomas Jefferson regarding the Jay Treaty and maritime and foreign relations law in 1793.<sup>49</sup>

At times the Court and commentators behave as if the dispute resolution model is still the Court's primary one. As Justice Alito wrote in the lead opinion in *Hein v. Freedom From Religion Foundation*,<sup>50</sup> a case rejecting taxpayer standing to challenge President George W. Bush's faith-based initiative program:

[T]he judicial power of the United States defined by Art. III is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The federal courts are not empowered to seek out and strike down any governmental act that they deem to be repugnant to the Constitution. Rather, federal courts sit solely, to decide on the rights of individuals, and must refrain from passing upon the constitutionality of an act ... unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.<sup>51</sup>

Amanda Frost has noted the continuing hold the notion of party control over litigation has on the federal courts. As she writes, "[J]udicial opinions and the academic literature confidently promote party presentation, and are critical of judges who raise issues *sua sponte*."<sup>52</sup>

Notwithstanding frequent paeans to the dispute resolution model, a funny thing happened on the way to the twenty-first century. Over time, Congress shrunk the Court's mandatory jurisdiction, most dramatically in 1925 and most recently in 1988.<sup>53</sup> Unlike the federal courts of appeals, which are courts of error that hear mandatory appeals, the Supreme Court has nearly plenary control over its docket. It deliberately refuses to engage in error-correction in individual cases, and it deliberately seeks out instances in which lower courts disagree

<sup>48</sup> See 1 FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION 21 (1911).

<sup>49</sup> See Robert J. Pushaw, Jr., *Why the Supreme Court Never Gets Any "Dear John" Letters: Advisory Opinions in Historical Perspective*, 87 GEO. L.J. 473, 489–90 (1998) (reviewing STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES (1997)).

<sup>50</sup> 551 U.S. 587 (2007) (Alito, J.).

<sup>51</sup> *Id.*, at 598 (citations and quotation marks omitted).

<sup>52</sup> Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 451 (2009).

<sup>53</sup> See Act of 13 February 1925, ch. 229, 43 Stat. 936; Supreme Court Case Selections Act of 1988, Pub. L. No. 100–352, 102 Stat. 662.

about the interpretation of the law.<sup>54</sup> Not infrequently, the Court ignores the question presented by the parties and instead crafts its own.<sup>55</sup> Simply put, the Court's lived self-conception is as a law-declaration court even as it often approaches actual cases as if it is a dispute-resolution court.

The American model is sometimes presented as if it is one of two (or more) competing conceptions of rights adjudication, either of which a jurisdiction might choose depending on its particular history and political structure. In fact, the American model is simply anachronistic and therefore inadequate to modern rights adjudication. Other jurisdictions' relative refusal to cite American cases bears some testimony to their dated decisional structure.<sup>56</sup> Below, I discuss three features of the model that must be reformed if the model is to address modern rights conflicts with sensitivity to the nature of such conflicts. Unless the Court reforms its practices along each of these lines, it will continue to lag well behind other courts in its capacity to adjudicate the sorts of disputes likely to arise in modern, pluralistic societies.

## A Proportionality

Proportionality analysis is an institutionalized and systematic approach to judicial balancing. It typically includes at least two distinct stages at which the reviewing court assesses a challenged action's means-ends fit and its degree of necessity. If necessary, the Court then balances either the overall costs (in rights terms) and benefits (in policy terms) of the challenged action or its marginal benefit in achieving its policy objective against the marginal cost to the asserted right. Proportionality is a feature of judicial review within nearly all of the constitutional systems that have been subjects of extensive study in the English-language literature, including those of Canada, South Africa, Israel, many Asian courts, and most European and Latin American constitutional courts (including at the regional level).<sup>57</sup>

Proportionality is not an explicit feature of U.S. constitutional law. There is some disagreement as to the degree to which proportionality has implicitly infiltrated (or has long been present within) American constitutional law.

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<sup>54</sup> See Sup. Ct. R. 10.

<sup>55</sup> See Frost, *supra* note 52, at 451.

<sup>56</sup> See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 767–68 (2012).

<sup>57</sup> See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 179–206 (2012); Jud Mathews & Alec Stone Sweet, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 74 (2008).

Stephen Gardbaum has noted that the American tiers of scrutiny analysis is, in practice, sensitive to context, just as proportionality regimes in other jurisdictions are sensitive to the nature of the right in assigning a burden of justification to the government.<sup>58</sup> Vicki Jackson has noted the recognition of proportionality as a legal principle in American Eighth Amendment and certain Fourteenth Amendment contexts.<sup>59</sup> Alec Stone Sweet and Jud Mathews have located proportionality analysis deep within American case law, in its nineteenth-century negative Commerce Clause doctrine.<sup>60</sup> On the other hand, Moshe Cohen-Eliya and Iddo Porat distinguish proportionality, a jurisprudential commitment, from balancing, an interstitial safety valve, and conclude that the former is in tension with American values of individualism and the U.S. constitutional culture's focus on legal authority rather than justification.<sup>61</sup>

It is fair to say that, although many individual areas of U.S. constitutional doctrine contain elements of proportionality analysis, proportionality is not, overall, a feature of U.S. constitutional law. Supreme Court opinions that relax or ignore the tiers of scrutiny analysis—such as *Obergefell v. Hodges*, holding that states may not deny marriage rights to same sex couples,<sup>62</sup> or *Grutter v. Bollinger*, in which the Court ostensibly applied strict scrutiny in upholding a race-based affirmative action plan at a public law school<sup>63</sup>—tend to do so *sub rosa*. Failing to acknowledge proportionality sits in tension with one of proportionality's essential features: its trans-substantivity. The fact that proportionality is used across rights areas alters the analytic center of gravity, away from specific models of rights identification and towards the rationality and necessity of the governmental act. As Möller explains, courts on what we might call the European model “are very generous in labeling an interest a ‘right,’” and at the same time, necessarily, “they do not attach much weight to a right simply by virtue of its being a right.”<sup>64</sup> To say that proportionality is used only sometimes begs the question; it sits in tension with a core tenet of a proportionality commitment.

This feature of proportionality analysis is critical in distinguishing it from the U.S. model and in recommending it for modern rights adjudication. Shifting

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<sup>58</sup> See Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 417–19 (2008).

