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NEITHER TRUMPS NOR INTERESTS: RIGHTS, PLURALISM, AND THE RECOVERY OF CONSTITUTIONAL JUDGMENT

PAUL LINDEN-RETEK*

ABSTRACT

This Article develops a novel framework for the adjudication of rights in an age of partisan and societal polarization. In so doing, it defends judicial review in a divided polity on new grounds. The Article makes two broad interventions.

First, the Article cautions against recent calls to shift rights adjudication in the United States from Dworkinian categoricalism toward proportionality analysis. Such calls correctly identify how categoricalism, by embracing the absolute nature of rights as “trumps,” pits citizens harshly against one another. The problem, however, is that proportionality’s proponents fail to see how it imposes a rights absolutism of its own. Proportionality reduces pluralism in rights adjudication to the degree of justified infringement of a right whose normative content is otherwise held to be unchanging. This trades constitutional hermeneutics for a far narrower, more impoverished view of the judicial role and the purpose of rights adjudication: a view of goal-oriented, technical policy refinement that offers citizens no resources to better comprehend the disagreements over public values that divide them. To demonstrate the stakes of this criticism, I draw on comparative constitutional scholarship concerning the limitations of European jurisprudence that employs proportionality analysis—and examine how such limitations align neatly with criticisms leveled at American categoricalism in various areas of US constitutional law.

Second, the Article offers an alternative. American constitutional theory requires a novel guiding light, which I term “narrative doctrinalism.” On this model, judicial review aims not merely to constrain democracy (categoricalism) or justify governance (proportionality) but instead to make possible a distinctive quality of democratic judgment. Set in a narrative frame, rights are neither trumps nor pragmatic interests to be balanced in proportion, but nodal commitments made in time. Their scope of application is not unlimited; but neither is their meaning timeless. Rights have pasts and futures that demand historically-grounded interpretation, which judges are uniquely well-positioned to provide. The Article develops narrative doctrinalism’s

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normative and methodological insights in detail. It then applies them to a salient case from a recent Supreme Court term: *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, a case whose resolution continues to guide—for good or ill—how the Court disposes of analogous conflicts among rights regimes in other areas of law.

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I. INTRODUCTION

Ours are deeply polarized times. A pluralistic republic is beset by malignant factionalism, in which difference yields not mutual critique or understanding but mutual distrust and enmity.¹ Public institutions, rarely enlisted for common goals, are the site of partisan capture. The American judiciary, in particular, is positioned at a central point in this crisis of civic faith and civic agency.² Increasingly, we find a system of government where rights come into conflict to such a degree and in such a manner that constitutional law is seen to offer only tenuous resources for bridging, however modestly or temporarily, the disagreements that afflict us. Most recently, the religious liberty cases brought under the coronavirus pandemic have shown how controversial and fragile the route to nuanced accommodation of conflicting rights can be, even in the face of grievous material harm.³ In such a political context, how should

¹ According to a Pew Research Center poll released in July 2019, seventy-five percent of Americans say that trust in the federal government is shrinking; and two-thirds of Americans have significantly less trust in one another. LEE RAINIE ET AL., TRUST AND DISTRUST IN AMERICA 3–15 (Pew Research Center 2019).

² See, e.g., PEW RESEARCH CENTER, THE PUBLIC, THE POLITICAL SYSTEM AND AMERICAN DEMOCRACY 21, 84 (2018) (discussing findings that “[m]ost Republicans viewed the Supreme Court unfavorably after its decisions on the Affordable Care Act and same-sex marriage in summer 2015” and that Republicans and Democrats disagree whether “the U.S. Supreme Court should make its rulings based on what the Constitution ‘means in current times’” or based on “what the Constitution ‘meant as originally written’”).

³ See *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020); *High Plains Harvest Church v. Polis*, 141 S. Ct. 527, 527 (2020); *Danville Christian Acad. v. Beshear*, 141 S. Ct. 527, 527–28 (2020); *Calvary Chapel Dayton Valley v. Sisolak*, 140 S. Ct. 2603, 2604 (2020) (Alito, J., dissenting); *S. Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1614 (2020) (Kavanaugh, J., dissenting). In oral arguments for *Fulton v. City of Philadelphia*, a case concerning the obligations of Catholic Social Services under municipal contract to provide adoption services to same-sex couples without discrimination, Justice Kavanaugh issued a diffident appeal for guidance:

I have kind of a bigger picture thought to express . . . and you can react as—as you wish. It seems like this case requires us to think about the balance between two very important rights recognized by this Court. And it seems when those rights come into conflict, all levels of government should be careful and should often, where possible and appropriate, look for ways to accommodate both interests in reasonable ways.

Transcript of Oral Argument at 80–81, *Fulton v. City of Philadelphia*, 140 S. Ct. 1104 (2020) (No. 19-123). Unlike the coronavirus restriction cases, *Fulton* countenanced no material harm, as no same-sex family had ever used Catholic Social Services as an adoption agency, but likewise no same-sex family had been precluded from adopting because services of other agencies are available. Somehow a situation with strictly no consequential impact has become a vehicle for a grand stand off between two rights regimes under constitutional law. *Fulton v. City of Philadelphia*, 922 F.3d 140, 148 (3d Cir. 2019).

we understand the legitimacy of judicial review? How should judges and others within our constitutional culture conceptualize the rights they defend—and the meaning they aspire to give to our constitutional values? We search for a theory of constitutional judgment fit for our time.

Recovering this form of constitutional judgment entails confronting, with a critical eye, the two dominant methods of constitutional interpretation that have guided the legitimacy of judicial review in contemporary scholarly debates: (1) Dworkinian categoricalism and (2) proportionality analysis. This Article finds both wanting, insofar as they both recreate, albeit in different ways, an absolutist discourse of rights that fails to sustain the plural character of our public life. In turn, the Article advances a third path forward and applies it to constitutional discourse and case law.

I begin with a foundational question: What warrant do judges have to resolve deep conflicts over values in a pluralistic political order? In the American constitutional tradition, the answer has historically turned to doctrinal categories, which draw strength from a claim about expertise: the judicial skill to interpret categorical boundaries beyond which democratic decision-making must not reach. But the categorical approach, as Professor Jamal Greene has powerfully argued, risks embracing the absolute nature of constitutional rights as “trumps.”⁴ It distorts, or simply ignores, salient values and thus further alienates citizens from one another.

Proportionality analysis, favored by Greene and others to replace categoricalism, offers a second answer.⁵ But proportionality gives rise to an important inverse dynamic. Proportionality conceives rights not as trumps but as interests, and constitutional adjudication as the pragmatic balancing of those interests at singular points in time.⁶ While it can authentically claim to keep better track of competing values in the present and justify their infringement, proportionality nevertheless invites the objection that judges have neither the democratic pedigree nor relative competence to weigh the relevant costs and benefits. Although Greene hopes proportionality will “lower the stakes” of constitutional litigation and encourage democratic deliberation,⁷ it remains unclear whether and how the intrinsic indeterminacy of balancing standards is meant to withstand the partisan capture of adjudication.

Proportionality thus strains the legitimacy of judicial review by enforcing a rights-absolutism of its own. Proportionality holds the underlying substantive meaning of rights as a constant. It reduces the pluralism of rights adjudication merely to the variable extents to which this content can justifiably be limited or infringed in any individual case of conflict. This loses a crucial achievement of American

⁴ See Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 30, 33 (2018).

⁵ *Id.* at 35; see also Vicki Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3136 (2015).

⁶ Greene, *supra* note 4, at 85–86.

⁷ See Greene, *supra* note 4, at 80; see also Jamal Greene, *Trump as a Constitutional Failure*, 93 IND. L.J. 93, 108 (2018). See generally William Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1293–94 (2005) (detailing “lowering the stakes” of electoral politics as the overarching purpose of judicial review in a pluralistic democracy).

constitutional theory: the idea that paradigmatic judicial interpretations of rights trace the self-authorship of a democratic polity over time.⁸ The turn to proportionality, while responding to real deficiencies of categoricalism, risks a flawed normative overcorrection.

American constitutional theory therefore requires—and this Article recommends—a third guiding light, which I term “narrative doctrinalism.” On this model, informed by the constitutional thought of Robert Cover, judicial review aims not merely to constrain democracy (categoricalism) or justify governance (proportionality) but instead to make possible a distinctive quality of democratic judgment. Set in a narrative frame, rights are neither Dworkinian trumps⁹ nor pragmatic interests to be balanced in proportion, but nodal commitments made in time. Their scope of application is not unlimited; but neither is their meaning timeless. They have pasts and futures that demand historically grounded interpretation in each case.

The narrative interpretive method suggests the following: for constitutional judgment to retain the plural and limited understanding of rights, a court must articulate a critical interpretive stance that applies both horizontally to the facts presented by the parties and vertically to the landscape of public law and the position of the state.¹⁰ Each of these dimensions, further, is set within a diachronic frame of historical and imagined (future) development: how broader social and political confrontations emplot the particular dispute; and how doctrine has, meanwhile, developed around them and might yet develop afterwards still in light of the present judgment.

A key strength of this third “narrative” category of constitutional interpretation is that it not only legitimizes the judicial role in the face of a pluralism objection; it actually supplies a reason to think judges are better than other actors at contending with pluralism, at least insofar as we think judges are uniquely well-positioned to engage in the form of historically-situated reasoning the narrative frame prescribes. In this sense, I stand the usual critique on its head: pluralism is a reason for judicial resolution, not an obstacle to it. It offers an affirmative vision of judicial review that creates new, critical channels of democratic plurality, not merely defends those that already exist.

This affirmative stance distinguishes my account from recent scholarship that has also responded to the effects of polarization on constitutional law: work that aims to restore political balance (or randomness) in the Court’s composition,¹¹ for example; or Mark Graber’s recent promotion of judicial minimalism, with narrow holdings and

⁸ See Greene, *supra* note 4, at 32; see also, Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

⁹ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* xi (1977).

¹⁰ Helen Hershkoff, “*Just Words*”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1523 n.20 (2010).

¹¹ Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148 (2019) (offering two proposals—the Supreme Court Lottery and the Balanced Bench—for preserving the Court’s legitimacy as an institution “above politics”).

rationales to calm the extreme swings of constitutional decision-making.¹² My intervention differs, too, from scholarship that advises a neutral ethos to yield systemically cross-partisan benefits in the Court's jurisprudence.¹³

Appeals to composition or minimalism or neutrality, on my view, ask far too little of constitutional interpretation. They take the polarization of politics as a problem for courts to structurally supersede, to representatively reflect, or to defensively appease. That is, they understand the grounds of judicial legitimacy in terms of Elyan representation or Bickelian consent. Categoricalism and proportionality are illustrative of this same family of impulses. This Article questions the wisdom and adequacy of such views.

To understand the roots of the dilemma that polarization poses to constitutionalism and the strength of narrative doctrinalism as I conceive it, it is necessary to understand the complicated relationship between rights and democratic pluralism. To do that we must first free ourselves from the hold of certain premises that characterize predominant approaches to judicial review: this insistence that legal judgments are meant foremost to constrain or to refine the majoritarian political process; and that their aim is to resolve or moderate the terms of public conflict. Understanding the limitations of this view is essential to perceiving why present models of constitutional adjudication remain wedded to absolutist dispositions—and thus are inadequate for the plurality of our time.

Categoricalism and proportionality are informed by two variants of such democratic theory. The former subscribes to a Dworkinian appeal to the absolute authority of rights that delimit the boundaries of legitimate public action and thus constrain majoritarian rule.¹⁴ The latter subscribes to a model of rights as technologies of governance that place certain burdens of justification on public power; their role is to correct for inadequacies in the political process, not to authoritatively delimit.¹⁵ Rights, accordingly, become interests citizens hold in the process of political justification and the resolution of conflict.¹⁶

The absolutism of categoricalism is easier to perceive: it presumes the conflict of values away beneath its “culture of authority,” tending to reproduce boundaries of constraint in a mechanical fashion, hardly yielding to the changing societal values that clash beneath them. But proportionality's countering “culture of justification,” while perhaps more subtle in its effects, is no less damaging to the plurality of rights.¹⁷

¹² Mark Graber, *The Coming Constitutional Yo-Yo? Elite Opinion, Polarization, and the Direction of Judicial Decision Making*, 56 HOW. L.J. 661, 704–13 (2013). See generally CASS SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (2001).

¹³ Zachary Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1275 (2019).

¹⁴ Greene, *supra* note 4, at 35; see also Stephen Macedo, *Against Majoritarianism: Democratic Values and Institutional Design*, 90 BOST. UNIV. L. REV. 1029, 1032 (2010).

¹⁵ Greene, *supra* note 4, at 63.

¹⁶ See generally Greene, *supra* note 4.

¹⁷ The categories of authority and justification are inspired in the first instance by the work of Moshe Cohen-Eliya and Iddo Porat, who in turn borrow from South African scholar Etienne

For proportionality, too, assumes political conflict away: not the existence of conflict as such, which it readily admits, but the political nature of that conflict. By limiting the Court's task to properly weighing the practical infringements of interests in the present, proportionality narrows adjudication's interpretive character and becomes in key respects, like categoricalism, a mechanical jurisprudence. Public conflict is here translated into a technical problem of how best to refine and balance competing interests. Its political dimensions—embedded in meaning and history—disappear from the Court's scrutiny.

The problem polarization poses for democratic constitutionalism is therefore deeper than the need to restore moral constraint or to refine a politics of “lowered stakes.” These democratic theories of judicial review fundamentally mislead. They suggest that the relationship between pluralism and constitutional judgment is mechanical, formalistic, and subsumptive—points I will develop below—and give us an impoverished notion of judgment. It is this impoverished picture of judgment that reproduces the absolutism—in politics as well as law.

Consider the two absolutisms as we find them in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,¹⁸ a case I will return to in detail below, and consider, specifically, two visions of that dispute.¹⁹ The first vision is framed by proportionality: two citizens who quibble merely about how a shared set of values is to be applied to a particular set of facts. Both agree that the state cannot compel protected forms of expression and, likewise, that a baker's free expression defense could not justify not serving customers on account they are gay men.²⁰ The dispute is not generalized to these principles; it is narrower, over where to draw the line, in this particular instance, between free expression and protections against discrimination on the basis of sexual orientation. At stake is not a principled stand, one way or another; but instead, merely the successful delivery of a personalized cake and the matter of who must bake it.

The second vision is a categorical vision and, as Greene portrays it in his account, a much darker view, with “slippery slopes, law school hypotheticals, and assorted horrors on parade.”²¹ The categorical mindset forces one to see particular conflicts in the absolute consequences they hold for the principles at stake. Any particular case is a reorientation of high principle. Would non-discrimination require the sale of a cake honoring the Ku Klux Klan or *Kristallnacht*? Is *Masterpiece Cakeshop* best understood as a successor to Ollie's Barbecue, the “whites only” Alabama restaurant

Mureinik. See MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE 111–12 (2013); Greene, *supra* note 4, at 64.

¹⁸ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018).

¹⁹ See Greene, *supra* note 4, at 31–32.

²⁰ See Brief for Petitioner at 18–19, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) 2017 WL 5644420; Brief for Respondents Charlie Craig and David Mullins at 2–3, *Masterpiece Cakeshop, Ltd. V. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) 2017 WL 4838415; Brief for Respondent Colorado Civil Rights Commission at 3, *Masterpiece Cakeshop, Ltd. V. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) 2017 WL 4838416.

²¹ Greene, *supra* note 4, at 31.

that challenged the public accommodation provisions of the Civil Rights Act of 1964,²² and ought it be condemned as forcefully? Because the parties' arguments signify these absolute repercussions, their argument must be guided on one side by bad faith alone; and the case must be decided, therefore, "without mercy to the loser."²³

While Greene correctly presents the latter categorical, rights-as-trumps vision as a pathological escalation, can we say that the former proportionality view holds more faithfully to the value conflict of the case? In his account, Greene suggests approvingly the way in which proportionality's framing might have made available a "less coercive, less binary" remedy to the dispute.²⁴ "[T]he Court," Greene writes, "could have (perhaps after mediation) required Phillips to provide a customized cake to the couple that he was not personally obligated to bake."²⁵ But is this all that was at stake in a legal remedy for the parties in the case—or, before litigation was contemplated, in the encounter at the Masterpiece Cakeshop itself? The harm suffered by both Phillips, the baker, and by Craig and Mullins, the gay couple, exceeded the transactional interest of the cake itself. The cake assumed a symbolic significance that implicated the constitutional values of the society both parties hoped to call home. And as prudent or judicially expedient it might be from the perspective of conflict-resolution to deny this dimension of the parties' dispute, it is also unresponsive to their normative claims for recognition. It distorts the place and meaning in public life of religion and LGBTQ+ rights alike to make this kind of reduction. It reaches the deeper stakes of pluralism hardly at all.

These deeper stakes of pluralism demand a more robust account of constitutional judgment. The object of a legal judgment is not to resolve a conflict in the sense implied by either categoricalism or proportionality, but rather to critically articulate the terms and social import of that conflict in light of evolving understandings of constitutional commitments. And it is to do so in such a way that makes mutual understanding possible, even as a particular resolution of the particular conflict is demanded. The process involves interpretation that is both historical and prospective, dynamic and systemic, and deeply plural—with the acknowledgment that there might indeed be many remedies for resolving the individual conflict at hand. Its purpose is to expand citizens' capacity for policy choice and to explore the expressive values at stake in those choices. Its emphasis is on the power of legal judgment composed as a public text that is able to disclose new self-understandings and subject-positions in the midst of political struggles.

It is this emphasis on interpretive disclosure that makes narrative doctrinalism distinctive as a theory of judicial review. Narrative doctrinalism occupies a conceptual middle ground between the models of authority and justification. While it rejects the

²² Greene, *supra* note 4, at 32; see also Transcript of Oral Argument at 18–19, 37, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111) (exemplifying a situation similar to that of Ollie's barbecue); *Katzenbach v. McClung*, 379 U.S. 294, 296–97 (1964) (describing discriminatory practice at Ollie's Barbecue).

²³ Greene, *supra* note 4, at 32.

²⁴ *Id.* at 123.

²⁵ *Id.* at 124.

Dworkinian view that rights act as authoritative trumps, it also demands more from rights (and from adjudication) than the reasonable balancing of civic interests. It suggests that the preservation of a pluralistic polity requires more from the judicial role than justification. Constitutional judgment, on this view, is an essential public mechanism for disclosing and enriching the possibilities of change within citizens' normative commitments—new or better ways to understand the concerns of fellow citizens, driven by the problems and conflicts that arise among them before the law. It takes seriously the dialogic nature of constitutional politics, such that constitutional law and the authority of the Court are set within an iterative relationship among institutions of representative government and the people themselves in the course of interpreting the Constitution.²⁶ And it asks what structures of legal judgment can better sustain the pluralistic character of this broader political dialogue. Considering conflicts between rights in this vein requires not merely finely-tuned conflict resolution but also the repair of what Hannah Arendt called a “common world,”²⁷ in which citizens better comprehend—and thus can imagine sharing—one another's claims, no matter how separate, foreign, or conflicting they in fact are.

My argument is structured in the following parts: Part II elaborates the terms of categoricalism and proportionality as two competing frames of constitutional interpretation, each grounded in a distinct view of constitutional democracy: rights as trumps and rights as interests, drawing on the work, respectively, of Ronald Dworkin and Robert Alexy. It then argues that, like categoricalism, proportionality also enforces a rights absolutism that undercuts its purported understanding of rights as limited. This analysis therefore cautions against the suggested turn away from the former toward the latter in American jurisprudence. To demonstrate the contours and stakes of this criticism, I cite limitations of European jurisprudence employing proportionality analysis and examine how such limitations align neatly with those criticisms Greene levels at American categoricalism in various areas of U.S. constitutional law.

Part III, in response, recommends “narrative doctrinalism” as a third interpretive frame to guide the judicial role in times of deep pluralism. This Part is a work of constitutional, democratic, and legal theory that connects the insights of Robert Cover with the political theory of Hannah Arendt to craft a view of constitutional democracy as the site of a particular form of democratic judgment, a condition for which is the preservation of plurality.

Part IV applies narrative doctrinalism's normative and methodological insights in detail to a salient case from the Supreme Court's prior term: *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,²⁸ the resolution of which is likely to guide how the Court will dispose future analogous conflicts among rights regimes in other areas of law.

²⁶ See Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1323 (2006); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 373–74 (2007).

²⁷ See generally HANNAH ARENDT, *THE HUMAN CONDITION* 52–53 (2d ed. 1998).

²⁸ See generally *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S.Ct. 1719 (2018).

II. TWO ABSOLUTISMS: JUDICIAL REVIEW AND THE SEARCH FOR PLURALISM

The first task is to develop accounts of categoricalism and proportionality as distinct theories of the judicial role and the reasons why each tends towards the pathologies of rights absolutism. Part A details core features of the categorical approach: its basis in the Dworkinian conception of “rights as trumps” and a democratic theory of “constrained democracy;” and its resulting absolutist distortions, in which threshold interpretive questions displace applications of law to fact and the balancing of rights-claims is thus treated as exceptional rather than constitutive of legal judgment. Part B details the jurisprudential architecture of proportionality analysis and its roots in a theory of “refined democracy,” or “justified governance.” With reference to its use in European law, I then develop a critique of proportionality’s analogous absolutist distortions. Part C formalizes the critique common to both approaches as a concern about presumptive judgment, a particular understanding of legal judgment in which the case is subsumed beneath existing interpretations of law and loses its role as a singular point of normative articulation. It is presumptive judgment that imperils the search for plurality in law.

In parsing theories of judicial review, my focus is on the meaning of interpretation within a constitutional culture. It evaluates judicial reasoning—whether categoricalism or proportionality—on the basis of its potential to do more than evenly represent partisan views or deliver a broadly balanced distribution of political outcomes. It concerns, instead, the role of judicial interpretation in sustaining a particular form of politics and a particular grammar of political argument.²⁹

In American constitutionalism, while arguments based on text, structure, history, and precedent guide judicial inquiry, deep disagreements remain over where to take the legal analysis at the moment these guides conflict or cease to be clear. When we foreground the context of pluralism, this conflict and indeterminacy constitute the generalized, paradigm case. Categoricalism and proportionality—and, later, narrative doctrinalism, as well—each suggest a distinct ethos or disposition that guides primary interpretive approaches to constitutional adjudication in precisely these instances. They are dispositions that judges who find different primary interpretive approaches compelling may nevertheless likewise employ. Of chief interest in my analysis is whether these visions of the judicial ethos provide an adequate grounding for political pluralism. This Part argues that neither categoricalism nor proportionality—albeit by different means and on different grounds—succeeds in doing so.

A. *Categoricalism*

Over time, the Supreme Court of the United States has developed a distinctive discourse around rights. This discourse typically discusses rights as absolute and subject to external limitation only in exceptional circumstances. When U.S. jurists, lawyers, or scholars conclude that a “right” is “infringed,” their analysis comes to an end. This approach is generally associated with Ronald Dworkin and the notion that rights are “trumps” over other interests and against governmental action.³⁰

²⁹ Compare PHILIP BOBBITT, *CONSTITUTIONAL FATE* 5–6 (1982), with J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 *TEX. L. REV.* 1771, 1782–84 (1994).

³⁰ See DWORKIN, *supra* note 9, at xi (calling rights “political trumps held by individuals”); Ronald Dworkin, *Rights as Trumps*, in *THEORIES OF RIGHTS* 153, 166 (1984) (describing rights

Dworkin's basic view is that holding a right limits the grounds the state might justifiably cite to deprive the rights-holder of that which the right protects.³¹ These grounds may involve protecting conflicting rights or perhaps securing some other extraordinarily significant moral concern, but they may not countenance logic that is more crudely utilitarian:³² that is to say, a logic that holds ever open the possibility that any right can conceptually be infringed in the event that its violation would bring greater public benefits than its respect.³³ To weigh a right against the public good in this way, Dworkin writes, is to erase the essence of the dignity and respect that a right is meant to confer upon those who hold it.³⁴

1. Authority: The Paradigm of Constrained Democracy

Dworkin's use of the term "right" is drawn from a broader democratic theory upon which the particular consequences of rights adjudication in the Dworkinian vein are grafted. This theory entails a paradigm of democratic legitimacy I term "constrained democracy," in which rights form the authoritative boundaries of legitimate public action. The authoritative power of rights derives precisely from the fact that they are not *ex ante* presumed to fall under the same dispensation of interest as do other public goods the government might choose to protect.

Dworkin's concern is thus neither with mere interests nor even with legally or constitutionally protected entitlements, even those experienced as particularly intense.³⁵ Dworkin attends to those rights "necessary to protect [a person's] dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence."³⁶ The right to be governed by democratically enacted laws—a citizen's right to self-government through co-participation—does not count as a right in Dworkin's understanding.³⁷

Rights, in other words, sit atop a hierarchy of law over political action. They are paradigmatically counter-majoritarian, to be sure, but also pre-political, extra-political, even anti-political. Sustaining an individual right thereby inevitably entails infringing, in Greene's elaboration of Dworkin, upon a "right" of a people to collective self-government. As Dworkin writes, "A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done."³⁸ On the view of constrained

as "trumps over some background justification for political decisions that states a goal for the community as a whole").

³¹ DWORKIN, *supra* note 9, at 191.

³² *Id.*

³³ *Id.* at 191–92.

³⁴ *See id.* at 239–40, 277.

³⁵ *See id.* at 191; Greene, *supra* note 4, at 67.

³⁶ DWORKIN, *supra* note 9, at 199.

³⁷ *Id.* at 194.

³⁸ *Id.*

democracy, rights are moral norms that precede or frame the practice of politics; they are the pre-conditions of democracy and thus form a pre-existing consensus from which politics paternalistically follows.

In this regard, even should a judge yield to a certain pragmatism in the ultimate application of rights in a particular case, at stake in categoricalism is what Professor Charles Black understood to be a guiding judicial “attitude”³⁹—a posture that disposes the judge negatively toward a pragmatic or utilitarian calculus of fundamental societal values. The course of pragmatic politics must be kept conceptually distinct from the normative primacy of law.

2. Rights as Trumps: Limitations and Distortions

Categoricalism’s focus on rights as claims that protect from intense, dignitary harm disregards a countervailing concern, however: what does it mean, for democratic pluralism and the politics of that pluralism, to declare that every other interest at stake is not a right?⁴⁰ This oversight is at the heart of key limitations and distortions in constitutional adjudication. Categoricalism fails to acknowledge or accommodate salient competing values of public concern. On Greene’s reading, the critique of categoricalism runs along three dimensions, as follows.

First, the elevated intensity of rights makes concerns of judicial overreach intuitively strong.⁴¹ The threshold definition a right becomes the core analytic focus, to which other considerations must be conceptually and lexically secondary.⁴² This organizing structure produces a certain interpretive effect.⁴³ It engenders interpreting the scope and meaning of rights according to the particular categories that judges are able to articulate and delimit as a matter of their doctrinal competence.⁴⁴ Held further afield are principles of justice and their potential realization in the case at hand.⁴⁵ While Dworkinian categoricalism aims to moralize politics in the constrained democracy paradigm, reasoning on the basis of categorical threshold judgment paradoxically yields a mode of adjudication disjoined from the moral vision of justice that a polity at any point in time might require.⁴⁶

The consequence is the jarring line-drawing exercises American constitutional law has countenanced historically. Consider that the right to protected “speech” covers

³⁹ See Charles Black, Jr., *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER’S MAG., Feb. 1961, at 66.

⁴⁰ See Kai Möller, *Proportionality and Rights Inflation*, in PROPORTIONALITY AND THE RULE OF LAW 155, 160 (2014); Joseph Raz, *Professor Dworkin’s Theory of Rights*, 26 POL. STUD. 123, 127–28 (1978).

⁴¹ See Greene, *supra* note 4, at 32–33.

⁴² *Id.*

⁴³ Greene, *supra* note 4, at 30.

⁴⁴ *Id.* at 32–33.

⁴⁵ *Id.* at 33.

⁴⁶ See Jackson, *supra* note 5, at 3147.

corporate election expenditures⁴⁷ and access to pharmacy records for the purposes of more effectively marketing pharmaceutical drugs to doctors,⁴⁸ while no rights exist to education, nutrition, or health care.⁴⁹ This is despite the fact that substantive due process construes the Fourteenth Amendment to confer fundamental rights even in the absence of textual specification.⁵⁰

By the same light, because rights entail an absolute bar to virtually any legislative or executive action, creative judicial expansion almost immediately risks unworkability. This prompts an implicit bias toward judicial caution, and the absolutist conception of rights is liable to quickly form a ceiling of protection. Consider *Washington v. Davis*,⁵¹ in which the Court first declared that equal protection jurisprudence countenances only cases of intentional discrimination and must not further apply to matters of disparate impact, lest it would “raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.”⁵² Or consider *McCleskey v. Kemp*,⁵³ in which the Court considered an Eighth and Fourteenth Amendment challenge to the death penalty citing statistics that black defendants with white victims were more likely to receive capital sentences than white defendants or defendants whose victims were not white.⁵⁴ Or take *Employment Division v. Smith*,⁵⁵ in which the Court found that a disproportionate burden on a particular religious practice does not cause an otherwise neutral and generally applicable law to run afoul the Free Exercise Clause;⁵⁶ and that to find such a violation entails a “compelling interest” test that would potentially demand “religious exemptions from civic obligations of almost every conceivable kind.”⁵⁷ As Greene details, the same effect is on display in the Court’s recent partisan gerrymandering cases, in which Justices’ manageability concerns activated the political question doctrine, despite the fact that the Court admitted gerrymandering

⁴⁷ See *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010).

⁴⁸ See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011).

⁴⁹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 36–37 (1973); Jennifer Prah Ruger et al., *The Elusive Right to Health Care Under U.S. Law*, 372 *NEW ENG. J. MED.* 2558, 2558 (2015).

⁵⁰ See Greene, *supra* note 4, at 70–71.

⁵¹ *Washington v. Davis*, 426 U.S. 229 (1976).

⁵² *Id.* at 248.

⁵³ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

⁵⁴ *Id.* at 286–87.

⁵⁵ *Emp. Div., Dep’t of Hum. Res. of Or. v. Smith*, 494 U.S. 872 (1990).

⁵⁶ *Id.* at 878–80, 882.

⁵⁷ *Id.* at 888.

claims were serious threats to the integrity of democratic politics.⁵⁸ Categoricalism laces judicial reasoning with a fear of the generative potential of rights' meaning—a fear that can verge on the perverse. In Justice Brennan's haunting words of dissent in *McCleskey*, it is a “fear of too much justice.”⁵⁹

Second, categoricalism creates a structural tension in adjudication that over time erodes the integrity of its own categorical doctrinal architecture.⁶⁰ Judges, of course, have intuitions about justice that they bring to each case, notwithstanding the rigidity of the doctrinal boundaries they inherit.⁶¹ Where such intuitions conflict with categorical definitions and cannot be quieted by appeals to justiciability or other forms of deference, the result is typically a latent distortion of the doctrinal categories themselves.⁶²

For example, while categoricalism straightforwardly underwrites the Court's tiers-of-scrutiny framework, according to which the nature of protected classification establishes the standard of review, these doctrinal distinctions are far more complicated in application. The Court has applied strict scrutiny differently where the state reinforces social hierarchy than where it resists that hierarchy.⁶³ And more rigorous scrutiny of state motives and methods have protected certain groups whose defining characteristics would otherwise trigger only the rational basis test—children of undocumented immigrants, gays and lesbians, or the disabled, for instance.⁶⁴ The result is a breakdown of legal form, but one clouded by a surface pretension of absolute boundaries and precision. If in the first cluster of problems above, judges embrace the mindset of categoricalism as a way to ensure legal certainty, categoricalism now forces judges to conceal the real grounds of decision-making.⁶⁵ If this is in practice some form of creative pluralism, it is a pluralism disavowed.

⁵⁸ See *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004); Greene, *supra* note 4, at 33.

⁵⁹ *McCleskey*, 481 U.S. at 339 (Brennan, J., dissenting).

⁶⁰ Greene, *supra* note 4, at 35.

⁶¹ *Id.* at 33.

⁶² *Id.*

⁶³ Compare *Palmore v. Sidoti*, 466 U.S. 429, 433–34 (1984) (striking down a judgment denying custody of an infant to a white mother because she had remarried a black man), with *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, at 2214–15 (2016) (upholding the University of Texas's race-based affirmative action policy).

⁶⁴ See, e.g., *Plyler v. Doe*, 457 U.S. 202, 227–30 (1982) (holding that Texas lacked sufficient rational basis to deny undocumented immigrant children access to free public education); *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (finding no rational basis for an amendment to the state's constitution that would withdraw protection of antidiscrimination laws from gays and lesbians); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448–50 (1985) (finding no rational basis for a permit requirement imposed upon a home for persons with intellectual disabilities). See generally Greene, *supra* note 4, at 46–47.

⁶⁵ Deviations from the black letter framework are inevitably critiqued in dissenting or concurring opinions, to which the majority is seldom responsive. See, e.g., *Fisher*, 136 S. Ct. at 2238 (Alito, J., dissenting); *Grutter v. Bollinger*, 539 U.S. 306, 380 (2003) (Rehnquist, C.J., dissenting); *United States v. Virginia*, 518 U.S. 515, 559–62 (1996) (Rehnquist, C.J., concurring

Thirdly, categoricism reaches beyond substantive doctrine and legal form into the sphere of legal rhetoric.⁶⁶ It affects how legal texts structure relationships among the parties to a case—and among citizens at large.⁶⁷ As Greene writes, this cost of categoricism in the “relational register” is perhaps the most “damaging” to the project of American constitutionalism in its effort to sustain pluralism.⁶⁸ If constitutional law is indeed a grammar of political argument, the narrow controversy between individual adversaries under Article III⁶⁹ assumes more general importance for the body politic itself. The concern with categoricism is that it distorts the encounter between litigants, who are forced to view their dispute in the harsh and divisive absolutism of categories, structured as detailed above. It encourages exaggerated postures and the most polarized versions of claims. Insofar as rights are trumps, the presumption of either party is that the other side in the end has no legitimate claim of protection.⁷⁰ Morality admits little dispute, and categoricism leaves citizens less able to recover common ground in the debate among them.⁷¹

This last point goes to the heart of whether judicial review can serve not merely as a source of moral constraint but also as the substance of moral self-government.⁷² The pathologies and distortions of categoricism reveal that the gulf between these two—between moralism and a moral politics—remains insurmountably wide when rights are conceived as trumps.⁷³ Not only justice or legality suffers; democratic self-authorship does, as well.⁷⁴

In light of categoricism’s deficiencies, Greene recommends to American jurisprudence the alternative framework of proportionality as an ameliorative, more pluralistic vision of rights. The following Part elaborates what this vision of constitutional adjudication looks like. But in contrast with Greene, it instead demonstrates how the same or analogous distortions to the plurality of the body politic plague the proportionality view, as well.

in the judgment); *Romer*, 517 U.S. at 640–41, 644 (Scalia, J., dissenting); *Plyler*, 457 U.S. at 244 (Burger, C.J., dissenting).

⁶⁶ Greene, *supra* note 4, at 34.

⁶⁷ *Id.*

⁶⁸ *Id.* at 33.

⁶⁹ U.S. CONST. art. III, § 2.

⁷⁰ See Greene, *supra* note 4, at 34.

⁷¹ See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 14 (1991).

⁷² See Paul W. Kahn, *Freedom, Autonomy, and the Cultural Study of Law*, 13 *YALE J. L. & HUM.* 141, 167 (2001).

⁷³ *Id.* at 167, 170.

⁷⁴ See Kahn, *supra* note 72, at 155. See generally Guyora Binder & Robert Weisberg, *Cultural Criticism of Law*, 49 *STAN. L. REV.* 1149 (1997).

B. *Proportionality*

Proportionality as a legal principle is familiar in many areas of U.S. constitutional law. It relates to the idea that the larger the harm imposed by the state, the more weighty the reason required as justification and that the more severe a transgression of the law, the more severe the proper sanction. We find it in Eighth Amendment case law on “cruel and unusual punishments” and “excessive fines”;⁷⁵ the Due Process Clause’s limits on the award of punitive damages; and the requirement under the Takings Clause of “rough proportionality” between conditions on zoning variances and the benefits gained by the property owner.

But proportionality, on the basis of this basic principle, is also more broadly a “structured legal doctrine” that calibrates the careful limitation of rights as such.⁷⁶ Some form of proportionality as a legal doctrine is practiced in courts globally (the United States being the notable exception), so much so that even proportionality’s detractors have fashioned it “the *jus cogens* of human rights law.”⁷⁷ It characterizes, as explored in greater detail below, the approach of national constitutional courts in Europe, the European Court of Human Rights, and the Court of Justice of the European Union.⁷⁸ Courts in South Africa and Israel employ proportionality as an essential method in their jurisprudence,⁷⁹ as does the Canadian Supreme Court in its adjudication of the Canadian Charter of Rights and Freedoms.⁸⁰ In the last decade or

⁷⁵ See *Weems v. United States*, 217 U.S. 349, 367, 369–70 (1910) (requiring punishments be proportional to the crime’s severity as part of the Eighth Amendment’s ban on cruel and unusual punishment).

⁷⁶ See Jackson, *supra* note 5, at 3098.

⁷⁷ Grant Huscroft et al., *Introduction*, in *PROPORTIONALITY AND THE RULE OF LAW* 1, 3 (2014); accord NIELS PETERSEN, *PROPORTIONALITY AND JUDICIAL ACTIVISM* 6 (2017) (“[S]ome form of proportionality test is used by most courts exercising judicial review outside of the United States today.”).

⁷⁸ See Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 139–52 (2008).

⁷⁹ AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* 197–98, 208–10 (2012); Stone Sweet & Mathews, *supra* note 78, at 74.

⁸⁰ See *R. v. Oakes*, [1986] 1 S.C.R. 103, 139 (Can.); see also Greene, *supra* note 4, at 58–59.

so, courts in Mexico, Colombia, and Brazil⁸¹ have also adopted the doctrine, as have their counterparts in South Korea, Taiwan, Hong Kong, and Malaysia.⁸²

The distinctive structure of proportionality analysis comprises the following multipart, typically hereby sequenced, set of inquiries: (1) some discernment of the nature of the right that is claimed; (2) a determination of whether the legislative measure pursues a “legitimate” purpose [“legitimacy”]; (3) an assessment of whether the measure is “suitably” related to the policy objective [“suitability” or “means-ends fit”]; (4) a test of whether the measure pursues the “least-restrictive means:” infringing the right no more than necessary [“necessity” or “minimal impairment”]; and (5) an assessment of the marginal benefits of the measures balanced against the costs to the rights-bearer [“balancing” or “proportionality in the strict sense”].⁸³

Proportionality is, in the first instance, best understood as an analytic frame, a kind of “intermediate scrutiny for all.”⁸⁴ Its core and central aim, in Greene’s words, is to “discipline the process of rights adjudication on the assumption that rights are both important and, in a democratic society, limitable.”⁸⁵ This view reflects the influential legal theory of Robert Alexy and his reconstruction of proportionality’s philosophical foundations drawn largely from the jurisprudence of the German Federal Constitutional Court.