<sup>59</sup> See Jackson, *supra* note 6, at 3104–05.

<sup>60</sup> Jud Mathews & Alec Stone Sweet, *All Things in Proportion? American Rights Review and the Problem of Balancing*, 60 EMORY L.J. 797 (2011).

<sup>61</sup> See COHEN-ELIYA & PORAT, *supra* note 8, at 52–53, 126–29.

<sup>62</sup> *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

<sup>63</sup> *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>64</sup> MÖLLER, *supra* note 38, at 5.

the analytic weight from identification of the right and the right-bearer to assessment of the government's justification accomplishes two objectives essential to judging within a mature rights regime.

First, it sidesteps arguments over whether a particular claim activates constitutional analysis in the first place, avoiding the polarizing analysis that tells the losing plaintiff, who by hypothesis has suffered a concrete injury at the hands of a government actor, that he or she is simply beneath any constitutional concern.

Rights inflation has come in for much criticism. As Grégoire Webber has argued, suggesting that rights are everywhere (but subject to limitation) can deprive the law of a vocabulary for articulating why rights are special and may underwrite an antagonistic attitude toward the political process.<sup>65</sup> I think this criticism too sanguine about the ability of either courts or legislatures to draw stable and persuasive distinctions between constitutional rights and mere interests. The relative weight of an asserted right enters the analysis, but only in proportionality's final stage, should the court get so far. In an environment of persistent and reasonable disagreement over the specification of rights, a court better stays within its lane when expressive value judgments are held in reserve.

The second benefit of proportionality analysis within a mature rights regime is that it preserves the government's ability to prevail notwithstanding identification of a constitutional right. Proportionality analysis thereby not only takes seriously the constitutional right of self-governance even in the face of prima facie rights claims, but also—and at least as importantly—substantially mitigates a court's instinct to deny rights claims entirely based on fallacious slippery slope arguments.

Consider the San Antonio case we began with. Recall that the *Rodriguez* Court adopted an atomized and categorical approach that led it to deny that any rights had been violated. The Court also denied relief in part based on concerns about a slippery slope to court rulings that would threaten local governance in areas far afield of education. Under a proportionality approach, the Court would have understood the plaintiffs' claims in broad, prima facie terms. Without speculating as to how a good-faith proportionality court would approach the San Antonio case, it is not difficult to understand severe wealth discrimination in public education as implicating constitutional equality guarantees. That recognition is far less threatening when automatic invalidity does not follow. What would follow instead is an inquiry into whether the government is justified in discriminating in this way. Is the state pursuing a legitimate objective? Does

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<sup>65</sup> See GRÉGOIRE C.N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* (2009).

wealth discrimination serve that objective? Are there other ways of serving the objective that would not cause the same kind of injury? How does the marginal contribution of the government's policy to its ultimate objective relate to the marginal injury to Edgewood residents of a policy that discriminates in this way?

However, a court answers these questions, the benefit of this approach is that it prompts a court to answer *these* questions, about *this* policy, in relation to *these* rights claims. Under a mature rights regime, those on all sides of a rights conflict disagree reasonably about how far rights reach. They deserve to have their concerns taken seriously in the case before the court.<sup>66</sup> When rights sit at the margins of a human rights norm, a minor change in fact could have a major impact on a case outcome. Deciding hypothetical cases adopts overly simplistic assumptions about the nature of rights. In refusing to confront rights assertions in their own marginal terms, the Court denudes the right of any power at all. And so even conceding that, relative to Europeans, Americans are liberal rather than communitarian in their rights orientations, as Cohen-Eliya and Porat have argued,<sup>67</sup> the Court's continued resistance to proportionality is self-defeating. Rights bearers are at least as vulnerable to the U.S. model as the state is.

A proportionality approach would enable courts to adjudicate disparate impact claims on a case-by-case basis, just as they do routinely under federal, state, and local antidiscrimination laws that recognize indirect discrimination.<sup>68</sup> A racial impact that was foreseeable and avoidable but not specifically sought out would become a (defeasible) matter of constitutional concern rather than a constitutional irrelevancy. Government actors contemplating a policy with a disparate racial impact would have incentives to mitigate that impact.

Several conflicts in American constitutional law that currently involve deliberate obfuscation or formalistic distractions by litigants and judges could be adjudicated more transparently under proportionality analysis. For example, public institutions that engage in affirmative action assert that diversity is their only objective, and courts pretend that they treat race-based affirmative action policies with the same degree of scrutiny reserved for Jim Crow laws. Litigants seeking rights for gays and lesbians argue that rational policies are

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<sup>66</sup> See ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 142 (2000).

<sup>67</sup> See COHEN-ELIYA & PORAT, *supra* note 8.

<sup>68</sup> See, e.g., *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507 (2015) (holding that disparate impact claims are cognizable under the Fair Housing Act); *Smith v. City of Jackson*, 544 U.S. 228 (2005) (holding that disparate impact claims are cognizable under the Age Discrimination in Employment Act); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that disparate impact claims are cognizable under Title VII of the Civil Rights Act of 1964).

irrational, because courts are unwilling (again, for fear of slippery slopes) to remove sexual orientation discrimination from the rational basis bucket.<sup>69</sup> The gun control debate continues to be framed in the pedantic terms set by the litigation in *District of Columbia v. Heller*—is there an individual right to bear arms under the Second Amendment?—rather than in terms of what kinds of regulation of guns are nonetheless permissible. Opponents of the Affordable Care Act, which penalizes some individuals who do not carry health insurance, awkwardly framed their arguments as grounded in federalism rather than individual autonomy, and the Supreme Court awkwardly abided that framing.

Proportionality analysis would not eliminate conflict about these matters but it would channel disagreement in more productive directions. Litigants could argue about empirical facts in the world instead of parsing eighteenth- or nineteenth-century dictionaries. The Court's resolution of rights conflict would not be zero sum for all time, and so actors within civil society would have good reason to remain engaged in the legal and political negotiation that should lie at the root of a pluralistic democracy. Moreover, part of Waldron's concern with judicial intervention into rights conflicts was that judges are too accustomed to thinking in the technical terms of legal doctrine rather than deliberating about rights directly. This legitimate concern hits with less force in a proportionality regime.