Alexy reformulated rights not as rules to be either fulfilled or not but principles demanding the greatest possible realization.⁸⁶ They are “optimization requirements” in search of Pareto-optimal solutions according to the general principle of balancing: “The greater the degree of non-satisfaction of, or detriment to, one principle, the

⁸¹ Carlos Bernal Pulido, *El Juicio de la Igualdad en la Jurisprudencia de la Corte Constitucional Colombiana*, Universidad Externado de Colombia, in VEGA GOMEZ, JUAN AND CORZO SOSA, EDGAR (EDS.), INSTRUMENTOS DE TUTELA Y JUSTICIA CONSTITUCIONAL. Memoria del VII Congreso Iberoamericano de Derecho Constitucional, México, IJ-UNAM, 2002, available at <https://archivos.juridicas.unam.mx/www/bjv/libros/1/344/5.pdf>; Marin, Amaya Alvez, *Proportionality Analysis as an ‘Analytical Matrix’ Adopted by the Supreme Court of Mexico*, COMPAR. RSCH. IN L. & POL. ECON. (2009) (Research Paper No. 46/2009, available at <http://digitalcommons.osgoode.yorku.ca/clpe/154>); JOÃO ANDRADE NETO, BORROWING JUSTIFICATION FOR PROPORTIONALITY: ON THE INFLUENCE OF THE PRINCIPLES THEORY IN BRAZIL (2018).

⁸² Alec Stone Sweet & Jud Mathews, *Proportionality and Rights Protection in Asia: Hong Kong, Malaysia, South Korea, Taiwan—Whither Singapore?*, 29 SING. ACAD. L.J. 774, 774 (2017).

⁸³ See Stone Sweet & Mathews, *supra* note 78, at 75; see also Oakes, [1986] 1 S.C.R. at 139; BARAK, *supra* note 79, at 131–33. Different jurisdictions place different weights on various steps in the analysis. See Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 U. TORONTO L.J. 383, 393–95 (2007); Jackson, *supra* note 5, at 3098–01.

⁸⁴ Jamal Greene, *The Rule of Law as a Law of Standards*, 99 GEO. L.J. 1289, 1292–93 (2011); see also United States v. Alvarez, 567 U.S. 709, 730 (2012) (Breyer, J., concurring in the judgment).

⁸⁵ Greene, *supra* note 4, at 58.

⁸⁶ ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 47–61 (Julian Rivers trans., Oxford University Press 2002) (1986).

greater must be the importance of satisfying the other.”⁸⁷ Principles, unlike rules, are inherently subject to weighing and to limitation—they contain implicit acknowledgment that factual circumstances and competing principles will always make some claim to limit a principle’s application. And, Alexy argues, even in instances when a right’s scope is constrained, it is vindicated as a principle—in the sense of being optimized—insofar as the constraint is done in proportion.⁸⁸

The basic proportionality test has become so dominant in great part because of its flexibility. Proportionality as a mode of judgment allows law to adapt to rapid social change in contemporary conditions of plurality and complexity.⁸⁹ Where rights are thus always potentially in conflict, proportionality formalizes and simplifies the task of interpreting their comparative import. For this reason, many hail proportionality as a crucial methodology for deepening supranational judicial dialogue and harmonizing diverse legal systems and cultures. Michel Rosenfeld, for example, celebrates proportionality analysis as a doctrinal technique, easily understood and applied by courts, for achieving congruence in constitutional interpretation across diverse jurisdictions.⁹⁰ And Marco Dani, in pleading for more serious judicial dialogue across European institutions, sees proportionality review as the natural “syntax” and “common language” for such exchange.⁹¹

Because of this privileged place, however, one must more carefully scrutinize the effects of proportionality on the politics, identity, and law of a modern, pluralistic polity. In what ways does its use alter the nature of political commitments? What form of learning does it express? What account does it give of democracy and self-government in relation to the fact of pluralism; and vice versa? If proportionality has indeed become global constitutionalism’s *lingua franca*, it is due to certain rationalistic characteristics, which lend themselves to universalization, generalization, and commensurability across contexts.⁹² But if proportionality is able to generalize across contexts only by sidestepping questions of text, history, precedent, and social meaning, then its transformative capacities might be for a pluralistic legal culture rather forceful but in an ultimately self-undermining sense. It is this more caustic dynamic of constitutional judgment that I aim to illuminate.

⁸⁷ *Id.* at 47, 102.

⁸⁸ *Id.* at 57.

⁸⁹ T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 960 (1987).

⁹⁰ Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT’L J. CONST. L. 415, 451 (2008) (citing proportionality’s utility for “harmonization within a multilayered and highly segmented legal and political universe”).

⁹¹ Marco Dani, *Intersectional Litigation and The Structuring of a European Interpretive Community*, 9 INT’L J. CONST. L. 714, 732 (2011).

⁹² Mattias Kumm, *Institutionalizing Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 EUR. J. LEG. STUD. 153, 156 (2007) (“Arguments relating to legal texts, history, precedence, etc. have a relatively modest role to play in European constitutional rights practice.”).

1. Justification: The Paradigm of Justified Governance

Proportionality conforms to a competing democratic theory of judicial review: the paradigm of “justified governance.” This view orients rights not as sources of collective authority but as technologies for the justification of public power. Adjudication is here deemed a chiefly empirical exercise that concerns itself with testing the state’s reasons for acting. Its focus is to refine good governance, not to police its moral bounds.

In attending to this refinement, adjudication subscribes to what Professor William Eskridge has identified as the overriding end of judicial review in modern, pluralistic democracies: “lowering the stakes of politics.”⁹³ If rights-as-trumps categoricalism sharpens the conflicts among citizens in absolutist terms, proportionality encourages political deliberation toward an acceptable consensus. For this reason, Professor Greene calls for proportionality to replace categoricalism as the guiding doctrinal framework of American constitutional law.⁹⁴ Proportionality promises to scrutinize government action, to “sharpen [its] ends and means to those that are necessary to vindicate its interests and are respectful of the impact on individuals.”⁹⁵

An anchor to this view is, perhaps paradoxically, John Hart Ely and his famous synthesis of the political process school of constitutional thought.⁹⁶ Ely’s theory grounds the democratic legitimacy of judicial review in its ability to enable equal and effective access to the political process and to correct for systemic disadvantages certain groups might face within that process.⁹⁷ If categoricalism accepts judicial review as paradigmatically and intentionally anti-democratic, political process theory turns the ensuing “counter-majoritarian difficulty”⁹⁸ on its head. As Ely elaborated, constitutional adjudication in fact aids, not obstructs, democracy.⁹⁹ Proportionality’s ambitions to refine the democratic process reflect precisely this logic of judicial review.

I say paradoxically because the canonical doctrinal statement of political process theory is *Carolene Products*¹⁰⁰ footnote four, the birthplace of the tiered review framework I have just depicted as the hallmark of a categorical approach. Indeed, *Carolene Products* underwrote the bifurcated categories that characterize, at least formally, the Court’s contemporary method: more deference granted to economic regulation and heightened scrutiny to laws imposing upon “discrete and insular minorities,” the representative process, or the protections of the first eight

⁹³ See Eskridge, *supra* note 7.

⁹⁴ Greene, *supra* note 4, at 70.

⁹⁵ *Id.*

⁹⁶ See generally JOHN HART ELY, *DEMOCRACY & DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

⁹⁷ See generally *id.*

⁹⁸ See ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 16 (1962).

⁹⁹ See generally ELY, *supra* note 96.

¹⁰⁰ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

amendments.¹⁰¹ Responding to the critiques of “Lochnerism,”¹⁰² the result was a clear hierarchy of rights: with liberty of contract demoted and judicial inquiry delimited with regard to its scrutiny of political decision-making. The Court was confined to two broad standards of review, which bear all but outcome determinative effect—strict scrutiny almost always fatal; rational basis only rarely.¹⁰³ So far, so categorical.

But behind the tiered framework remained the animating theory of democratic distrust. Footnote four, as Ely envisioned it, found the proper purpose of judicial review in instances in which the political process was unworthy of trust.¹⁰⁴ The great fear of such a view is the systemic disregard of the interests of those who presently do not hold political power. Relevant to our purposes is precisely how footnote four’s framework has evolved and been extended—precisely continuous with the logic of Ely’s insights if not with the substance of his immediate conclusions—into something approaching the view of justified and refined governance we associate with proportionality.

As political theory and history have shown many times over, the pathological prejudice against discrete and insular minorities that Ely emphasized is not the only source from which threats to the political order come.¹⁰⁵ As Bruce Ackerman famously observed, anonymous and diffuse majorities might face difficulty forming robust political coalitions or demonstrating the strength of preference required to secure a place on the legislative agenda.¹⁰⁶ As Daryl Levinson and Richard Pildes have argued, high degrees of party polarization might overwhelm the system of checks and balances otherwise designed to restrain extreme legislative programs.¹⁰⁷ The

¹⁰¹ See Jackson, *supra* note 5, at 3127; see also Richard Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1270–71, 1288 (2007).

¹⁰² See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, 197, 263 (1992) (noting that “Lochnerism” can refer to debates over the proper relation between the judicial and legislative powers or to the validity of the Court’s substantive theory of economic order in *Lochner*); Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT’L J. CONST. L. 1, 4–15 (2004) (describing the condemnation of *Lochner* and arguing that Court’s critics drew attention to what they considered crises of governance of its own creation); Gary D. Rowe, *Lochner Revisionism Revisited*, 24 L. & SOC. INQUIRY 221 (1999) (discussing works by Fiss, Gilman, and Horowitz).

¹⁰³ Jackson, *supra* note 5, at 3126; see Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

¹⁰⁴ See ELY, *supra* note 96, at 75–77.

¹⁰⁵ See Greene, *supra* note 4, at 93; Bruce Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 718 (1985) (“[J]udges can no longer expect these familiar concepts to operate in a way that will allow courts to solve the problem of countermajoritarianism.”).

¹⁰⁶ Ackerman, *supra* note 105, at 726–28.

¹⁰⁷ See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2347–49 (2006).

legislative agenda can be unfairly and disproportionately influenced by groups of wealthy donors or well-organized, well-connected lobbyists. Political actors can systematically misdiagnose or misperceive key social facts.¹⁰⁸ And the rigid tiers of scrutiny have accordingly given way, as well.¹⁰⁹

Notwithstanding these often-dramatic developments in constitutional thought, it must be said that, as a theoretical matter, the core of Ely's logic remains intact. Each of the above phenomena at heart concerns the ability of citizens to trust the political process. And the task of law remains to oversee the justification of politics—not its confinement to morality but its retention of a fluid contestation of public value. Proportionality aims not to supplant politics but to refine its terms.

This illuminates what, in the end, distinguishes categoricalism and proportionality not merely as judicial methods but as theories and ideal types of democracy. For trust is a political, not moral, category. From Ely onward, once the guiding line of judicial review was political and positioned in line with democracy and not in the counter-majoritarian vein, its legitimacy could no longer rely on the moral authority of categories alone. Its currency was justification.

To be attuned to failures of justification, proportionality must scrutinize empirics, and constitutional adjudication is framed as predominantly an empirical exercise. With the specter of distrust in mind, the question for adjudication is whether the state in this instance has acted with sufficient grounds—given the nature of the problem it aims to address and the other means available to it. In the end, can the benefits of the intervention plausibly outweigh its costs? Adjudication is not, however, a question of what rights authoritatively mean. Indeed, under proportionality, the empirical and the hermeneutic are increasingly spread apart. For to answer questions about the justification of policy in the present instance, one need not extensively develop a reading of constitutional text, history, structure, or precedent. What matters are social facts.

Now, it cannot be that proportionality as an interpretive method requires no value judgments and that it is in fact a purely technocratic exercise. But the relevant question is whether proportionality's theory of judicial review nevertheless projects a technocratic reading of constitutional adjudication and a theory of rights that, while rejecting rights as trumps, reduces rights to mere interests. If proportionality does require value judgments, it may be that its own ideological framing requires it to act as though it need not. This exacts a certain cost on constitutional interpretation that coarsens citizens' constitutional claims just as seriously as do the pathologies of categoricalism. There is reason to believe, then, that the suggested embrace of proportionality risks a normative overcorrection. This is the critique I take up in the next Parts.

¹⁰⁸ See Greene, *supra* note 4, at 93.

¹⁰⁹ See *Dandridge v. Williams*, 397 U.S. 471, 519–25 (1970) (Marshall, J., dissenting) (arguing for a distinction to be drawn between the form of economic regulation of commercial activity that guided the *Caroline Products* rationale and the determination of the level of welfare benefits for children).

2. Rights as Interests: Limitations and Distortions

It is important to acknowledge that proportionality as a formal matter cannot be reduced merely to the notion of “balancing.”¹¹⁰ It certainly differs in its ideal form as a structured method of reasoning from the mere quantification of social goods we find in American cases like *Dennis v. United States*¹¹¹ or *Mathews v. Eldridge*.¹¹² But the question is whether the mindset of balancing represents a deeper logical and conceptual structure in the reasoning of proportionality as such. In this regard, the following limitations and distortions suggest reasons for concern.

If categoricalism’s absolutism presumes the pluralistic conflict of values away beneath authoritative rights, proportionality’s frame of justification, too, assumes political conflict away—not the existence of conflict as such, which it of course admits, but the political nature of that conflict. Proportionality translates public conflict into a technical problem of how best to refine and to balance competing interests. Its political dimensions—those aspects of conflict that are embedded in shared meanings and histories and that animate citizens’ concerns—become secondary in the Court’s scrutiny. And thus, while it is indeed true that proportionality cannot be reduced to the notion of “balancing” alone, the ultimate balancing of rights as interests animates proportionality as a legal doctrine with the posture and disposition of economic-scientific expertise.

But it is unclear whether scientific methodology can in fact be applied in the case of constitutional rights; that is, whether rights can be quantified, evaluated, and compared in the way Alexy’s balancing model presumes. Transplanting quantified cost-benefit analysis onto questions of moral and political valuation runs up against the problem of commensurability. As Stavros Tsakyrakis writes, “The principle of proportionality assumes that conflicts of values can be reduced to issues of intensity or degree and, more importantly, it assumes further that intensity and degree can be measured with a common metric . . . and that this process will reveal the solution to

¹¹⁰ Indeed, some of proportionality’s firmest proponents believe balancing should play a limited role in its jurisprudential reasoning. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 259–61 (William Rehg trans., MIT Press 1996) (1992).

¹¹¹ 341 U.S. 494, 510 (1951) (plurality opinion) (suggesting that a determination whether prosecution violates First Amendment free speech protections requires assessing “whether the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger”).

¹¹² 424 U.S. 319, 335 (1976) (establishing that procedural due process “requires consideration of three . . . factors: First, the private interest . . . affected . . . ; second, the risk of an erroneous deprivation . . . through the procedures used, and the probable value . . . of [other] procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional . . . requirement[s] would entail”). See generally Jerry Mashaw, *The Supreme Court’s Due Process Calculus for Administrative Adjudication*, in *Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976) (arguing that *Mathews* fails rights adjudication due to its privileging of cost-benefit inquiry at the expense of carefully articulating the procedural significance of a fair hearing to those subject to adverse state treatment and in “its focus on questions of technique rather than on questions of values”).

the conflict.”¹¹³ This Benthamite formula is the source of its appeal; its judgments rely on implicit quantification rather than interpretation. The jurisprudence is easy to apply and straightforward to defend because it is mechanical not hermeneutic.

But from where in practice does the commensurability scale derive? Available answers are deeply obscure, with courts often speculating on policy consequences with divergent heuristic frameworks of social consensus, history, or economics. The question of commensurability is challenging because, without a clearly developed answer, proportionality analysis too easily becomes a “black box” whose calibration is operative yet inscrutable.¹¹⁴ In the European context, for example, surface appeals to cost-benefit quantification hide deeply inconsistent applications of proportionality across cases.¹¹⁵ The Court of Justice of the European Union has in fact applied more strenuous tests to Member States’ regulation than to EU-level legislation, ostensibly with the non-neutral purpose of promoting European integration.¹¹⁶ This suggests that the real inflection of moral-political judgments occurs elsewhere and remains under-examined as a matter of judicial analysis. The accusation of judicial politics is itself not bothersome, but its disavowal or concealment by an appeal to proportionality is. The methodology enables adjudication to occur, using Jürgen Habermas’s formulation, “behind the backs” of citizens by functionalist means.¹¹⁷

Some, following Jeremy Waldron, maintain that proportionality need not be reduced to quantifiable cost-benefit analysis and “strong commensurability.”¹¹⁸ Rather, it stands for the exercise of “general practical reasoning” about the salience of particular values in certain circumstances.¹¹⁹ And further, this fosters constitutional discussion by which society explores deeply held views on social justice and the purposes of state power.¹²⁰ On this view, proportionality does not undermine but strengthens democratic self-government. Proportionality’s formalism, so the argument goes, makes governance more accessible.

But this claim is undercut if we consider the particular form of practical reasoning proportionality in fact advances. In the case of balancing, a court’s analysis turns not on norm-articulation but on the concurrent effects on other rights or public interests.

¹¹³ Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT’L J. CONST. L. 474, 474 (2009).

¹¹⁴ See Aleinikoff, *supra* note 89, at 976.

¹¹⁵ See Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L. J. 158, 171–180 (2010).

¹¹⁶ *Id.* at 172, 180–01. See generally TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* chs. 3 & 5, 193 (2006).

¹¹⁷ JÜRGEN HABERMAS, *ON THE LOGIC OF THE SOCIAL SCIENCES* 77 (Shierry Weber NicholSEN & Jerry A. Stark trans., Polity Press 1988) (1970).

¹¹⁸ See Jeremy Waldron, *Fake Incommensurability: A Response to Professor Schauer*, 45 HASTINGS L.J. 813, 813–19 (1994).

¹¹⁹ Kumm, *supra* note 92, at 159. See also Kai Moller, *Proportionality: Challenging the Critics*, 10 INT’L J. CONST. L. 709, 721 (2012).

¹²⁰ See generally Kumm, *supra* note 92.

The focus in the first instance is on the narrow-term consequences of constitutional norms as they appear in the case, on their immediate actuality, while less emphasis is placed on what they have meant, do mean today, or could mean in the future. Whether it accepts Bentham's strong or Waldron's weak commensurability, a court employing proportionality review replaces the task of interpreting the meaning of constitutional principles with "a general discussion of the reasonableness of governmental conduct."¹²¹

This entails a subtle but consequential shift in the objects and objectives of constitutional discourse. One statement of this problem returns us to cite the normativity of Dworkinian categoricalism, which maintains that rights ought to remain trumps over majoritarian governmental action, not mere principles to be balanced alongside other public interests.¹²² But there is a further dimension more relevant to my purposes: constitutional law is concerned not merely with defending proper bounds for state power but also with the ongoing validation and elaboration of publicly held values in a shared normative world.¹²³ This is a process for which constitutional adjudication, too, is responsible.