There are at least three broad objections to proportionality that temper its adoption in U.S. courts. First, the U.S. Supreme Court is the apex court in a vast federal system. Every Article III court and every state supreme court, among other state courts, has jurisdiction over federal constitutional questions. Although many apex courts in decentralized systems adopt proportionality analysis—including Canada's, most prominently—the felt need for such courts to articulate intelligible rules that promote uniformity and discourage bias in federal law counterbalances some of the advantages proportionality offers.

This objection, while not fallacious, is unpersuasive as a reason to reject proportionality. For one thing, the Court adopts balancing analysis and totality of the circumstances tests on a regular basis but does so on essentially an ad hoc basis. For another, because of the pressure modern rights adjudication exerts on rule-bound adjudication, the Court's existing categories tend to break down in unpredictable and unsystematic ways. Note also that the Court, for undisclosed reasons of its own devising, has dramatically reduced its docket over the last

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<sup>69</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (Roberts, C.J., dissenting) (“Interests in uniformity and stability amply justified Congress’s decision to retain the definition of marriage that, at that point, had been adopted by every State in our Nation, and every nation in the world.”).

three decades. In the 1980s the Court routinely heard more than 150 cases per term.<sup>70</sup> In the 2015 Term, it heard 80. This docket reduction suggests an implicit judgment that lower courts are not in desperate need of guidance from above. “The Court,” Kenneth Starr has written, “by and large does not even pretend to maintain the uniformity of federal law.”<sup>71</sup> Finally, the presence of proportionality in other decentralized systems offers some evidence for its viability in the United States.

A second broad objection is grounded in U.S. constitutional history. Lawyers trained within the American system see in proportionality analysis the ghost of *Lochner v. New York*.<sup>72</sup> There, the Supreme Court invalidated a maximum hour law for bakers that had been passed unanimously by the New York legislature. Justice Rufus Peckham’s *Lochner* majority opinion held, consistent with earlier cases,<sup>73</sup> that the Fourteenth Amendment protected a right to contract. The right was not absolute and could be limited through an appropriate exercise of the state’s police power, but in this case the state had not demonstrated that bakers’ work was unusually dangerous or in need of regulation or that bakers lacked the capacity to bargain freely over their working conditions.

The *Lochner* Court captured the methodological spirit of modern proportionality analysis. The opinion devotes no attention to establishing the bona fides of a right to contract as an interpretive matter but devotes substantial energy to exploring why the state’s asserted reasons for regulation were inadequate.<sup>74</sup> Namely,

[t]he act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.<sup>75</sup>

The fact that proportionality analysis is *Lochner*’s methodological cousin stands as a substantial obstacle to its open use in U.S. courts. A judge who assumes a broad reach of the Fourteenth Amendment into areas, such as contract, not specifically enumerated, and who scrutinizes means-ends fit even for rights that today are evaluated under a rational basis standard invites a dissenter to accuse

<sup>70</sup> LEE EPSTEIN, ET AL., *THE SUPREME COURT COMPENDIUM* 86 tbl. 2–6 (2015). Notably, nothing in this article’s proposal would make it necessary for that number to rise.

<sup>71</sup> Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1365 (2006).

<sup>72</sup> 198 U.S. 45 (1905); see Jackson, *supra* note 6, at 3126.

<sup>73</sup> See *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

<sup>74</sup> See Gardbaum, *supra* note 58, at 425.

<sup>75</sup> *Lochner*, 198 U.S. at 57–58.

her of “Lochnerizing.”<sup>76</sup> Being affiliated with the case counts as an epithet within the U.S. constitutional tradition.<sup>77</sup> Until that changes, proportionality proponents will have difficulty making inroads in the United States.

Be that as it may, *Lochner*’s status as an anticanonical decision is not sacrosanct. Although judges continue to use *Lochner* as a reason for rejecting claims implicating social and economic legislation, *Lochner* revisionism is rampant within the American legal academy.<sup>78</sup> It is worth noting, moreover, that it is notionally possible to reject the result in *Lochner* without rejecting its methodology. Indeed, the best reading of Justice John Marshall Harlan’s *Lochner* dissent is that it did just that. Justice Harlan accepted the existence of a constitutional right to contract but argued based on empirical evidence—some of which he described as judicially noticed—that bakers’ work is at least arguably as dangerous as the statute’s defenders claimed. The dispute between Justice Peckham and Justice Harlan is an ordinary argument about the actual state of the world the legislature sought to regulate.

By contrast, the dispute between Justice Peckham and Justice Holmes, whose *Lochner* dissent is better known than Justice Harlan’s, reflects an ideological divide over the judicial role. Justice Holmes’s dissent states that legislation should be free of judicial interference “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.”<sup>79</sup> This formulation is the precursor of the two-tier U.S. model, under which legislation is reviewed deferentially unless it falls into a protected category.

There is nothing inevitable about adopting the Holmes rather than the Harlan critique of *Lochner*. Progressive thinkers influential in interring the *Lochner* era, such as Louis Brandeis and Felix Frankfurter, were Holmes acolytes, and Holmes himself of course sat on the Court for more than a quarter century after *Lochner* was decided. Those facts explain the special status of the Holmes dissent as well as any others. But the categorical approach has proven itself inadequate to the task of confronting claims growing out of new categories of rights holders, those that implicate the government fisc or conflicting rights,

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<sup>76</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015), (Roberts, C.J., dissenting); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S.455, 459–60 (1985) (Marshall, J., concurring in part and dissenting in part).

<sup>77</sup> See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

<sup>78</sup> See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION* 213–24 (2004); DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011); RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION* 338 (2014).

<sup>79</sup> *Lochner*, 198 U.S. at 76, (Holmes, J., dissenting).

and those that impose duties on others. It is past time for a judicial resurrection of the Harlan critique.

Which leads to the third major objection to proportionality: judicial competence. Justice Harlan based his dissenting opinion on certain claims about the dangers of baking that, as he noted, are subject to reasonable disagreement.<sup>80</sup> A categorical approach tends to reduce the instances in which judges must rely on social facts that they lack the institutional capacity to adduce and assess. As Jackson notes, “[I]n situations of epistemic or normative uncertainty, legislatures may be more empirically competent and democratically legitimate than courts in making prognostic factual determinations and in making accommodations among competing values.”<sup>81</sup> The U.S. model seeks to avoid this morass. In its most aggressive formulation, it permits case outcomes to turn on hypothetical states of affairs that are outside the record as a basis for rejecting most rights challenges.<sup>82</sup> In those exceptional cases in which rights claims receive heightened scrutiny, the government—whose fact-finding capacity typically exceeds that of private litigants—is burdened with producing evidence sufficient to establish the requisite means-ends fit.

It is not enough to note that judges in other jurisdictions regularly make judgments requiring them to develop and evaluate legislative facts. We must say more about the institutional mechanisms in place to do so, and how they relate to those in the U.S. system. I turn to those mechanisms below.

## B An Inquisitorial Approach to Legislative Facts

Among the most startling passages in Justice Powell’s *Rodriguez* opinion is the Court’s discussion of whether the residents of poor school districts are poor. At a glance, this might seem to be the sort of fact about which the Court could take judicial notice. The Federal Rules of Evidence permit judicial notice of “a fact that is not subject to reasonable dispute.”<sup>83</sup> The Rules limit such notice, however, to “adjudicative” rather than “legislative” facts.<sup>84</sup> As Kenneth Culp Davis originally defined them, adjudicative facts are those “concerning the immediate parties—who did what, where, when, how, and with what motive or intent.”<sup>85</sup>

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<sup>80</sup> *Id.*, at 72 (Harlan, J., dissenting).

<sup>81</sup> Jackson, *supra* note 6, at 3145.

<sup>82</sup> See *Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955).

<sup>83</sup> Fed. R. Evid., 201.

<sup>84</sup> Fed. R. Evid., 201(a).

<sup>85</sup> Kenneth Culp Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

These are the facts that we permit juries to decide in jury trials.<sup>86</sup> Legislative facts, by contrast, are “those which 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.”<sup>87</sup> As Davis write, legislative facts “are ordinarily general” and are not uniquely related to the parties or their activities.<sup>88</sup>

What is most alarming about the *Rodriguez* Court’s treatment of the question of whether poor school districts house poor people is less its answer, (though its answer—*no*—was counterintuitive) than its method of investigation. The Court relied on a student note in the *Yale Law Journal* that analyzed educational financing in Connecticut.<sup>89</sup> But the relevant question is either one about judicial facts—do the poor school districts in San Antonio contain poor people?—or about legislative facts—do poor school districts generally contain poor people? In neither case is a single, untested study from a different state, more than 1,500 miles away and radically different politically, economically, and culturally even probative of the answer to the question, much less dispositive.

Serious constitutional adjudication requires that a reviewing court have some reliable means of receiving accurate and relevant factual information. That imperative is valuable for any constitutional court, but it is essential for a court that intends to apply proportionality analysis, engage in balancing, or routinely draw qualitative distinctions between similar cases. Under those circumstances, the facts that motivate that qualitative assessment may be “decisive of constitutional claims” and therefore approximate “constitutional facts.”<sup>90</sup> And like constitutional facts, such facts have a quasi-legal character and therefore should be assessed non-deferentially by a reviewing court.

The problem is that in the U.S. system, the Supreme Court and other appellate courts have no reliable method of identifying, soliciting, or adjudicating disagreements relating to legislative facts. For judicial facts, the adversarial, private law model relies on the parties to present evidence to the trial court, usually in the form of lay witnesses or relevant documents. In significant constitutional cases, however, judicial facts are minimally relevant. The Court itself has conceded the relative unimportance of judicial facts in its certiorari

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<sup>86</sup> *See id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23 (1973); *see Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 *YALE L.J.* 1303 (1972).

<sup>90</sup> Henry P. Monaghan, *Constitutional Fact Review*, 85 *COLUM. L. REV.* 229, 230 (1985). Monaghan applies the label only to adjudicative facts, *id.*, n.16, but judicial review of legislative facts that decide constitutional claims is equally in need of scrutiny.

practices. As the Court's rules stipulate, a cert petition "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."<sup>91</sup> In memoranda that Supreme Court law clerks circulate to the Justices advising whether to grant petitions, the standard language recommending the denial of most petitions is: "fact-bound error-correction."<sup>92</sup> Instead, as noted, the most significant criterion for a grant is a division of authority within the circuits relating to the appropriate rule of law or the application of that rule to analogous sets of facts.<sup>93</sup> The facts of any individual case are relevant only if similar facts apply broadly to other cases as well. Put more simply, the Court does not actually care about the particular circumstances of individual litigants.

The facts that matter in the high-stakes rights cases that form the core of the Court's constitutional docket are quite particular to the issue at stake, but they are not particular to the litigants who happened to press them. What is the relationship between indigence and housing?<sup>94</sup> What are the educational and societal benefits of a diverse student body at elite schools?<sup>95</sup> Are so-called partial birth abortions ever medically necessary?<sup>96</sup> Do women who have such abortions tend to regret doing so?<sup>97</sup> Does capital punishment deter crime?<sup>98</sup> What forms of gun control were prevalent in late eighteenth century America?<sup>99</sup> These questions are about the state of the world rather than any particular individual's conduct or circumstances. The answers to these questions are legislative (also called social) facts.

American appellate courts, including the Supreme Court, have no reliable means of ascertaining the answers to these kinds of questions. The default is for the parties themselves to introduce expert testimony. But the private law, adversarial model that supports this practice is ill suited to legislative factfinding. The Rules of Evidence are silent on legislative facts. Judicial facts are reviewed under a "clear error" standard,<sup>100</sup> but that standard is awkward for facts that are relevant to a broad swath of cases and that will support a legal conclusion that affects the entire nation. The Supreme Court itself has noted that multiple courts might

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91 SUP. CT. R. 10.

92 See Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109, 1140 (2011).

93 SUP. CT. R. 10(a)-(b).

94 See *Rodriguez*, 411 U.S. 1.

95 See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

96 See *Gonzales v. Carhart*, 550 U.S. 124 (2007).

97 See *id.*, at 159.

98 See *Glossip v. Gross*, 135 S. Ct. 2726, 2767–68 (2015) (Breyer, J., dissenting).

99 See *District of Columbia v. Heller*, 554 U.S. 570, 683–87 (2008) (Breyer, J., dissenting).

100 FED. R. CIV. P. 52(a).

readily reach conflicting conclusions about legislative facts.<sup>101</sup> There is no reason to suppose that the particular litigants whose case happens to become the Court's vehicle for a rights question will litigate the case aggressively and competently, hire the appropriate experts, or apprise the Court of all relevant data.<sup>102</sup>

The Court's current practices are not promising. Kenneth Culp Davis wrote three decades ago of seven responses the Court tends to have when confronted with the need for legislative facts that it does not have.<sup>103</sup> I discuss each below.