Greene rightly criticizes categoricalism's rights-as-trumps framework for front-loading adjudication to the threshold question of whether an absolute right is triggered.¹²⁴ No determinations can proceed before this first question is answered. But Greene is less concerned, in my view wrongly, with the mirror problem I have been describing—the way proportionality's rights-as-interests framework back-loads adjudication, such that the case is too often decided merely by the cost-benefit analysis of balancing and the interpretive moment of rights-definition is diminished. The empirical analysis in practice threatens to become no less mechanistic than the formalism of rights as trumps. Both problems are significant to the task of sustaining pluralistic democratic politics.

In this respect, the European experience with proportionality analysis offers a cautionary tale, to which I now turn. In the constitutional pluralism of the European Union, proportionality has become a mode of judicial depoliticization, not of democratic pluralism.

a. European Lessons: Proportionality Amidst Diversity

Proportionality analysis is today a vital doctrinal tool for the expansion of supranational judicial authority and legal efficacy across institutions, utilized by both the European Court of Human Rights (ECtHR) and the Court of Justice of the

¹²¹ Aleinikoff, *supra* note 89, at 987.

¹²² See HABERMAS, *supra* note 110, at 256–59.

¹²³ See JAMES BOYD WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM 101 (1990) ("In every opinion a court not only resolves a particular dispute one way or another, it validates or authorizes one form of life—one kind of reasoning, one kind of response to argument one way of looking at the world and at its own authority—or another.").

¹²⁴ Greene, *supra* note 4, at 88–89.

European Union (CJEU).¹²⁵ In the EU, proportionality has served as a foundation for the CJEU's jurisprudence on free movement of goods, indirect sex discrimination, and fundamental rights since the early 1970s when the Court first applied a "least-restrictive means" test.¹²⁶ The Court pronounced explicitly in 1989 that proportionality is a "general principle of Community law."¹²⁷ Article 52 of the EU Charter of Fundamental Rights similarly codified the procedure, becoming what Mathews and Stone Sweet have called a "master technique of judicial governance" and the "most important institutional innovation in the history of European legal integration."¹²⁸

Proportionality might indeed be, and historically has at points been, a vehicle for the formal expansion and creation of rights. The EU's freedom of movement and consequent anti-discrimination case law illustrate this.¹²⁹ But at stake here, too, is the effect this expansion has had on the nature and status of constitutional law, on the standing of those new supranational rights as compelling objects of civic commitment.¹³⁰

i. *Hirst*: The Politics of Prisoner Disenfranchisement

We see this across European fora. In the notable case *Hirst v. United Kingdom*, concerning restrictions on voting rights of criminal offenders (Protocol 1, Article 3 of the European Convention on Human Rights),¹³¹ the European Court of Human Rights did not elaborate in any detail why the normative aims of the vote restriction ("enhancing civic responsibility and respect for the rule of law")¹³² were in substantive accord with Convention principles. Instead, the Court merely considered the restriction's proportionality: whether there existed "a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned."¹³³ The judgment turned on the determination that the measures

¹²⁵ See Helen Keller & Alec Stone Sweet, *Assessing the Impact of the ECHR on National Legal Systems*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 681, 698 (2008).

¹²⁶ Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *COLUM. J. TRANSNAT'L L.* 72, 75, 139–40 (2008). See Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125, 1136.

¹²⁷ Case 265/87, *Schraeder v Hauptzollamt Gronau*, 1989 E.C.R. 2237, 2269.

¹²⁸ Stone Sweet & Mathews, *supra* note 126, at 140–41.

¹²⁹ See generally ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 165–70 (2004).

¹³⁰ Aleinikoff, *supra* note 89, at 987.

¹³¹ *Hirst v. United Kingdom (No. 2)*, 74025/01 Eur. Ct. H.R., ¶ 3 (2005).

¹³² *Id.* at ¶ 74.

¹³³ *Id.* at ¶ 71.

were “indiscriminate,”¹³⁴ not on an inquiry into the meaning of voting rights as such, their relation to the purposes of state incarceration, or their particular significance in contemporary societies marked increasingly by socio-economic inequity and aggressive policing. The Court, for many, of course reached the correct decision, but it did so by grasping at the provision’s quantifiable aspects in an effort at balancing. The decision—if read not simply as a concluding judgment but as a text and an argument—neither illuminated constitutional meaning nor defended normative commitment in any serious sense. One can only wonder how the ensuing political debate in the United Kingdom, further appeals before the ECtHR, the ruling of the UK High Court, and positions taken by the Tory government would, in fact, have developed had the European Court laid more substantial normative bedrock. As it stood, the judgment did little to further supranational debate in a European public sphere, instead punting the substantive questions back to a body politic whose normative self-understanding was pressed to change hardly at all.

ii. *Omega*: Balanced Dignity?

Or consider the *Omega* case, in which the CJEU upheld under Community law a German public policy prohibition of economic activity on grounds that it presented an affront to human dignity.¹³⁵ The court’s decision, while evidently respectful of the need to protect fundamental rights, defended such rights against economic freedoms only through a case-by-case balancing approach. By evaluating the proportionality of the German restriction,¹³⁶ the CJEU both restricted the ruling’s scope and abstracted its substantive meaning. To the disappointment of many, the court did not examine for itself what the concept of human dignity might mean, what legal respect it might deserve, or what place it might have within EU law.¹³⁷ The court’s self-conceived role was to manage the expectations of conflicting interests, not to explore or give shape to that conflict in the service of normative development. It ultimately submitted no substantive claims but only a vague, elliptical confirmation of jurisdictional boundaries. To do so in the context of dignity, which the German Basic Law holds as an inviolable norm, is particularly contentious.¹³⁸ The restrictive normative scope of

¹³⁴ *Id.* at ¶ 82 (“It [the measure] strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances.”).

¹³⁵ Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundestadt Bonn* 2004 E.C.R. I-9641, I-9655 (holding that German authorities were within their discretion when banning the import of British gaming equipment on grounds that the recreational simulation of homicide offended the principle of human dignity).

¹³⁶ *Id.* at I-9653.

¹³⁷ See generally, e.g., Thomas Ackermann, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundestadt Bonn*, Judgment of the Court of Justice (First Chamber) of 14 October 2004, 42 COMMON MARKET L. REV. 1107 (2005).

¹³⁸ Indeed, this did not go unnoticed in the German reception of the case, and the decision was referenced negatively by counsel for this reason in proceedings before the German Federal

proportionality was convenient here precisely because of the plural definitions given to human dignity by various national constitutional traditions, but the court again failed to tender even the beginnings of a substantive interpretation. What suffers is not merely a nascent European public sphere but the very normativity and ongoing justiciability of European law.¹³⁹

Is this all we ask of legal judgment? There is, after all, something quite deflating about such approaches to constitutional questions. Whether or not proportionality mistakenly presumes a quantifiable cost-benefit analysis in the strictest sense, it nonetheless instrumentalizes the role of constitutional norms in the eyes of the judge. The balancing opinion works with constitutional values but does not reason through them. It need not develop readings of dignity or voting rights, for example, to deliver judgments about them. This represents a clear elision of meaning within constitutional discourse. As Aleinkoff writes memorably, “In a curious way, constitutional law goes on *next to* the Constitution.”¹⁴⁰

Proportionality owes this elision to its axiomatic cost-benefit framework, whose interest aggregation and optimization presume to exhaustively account for the pertinent facts. But proportionality achieves such impartiality only by treating certain criteria as externally fixed and determined: “respect for the rule of law” or “human dignity,” in the discussed cases.¹⁴¹ This might be a sensible approach where law is fully embedded in a closed, homogenous political system that shoulders the burdens of articulating such criteria completely. But employing proportionality in a pluralistic legal order—a project of democratic pluralism—means that these exogenized variables are of fundamental, intrinsic importance to the decision’s legitimacy and meaning.

This discourse is easier, perhaps, as a technical matter to understand and to employ. But its mode of judgment distorts political life in a constitutional democracy. It reduces the potential of creative political action by distancing citizens from the judicial opinion. Citizens become “spectators” as their interests are placed on the scales.¹⁴²

This reduction to interest accompanies, notably, a reduction to the temporality of the present. No matter how public such an interest is, a presentist turn loses the temporal horizon of a political project in favor of satisfying social interests as they are at the moment conceived. Proportionality accepts the “pre-existing preferences” of

Constitutional Court assessing the constitutionality of the Treaty of Lisbon. *See* BVerfG, 2 BvE 2/08 and joined cases, June 30, 2009, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html.

¹³⁹ *See, e.g.*, Ackermann, *supra* note 137, at 1116–17.

¹⁴⁰ Aleinikoff, *supra* note 89, at 989. *See* Mark Antaki, *The Rationalism of Proportionality’s Culture of Justification*, in *PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING* 284, 303 (2014) (“Proportionality analysis may not be a model of situated judgment as much as a model of judgment about situations.”).

¹⁴¹ *Hirst v. United Kingdom (No. 2)*, 74025/01 Eur. Ct. H.R. (2005); *Case C-36/2002, Omega Spielhallen-und Automatenaufstellungs-GmbH* [2004] ECR I-9609.

¹⁴² Aleinikoff, *supra* note 89, at 993.

interest,¹⁴³ rather than seeing interests as markers of a background social-political world that learns in time.

Proportionality, then—despite the appeal of its surface-level flexibility—ratifies a more static understanding of value and principle. It confines the possible to the actual. Seeing interests as static not only does a disservice to the inner complexity of the human beings who hold them; it also displaces alternative ways we might approach questions of public norms and social policy. What causes these interests, who should interpret them, how have they evolved, what social and institutional forces are at play? In balancing interests, seldom do such questions enter the court’s analysis. This occludes an understanding that constitutional rights—as a *constitutive part* of their import in a particular case—have a textual and historical architecture that extends beyond their present application. Proportionality is not attuned to such a dimension, however, for—once the balancing stage is reached—what ostensible use could it be in determining the proper weight in the present case? The moment of balancing leaves no trace of itself, contains no record of law’s development. It has no duration, contains no time.

iii. *Laval/Viking*: Europe’s *Lochner*

Finally, take the example of the controversial *Laval* case on European labor regulations. *Laval* affirmed a right to strike as part of EU law but also made clear that this right was subject to restriction in balance of the competing free movement of services.¹⁴⁴ The court held that industrial action taken by Swedish construction workers’ trade unions, which meant to induce a Latvian firm to sign a collective agreement securing more favorable labor protections for work performed in Sweden, infringed the free movement provisions of Article 56 Treaty on the Functioning of the European Union (then-Article 49 Treaty Establishing the European Community). The decision turned on a vague interpretation that the standard of worker protection targeted as a legitimate objective by collective action was satisfied by the employer’s compliance with mandatory rules for minimum protection outlined in the Posted Workers Directive.¹⁴⁵ Any objectives beyond this floor—as the trade unions demanded—were considered illegitimate and the industrial action thereby deemed disproportionate. *Laval* greatly expanded the scope for judicial review of national labor laws out of concern they might unreasonably violate free movement rights.¹⁴⁶

But the court’s proportionality method—clarified in the sister case *Viking*¹⁴⁷—conceals rather than elaborates the complex issues of transnational economic justice at stake. As Simon Deakin observes, the *Laval* judgment fails to articulate a

¹⁴³ *Id.*

¹⁴⁴ Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767, I-11884–85. For a critique of *Laval* and of the role of proportionality analysis in the context of the jurisprudential practice of the Court of Justice of the European Union, see Paul Linden-Retek, *History, System, Principle, Analogy: Four Paradigms of Legitimacy in European Law*, 26(3) COLUM. J. EUR. L. 1 (2021).

¹⁴⁵ 1997 O.J. (L. 18) 3 (concerning the posting of workers in the framework of the provision of services).

¹⁴⁶ See generally Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767.

¹⁴⁷ Case C-438/05, *The Int’l Transp. Workers’ Fed’n & The Finnish Seamen’s Union v. Viking Line ABP & Oü Viking Line Eesti* 2007 E.C.R. I-10779, ¶ 46.

comprehensible economic account for its intervention.¹⁴⁸ Instead, proportionality “invites the courts to engage in ad hoc, subjective judgments on the appropriateness of regulatory action” without “a more fundamental reappraisal of the scope of free movement law.”¹⁴⁹ The opposing sides of the proportionality scales frame the case as a homogenous struggle between socio-economic rights of labor and capital. But this isolates the meaning of such categories of rights from the more differentiated, overlapping political realities underlying them. The class distinction overlooks the center-periphery relationship¹⁵⁰ between Europe’s more powerful core states and those who remain structurally disadvantaged.¹⁵¹ *Laval’s* proportionality framing itself invites the critique that neoliberal free movement claims come at the expense of social justice. But what differentiates the meaning of free movement protections in this case from neoliberal ideology may not concern economic mobility as such, but something else—for example, the fact that the interests of firms and workers at the periphery meaningfully diverge from the interests of those in the center. As Damjan Kukovec has compellingly argued regarding *Viking*: “The privilege to protest and block relocation is thus a false social privilege for the workers of the periphery. The autonomy to relocate is a false autonomy for the companies of the periphery.”¹⁵² The court’s proportionality analysis discursively silences the center-periphery problem. Its generalized discussion of rights to strike or freedoms of movement takes the claims of the structurally privileged as the interests to be balanced.¹⁵³ This sidesteps a crucial discussion of transnational redistributive consequences and political economy.

Thus, while a charitable reading might argue that a nuanced defense of peripheral business and labor motivates the invocation of free movement provisions, the court’s reasoning and methodology fail these motivations. The court’s framing, idle as it is, is possible only because the judicial opinion contains little reference to the historicity of European labor regulations. Its presentist approach shows little sensitivity to ongoing debates in the EU on regulatory diversity, regime portability, and harmonization of labor laws transnationally.¹⁵⁴ Ignoring the historical nature of this debate also denies the many possible comparisons to be made with past doctrinal developments in other jurisdictions, most notably from the United States and its 1930s shift in dormant

¹⁴⁸ See Simon Deakin, *Regulatory Competition in Europe after Laval* (Centre for Bus. Rsh, Univ. of Cambridge, Working Paper No. 364, 2008).

¹⁴⁹ *Id.* at 21.

¹⁵⁰ See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

¹⁵¹ See Damjan Kukovec, *A Critique of the Rhetoric of Common Interest in the European Union Legal Discourse* (2012).

¹⁵² Damjan Kukovec, *Taking Rights Seriously: The Rhetoric of Justice and the Reproduction of the Status Quo*, in *EUROPE’S JUSTICE DEFICIT?* 323 (D. Kochenov et al. eds., 2015).

¹⁵³ See Damjan Kukovec, *Whose Social Europe?—The Laval/Viking Judgments and the Prosperity Gap* 3–6 (April 16, 2010) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800922).

¹⁵⁴ See Deakin, *supra* note 148, at 18.

Commerce Clause interpretations.¹⁵⁵ We see that proportionality serves to entrench, not identify and challenge, the present constellations of interests. And this is a problem for the intelligible development of EU law. It lacks a critical motor to question and complicate demarcations of class, nation, or region in a manner generative of pluralistic, supranational political imagination.

Here, proportionality analysis has its detrimental consequences. Distributional questions at their best invite us to see what place others might have in our collective priorities. Part of the task set for courts is to make such matters clear to citizens in the centre: to offer them discursive tools to make choices about their ethical lives and to decide whose interests they might wish to defend beyond their own borders. Proportionality, however, fails to set the stage for alternative social arrangements: different structures of free movement, for example, that would address the existing economic consequences of multiple social models and cross-cutting interests. One does not reach this point of moral imagination by understanding rights, as proportionality does, as interests to be optimized with externalities to be managed. Proportionality on this count exhibits what Mark Antaki has termed “impatience” with the difficult work of political life.¹⁵⁶

This difficulty is structurally identical to the critique Greene levels at categoricalism: it communicates to a losing party “not simply that he has lost but that he does not matter.”¹⁵⁷ Dworkin’s famous refusal, for example, to recognize the existence of Marco DeFunis’s rights to be free from racial discrimination in university admissions—a question, to be clear, that is quite apart from whether DeFunis’s rights in fact deserve to be vindicated in the case—damages the relation of citizens to one another.¹⁵⁸ Because DeFunis is formally owed nothing at all by the university, there remain no rationale and no incentives for the university to strive to accommodate its practices at all in the direction of DeFunis’s concerns—for him or those similarly situated. And similarly in the *Viking/Laval* saga, neither workers nor firms at the centre were asked to perceive the differing structural situation in which their counterparts at the periphery find themselves.¹⁵⁹

These limitations of proportionality affect the method’s democratic legitimacy. Balancing distances citizens from the law and from one another because, in the end, its abstraction cares too little for the persuasive capacities of speech. A judicial opinion self-understood as the objective management of interests fails to express its rulings as

¹⁵⁵ See generally Richard A. Epstein & Michael S. Greve, *Conclusion: Preemption Doctrine and its Limits*, in *FEDERAL PREEMPTION: STATES’ POWERS, NATIONAL INTERESTS* 1, 318–23 (Richard A. Epstein & Michael S. Greve eds., 2008).

¹⁵⁶ Antaki, *supra* note 140, at 307.

¹⁵⁷ See Greene, *supra* note 4, at 79.

¹⁵⁸ See DWORKIN, *supra* note 9, at 227–29 (taking rights seriously); Greene, *supra* note 4, at 67, 79. See generally Elizabeth Anderson & Richard Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1533–45 (2000) (discussing the expressive dimensions of equal protection doctrine).

¹⁵⁹ See generally Case C-438/05, *The Int’l Trans. Workers’ Fed’n & The Finnish Seamen’s Union v. Viking Line ABP & Oü Viking Line Eesti* 2007 E.C.R. I-10779; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767.

a matter of ongoing commitment, with no expressed belief in the justice of its views. “It has lost,” Aleinikoff writes, “its ability to persuade.”¹⁶⁰ In such cases, courts lean on the power of their office, not on the promise of their normative articulation.

3. Two Absolutisms, Not One: Recasting Greene’s Critique

This analysis of European law allows us to reformulate and reopen Greene’s critique—making it applicable in dual, perhaps equal, measures to categoricalism and proportionality alike. There are, in effect, two ways judicial intervention can unhelpfully presume political conflict away—and thus intervene insufficiently in preserving the democratic integrity of the body politic. There are two absolutisms in constitutional theory, not one.

Implicit but central to the preservation of democratic plurality under constitutionalism is the idea that there is a “life of the law.”¹⁶¹ This was a concern of Hannah Arendt, who feared that the law might “petrify and decay,” no longer a source of meaning or normative direction to our present lives as they extend into the future.¹⁶² This would signal a return of mere legality and of coercion. As the preceding characteristics make clear, the ideal of a “living law” has always been close to the ambitions of proportionality analysis as mode of justified governance, for law must seek to be responsive to the problems citizens face within the constellations of political power they create and find themselves.

But the question is whether the specific terms of proportionality analysis and its culture of justification succeed in fully preserving this life of the law, and whether they can indeed underwrite the kinds of political orientations, relationships, and subjectivities required by modern pluralism. In our time, we are pressed by the question of how to make the law live again. This does not entail a rejection of justification wholesale as an animating ideal for the legitimacy of judicial review. Rather, it prompts a closer inquiry into what it would mean to believe, as Greene of course does, in the possibility of law to serve as a means and medium for social integration in a changing, pluralistic world.