First, it might remand to the trial court for factfinding. This approach is inadequate for the reasons just discussed. A trial court's finding of legislative facts under conditions of adversarial presentation does not match what the Court implicitly concedes to be the quasi-legislative function of its constitutional rights adjudication. No one would design a system of judicial lawmaking by delegating constitutional factfinding to essentially random and decentralized trial courts possessing little or no inquisitorial power.

Second, the Court "simply asserts an emphatic view of the legislative facts, with nothing to support its view."<sup>104</sup> This practice is surprisingly common in light of its obvious pathologies. Davis's example was *United States v. Butler*,<sup>105</sup> in which the Court invalidated the Agricultural Adjustment Act as exceeding Congress's taxing and spending authority. Davis argued that the Court's assertion of "a widespread similarity of local conditions"<sup>106</sup> was "contrary to the view of all economists of the time."<sup>107</sup> More recently, in *Citizens United v. FEC*, Justice Kennedy wrote a majority opinion rejecting the government's reasons for prohibiting corporate electioneering expenditures in which he asserted, without evidence, that "[t]he appearance of influence or access [by wealthy corporations] will not cause the electorate to lose faith in our democracy."<sup>108</sup> A 2012 survey conducted by the Brennan Center for Justice found that one in four Americans were less likely to vote because of the influence of large donors.<sup>109</sup> Some engagement with information of this sort would be a good practice.

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**101** *Lockhart v. McCree*, 476 U.S. 162, 168 n.3 (1986).

**102** See Kenneth Culp Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 470 (1970).

**103** See Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 9–10 (1986).

**104** *Id.*, at 9.

**105** 297 U.S. 1 (1936).

**106** *Id.*, at 75.

**107** See Davis, *supra* note 103, at 9.

**108** 558 U.S. 310, 360 (2010).

**109** Brennan Ctr. for Just., NATIONAL SURVEY: SUPER PACS, CORRUPTION, AND DEMOCRACY 3 (2012), <http://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy>.

Third, the Court relies on judicial notice. The Rules of Evidence, which prohibit taking judicial notice of legislative facts, are not binding on the Supreme Court.<sup>110</sup> Still, the kinds of legislative facts on which constitutional disputes turn are often contested and therefore are not appropriate for judicial notice. In *Gonzales v. Carhart*,<sup>111</sup> the Court stated, “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”<sup>112</sup> Some measure of the prevalence of the asserted phenomenon would have been relevant to whether Congress could use it as the basis for an abortion restriction.

Fourth, the Court “examine[s] a published source and find[s] what is not there.”<sup>113</sup> Davis’s example was *Paris Adult Theatre I v. Slaton*, in which the Court relied on the two-person minority report of a 19-member study to conclude that “there is at least an arguable correlation between obscene material and crime.”<sup>114</sup> As David Richards and others have noted, the Court “flatly ignore[d] the great body of empirical evidence that shows there to be no empirical basis for such a view.”<sup>115</sup>

Fifth, the Court is entirely silent, as when the *Citizens United* Court held that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption”<sup>116</sup> without citing any evidence, without discussing the record, and without acknowledging that it was answering a factual rather than a purely legal question.<sup>117</sup>

Sixth, the Court resolves the problem by placing the burden of proof on one of the parties. To return to *Gonzales v. Carhart*, the Court rejected a facial challenge to the Partial Birth Abortion Ban Act and instead placed the burden on women and their doctors to prove that the banned procedure was medically necessary in their case. Doing so reverses the usual presumption in abortion rights cases, which requires a statutory exemption for abortion restrictions.

The final strategy for engaging with legislative facts that Davis discusses is diligent extra-record research, as with Justice Blackmun’s famous trip to the

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**110** Fed. R. Evid., 1101(a).

**111** 550 U.S. 124 (2007).

**112** *Id.*, at 159.

**113** Davis, *supra* note 103, at 9.

**114** 413 U.S. 49, 58 (1973).

**115** David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 84 (1974).

**116** *Citizens United*, 558 U.S. at 357.

**117** See Gorod, *supra* note 9, at 28–30.

Mayo Clinic in preparation for his opinion in *Roe v. Wade*.<sup>118</sup> For the modern Court, both the dramatic proliferation of amicus briefs<sup>119</sup>—itself an implicit recognition that many cases turn on legislative facts that the record under-supplies—and the vast store of electronic information available online make such trips unnecessary.<sup>120</sup>

Relying on amici and independent Internet or other *in camera* extra-record research to supply critical legislative facts is not just awkward or second-best: it is pathological. The material contained in amicus briefs submitted to the Court is untested by any adversarial process or expert review and it often contains factual errors.<sup>121</sup> Since the filing of amicus briefs typically requires organizational capacity and legal resources, their presence may be weighted towards positions whose proponents enjoy those qualities.<sup>122</sup> The Internet is a minefield of misleading and/or out-of-date information. Neither the parties nor other interested actors are given any opportunity to comment upon or rebut extra-record research, which is itself often hastily prepared. Even where they are apprised that such research has occurred, the thirty minutes each side is typically given at oral argument is wholly inadequate to rebut newly introduced evidence. Assertions made by amici are often too numerous for the parties to engage with in their briefs, which are policed through strict page limits.

Were we to design a system of judicial lawmaking from scratch, we would presumably provide the court with a staff competent to conduct empirical research and resourced to commission it, and we would give the parties the opportunity to respond to that research.<sup>123</sup> But because our system was developed with common law, private law disputes in mind, courts, in Brianne Gorod's words, "ignore the rules when they are considering cases that turn ... on legislative facts."<sup>124</sup>

In considering ways in which the Court could improve its ability to use legislative facts, we can divide the possibilities into those the Court could pursue on its own and those that would require rulemaking or congressional intervention. This division does not necessarily track how radical a departure each suggestion represents.

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**118** 410 U.S. 113 (1973).

**119** See Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000).

**120** See Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 DUQ. L. REV. 51, 56 (2013).

**121** See Alli Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014).

**122** See *Jaffee v. Redmond*, 518 U.S. 1, 36 (1996) (Scalia, J., dissenting) ("There is no self-interested organization out there devoted to pursuit of the truth in the federal courts.").

**123** See Davis, *supra* note 103, at 9.

**124** Gorod, *supra* note 9, at 38.

Within the first category, the Court could adjust rules of standing, both within the lower courts and at the Court itself, so as to permit better informed parties or public institutions to initiate litigation; it could make more aggressive use of its authority to appoint a special master to take evidence and issue findings; it could broaden or lengthen oral argument to permit participation of interested parties or to allow the Court to hear evidence and question witnesses; and it could solicit party responses to extra record evidence that plays an important role in the Court's decision-making. Within the second category, the Judicial Conference could recommend changes in the rules for third-party intervention in lower court cases and Congress could establish a judicial research service akin to the Congressional Research Service.<sup>125</sup>

Several of these innovations would mirror what occurs in Kelsenian courts, such as abstract review, which is common at such courts,<sup>126</sup> and the use of oral argument to receive factual information, including from nonparties, rather than just to hear legal arguments.<sup>127</sup> Consistent with the approach of its civil and criminal courts, the German Constitutional Court adopts an inquisitorial approach to factfinding, not only hearing and receiving evidence directly, but also appointing legal experts on its own initiative, requesting information or documents from administrative agencies, or appointing judges as independent investigators.<sup>128</sup>

We should be cautious in assuming that these procedural choices are appropriate to a court system with a common law and adversarial tradition and, moreover, the challenges involved in receiving and adjudicating legislative or social facts is hardly unique to the U.S. Supreme Court.<sup>129</sup> The tension between the judicial role and the complex policy analysis necessary for modern rights adjudication is an inherent one. Inviting outside experts or NGOs to participate in cases risks inviting an agenda that may not in any meaningful sense represent either the plaintiffs or the public at large.<sup>130</sup>

At the same time, we should not assume that procedural norms apply equally well regardless of the nature of the case or the number of people its

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<sup>125</sup> See *id.*, at 11; Davis, *supra* note 103, at 17.

<sup>126</sup> See Louis Favoreu, *American and European Models of Constitutional Justice*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW* 105, 113 (Mathias Reimann & Reinhard Zimmermann, 1990).

<sup>127</sup> See DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 27 (3d ed. 2012).

<sup>128</sup> See Julia Hughes & Vanessa MacDonnell, *Social Science in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations*, 32 *NAT'L J. CONST. L.* 23, 40–41 (2013).

<sup>129</sup> See *id.*

<sup>130</sup> See Carol Harlow, *Public Law and Popular Justice*, 65 *MODERN L. REV.* 1 (2002).

resolution affects.<sup>131</sup> Current Supreme Court practice notionally adopts that posture, which is not well-suited to a docket and a set of operative legal questions that look quite different than that of a typical trial court. The fact that these kinds of problems plague other courts as well is not a reason to leave them unaddressed. The first step in treating any pathology is diagnosing it.

## C Flexible Remedies

In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>132</sup> the Supreme Court invalidated the racial integration plans of school districts in Seattle and Louisville because of the improper use of race as a factor in school assignment. Chief Justice Roberts wrote an opinion for four Justices in which he said that the use of racial targets for schools in the absence of a remedial order from a court constituted impermissible racial balancing and was “patently unconstitutional.”<sup>133</sup> This conclusion reflects the kind of binary thinking about rights and government obligations that this article has sought to resist: a plan that could be constitutionally required if ordered by a court because of past de jure segregation could be patently unconstitutional if undertaken voluntarily to address a self-diagnosed problem or even (as in Seattle’s case) in response to the threat of litigation. Only a categorical approach that assesses the bona fides of government action using crude heuristics could produce this sharp a dichotomy.

Equally concerning, however, was the Court’s remedy. Justice Kennedy did not join Chief Justice Roberts’s opinion, but instead wrote a separate and narrower concurrence that amounts to the Court’s *ratio decidendi*. Justice Kennedy did not agree with the Chief Justice that the school districts had failed to articulate a compelling interest justifying the use of racial classifications, but he argued that their application of those classifications was too imprecise to withstand strict scrutiny. In Louisville, the school district was unable even to identify exactly how it used race, and in Seattle the district used blunt, binary classifications of “white” and “nonwhite” even though the student population was racially diverse. After explaining that this imprecision was fatal to the school district’s plan, Justice Kennedy wrote the following remarkable sentence as prelude to his conclusion that the plan must be invalidated: “Other problems are evident in Seattle’s system, but there is no need to address them now.”<sup>134</sup>

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<sup>131</sup> See *id.*, at 26.

<sup>132</sup> 551 U.S. 701 (2007).

<sup>133</sup> *Id.*, at 723.

<sup>134</sup> *Id.*, at 787 (Kennedy, J., concurring in the judgment).

The Court's judgment resulted in the invalidation of the school districts' school assignment plans but Justice Kennedy's cryptic opinion gave little sense of what a viable plan would look like. Consider the options the Seattle district had available to it immediately following the decision. It could develop more precise racial categories, or perhaps it could use some of the race-conscious but more obfuscatory means of integration that Justice Kennedy described as presumptively constitutional: "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."<sup>135</sup> Whatever course the school district pursued, it would likely be subject to additional litigation. That litigation or analogous litigation elsewhere could again reach the Court, four, five, 10, 20 years down the line, with no indication in advance of what unmentioned problems Justice Kennedy had with the program.

Procedurally, the Court treated *Parents Involved* just as it would have treated a case involving Jim Crow laws. It identified the constitutional infirmity and, in effect, instructed the lower courts to enjoin the associated policy permanently. The Court did not entertain any procedural or remedial mechanism for recognizing the good faith of the government actor or the complexity of the problem it was trying, in good faith, to resolve. Comparative inquiry points the way to alternative approaches to just this kind of problem.