We need, therefore, to get the critique that Greene is after right. The key move comes in acknowledging the core failure at the heart of both absolutisms that constitutional interpretation must resist. While Greene has rightly addressed one (in categoricalism), he has not addressed the other (in proportionality itself).

a. Subsumptive Judgment and the Responsiveness of Rights

Proportionality’s absolutism begins with its conception of constitutional adjudication as the pragmatic balancing of interests at singular points in time. For absent norm-articulation, proportionality implicitly holds the substantive meaning of rights to be a constant. The pluralism of rights adjudication here manifests merely in the variable extents to which this content can be limited or infringed in any individual case of conflict. Proportionality, then, reflexively narrows adjudication’s interpretive character and becomes in key respects, like categoricalism, a mechanical jurisprudence. Proportionality risks losing a crucial achievement of American

¹⁶⁰ Aleinikoff, *supra* note 89, at 983.

¹⁶¹ See HANNAH ARENDT, ON VIOLENCE 41 (1970).

¹⁶² *Id.*

constitutionalism: the idea that paradigmatic judicial interpretations of rights trace the self-authorship of a democratic polity over time.¹⁶³ The temporality of law is salient because of law's charge to remain responsive—in adjudication and in its definition of rights—to the shifting pluralities of politics over time.

Both categoricism and proportionality yield instead an orientation to constitutional judgment that is subsumptive: it restricts the creative capacities of adjudication. Categoricism subsumes the case beneath the existing categories of legal norms. On the other hand, as we have seen, proportionality subsumes legal norms beneath the immediate interests at stake in the present. The law reduces to enforcing the bounded understandings of a particularly constituted community, or, alternatively, to the reasonable balancing of interests as they appear to citizens today. If categoricism ignores the particulars of state behavior in favor of an abstracted right,¹⁶⁴ proportionality scrutinizes that behavior without imparting its meaning. In either case the temporal character of both law and fact are lost.

Greene is correct that the great distortion of our time is not the counter-majoritarian difficulty traditionally conceived but instead the prospect that our democratic process will devolve into crude, destructive factionalism, as Madison warned.¹⁶⁵ But at stake in factionalism is something in a sense more profound than a “motivated and resourced minority”¹⁶⁶ and the responding need, as some have said, to symmetrically distribute the fruits of constitutional rulings.¹⁶⁷ More than this, the specter of factionalism presents for pluralism a misattribution of what it is that separates and divides us.

The subsumptive attitude of both categoricism and proportionality treats factional difference superficially. It engages in an attempt to resolve competing claims for recognition in a polity either by categorically deciding where recognition should be granted, or by splitting the difference and carving out spaces for partial recognition of the values at stake. But these tacks are inadequately narrow and limited.

The responsiveness of rights in a non-mechanical jurisprudence requires that law not take the existing modes of recognition at face value. Courts ought instead turn their attention to the underlying motives, experiences, and investments that sustain the *mis*-recognition among citizens, in the first place.¹⁶⁸ Central to such investments is precisely the narrow desire for recognition in the present, which fuels the need for full and sovereign agency by some at the expense of others and thus loses sight, indeed, of the plurality of democratic politics.¹⁶⁹ This insight informs the antidote to the

¹⁶³ See, e.g., Michelman, *supra* note 8.

¹⁶⁴ See Greene, *supra* note 4, at 78.

¹⁶⁵ *Id.* at 115, 131.

¹⁶⁶ *Id.* at 115.

¹⁶⁷ See generally Price, *supra* note 13.

¹⁶⁸ See generally PATCHEN MARKELL, BOUND BY RECOGNITION 16 (2003) (arguing that contemporary political thought, while acknowledging that recognition may be provisional, fails to consider the “more challenging possibility that the pursuit of recognition . . . might be an incoherent and therefore potentially costly enterprise.”).

¹⁶⁹ See *id.* at 5.

misplaced intention merely to circumvent political conflict through law. Responsiveness in law means scrutinizing the terms of conflict and, further, precisely in the course of legal confrontation, to creatively transform those terms and their political possibilities into the future.

b. The Need for Interpretive Disclosure

Responsive jurisprudence corrects for the misleading presumptive tendency to assign constitutional judgment merely the task of disposing of the immediate conflict at hand. In this sense, it follows the insight made by Owen Fiss in his reevaluation of the remedy beyond a principle of tailoring, in which a remedy arises deductively and formalistically from the immediate terms of a violation.¹⁷⁰ Fiss criticizes the impoverished quality of tailoring's emphasis on exclusivity, specificity, uniqueness, and certainty of the remedy's bounds in a structural legal context in which such qualities "are never present."¹⁷¹ These qualities are precisely the presumptive orientations that afflict categoricalism and proportionality as modes of constitutional adjudication.

But the object of a structural remedy, Fiss writes, is more than eliminating a violation in the sense that the tailoring principle advises.¹⁷² It is to "give meaning to our public values."¹⁷³ Fiss sees a structural relation between the declaration of a right at issue—abstract as it is—and the remedy actualized in practice.¹⁷⁴ In the same vein, I see responsive jurisprudence to take seriously how actualizations of rights in the particular case can do more than correct immediate violations but illuminate the broader meanings of declared rights.

The joint illumination of constitutional meaning in norms and facts means that constitutional judgment is a moment of critical interpretive disclosure. This is precisely what the European courts' deployment of proportionality failed to comprehend—and why, just as the United States Supreme Court in *Carolene Products* did, the CJEU in *Laval* could conspicuously isolate the question of nationality (or race) from that of political economy.¹⁷⁵ If *Carolene Products* repudiated *Lochner*, it also failed to invest with meaning the differing kinds of social and economic legislation that the state could legitimately consider.¹⁷⁶ What the cultures of justification in neither Europe nor the United States do is serve to inspire possibilities of democratic politics into the future.

The need for such investment suggests, however, that the binary choice that Greene gives us—"Is the baseline attitude that governments are constituted to solve social

¹⁷⁰ See Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 47–49 (1979).

¹⁷¹ *Id.* at 47–48.

¹⁷² *Id.* at 48.

¹⁷³ *Id.* at 52.

¹⁷⁴ See *id.* ("Rights and remedies jointly constitute the meaning of the public value.").

¹⁷⁵ See Greene, *supra* note 4, at 102.

¹⁷⁶ *Id.*

problems so long as they do so reasonably or is it that rights are implemented to limit government, unless government is necessary?”¹⁷⁷—is misleading. For there is a third option for courts: a jurisprudence responsive to the dynamic possibilities of both fact and law that demands not just reasonability in problem-solving but investment in the activity of interpretation and imagination. What the structure of this kind of responsive jurisprudence might be is the question to which I now turn.

III. DEMOCRATIC JUDGMENT: A THIRD VIEW

An alternative vision of adjudication distinct from the categoricalism of constrained democracy and the proportionality of justified governance requires its own theory of judicial review in a constitutional democracy. Given the above analysis, the motivating question is how judicial review can transform factionalism, in particular, into pluralism positively inflected. This pluralism would affirm a non-absolutist, limited understanding of rights and, with it, a deeper respect among citizens for the bounds of their conflicts and a commitment to work through them productively.

In posing the question in this way, our focus is on whether constitutional law can become a form of consensus or a constellation of power that politically sustains and enables plurality. Plurality, of course, is bearing much normative weight in this orientation, and the term itself comes from the political thought of Hannah Arendt. Arendt’s insights, therefore, are our first point of reference in parsing the normative promise of the term—plurality as reflecting a distinct manner in which citizens speak and act politically.

In her magisterial work *The Human Condition*, Arendt critically distinguishes, among distinct types of political action, forms of “acting together.”¹⁷⁸ Most instructive for our purposes is the notion of “acting with one another,” distinguished from both “acting for one another” and “acting against one another.”¹⁷⁹ The “revelatory quality of speech and action,” Arendt writes, “comes to the fore where people are *with* others and neither *for* nor *against* them.”¹⁸⁰ When a person acts for or against another, their speech and action lose meaning; they cease to reveal the person’s qualities, instead subsuming such disclosure beneath the cardinal aims of, either, solidarity or resistance.

Arendt speaks of goodness as an instance of “acting for one another,” an articulation of Christian traditional moralism transposed to the modern lexicon of moral philosophy. In democratic theory, this line finds its bearing, among others, in the thought of Rousseau, whose ideas of popular sovereignty and the general will draw their rectitude from the expectation that an individual in their light relinquishes her private interest and instead conforms to the communal good for others.¹⁸¹ Rights, on this account, are expressions of consolidated public morality—they are absolute

¹⁷⁷ *Id.* at 96.

¹⁷⁸ ARENDT, *supra* note 27, at 203.

¹⁷⁹ *See id.* at 179–81.

¹⁸⁰ *Id.* at 180 (emphasis added).

¹⁸¹ *Id.* at 52–53.

trumps over the immoral individual wills that are mistaken because they are insufficiently general. This is categoricism.

Arendt finds “acting against one another” foremost in the political agonism of the Greeks, especially the spirit of Achilles and of war, in which self-disclosure is only for strategic gain and directed not, in truth, at oneself but at one’s adversary.¹⁸² Oriented in the antagonistic mode of action, one does not risk disclosing the identity of “the ‘who,’ the unique and distinct identity of the agent.”¹⁸³ Arendt understands this mode of action as “highly individualistic” and unresponsive to the ideal of plurality as a condition of human action.¹⁸⁴ One’s relationship to the other remains instrumental; the diversity of opinions found in the space between individuals reveals only an agonism of solipsistic perspectives. Here, the rights individuals bear are *ex ante* understood to be limited, their bounds to be delineated in struggle against others claiming rights of their own. Accordingly, governance consists in properly apportioning this inevitable conflict of rights—and thus to compensate or correct for the distrust that this form of political action naturally creates. Rights, however, do not disclose the identity of those who fight for them; they merely guard the properly balanced relation of various individual subjects to others. This is proportionality.

Plurality requires more. Arendt speaks of plurality as a condition of inter-subjectivity, in which the meaning of our actions and ourselves are disclosed by others and, in turn, we illuminate the lives of others through our own speech and action. This orientation is not, however, merely ethical; it is the core of a normative account of public power—“acting with one another.” In acting with one another, individuals assemble freely together as citizens; they articulate their views in public, awaiting the response and potential challenge of others. Such willingness to act and be exposed, then, is no mere rational action; it entails a commitment to sustaining debate, drawing forth the participation of others in a process of parsing possibilities, alternatives, even the landscape of disagreement. The goal of such action is not mere rational agreement but better understood as the development of a certain kind of faculty: one’s ability to be aware of and to make mutually intelligible the views of others. This is democratic judgment—the third paradigm I wish to advance.

A. *The Paradigm of Judgment: Constitutionalism in an Arendtian Key*

Arendt writes that public constitutional authority gives the world a “permanence and durability which human beings need precisely because they are mortals”¹⁸⁵ and therefore that a crisis of constitutionalism threatens something fundamental to

¹⁸² See *id.* at 194 (suggesting that Achilles is the only figure who, while acting against another, “delivers into the narrator’s hand the full significance of his deed[s], so that it is as though he had not merely enacted the story of his life but at the same time also ‘made’ it,” thus becoming the exception that proves the rule). See generally CHRISTIAN VOLK, *ARENDTIAN CONSTITUTIONALISM: LAW, POLITICS AND THE ORDER OF FREEDOM* 180ff (2015).

¹⁸³ ARENDT, *supra* note 27, at 180.

¹⁸⁴ *Id.* at 194.

¹⁸⁵ Hannah Arendt, *What is Authority?*, in *BETWEEN PAST AND FUTURE* 91, 95 (1961).

humanity itself, to the “conditions of human existence.”¹⁸⁶ It threatens the loss of the “common world,” what Arendt compared metaphorically to a table, “located between those who sit around it,” that “relates and separates men at the same time.”¹⁸⁷ Constitutional authority, understood as a structuring of the normative space in which citizens act “with one another,” reflects and preserves the plurality of democratic judgment.¹⁸⁸ And its crisis, then, portends a return to a confused and mass society, which citizens find “so difficult to bear,” Arendt writes, because the law no longer orients them intelligibly to one another.¹⁸⁹

What would efforts to regain this common world consist of? Arendt is concerned with democratic judgment not as a capability rooted in epistemic confidence or prudent balance—either in one’s own morality or in the justification of one’s own interest—but instead a form of historical discernment put into practice.¹⁹⁰ Such discernment works on the basis of a central realization that “[t]he realm of human affairs, strictly speaking, consists of the web of human relationships which exists wherever men live together.”¹⁹¹ This web, further, is structured by the narratives that we spin; but we never do so merely by ourselves. “Although everybody started his life by inserting himself into the human world through action and speech, nobody is the author or producer of his own life story.”¹⁹² Our narratives are thus structurally open and reliant upon the narratives of others¹⁹³—this is why they constitute a complex web, instead of a linear, teleological, or uniform path. Making sense of others and myself means including them in my story as they include me in theirs. As Seyla Benhabib writes, “This narrative entails both knowledge of our past and self-projection—desires for our future. It also anticipates the meaning that this past and future may have and will have in the eyes of others.”¹⁹⁴ This intersubjectivity forms the basis of the common world. Democratic judgment is thus at heart sustained by the communicability of its narratives.

These requirements of democratic judgment help us to perceive the challenge of pluralism correctly. Indeed, they reframe the problem posed to constitutionalism by pluralism—in terms not only of the multitude of actors but of the plurality of political

¹⁸⁶ ARENDT, *supra* note 27, at 11.

¹⁸⁷ *Id.* at 52.

¹⁸⁸ *See id.* at 52–53.

¹⁸⁹ *Id.*

¹⁹⁰ *See generally id.*

¹⁹¹ *Id.* at 183–84.

¹⁹² *Id.* at 184.

¹⁹³ *See, e.g.,* Seyla Benhabib, *Sexual Difference and Collective Identities: The New Global Constellation*, 24 SIGNS: J. WOMEN CULTURE & SOC’Y 335, 348 (1999).

¹⁹⁴ Seyla Benhabib, *Judgment and the Moral Foundations of Politics in Arendt’s Thought*, 16 POL. THEORY 29, 35 (1988).

action itself understood as “acting in concert.”¹⁹⁵ The problem of factionalism is not that it fragments the epistemic or pre-political (material) perspectives that would ground politics but instead that politics no longer is the site for that “common world” which pluralism sustains and is sustained by.¹⁹⁶ Judgment, then, cannot be understood merely as a confluence of reasoned decision-making. Judgment has a distinct normativity, based on the specific requirements of the “power of judgment”¹⁹⁷ that itself must inform the structure of judicial review as a concept.

Judgment organizes, in particular, a certain form of political agency. It reduces the confounding distance between thinking and doing not by deferring to the universal criteria of rationality, but instead by strengthening the capacity to make mutually intelligible our shared objects of concern, precisely in the absence of a preceding concept or rule.¹⁹⁸ If political agreement is something that judicial review aims to secure in its opinions and decisions, agreement here must also mean that we might agree to disagree, and the terms of this are accomplished for Arendt in a particular way. At the center of this political agreement stands not the other herself, “but rather the common world as it appears to the other.”¹⁹⁹

If categoricalism assumed conflict resolved under the mantle of moral categories and proportionality resolved conflict by calibrating governance, democratic judgment centers the mediation of a “common world.” Greene is right to say that “the best justification for judicial review in a pluralist democracy with a mature rights culture is that judges have the unique capacity to call partisans to the table, and to enable them to see the dignity in each other’s commitments.”²⁰⁰ The choice of words is here instructive. Arendt’s own metaphor prompts us to see the relationship between a call to come to the table and the particular structure of the table itself. The latter structuring requires a deeply interpretive, non-mechanical jurisprudence, one that would see the judicial opinion as a public text, situating citizens in the public principles of a shared sphere of life in a particular way.

The paradigm of democratic judgment thus occupies a conceptual middle ground between the models of authority and justification. While it rejects the Dworkinian view that rights act as authoritative trumps, it also demands more from rights (and from adjudication) than the reasonable balancing of civic interests. Constitutional judgment, on this view, is an essential public mechanism, too, for disclosing and enriching the possibilities of change within citizens’ normative commitments—new or better ways to understand the concerns of fellow citizens, driven by the problems and conflicts that arise among them before the law.

Set in the frame of judgment and Arendt’s common world, rights are neither trumps nor pragmatic interests, but nodal points whose obligations have taken particular shape over time. These take on a narrative character. Their scope of

¹⁹⁵ ARENDT, *supra* note 161, at 44.

¹⁹⁶ LINDA M. G. ZERILLI, *A DEMOCRATIC THEORY OF JUDGMENT* 266 (2016).

¹⁹⁷ HANNAH ARENDT, *DENKTAGEBUCH* 818 (2003).

¹⁹⁸ ZERILLI, *supra* note 196, at 265.

¹⁹⁹ *See* ARENDT, *supra* note 197 at 451.

²⁰⁰ Greene, *supra* note 4, at 37.

application is not unlimited; but neither is their meaning timeless. Rights have pasts and futures and thus demand historically-grounded interpretation, which the judge is properly tasked (and uniquely well-suited) to articulate. Sensitivity to this historically-grounded, expressive character of rights is what preserves their plural (non-absolute) nature and thus attunes citizens to the competing meanings rights might yet be imagined to compel. Judicial opinions thereby also become, in short, acts of persuasion that speak faithfully but imaginatively to the plural constitution of political life. This view notably offers reason to think that pluralism, far from being an obstacle to judicial review, in fact demands it.

B. *Revisiting Robert Cover*

The American constitutional theorist most attuned to this Arendtian view of democratic judgment and to the recovery of the common world and its narratives is Robert Cover. Cover wrote famously:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each Decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.²⁰¹

Cover's conception of law, as this grand articulation suggests, seeks a remarkable reorientation to the scope of legal inquiry and, indeed, in the way we understand citizens to position themselves and act within the law as a distinct form of human culture. Reducible to neither command nor rationality nor will, a legal order draws legitimacy and social consequence from the narrative character of its common, but diverse interpretations. Narrative establishes law's persuasive power by making its normative meaning intelligible across time.

Cover greatly expands the canonical repertoire of materials considered "legal." The law intertwines with the practices, beliefs, modes of expression, memories, hopes, and texts of cultural life.²⁰² It is a cultural instrument. The rule of law consists not simply in a body of regulations but in an entire "world." Law's interpretive character charges a community's shared political project, its self-understanding, and its identity with normative meaning.

Cover's cultural and narrative conception offers important shifts in perspective for understanding law's relation to democratic plurality. Cover specified and valorized the processes by which individuals—gathering together in what he termed "paideic" communities—generate a multiplicity of normative meanings.²⁰³ Law is, most

²⁰¹ Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4–5 (1983). Cf. Michael Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 83 (1984) (noting that institutions describe more than "a set of regulative principles, [but] also a view about the way that the world is, and the way we move within it").

²⁰² See Cover, *supra* note 201; Cover, *infra* notes 203–10. See generally Judith Resnik, *Living Their Legal Commitments: Paideic Communities, Courts and Robert Cover*, 17 YALE J.L. & HUMAN. 17, 18 (2005). For an application of Cover's thinking to the dilemmas of constitutional theory beyond the nation-state, see Paul Linden-Retek, *Cosmopolitan Law and Time: Toward a Theory of Constitutionalism and Solidarity in Transition*, 4(2) GLOB. CONST. 157 (2015).