Numerous apex and constitutional courts around the world—including those in Canada, South Africa, Germany, India, and Israel—regularly announce the provisional unconstitutionality of governmental laws and policies without necessarily invalidating them. Consider the South African case of *State v. Ntuli*,<sup>136</sup> which Erin Delaney highlights in her study of judicial suspensions of constitutional invalidity.<sup>137</sup> The Constitutional Court declared unconstitutional a statute governing the means by which convicted criminals could appeal their convictions. But, anticipating the rise in appeals that the judgment would likely occasion and the absence of an infrastructure for accommodating that increase, the Court suspended its declaration of invalidity for nearly 18 months.<sup>138</sup>

The *Ntuli* case reflects one of two distinct kinds of problems that reasonably should temper an apex or constitutional court's instinct to order an all-or-nothing

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<sup>135</sup> *Id.*, at 789.

<sup>136</sup> 1996 (1) SA 1207 (CC) (S. Afr.).

<sup>137</sup> Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1 (2016).

<sup>138</sup> See *Ntuli*, *supra* note 136, paras 28–30.

remedy. The first and most obvious, which *Ntuli* represents, is an insuperable logistical or administrative problem that immediate constitutional invalidity would create. The Canadian Supreme Court's decision in the *Manitoba Language Act Reference* provides an extreme example of this motivation for remedial flexibility. There, the Court held that the province had violated a constitutional requirement that laws be published in both English and French. Rather than immediately invalidate all provincial laws, and rather than permit fear of a draconian remedy to influence its merits determination, the Court declared a period of temporary validity for the length of time it would take for "translation, re-enactment, printing and publishing" of existing provincial laws.<sup>139</sup>

Paradoxically, the second scenario calling for remedial flexibility is good faith disagreement about the scope of rights. Courts sometimes have an instinct towards obduracy in the face of high-profile rights conflict, as when the Supreme Court suggested in *Planned Parenthood of Southeastern Pennsylvania v. Casey* that intense public disagreement counted as a reason *not* to overrule its prior decision in *Roe v. Wade*.<sup>140</sup> This instinct proceeds from the mistaken premise that the Court has either the capacity or the obligation to firmly settle such controversies for all time. Indeed, that statement by the *Casey* Court was bluster. In departing from *Roe*'s doctrinal framework and in overruling multiple other precedents favorable to abortion rights,<sup>141</sup> the Court was responding precisely to the anti-abortion movement's claims. The Court's undue burden standard, which falls short of strict scrutiny, was an implicit recognition that it should not treat anti-abortion laws the same way it treats laws infringing other fundamental rights. Abortion rights opponents disagree, in good faith, about the scope of women's reproductive autonomy in the face of contrary rights claims grounded in a certain conception of human life.

Other constitutional courts are more systematic in their flexible approach to intense disagreement over the scope of rights. As Alex Stone Sweet has observed, European judges tend to "avoid declaring either side a clear loser, preferring, wherever possible, to issue partial victories, splitting the difference between the disputants."<sup>142</sup> Rather than completely invalidate laws when engaged in abstract review—which tend to be higher-stakes conflicts than individual complaints—they instead "remove those provisions considered to be contaminated by unconstitutionality, allowing the rest of the law to be applied;

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<sup>139</sup> Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, 748 (Can.).

<sup>140</sup> 505 U.S. 833, 866–68 (1992).

<sup>141</sup> See *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983).

<sup>142</sup> STONE SWEET, *supra* note 66, at 142.

or they tell the legislature how it must correct the law if it wishes to pursue a given legislative reform.”<sup>143</sup> Remedial options might include suspensions of invalidity, severance of statutes, declaratory judgments that influence how collateral laws or actions are understood or enforced, or information-forcing devices such as disclosure requirements.

Consider another example from Canada. A group of sex workers challenged a criminal prohibition on brothels on the ground, in part, that it violated their right to security of the person, guaranteed in section 7 of the Charter of Rights and Freedoms, without sufficient justification.<sup>144</sup> The Court agreed with the plaintiffs, but it suspended the invalidity of the provision for 1 year to permit Parliament to revise the law to respond to the identified constitutional problem. The Court explained its reasoning thus:

[I]mmediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated. Whether immediate invalidity would pose a danger to the public or imperil the rule of law ... may be subject to debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.<sup>145</sup>

It is fair to say that the Court’s reason for suspending invalidity was not administrative necessity but rather a recognition that Parliament was dealing with a “complex and sensitive” problem that is “a matter of great public concern.” The problem of racial balkanization that the Seattle and Louisville school districts were attempting to address in *Parents Involved* was no less complex, sensitive, or of concern to the American public.

As Delaney has noted, this kind of flexibility can meet the concerns of those who fear the consequences of the merits ruling in much the same way that justiciability doctrine is sometimes used in the United States and elsewhere as a means of constitutional avoidance.<sup>146</sup> The major difference is that engaging in this kind of back-end remedial mitigation rather than the sorts of passive virtues memorably advocated by Alexander Bickel transparently and indeed coercively alerts political actors to constitutional problems. It does so in a way that preserves their prerogative to address those problems in the first instance, which itself is of constitutional dimension.

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143 *Id.*

144 *Canada (Att’y Gen.) v. Bedford*, [2013] 3 S.C.R. 1102 (Can.).

145 *Id.*, at 167.

146 See Delaney, *supra* note 137.

The relationship between remedial flexibility and recognition of second and third generation rights is well-known and abundantly theorized.<sup>147</sup> The suggestion here is that the need for relatively weak remedies is not categorically limited to positive rights, economic and social rights, or rights implicating horizontal effects. Rather, weaker remedies are integral to enforcement of *all* marginal rights, insofar as the motivation is not necessarily administrative or fiscal but the existence of reasonable disagreement in itself.

As with proportionality and *Lochner*, an aversive example is relevant to any discussion of the Court's remedial posture in high-stakes cases. The U.S. Supreme Court's most celebrated decision, *Brown v. Board of Education*, was enforced through a famously weak remedial order. Rather than behave like a common law court and order that the plaintiffs in *Brown* and its consolidated cases be admitted to school in a race-neutral fashion, the Court behaved like a court of equity and left space for school authorities to proceed "with all deliberate speed" in light of the administrative and infrastructural burden of integrating public schools that had long been racially segregated.<sup>148</sup>

The *Brown II* Court's effort to be flexible in just the way this article advocates has exposed it to unrelenting criticism. The implementation of *Brown* was met with massive resistance by southern politicians and residents, and eventually the Court itself abandoned the integration project with a series of cases in the 1970s that most prominently included *Milliken v. Bradley*.<sup>149</sup> Much of the conventional constitutional wisdom understands "'all deliberate speed' as little more than 'a soft euphemism for delay.'"<sup>150</sup>

It is a mistake, however, to pin failures in the school desegregation battles on the *Brown II* remedial standard. First, it is arguable that *Brown*'s contemporaneous weak remedy was necessary to the strong right it established. Second, the school desegregation movement lost momentum because of political opposition to increasingly coercive remedies, such as busing, that were being ordered by courts rather than devised by local officials. The substantive and remedial mechanisms this article contemplates are precisely designed to invite political actors into a conversation about the way forward in the face of a rights violation.