²⁰³ Cover, *supra* note 201, at 12–13.

essentially, a medium for which the centralized state is in the first instance neither necessary nor desired.²⁰⁴ This creation of legal meaning—“jurisgenesis”—bears the imprint of the theological and sacred: a “common understanding of creed and ritual” through which a community’s beliefs about the world develop.²⁰⁵ And yet, a pure paideic community is illusory, for precisely the reasons Arendt suggested.²⁰⁶ Legal creativity also implies sectarian “juridical mitosis,” as meaning is never stable but splits, grows, and expands anew.²⁰⁷ A paideic community is at once established and shaken by the “jurispotence” of its fertile normative precepts.²⁰⁸ For jurisgenesis alone is an unstable and dissociative virtue, yielding a mistrustful multiplicity of interpretations and commitments to communal law.

Cover correspondingly points to a second “world-maintaining” legal type—law in its “imperial mode” that restores an “organizing principle” to the social world.²⁰⁹ Such a law is institutional and systemic, however. It blocks proliferation of meaning only by distancing itself from the normative worlds themselves. This distance renders it “incapable of producing the normative meaning that is life and growth” on its own.²¹⁰ Cover famously calls the modern judiciary a “jurispathic” office.²¹¹ Responding to jurispotency as the problem of “too much law,” it enforces a choice, from the outside, to privilege some voices by overruling or silencing others. It does so by speaking a language of objectivity, the hierarchy of the liberal state. This is holistic law familiar to the modes of reasoning we find in categoricalism and proportionality alike.

Thus far, Cover’s picture is sobering: a “radical dichotomy” between community law as meaning and state law as social control, in which the institutions of law’s imperial mode are in fact parasitic upon the very social meanings they restrain but can neither guarantee nor replenish.²¹² The concern remains always that the state will “exact too high a cost,” as Martha Minow put it, for its form of order, at the expense of other worlds and ways of life.²¹³ Cover was, of course, profoundly skeptical of state power and adamant that judicial decisions, in particular, concealed their relation to political violence.²¹⁴

²⁰⁴ *Id.* at 11.

²⁰⁵ *Id.* at 11, 15.

²⁰⁶ *Id.* at 14.

²⁰⁷ *Id.* at 15.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 13, 16.

²¹⁰ *Id.* at 16.

²¹¹ *See id.* at 40–44.

²¹² *Id.* at 18.

²¹³ Martha Minow, *Introduction* to NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER, at 7 (Martha Minow et al. eds. 1992).

²¹⁴ *See* Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986).

If this were all Cover's theory told us, it would be of limited, less novel help in reimagining the character of pluralistic law. It would rehearse, perhaps in a distinctive language, merely the critiques of the paradigms of authority and justification as discussed above. But it would not yet offer tools to reimagine how constitutional law might ask communities to see themselves differently nor illuminate new forms of transformative legal discourse among them nor envision new grounds for constitutional authority from above.

But Cover's constitutional theory—while perhaps yielding such an interpretation—promises also to rescue constitutional law from this same critique. Cover's argument that narrative underlies the structure of legal norms inspires an entirely different account of how a community's normative meaning exists and endures in time, demonstrating a dynamic interdependence between jurisgenerativity and jurispathology. Narrative as a texture and literary form denies the inherited stasis of linguistic boundaries and instead affirms a constant, dialectical creativity—a delicate, continuous closure and opening of legal meaning. And this creativity holds the key to resisting legal violence and for building the grounds of justice, for reducing the space between law and the plurality of social meaning. Indeed, Cover signals exactly this in his epigraphic citation of the opening lines from the poem "Connoisseur of Chaos" written by Wallace Stevens: "A. A violent order is a disorder; and / B. A great disorder is an order. These / Two things are one. (Pages of illustrations)."²¹⁵ It is Cover's powerful conception of narrative—his understanding of how narrative secures commitment to legal precepts but, perhaps more importantly, also how narrative can limit state violence—that contains the possibility for Arendtian democratic judgment and, with it, for redeeming the modern pluralistic legal order. Let me explore this conception in greater detail.

1. Normative Worlds and Narratives

Cover writes in his introduction, "Every [legal] prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose."²¹⁶ Citing Clifford Geertz and the thick contextualism of morality, Cover emphasizes that law's capacity for societal integration derives from "the narratives that are the trajectories plotted upon material reality by our imaginations."²¹⁷ Legal narrative joins the citizen as subject to the order of law as object. Cover further writes: "This objectification of the norms to which one is committed frequently, perhaps always, entails a narrative—a story of how the law, now object, came to be, and more importantly, how it came to be one's own."²¹⁸ The law we inherit—and we are, all of us, born into an already existing legal order—must come to resonate with the citizen as one she can imagine authoring, engaging with, celebrating, perhaps resisting, or even overturning. One's normative commitment is conditioned upon imagining and in fact shaping the narrative development of law. Located within a *nomos*, actions become intelligible as part of an enduring political

²¹⁵ Cover, *supra* note 201, at 4.

²¹⁶ *Id.* at 5.

²¹⁷ *Id.*

²¹⁸ *Id.* at 45.

project; one is freed, if only for a time, from anomie, alienation, and arbitrariness.²¹⁹ For Cover, “To inhabit a *nomos* is to know how to *live* in it.”²²⁰ This is perhaps the most concise definition we might find of the way law situates a citizen in the world. But law is more than a mythical or historical fabric within which actions assume meaning or value. Cover’s understanding of what it means to “live in the law” is more complex—and for the following reasons more relevant to emancipatory constitutional thought.²²¹

First, law’s narrative structure makes intelligible in social life the possible pathways for concrete critique and transformation. Cover describes law’s narrative arc as the “system of tension or *bridge* linking a concept of a reality to an imagined alternative;” the drawn thread between “reality and vision.”²²² Law provides an orientation, a language, and a process that guides public life from the present constraints of the social world towards a yet unrealized or previously defeated political hopes. On the one hand, history; on the other, possibility. Law is not simply a tapestry of “meaningful patterns of the past” into which citizens secure themselves, but a medium reaching across each register of time from past to future.²²³

Cover’s quite revolutionary intervention in constitutional theory—in understanding how citizens experience commitment to the legal order—comes just at this point. As a bridge in normative time, law connects three distinct domains: the “world-that-is” (our present behavior, including what we have inherited), the “world-that-ought-to-be” (our normative vision), and the “worlds-that-might-be” (our concrete sense of possibility for transforming reality toward our vision).²²⁴ Cover’s introduction of the third element, with its Aristotelian resonances, is decisive. This domain enables within law the imagination necessary for situated social critique—that is, for the growth of law and for social learning. In a later essay from 1985, Cover emphasized, “[Law] *is* the bridge—the committed social behavior which constitutes the way a group of people will attempt to get from here to there.”²²⁵

The law marks the process of transformation in the background worlds we inhabit—the imagination of possible or plausible states of affairs *for us*. It captures the dynamic of opening and closure necessary for political practice and legal judgment. As time extends toward past and future, law holds open the possibility that things might be otherwise than they are and that they *might have been* otherwise than they were. In this novel framework, legal narrative frees a polity not only from solipsistic traditionalism but also from nihilistic disengagement, in which our norms—

²¹⁹ *Id.* at 8, 10 (“Law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify.”).

²²⁰ *Id.* at 6.

²²¹ *See generally id.* at 4–11.

²²² *Id.* at 9 (emphasis added).

²²³ *Id.*

²²⁴ *Id.* at 10; *see also* Robert Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *CAP. UNIV. L. REV.* 179, 181 (1985).

²²⁵ Cover, *supra* note 224, at 181.

abstract and formal as they are—“dictate no particular set of transformations or efforts at transformation.”²²⁶

Legal narrative inscribes political being in time. Like the paideic enterprise, the rule of law is never found *in* itself but always already engaged in the dislocating movement of signification and meaning. Cover’s term for this interpretive legal play is “jurisgenerativity”—the law’s capacity as a text to generate multiple and competing interpretations of the realistic utopia to which a community is attached. Within the richness of law is an inner openness to creative development, and this proliferation in turn rejuvenates the semantic materials from which law is refashioned. A legal meaning that is in a proper sense shared can never be stable or monologic; it is overdetermined by the multiplicity of voices in law’s normative-cultural world. Cover’s law is thereby cast inherently as a process of renewal, of reevaluation and becoming.

Cover’s essential point is to stress that plurality and temporality are necessarily interconnected. The openness of law to alterity is a constitutive feature of its narration, and law’s openness remains only insofar as its narrative is preserved. Cover’s law affirms a vision of law familiar in the political-ethical interventions of deconstruction.²²⁷ Legal narratives are traces in the deconstructive sense.²²⁸ They deny access to a self-sufficient, immediately cognizable presence of legal meaning. Narrative structures yield questions about ideologically privileged positions of hierarchy and about the hidden inversions concealed by law read as coherence or mere rule. In so doing, they point to the enduring possibilities of new interpretive strategies, room for maneuver, and to the creativity of the *nomos* as a form of life.²²⁹ Cover made clear that he imagined law to bridge “two ‘moving worlds.’”²³⁰ As narrative, law’s imagination of possibility is plural; its web of perspectives rejects the revival of a holistic voice of the law whose aim is to stabilize.

2. Critiquing Dworkin Anew: Plurality and Time

Compare Cover’s conception of narrative to the constitutional theory of Ronald Dworkin, with whose literary metaphors of law Cover otherwise shares much.²³¹ In light of his emphasis on law’s jurisgenerative resources, Cover makes untenable the settled, holistic rationalism of Dworkin’s reconstruction: the view of law as integrity and the idea of a normative tradition that develops as a “chain novel” towards a set of

²²⁶ Cover, *supra* note 201, at 9.

²²⁷ See generally Jacques Derrida, *Force of Law: The ‘Mystical Foundation of Authority’*, 11 CARDOZO L. REV. 919 (1990).

²²⁸ See, e.g., JACQUES DERRIDA, *The Art of Memoires*, in MEMOIRES FOR PAUL DE MAN 45, 58 (1986).

²²⁹ See generally J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987).

²³⁰ Robert Cover, *Bringing the Messiah Through the Law: A Case Study*, 30 NOMOS: AM. SOC’Y POL. LEGAL PHIL. 201, 201–02 (1988).

²³¹ An extended comparison with Dworkin’s thought is helpful because a surface reading of Cover’s work on legal narrative can easily label him as merely another Dworkinian.

available liberal ends.²³² The societal function of constitutional law is not satisfied for Cover by appeal to what Dworkin describes as “narrative coherence,”²³³ the teleological horizon of expectation that seeks a “single and coherent vision of justice and fairness and procedural due process in the right relation.”²³⁴ Thus even the later Dworkin of *Law’s Empire*—and not only the conceptions of rights we find in *Taking Rights Seriously*—fails to escape the deficiencies of categoricalism as a mode of legal reason.

Cover himself presents a quite different conception of narrative rationality in law. Cover’s addition of the third term—“might be”—to Dworkin’s brand of Kantian teleological judgment between “is” and “ought”²³⁵ means that, unlike Hercules, Cover’s judge must not see in law a purposive organism, with each component part accounted for in a unitary scheme of development.²³⁶ Law’s history is shot through with imaginative potential. The metaphor of law as bridge means, too, that this judicial imagination does not simply project forward a normative ideal against whose standards one is to judge. Nor does it set the terms of an abstract evolutionary progress towards that ideal. Instead, Cover’s judge reads utopia back into the fabric of the past and entwines imagination with practices of recollection and recovery. Not recovery of a tradition wholesale but recovery in the mode of Arendt’s famous image of the pearl diver, who “select[s] his precious fragments from the pile of debris”²³⁷ and in the sense of deconstruction’s ideological critique. Recovering knowledge, for example, of how a tradition came to be and what it excluded or suppressed might in fact be grounds to reject it as persuasive or compelling. Cover understands narrative to restore the link between the two “moving worlds” of an unredeemed past and a newly envisioned future, and through this link secures commitment to a program of social change.²³⁸

This distinct rationality of narrative sustains what we might call, with Seyla Benhabib, a concrete-transfigurative mode of critique.²³⁹ Narrative gathers a reservoir of alternatives—imagined as possible—to press in the direction of reform. In foregrounding the exclusions and marginalizations at work in law, Cover’s *nomos* is itself already a pluriverse of *nomoi* to be developed and deepened.²⁴⁰ Law’s pluralism stems from its narrative structure. This elaboration of democratic judgment reflects

²³² See generally RONALD DWORKIN, *LAW’S EMPIRE* (1986).

²³³ *Id.* at 400–01.

²³⁴ *Id.* at 404.

²³⁵ Immanuel Kant, *First Introduction*, in *CRITIQUE OF JUDGMENT* 383, 429 (Werner D. Dillmann trans., Hackett Publ’g Co. 1987) (1790).

²³⁶ See DWORKIN, *supra* note 232, at 165; Cover, *supra* note 214, at 1627 n.61 (distinguishing his own understanding of the violence of judging from Dworkin’s Hercules).

²³⁷ Hannah Arendt, *Walter Benjamin*, in *MEN IN DARK TIMES* 200 (1968).

²³⁸ Cover, *supra* note 230, at 20.

²³⁹ See SEYLA BENHABIB, *CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATIONS OF CRITICAL THEORY* 328, 336 (1987).

²⁴⁰ See generally Cover, *supra* note 201.

what Cover refers to as “redemptive constitutionalism”—a form of association that advances sharply different visions from present social organization and requires “a transformational politics that cannot be contained within the autonomous insularity of the association itself.”²⁴¹ It is by the narrative imagination in law that justice is transformed from vision into political cause. By making such questions legible as concrete matters of law and of public concern, narrative unites the two values pluralistic constitutional law aims to hold in equipoise: commitment to law and the possibility for its imaginative, emancipatory transformation. Stretched between history and possibility, law no longer can be thought to be “merely one’s own.”

My term for the judicial method that sustains this equipoise between commitment and possibility is “narrative doctrinalism.” Narrative doctrinalism does not presume to resolve in foundationalist (categorical) terms how such redemptive constitutionalism relates to the insular bonds it aims to transform. These will always form a dissonant pluralism. But neither does it treat rights as *a priori* limited and thus always subject to a choice among their plural architecture to privilege some values over others. Cover’s emphasis on the internal connection between pluralism and narrative means that the plurality of rights is not a presumption but an interpretive result.²⁴² It must be crafted from the history and imaginative possibility of the particular case. The bounds of rights are not simply a pre-existing catalogue of options and protections to be selectively chosen at points of confrontation.

The intent, rather, is to give shape to this confrontation such that resources for mutual understanding are deepened, not presumed or constrained. Narrative doctrinalism provides the means by which legal judgment might proceed without compromising or stultifying the jurisgenerative processes of interpretation and world-creation at the heart of paideic communal life. The enterprise is more social and humanistic, less technocratic.

Cover’s work hereby retrieves the much-needed connection between “justification” as a public process of reason-giving and the practice of “world-disclosure” that yields, in time, new forms of self-understanding.²⁴³ Indeed, narrative doctrinalism offers a more expansive, dynamic picture of reason: one sensitive to context, to the work of persuasion, to the ways meaning appears or is hidden, and to the many dimensions of experience that law must illuminate for its claim to justification to take hold or for an unjust relation of power or exclusion to be exposed as such. Cover ties legitimacy, like Arendt, to the communicability of narratives.

IV. NARRATIVE DOCTRINALISM: METHOD, ETHOS, AND POLITICS

Cover presents a sophisticated critique of modern constitutionalism’s turn to either a model of constrained democracy or justified governance.²⁴⁴ He does so because he understands pluralism to function more subtly in the constitution of a modern polity’s normative commitments. Cover chides “modern apologists” who see the problem to

²⁴¹ *Id.* at 34.

²⁴² *See id.* at 16–17.

²⁴³ *See* NIKOLAS KOMPRIDIS, CRITIQUE AND DISCLOSURE: CRITICAL THEORY BETWEEN PAST AND FUTURE 117–18 (2006).

²⁴⁴ Cover, *supra* note 201, at 43.

which courts are the solution as merely one of normative indeterminacy, of unclear law.²⁴⁵ Categoricalism and proportionality, on this reading, risk reducing legal judgment precisely to this form of clarification—whether of categorical bounds, justified power, or prudent balance. Cover understood how such clarificatory modes of legal reasoning can be destructive of the jurisgenerative practices of political communities they concern.²⁴⁶ And, consequently, his critique might help rescue courts from the worst of their own insularity, and to find ways for the “jurispathic” to regain its contact with the “jurisgenerative.”²⁴⁷

Cover’s corrective invocation of “too much law”²⁴⁸ alters the ambitions of constitutional interpretation. The case that occasioned Cover’s reflections on legal narrative was *Bob Jones University v. United States*, in which the Supreme Court held that the Internal Revenue Service properly withdrew a federal tax exemption from the university on account of its racially discriminatory policies.²⁴⁹ Cover took aim not at the decision’s holding, with which he agreed, but at the “the failure of the Court’s commitment,”²⁵⁰ the weakness of its constitutional interpretation, and its reluctance to offer a clearer articulation of a fundamental norm’s meaning.²⁵¹ Instead of placing its decision on constitutional footing, the Court accepted passively the obviousness—and thus statutory soundness—of the Government’s compelling interest to eradicate racism in education. “It is a case,” Cover concluded, “that gives too much to the statist determination of the normative world by contributing too little to the statist understanding of the Constitution.”²⁵² He doubted the Court could sustain its redemptive anti-discrimination vision on such grounds.

A. *Responsiveness, Vertical and Horizontal*

Cover’s theory challenges constitutional interpretation along two main axes: the first concerning the vertical relation of the state to its citizens, the second concerning the horizontal relation of citizens to one another. Both relationships require the mediation of the judiciary in particular ways in order to sustain the common world within and between them. These two veins of mediation structure the wider, deeper field of judicial responsiveness. They form the dual movements of narrative doctrinalism as a method of constitutional interpretation.

First, vertical responsiveness requires that judges seek not merely to *clarify* but to *see differently*. That is to say, to lay claim to interpretations of constitutional norms in response to the particular claims of the parties involved. The vertical relation between

²⁴⁵ *Id.* at 42.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 40.

²⁴⁸ *Id.* at 41–42.

²⁴⁹ 461 U.S. 574, 605 (1983).

²⁵⁰ Cover, *supra* note 201, at 66.

²⁵¹ *Id.*

²⁵² *Id.*

state and citizen—and the boundaries between potentially conflicting normative interpretations given by each—must in each case be again constructed. For this task, Cover sees judicial deference to state power as the great danger to be avoided.²⁵³ The use, for example, of the “jurisdictional canons”—appeals to the proper exercise of already constituted political authority—conceals the absence of the articulation of legal principle.²⁵⁴ And it is only in the course of such articulation that the relationship between state and citizen can be given meaning.

If in *Bob Jones University* the Court’s judgment failed to be so responsive, it was because the Court offered no narrative of constitutional redemption; in this case, the “grand national travail against [racial] discrimination.”²⁵⁵ Judith Resnik has helpfully argued—with Cover and against him—that Justice Berger’s opinion offered registers of jurisgenerativity that Cover himself did not recognize.²⁵⁶ But Resnik’s own reconstruction of the politics and administrative struggles that preceded the Court’s ruling shows what the legal judgment itself might have traced but did not.