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**147** See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (2009); KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* (2012).

**148** *Brown v. Board of Educ.*, 349 U.S. 294, 300–01 (1955).

**149** 418 U.S. 717 (1974).

**150** Jim Chen, *With All Deliberate Speed: Brown II and Desegregation's Children*, 24 L. & INEQUALITY 1, 4 (2006) (quoting *Alexander v. Holmes County Bd. Of Educ.*, 396 U.S. 1218, 1219 (1969) (Black, Circuit Justice)).

Indeed, the Court's categorical instincts on rights arguably played an important role in the ultimate failure of the Court to continue to engineer nationwide school integration. While the Court remained unanimous in its cases seeking to enforce integration in southern school districts, most recently in its 1973 decision in *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>151</sup> it divided sharply over desegregation orders in northern districts. The problem is that northern districts could not be shown to have engaged in systematic de jure or intentional discrimination and yet many had levels of racial segregation that matched or exceeded many southern school districts. In the first case to reach the Court from a northern school district, *Keyes v. School District No. 1*,<sup>152</sup> the Court confronted a district, Denver, with no evidence of intentional districtwide segregation but with demonstrated segregation efforts in a single portion of the city. The Court held that a finding of intentional discrimination in a significant portion of the city shifted the burden to the city to show that segregation in particular schools was not racially motivated.<sup>153</sup>

The problem is that the *Keyes* decision perpetuated the view that the de jure-de facto distinction should be treated as an on-off switch, not unlike the tiers of scrutiny analysis. A finding of de facto segregation means that no rights have been violated and relieves the state of any and all corrective obligations, whereas a finding of de jure segregation means a constitutional violation of the highest order, one that authorizes courts to order states to take racially sensitive measures that the states are constitutionally forbidden from taking voluntarily.

Justice Powell, who blessed tiered review in *Rodriguez*, condemned its analog in *Keyes*, decided in the same Term. Justice Powell argued in his concurring opinion (and behind the scenes) that the Court should abandon the de jure-de facto distinction and instead subject every school district to a test of racial equality—in effects rather than intent—with respect to every significant aspect of the educational process.<sup>154</sup> Justice Brennan, who wrote the *Keyes* majority opinion, offered to jettison the distinction so long as Justice Powell was willing to impose an affirmative desegregation obligation, including busing, on northern and western school systems.<sup>155</sup> Powell refused.<sup>156</sup> To the ears of

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<sup>151</sup> 402 U.S. 1 (1971).

<sup>152</sup> 413 U.S. 189 (1973).

<sup>153</sup> *Id.*, at 208.

<sup>154</sup> *Id.*, at 224 (Powell, J., concurring in part and dissenting in part); see also JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 303–04 (1994).

<sup>155</sup> See JEFFRIES, *supra* note 154, at 303–04.

<sup>156</sup> See *id.*

Justice Brennan and Justice Marshall, who joined the *Keyes* majority opinion, Powell's alternative no doubt sounded like "separate but equal" all over again. But Justice Powell recognized that the problem of school segregation caused by discriminatory housing patterns is too complex for a court to address through the blunt instruments of *Brown*. Adopting Justice Powell's suggestion would, in effect, have subjected all of the nation's schools to a proportionality regime with respect to racial equality.

As with proportionality and as with drawing on greater investigative resources to make factual findings, there are potential harms associated with a court's remedial flexibility. A timid attitude towards rights enforcement can have expressive effects that ultimately diminish rather than enhance the power of the court.<sup>157</sup> In more practical terms, politicians and executive officials who do not face strong remedies are more likely to drag their feet. But it is important to be clear-eyed about the alternative. As noted, a limited remedial menu predictably leads judges to "underenforce" rights based on slippery slope rather than substantive arguments.<sup>158</sup> The choice between these dangers will depend greatly on the nature of the rights culture and the constitutional court's place within it.

## Conclusion

The U.S. Supreme Court is the world's oldest constitutional court. With age comes not just wisdom but obstinance. The American model of rights adjudication maps procedural instincts developed in the context of private law litigation between individuals onto disputes that set the terms of the Constitution for the entire nation. While younger courts around the world have created institutional mechanisms to better adapt to this lawmaking function, the U.S. Court has barely budged. The result is not rights absolutism, which is how the U.S. approach is sometimes described, but rights emasculation, as the pressure of substantive and remedial inflexibility prevents the Court from sensitive adjudication in cases that generate reasonable disagreement about the scope of rights.

I have argued that the Court must adopt proportionality analysis, must equip itself better to receive and adjudicate legislative facts, and must adopt more flexible remedies if it is to engage sensibly with modern rights claims.

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<sup>157</sup> See Charles L. Black, Jr., *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 1961, at 63, 66; Robert Leckey, *The Limits of Remedial Discretion*, 14 INT'L J. CONST. L. 584 (2016).

<sup>158</sup> See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1217–18 (1978).

Other courts have adopted these methods with varying degrees of success, but the argument does not depend on the strength of this comparison. To the degree these innovations are incompatible with the American judicial system, the American judicial system is incompatible with modern rights. U.S. courts will either continue to engage in deliberate obfuscation in order to grow constitutional law, or they will reject novel or contested rights conceptions simply for being novel or contested. There is no middle ground.

**Acknowledgements:** I would like to thank Vicki Jackson, David Law, Vanessa MacDonnell, Ronaldo Macedo, John Manning, Martha Minow, Iddo Porat, Gila Stopler, the anonymous reviewer, and workshop participants at Harvard Law School, the University of Minnesota Law School, the University of Texas at Austin School of Law, and the Global Constitutionalism and Human Rights Conference at Boston College Law School for insightful comments on earlier drafts.