True, Justice Berger issued his opinion over the objections of two fellow Justices who advocated far narrower holdings,²⁵⁷ heated debates in the United States Congress reflected in amicus briefing, strategic reversals of policy by the Reagan Administration intended to block the Court’s intervention on the merits, and impassioned interventions in the public press.²⁵⁸ But if the Court rescued the anti-racism norm from such pressures, it was only by sidestepping their normative content. The move was generative, but implicitly so. And this implicit jurisgenerativity of the Court’s judgment prompts Cover’s original critique once more. For it was the reluctance to interpret the constitutional norm explicitly that permitted the Court’s “limited appreciation”—as Resnik rightly states—of what the norm could and should mean into the future.²⁵⁹ The richness and scope of interpretation occasions appreciation of its past entanglements, their import, and future implications. In short, interpretation occasions the power of democratic judgment because it rebuilds the common world on the basis of which citizens are asked to judge.

Here is where Cover’s emphasis on the mutual relation between narrativity and plurality helpfully resurfaces. One must tell the story of a norm to see the individual threads that run through its narrative—and thus, to see its plurality. This is the substance of the jurisgenerative moment. Cover himself mentions such points of departure in a prominent footnote toward the close of his essay. There, Cover specifies

²⁵³ *Id.* at 67–68.

²⁵⁴ *Id.* at 66.

²⁵⁵ *Id.*

²⁵⁶ Resnik, *supra* note 202, at 40.

²⁵⁷ *Bob Jones Univ. v. United States*, 461 U.S. 574, 606–07 (1983) (Powell, J., concurring in part and in the judgment) (fearing ceding too much power to the IRS); *Id.* at 612 (Rehnquist, J., dissenting) (deferring to the legislative authority of Congress to directly address the conflict between anti-discrimination norms and religiously-grounded racism).

²⁵⁸ See generally Resnik, *supra* note 202.

²⁵⁹ *Id.* at 45.

the consequences of the Court's needed articulation of a "constitutional commitment to [end] public subsidization of racism."²⁶⁰ It would entail "massive potential change," and the Court would be asked to consider what other private actions a constitutional prohibition on such subsidization might cover, such as the denial of investment tax credits, the accelerated cost recovery to discriminatory employers, or home mortgage interest deductions.²⁶¹ Finally, if the protection against private racial discrimination were upheld, what of discrimination on the basis of gender, religion, national origin, or alienage?²⁶²

Cover concedes that "a host of problems" would attend such considerations.²⁶³ While the Court could of course not resolve all of these immediately in the space of its *Bob Jones* opinion, a constitutional commitment would require considering—as part of interpreting the meaning of the constitutional principle—an "early encounter with them."²⁶⁴ Admitting this frankly would prompt citizens to think deeply about the stakes of subsidizing private racist conduct. It would ask citizens to understand not only the principles of the state and their application differently but also the many *roles* of the state as a public actor that intervenes in private lives in the service of some ends. Vertical responsiveness in the course of articulating this kind of commitment prompts judgment about other kinds of private coercion for which the state should perhaps be, by analogy, equally responsible. It is, indeed, internal to the work of understanding and articulating constitutional commitment that the Court must consider such questions. How might a constitutional finding in *Bob Jones* reflect or challenge the Court's appreciation of racial disparities in the application of criminal law;²⁶⁵ its approach to affirmative action in education;²⁶⁶ and its sensitivity to other ways the tax code sustains racial discrimination?²⁶⁷ It is in this sense that the Court would do more—put more at stake—than merely clarify the law and begin to think differently about its meaning.

²⁶⁰ Cover, *supra* note 201, at 67.

²⁶¹ *Id.* at 67 n.195.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *See, e.g.,* United States v. Armstrong, 517 U.S. 456, 258 (1996) (refusing discovery to support a claim of disparate treatment of African-Americans prosecuted for drug offenses involving crack in comparison to those prosecuted for drug offenses involving cocaine, who were statistically more likely to be white); McCleskey v. Kemp, 481 U.S. 279, 282-83 (1987).

²⁶⁶ *See* Gratz v. Bollinger, 539 U.S. 244, 249-51 (2003); Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

²⁶⁷ *See generally* David Brennen, *Race and Equality Across the Law School Curriculum: The Law of Tax Exemption*, 54 J. LEGAL EDUC. 336 (2004). *See* Resnik, *supra* note 202, at 44.

Indeed, Cover anticipated these questions when he argued, in a 1983 op-ed published before his *Harvard Law Review* Foreword,²⁶⁸ against another Supreme Court decision, *Mueller v. Allen*,²⁶⁹ which upheld a Minnesota tuition tax deduction for the cost of private schooling.²⁷⁰ There, while Cover in fact praised the *Bob Jones* opinion by comparison, and thus did not himself mark the explicit connection between them, he nevertheless critiqued *Mueller* on precisely the grounds of the failed constitutional commitment for which he would later criticize the *Bob Jones* Court. Permitting states to offer tax deductions for private education, Cover argued, must be considered in light of the concrete risk that it will publicly subsidize “white flight” and thus threaten the principles and project of racial integration in the United States.²⁷¹ Reading these criticisms together, we see Cover’s Foreword as warning of a particular brand of vertical unresponsiveness. For it is through articulation of constitutional principle that such analogies come to the fore—the many ways the state may contribute to the “segregation and inequality in education.”²⁷²

The first lesson of Cover’s thought motivating narrative doctrinalism is thus the following: it is the work of these analogies, not merely the existence *a priori* of an anti-racism or non-segregation principle as such, that defines the terms and reach of the principle itself.²⁷³ The alternative view reveals the limitations, in particular, of the proportionality approach. The Court in *Bob Jones* gave an anti-segregation holding only by cabining the reach of the non-segregation principle itself.²⁷⁴ It granted license to the Internal Revenue Service to deny tax exemptions to educational institutions with overtly racist policies without identifying any principled prospect for such a holding to pose any consequences outside itself or to illuminate a broader range of subordinations the state might be pressed to address.²⁷⁵ The principle in this sense was powerful only in a very limited way—and hardly jurisgenerative. It might have been set properly in proportion to the harm posed by Bob Jones University to constitutional values; yet that proportion offered no insight into how else the state should consider the import of those values elsewhere.

Cover’s reasoning here also reveals another dimension of vertical responsiveness. It suggests, *contra* Resnik’s concerns, how the Court’s expression of constitutional commitment need not reduce it to a pre-emptive and dysfunctional rigidity²⁷⁶ that

²⁶⁸ See Robert Cover, *Court Has High Aim, Bad Plan on Bias*, N.Y. TIMES, July 11, 1983, at A15.

²⁶⁹ 463 U.S. 388 (1983).

²⁷⁰ *Id.* at 390 (Marshall, J., Brennan, J., Blackmun, J., and Stevens, J., dissenting).

²⁷¹ Cover, *supra* note 268.

²⁷² *Id.*

²⁷³ See *id.*

²⁷⁴ See generally *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

²⁷⁵ See Resnik, *supra* note 202, at 45.

²⁷⁶ *Id.* at 46.

dooms inventive state remedies;²⁷⁷ and instead aligns well with the kind of dialogic engagement with other public actors that facilitates norm articulation.²⁷⁸ Unlike categoricism's purity and teleology, the doctrinal set of rules and principles are conceived as nodal commitments in time, and are decisions with a history and a pedigree and a set of expectations that can be realized or disappointed or revised. And this understanding of nodal commitments counteracts, too, the abstract rationality of proportionality analysis by emphasizing the field of legal normativity beyond the immediate outcome of the present case. Particular determinations of rights are singular events that both establish a narrative chain but also suggest, in their singularity, how such a narrative could have developed differently.

Engaging in narrative doctrinalism, courts elaborate both constitutional principles and the present pattern of fact with an explicit view of past genealogy and future iteration. Just as judges trace doctrinal change, they also take time to situate the many factual perspectives of the case. They illuminate not just a claim's legal import but how the claim emerged and what it represents as an event in a polity's broader historical experience. As James Boyd White writes, "When we turn to a judicial opinion, then, we can ask not only how to evaluate its 'result' but, more importantly, how and what it makes that result mean, not only for the parties in that case, and for the contemporary public, but for the future."²⁷⁹ The law draws a narrative arc from individual to polity, and from past to future. If the law succeeds in preserving this temporal perspective, decisions never reduce to instances merely of administration or state violence. They provide a language and structure for articulating and working through competing, evolving interpretations of value. The actions of Bob Jones University ought to have prompted the judges, as Cover writes, "to face the commitments entailed in their judicial office and their law."²⁸⁰

In Cover's second lesson, he appreciated the task of vertical responsiveness in relation to responsiveness along the horizontal axis.²⁸¹ The latter suggests concern that a public ruling affects not merely the state's relation to the parties but also the relation of the parties (and those similarly situated) to one another. Appreciation for other private causes of segregation given systemic support by public subsidy is one example of this kind of concern. But another is for the self-understanding of other insular communities who were similarly vulnerable against the possibly sweeping

²⁷⁷ See, e.g., *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374(2001) (holding that Congress exceeded its Section 5 authority under the Fourteenth Amendment in attempting to rescind states' immunity from suit given the record of state activities related to persons with disabilities); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (limiting governmental affirmative action).

²⁷⁸ See Robert Post & Reva Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 *YALE L.J.* 1943, 1983 (2003).

²⁷⁹ WHITE, *supra* note 123, at 102.

²⁸⁰ Cover, *supra* note 201, at 68.

²⁸¹ *Id.* at 66.

public powers of the state.²⁸² In this regard, narrative doctrinalism promises to critically reflect on the particular commitments protected, in this instance, by appeals to religious freedom. By articulating constitutionally redemptive norms properly, Cover thought, the Court could forthrightly test the bounds of insular commitments—and thus also respect the jurisgenerative capacity of insular *nomoi*.²⁸³ This is a delicate argument, but one with important ramifications for the horizontal effects of judicial review.

In light of pressure from the state, Bob Jones University had shifted its policies from the exclusion of all African Americans, to the exclusion of unmarried black students, finally to a ban on interracial dating.²⁸⁴ Cover saw the retreat of the university from its established segregationist principles born of Biblical interpretations to be, in the face of state coercion, also a product of the “weakness of commitment in the [university’s] original interpretive act.”²⁸⁵ But within this weakness was also an insight about the nature of insular groups and their own necessary relationship to pluralism and to the wider political community in which they live. What Cover’s analysis suggests is that no insular group can manage a full break with the exterior world; every *nomos* is, by virtue of the narrative structure of its claims to authority, partly redemptive.²⁸⁶ To test the boundaries and meaning of these normative commitments—and thus to enable citizens to better and more creatively see their relations to one another—is a crucial role Cover assigns to courts, as well.

A prominent mechanism for this process is the broad development and review of a court’s own factual record, for which third-party interventions are salient. The materials of third-party briefing offer an exchange of views that prompts its own form of horizontal scrutiny. Consider in *Bob Jones* the series of filings supporting the university’s right to ban interracial dating that nevertheless, coming from Christian organizations, disagreed with its interpretation of the Scriptures.²⁸⁷ The importance

²⁸² *Id.* (“The insular communities, the Mennonites and Amish, are rightly left to question the scope of the Court’s decision: are we at the mercy of each public policy decision that is not wrong? If the public policy here has a special status, what is it? Can Congress change the policy?”).

²⁸³ *Id.*

²⁸⁴ See *Bob Jones Univ. v. United States.*, 461 U.S. 574, 580, 581 (1983). The Court stated that Bob Jones University had changed its policies in response to the Fourth Circuit decision in *McCrary v. Runyon*, 515 F.2d 1082 (4th Cir. 1975), *aff’d*, 427 U.S. 160 (1976), which held that racially motivated exclusion of blacks by private schools is proscribed by 42 U.S.C. § 1981 (1976). On April 16, 1975, the Internal Revenue Service notified Bob Jones University of the proposed revocation of tax-exempt status, effective December 1, 1970, the date on which the school received a general notification of the change in the IRS interpretation of I.R.C. § 50(c)(3) (1976). The change in the school’s admissions policies took place on May 29, 1975, six weeks following the IRS notification and the Fourth Circuit decision.

²⁸⁵ Cover, *supra* note 201, at 51.

²⁸⁶ See Julen Etxabe, *The Legal Universe After Robert Cover*, L. & HUMANS 122, 146 (2010).

²⁸⁷ See, e.g., Brief Amici Curiae of the American Baptist Churches in the U.S.A. joined by the United Presbyterian Church of the U.S.A. at 1, *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (No. 81-3) (disagreeing with leaders of Bob Jones University on their reading of scriptures and believing their beliefs to be “racist,” but supporting the University because

of these briefs is to activate an axis of reflection and reassessment on the part of Bob Jones University to consider its views with regard not only to the external perspective of the state but also the more closely aligned (and thus more “internal”) perspectives of other religious institutions that wish to claim their own appropriate exemptions.²⁸⁸ It suggests that the state acts not merely against a religious position in the name of secular law, but that within scripture itself there are resources to support the state’s normative principles.

When we juxtapose the diversity of religious interpretations with the university’s own shifts in policy, we begin to construct a more richly narrative account of the *nomie* values at stake. In line with Cover’s thinking, these narrative developments of scriptural interpretations disclose something important about their character; that they are themselves importantly heterogeneous, and that this heterogeneity warrants attention. Cover himself was somewhat derisive of the fact that that Bob Jones University’s commitment to scriptural principles extended only so far as tax liability.²⁸⁹ But the absence of commitment revealed to Cover the occasion for more adequate involvement with the other similarly situated insular communities that interpreted Christian scripture for themselves. And thus, the possibility for the university to pluralize the character of its own claims; to understand the stakes and meaning of their own interpretations perhaps differently.

Such pluralizations raise important questions about which members of particular communities are authorized or able to make community policy and the law that is understood to be constitutive of its identity. This is the substance of a dialogue through which communities are pressed to “make good” on their views or to find ways to change them into the future.²⁹⁰ And this is a dialogue to which judges—in their orchestration of briefing through the legal process and their marshalling of those views in the text of the legal opinion—can contribute much.

Professor Greene rightly suggests that a core value proportionality attempts to sustain is the investment of parties with diverse commitments in the constitutional system—to resist their alienation.²⁹¹ But such responsiveness of law to its parties—and of parties to one another—requires responsiveness not only to the substantive claims themselves but, as Cover suggests, to their narrative structure. Investment in the latter process cannot be accomplished merely by fine-tuning principles to the facts at hand and, then, suggesting that parties could win, on another day, should the facts

of the held position that sincere religious beliefs should be protected by the First Amendment); Brief Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of Church of God in Christ, Mennonite, Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (Nos. 81-1 & 81-3), 1981 U.S. S. Ct. Briefs LEXIS 606, at *1 (describing the Mennonite Church’s work in “support for victims of oppression and bigotry whether the oppression is motivated by class, racial, or religious beliefs”).

²⁸⁸ See Brief Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of Church of God in Christ, Mennonite, *supra* note 287, at *2.

²⁸⁹ Cover, *supra* note 201, at 51.

²⁹⁰ Resnik, *supra* note 202, at 52.

²⁹¹ See Greene, *supra* note 4, at 84.

appear different.²⁹² The latter work of pluralism in law reaches more deeply into the normative possibilities that govern any decision: onto what future they open, what kinds of responses might they invite, and how they ask both redemptive and insular communities to see their roles into the future—vertically and horizontally.

B. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*²⁹³

With these normative dimensions of narrative doctrinalism in mind, I now turn to give the concept critical purchase in more recent constitutional analysis, using *Masterpiece Cakeshop* as the illustrative example. The analysis here is meant to detail how narrative doctrinalism contributes novel insights at the level of hermeneutic theory, rhetorical framing, and doctrinal design—and how it corrects for deficiencies in categoricism and proportionality alike.

Masterpiece Cakeshop concerned a conflict between claims to free speech and free exercise under the First Amendment and protections against discrimination on the basis of sexual orientation.²⁹⁴ It reflects precisely the kind of deep disagreement over public recognition and partisan fault lines that a pluralistic judicial review must navigate. The case presented an opportunity for the Court to reformulate the “common world” around which a reconciliation of antidiscrimination law and religious freedom might be possible, notwithstanding its poor posture as a candidate for certiorari.²⁹⁵ For reasons I shall detail below, the majority opinion reproduced the kinds of doctrinal and rhetorical formulations that signal orientations to categoricism and proportionality—at the expense of the narrative doctrinal possibilities the case nevertheless held in view. In what follows, I outline these deficiencies of the judgment and, in turn, illustrate how it might have been differently composed, were it to have followed the guidance of a narrative interpretive method.

Masterpiece Cakeshop presented the question whether a baker (Jack Phillips) could refuse on religious grounds to create a cake for a couple (Charlie Craig and David Mullins) celebrating a same-sex marriage, despite a neutral state law of general applicability prohibiting discrimination on the basis of sexual orientation.²⁹⁶ The Colorado Civil Rights Commission held that the baker’s denial of service violated Colorado’s Anti-Discrimination Act (CADA).²⁹⁷ Phillips responded that this finding amounted to an unlawful burden on his free exercise of religion and compelled his expression in violation of free speech protections.²⁹⁸ The Court’s judgment was deliberately narrow and set aside the Commission’s ruling on

²⁹² *See id.*

²⁹³ 138 S. Ct. 1719 (2018).

²⁹⁴ *Id.* at 1723.

²⁹⁵ *See Greene, supra* note 4, at 120.

²⁹⁶ *See Masterpiece Cakeshop*, 138 S. Ct. at 1724–27.

²⁹⁷ *Id.* at 1723; COLO. REV. STAT. § 24-34-601(2) (2017).

²⁹⁸ *See Masterpiece Cakeshop*, 138 S. Ct. at 1726.

grounds that its decision-making was tainted by animus toward religion.²⁹⁹ Justice Kennedy's opinion was joined by all members of the Court except Justices Ginsburg and Sotomayor, who dissented,³⁰⁰ and Justice Thomas, who authored a separate opinion concurring in part.³⁰¹

The Court plainly chose a pluralistic approach in managing the claims of the litigants—neither granting unqualified protection to those who conscientiously object to providing certain goods and services nor labeling such objections as mere bigotry. Instead, the Court noted that “gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth,” and that, “[a]t the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.”³⁰² The question for us is what kind of pluralism the Court here in fact defends—in line with what understandings of judicial review and its place in a constitutional democracy? And is it a coherent, illuminating, and sustainable approach, one that is responsive to the disagreements at stake, both vertically and horizontally?

1. Categorical Exaggerations and the Turn to Judicial Avoidance

In the first instance, rights categoricism shapes the framing of the claims that come before the Court. Jack Phillips grounded his right to refuse service primarily in his freedom of speech rather than his free exercise of religion, despite the fact that his refusal to bake the cake was on account not of his artistic sensibilities but his religious ones.³⁰³ This formulation is the result of the distortions of doctrinal categoricism: to conceive of Phillips' right as one of religious exercise faces the doctrinal wall of *Employment Division v. Smith*, under which a religious objector has no First Amendment claim against a neutral law of general applicability,³⁰⁴ such as the Colorado statute. After *Smith*, those seeking to defend their freedom of religion have

²⁹⁹ In the proceedings of the state commission, some commissioners expressed hostility towards religion because of its historic role in justifying various forms of discrimination and harm. *Id.* at 1729. The Court concluded that, when compared with the commission's reluctance to find a violation for bakers who, for secular reasons, refused to write antigay messages, the commissioners' manifested animus towards religion demonstrated a lack of the “religious neutrality” required to satisfy the Court's free exercises doctrine. *Id.* at 1731–32.

³⁰⁰ *Id.* at 1748 (Ginsburg, J., dissenting).

³⁰¹ *Id.* at 1740 (Thomas, J., concurring in part and concurring in the judgment).

³⁰² *Id.* at 1727.

³⁰³ *Id.* at 1724.

³⁰⁴ 494 U.S. 872, 890 (1990).

thus turned to framing their claims in the “comparatively absolutist discourse”³⁰⁵ of free speech and federal and state religious freedom restoration acts.³⁰⁶

The categorical path leading from Justice Scalia’s spectre of “anarchy”³⁰⁷ in *Smith* not only disjoined the presentation of Phillips’ claim from the way he experienced the harm in reality; it also forced the Court to confront the free speech absolutism that remains insensitive to the content of the speech itself. A positive result for Phillips in this frame would threaten to give, by extension, a win for every bigot who wished to carve out exceptions in any and every law protecting civil rights. The Court, hoping to give voice to deeply felt constitutional claims of both parties,³⁰⁸ understandably recoiled from this result, unable to find the resources there with which to realize that hope. The way they did so is instructive.

The absolutist frame meant that the hurdle to parse the extent of free speech rights proved too high. In their interventions, Justice Clarence Thomas, joined by Justice Neil Gorsuch, accepted Phillips’ argument on free speech grounds and agreed that forcing the baker to make the cake in question would constitute impermissible compelled speech.³⁰⁹ Justice Thomas wrote:

[f]orcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are ‘weddings’ and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to “bear witness to [these] fact[s],” or to “affir[m] ... a belief with which [he] disagrees.”³¹⁰

The majority opinion, however, rejected this point of view without discussing why the First Amendment principles invoked by Justices Thomas and Gorsuch might render their position untenable.³¹¹ Instead, the Court leaned on the consequentialist implications of their interpretation, which would impose, as Justice Kennedy wrote, “a serious stigma on gay persons.”³¹² To categorically insulate the kinds of goods and services Phillips offered in this way would “in effect” allow artisans “to put up signs saying ‘no goods or services will be sold if they will be used for gay marriages.’”³¹³

³⁰⁵ See Greene, *supra* note 4, at 121.

³⁰⁶ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693–94 (2014); *State v. Arlene’s Flowers, Inc.*, 389 P.3d 543, 562–66 (Wash. 2017); Christopher Lund, *RFRA, State RFRAs, and Religious Minorities*, 53 SAN DIEGO L. REV. 163, 165–71 (2016).

³⁰⁷ 494 U.S. at 888–89.

³⁰⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1724–25, 1728 (reciting Colorado’s history of anti-discrimination laws).

³⁰⁹ *Id.* at 1744 (Thomas, J., concurring in part and concurring with the judgment).

³¹⁰ *Id.* (citations omitted).

³¹¹ *Id.* at 1727 (majority opinion).

³¹² *Id.* at 1729.

³¹³ *Id.* at 1728–29.

This result to the Court was manifestly intolerable. And if it was so understandably, the Court nevertheless retreated from further normative articulation of the legal principles at stake—whether of the CADA itself or of possibly finer distinctions to be made within free speech jurisprudence and First Amendment immunities. Instead, Justice Kennedy found an off-ramp by focusing on the inadequacy of decision-making process conducted by the Colorado Civil Rights Commission. The majority opinion thus kept in play both antidiscrimination principles and religious freedoms; but only by deflecting legal responsibility away from either Phillips or the Colorado legislatures’ statute and laying blame narrowly at the feet of the Commission and its animus toward religion.³¹⁴ The case, in the end, as Greene writes, offered what amounted to an “error correction that the Colorado Court of Appeals could have handled just fine.”³¹⁵ We see here how categoricalism creates the pressures toward a form of judicial avoidance, a kind of preemptive thinking that cuts short the creative use of law to illuminate the stakes of public problems and public principles alike.³¹⁶

2. Proportionality, Consequentialism, and Misrecognition

Greene finds the remedy to this kind of avoidance in the options that proportionality analysis provides. In the context of *Masterpiece Cakeshop*, Greene argues, proportionality would more adequately frame the issue as a conflict of rights, not merely one right (that of Phillips) pressed against a government interest (anti-discrimination). Proportionality in effect highlights that the Colorado public accommodations law “means to honor the state’s constitutional obligation to respect the rights of its gay, lesbian, and bisexual citizens.”³¹⁷

In the first instance, it is not clear the extent to which such a framing truly escaped the grasp of any of the opinions in the case. But more important is the horizon of outcomes that such a focus on proportionality balancing makes, in Greene’s view, possible. Greene identifies notable and analogous cases in the jurisprudence under the European Convention on Human Rights, in which controversies between freedom of expression and religion were balanced with obligations to protect against sexual orientation discrimination.³¹⁸ While such cases appear to Greene to formally recognize the harms on both sides, their clear import, however, lies in their foregrounding of “an issue that should have been but was not a subject of discussion in *Masterpiece Cakeshop*: the remedy.”³¹⁹

³¹⁴ *Id.* at 1729–31.

³¹⁵ *See* Greene, *supra* note 4, at 120.

³¹⁶ *See supra* Part II.A.2.

³¹⁷ *See* Greene, *supra* note 4, at 122.

³¹⁸ *Id.* at 122–23. *See, e.g.*, *Lee v. McArthur*, [2016] NICA (Civ) 39 (N. Ir.); *Lee v. Ashers Baking Co.* [2015] NICty 2 (N. Ir.); *Ladele v. London Borough of Islington*, [2009] EWCA (Civ) 1357 (Eng.), *aff’d sub nom. Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 215.

³¹⁹ *See* Greene, *supra* note 4, at 123.

Proportionality here holds before the court—something the categorical exaggerations of rights absolutism obscured—a “less coercive, less binary resolution of the conflict” in the form of a gently “mediated” outcome. “[T]he Court could have . . . required Phillips to provide a customized cake to the couple that he was not personally obligated to bake.”³²⁰ The question, however, is how this admittedly clever solution³²¹ entails a particular understanding of coercion. Like Justice Kennedy’s minimalist turn toward judicial avoidance, the focus rests on the consequences. And while Kennedy’s brand of consequentialism affirms—albeit only formally and unhelpfully—the dignitary harms at stake, proportionality turns the stake of such dignitary harms into exceedingly superficial indicia of public recognition.

Conceiving coercion and public recognition in this way—merely about who is forced to deliver what to whom—suggests that such recognition can be distributed or mediated (to third parties, for example) without altering the core concerns about attribution, responsibility, and respect that motivated it in the first place. Can dignitary harm truly be reduced in this manner to a form of market provision? Was all at stake merely the delivery of a cake? On one reading, without further elaboration, such an approach seems to curiously ratify a libertarian and individualistic understanding of market exchange, premised on the full commensurability of goods and services, while ignoring intersubjective, systemic, and distributional harms that also attend that exchange. Seen in this light, such rights appear merely as interests to defend, of a different kind than dignitary harms.

Now, as a principled matter, this might be true. We might support the notion, for example, that complicity-based claims should, for certain good reasons, merit less respect,³²² such that the baker’s enforced indirect delivery no longer runs afoul his right to free exercise. The problem with proportionality—and its illumination of the remedy as such—is that it divorces the meaning of that remedy from those good reasons, which no longer are the focus of analysis in the consequentialist frame of reference. The aim of proportionality is to scrutinize the fine edges of government conduct.³²³ As such, it translates the public conflict of values into the technical problem of how best to refine and to balance competing interests. Its political dimensions—embedded in meaning and history—slip from the Court’s view.

Remember that proportionality’s rights-as-interests framework back-loads adjudication, such that the case is too often decided merely by the cost-benefit analysis of balancing and the interpretive moment of rights-definition is diminished.³²⁴ In this regard, Justice Kennedy’s own opinion reveals the subtle ways in which such back-

³²⁰ *Id.* at 124. In the *Ladele* case, Lillian Ladele was given the option, as an employee of the local registrar, of signing paperwork for same-sex civil partnerships but not conducting the ceremonies. She refused. *See* Eweida, 2013-I Eur. Ct. H.R. at 223, 229–232 (describing Ladele’s case and combining it with three others before the European Court of Human Rights).

³²¹ *See also* Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, in *THE CONSCIENCE WARS* 187, 210 (Susanna Mancini & Michel Rosenfeld eds., 2018).

³²² *Id.* at 203.

³²³ *See* Greene, *supra* note 4, at 93.

³²⁴ *Id.* at 88–89.

loading masks the degree to which balanced judgments can be materially distorted by the rhetorical presentation that precedes the formal adjudicative steps. Consider, for example, that Kennedy makes special note that Colorado had not recognized same-sex marriages at the time Craig and Mullins requested their cake from Phillips.³²⁵ This observation shifts focus from the couple's sexual orientation as the main object of discrimination—protected by the CADA—and suggests that their request for a wedding cake could itself risk illicit conduct and justify Phillips' refusal. But this misconstrues the couple's intentions, which were merely to celebrate their own legal marriage in Massachusetts and not seeking official recognition for the same in Colorado at the time.³²⁶ The problem is not, in the first instance, with the inclusion of such facts. The problem is that they are not subject to interpretation as an explicit part of the judgment; they instead frame it rhetorically from the edges and impose their own force only implicitly. This kind of rhetorical slip—as marginal as it may at first seem—impacts the different forms and levels of dignity the opinion imparts on the parties; but it does so beneath the surface.³²⁷ Without an adequate interpretation or critique of the CADA, in particular, proportionality's unresponsiveness thus manifests as a fundamental *misrecognition*.

In distorting the nature of the dignitary harm, proportionality thus commits a relational harm to the litigants not merely because a solution may be unsatisfying to both, but because it conceals the interpersonal, intersubjective nature of the harm and not merely one that matters for the individual qua individual. For the same reason that market commensurability might violate the dignitary concerns of the individual, it also violates the relational concerns of the litigants vis-à-vis one another.

C. Masterpiece in the Narrative Frame

Having tabled such criticisms and limitations of the present approaches to *Masterpiece Cakeshop*, what might an alternative framework of analysis and interpretation, guided by narrative doctrinalism, contribute? The turn to narrative doctrinalism is motivated, at heart, by the need to resist the subsumptive temptation, in which the case is subsumed beneath existing interpretations of law and loses its role as a nodal point of normative articulation. If narrative doctrinalism searches first for the apposite analogies that might illuminate the narrative strands of law and fact that frame the dispute, for this reason it is important to begin with the facts, perhaps the central fact around which the disagreement between the parties revolves.

The Court itself remarked on the gaps in the record, noting the parties' disagreement "as to the extent of the baker's refusal to provide service."³²⁸ The disagreement concerns the characterization of the delivered product, whether it is a wedding cake that one would otherwise deliver to any couple celebrating their marriage, or whether it ought to be defined more specifically as a "special cake" that bears a particular message of same-sex marriage that one would otherwise not deliver

³²⁵ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723 (2018).

³²⁶ *Id.* at 1724.

³²⁷ See Jeremiah A. Ho, *Queer Sacrifice in Masterpiece Cakeshop*, 31 YALE J.L. & FEMINISM 249, 302 (2020).

³²⁸ *Masterpiece Cakeshop*, 138 S. Ct. at 1723.

to heterosexual couples.³²⁹ If the distinction at first seems trivial, it nevertheless implicates a profound set of public beliefs and tracks a pivotal line of free exercise jurisprudence. To define the product in question is also a statement about the state of the common world—the world of public things that citizens are asked to recognize the existence of, if not exactly submit moral support for.

The definition of the public thing the cake represents animates the opposing opinions of Justices Kagan and Gorsuch. Justice Kagan renders the cake that Phillips is asked to provide Craig and Mullins as a wedding cake, something to be shared equally by homosexual and heterosexual couples and thus properly available to both under anti-discrimination law.³³⁰ Justice Gorsuch, on the other hand, interprets the couple's request as one for a "cake celebrating a same-sex wedding."³³¹ If the latter is true, then it was the "kind of cake, not the kind of customer, that mattered to the bakers" and the antidiscrimination statute is inapplicable.³³² At stake in this distinction, then, is whether the "special cake" implicates—and perhaps compels—the baker's exercise of "the right of his own personal expression" and violates his free exercise of religious beliefs.³³³ As discussed above, the Court saw the specter of such a conclusion, with the result that any artisan could potentially challenge the whole array of public accommodation laws, just as any religious group might have claimed similar exemptions to generally applicable laws prior to Justice Scalia's categorical bar in *Employment Division v. Smith*.³³⁴ Indeed, this same question was recently advanced in *Arlene's Flowers v. Washington*—a case for which the Court already has a cert petition before it—in which a florist defended her refusal to supply a floral arrangement for a same-sex wedding on grounds of First Amendment protections of speech and religion.³³⁵

The question that emerges from this dilemma is how to resolve such a dispute without, as Justice Kennedy's opinion ultimately did, evading this basic rift in the "common world" that structures popular belief so deeply.³³⁶ The charge of a properly pluralistic opinion is to address this rift squarely. What does the freedom of religious exercise and its iteration in free expression here in fact protect? How are we to understand the symbolic meaning that something like a culinary product can so quickly assume before the public?

³²⁹ *See id.*

³³⁰ *Id.* at 1733-34 (Kagan & Breyer, JJ., concurring).

³³¹ *Id.* at 1735 (Gorsuch & Alito, JJ., concurring).

³³² *Id.*

³³³ *Id.* at 1728.

³³⁴ *Id.* at 1727.

³³⁵ *State v. Arlene's Flowers, Inc.*, 389 P.3d 543, 550 (Wash. 2017).

³³⁶ *Masterpiece Cakeshop*, 138 S. Ct. at 1732.

1. History and Emplotment: On the Meaning of Public Accommodations

In the first instance, the focus must be to develop a full interpretation of the concept of public accommodation and, in particular, an analysis of the Colorado Anti-Discrimination Act. Here, the Court's overly brief and unelaborated citation to *Newman v. Piggie Park Enterprises, Inc.*³³⁷—a leading precedent that denied a business exemption from the race non-discrimination mandate of the 1964 Civil Rights Act—prompts consideration of what a fuller articulation might be in a vertically responsive narrative frame. The story here becomes something like the following: in reasserting the public accommodation concept, narrative doctrinalism seeks to emplot the present case of a religious conservative challenge to public accommodation laws among a historical series of challenges to public equality whose guiding values need interpretation—and re-interpretation—today.

The purpose here is not, however, merely to display categoricalism's "assorted horrors on parade"³³⁸—the broad effects a ruling for the baker in this case might hold. The point is not a blunt one—that Masterpiece Cakeshop is uncompromisingly equivalent to those restaurants challenging the public accommodation provisions of the Civil Rights Act of 1964.³³⁹ To make the emplotment more responsive, the Court must do more than passively invoke *Piggie Park*³⁴⁰ as a source of doctrinal authority in the categorical vein. It must articulate more carefully the historical grounding and normative (and emotional) resonance of the values that are at stake. And it must frame that discussion in a particular way: to see the parallels that should guide us in our thinking but not presume to label one side or another as abhorrent.

Precedential authority here assumes a slightly different form—it requires more than a passive citation but instead an active interpretation of the case's meaning for today. The Court must articulate how public accommodation laws continue to further important political principles and valuable social ends—and how we might reason analogically to see the same humiliation in being denied a wedding cake that is on offer for other couples as we do in being refused to be served at a soda-counter on account of one's race.³⁴¹

It is in this context that the Court can then offer an analysis of the proper constitutional interpretation of the CADA, which is typical of anti-discrimination statutes passed precisely in light of the 1964 Civil Rights Act. Its spirit reflects the idea that those goods and services offered to the public generally must not be withheld merely at will—but must accord with the equality inherent in the meaning of the public itself. In this light, it becomes more persuasive and clear to conclude that the CADA cannot be interpreted to demand the design of a *special* cake—but merely the

³³⁷ 390 U.S. 400, 402 n.5 (1968) (per curiam), *aff'g* 377 F.2d 433 (4th Cir. 1967).

³³⁸ Greene, *supra* note 4, at 31.

³³⁹ See Transcript of Oral Argument at 18–19, 37, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16–111), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-111_f314.pdf; see also *Katzenbach v. McClung*, 379 U.S. 294, 296–98 (1964) (describing the discriminatory practice at Ollie's Barbecue).

³⁴⁰ See *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

³⁴¹ See 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 140 (2014).

provision of cakes a baker would generally sell to others. This speaks, further, to the transformation that goods can be said to assume when they enter the public sphere of exchange—and it places limits, accordingly, on the kinds of meaning artisans or others can impute to their products under public law. While this does not fully resolve the case in *Masterpiece*, it does offer grounds to liberate us from the comparisons that Justice Gorsuch uses to draw his own conclusions about the nature of the cake in question.

If this may not be enough to dispose of the case, narrative doctrinalism promises something further. There are two more issues, in my view more deeply attuned to the narrative character of law, that deserve elaboration.

2. Ornamentalism and Faith

Narrative doctrinalism also offers resources for making sense of a particularly difficult dimension of the case: the relationship between Phillips' free exercise and free speech claims under the First Amendment. For if Greene is correct that the absolutism of *Smith* forces the articulation of religious claims in the register of subjective free expression, how can we begin to see what is at stake in this translation? And might the Court not reflect upon this translation for purposes of adjudicating those instances when religious businesses attempt to moralize the terms of commercial exchange?

Paul Kahn has argued that the collapse of free exercise jurisprudence in American constitutional law into the jurisprudence of free speech is the effect of a broader secularization of religious belief.³⁴² The rituals of religious worship have been transformed from markers of religious conviction into the utterances of subjective opinion, meriting the same treatment and protection as does any other opinion. Manifestations of religious speech are thus protected on the grounds they are speech, not on grounds of their religious nature. Kahn suggests that prominent attempts to protect religious speech on these grounds, in fact and perhaps ironically, reveal a lack of serious recognition of religion, rather than an attempt to take it seriously.³⁴³ Today, Kahn writes, "Faith is not a necessary condition of our experience, but something extra that we can choose to take up or put off. Its function is often ornamental."³⁴⁴

This is a powerful observation, and one that merits analysis in the context of *Masterpiece Cakeshop* and the question of vertical responsiveness. Ornamentalism, as a historical development in law's engagement with society, poses a challenge to the simple notion to which Justices Gorsuch, Alito, and Thomas all appeal: corporate religion and the presence of thick moral identity in the contemporary marketplace. What does it mean—for the practice of religion and for its recognition by the state—for *this* to be the site of religious practice? The diagnosis of ornamentalism alerts us

³⁴² Paul Kahn, *The Jurisprudence of Religion in a Secular Age: From Ornamentalism to Hobby Lobby*, 10 L. & ETHICS HUM. RTS. 1 (2016).

³⁴³ *See id.* at 24.

³⁴⁴ *Id.* at 4. Consider the Court's embrace of this kind of ornamentalism in *Wisconsin v. Yoder*, which upheld the right of the Amish not to comply with a law requiring school attendance until age 16. The Court characterized the Amish community as descendants of the "the Swiss Anabaptists of the 16th century who rejected institutionalized churches and sought to return to the early, simple, Christian life." *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972).

to subtle forms of misrecognition and distortion in religion's meaning and status. In particular, it asks how the embrace of a religious group's identity as also an "interest group" may in fact change the character of the religion they profess to defend.

This is not merely a challenge directed to those who are religious—it poses questions to the state, as well. Consider Kahn's point that "[o]rnamentalism as the ground for a constitutional doctrine protecting free exercise makes a very weak claim: Why exactly would we be so concerned with the ornamental? Protection of the quaint, the nostalgic, or the symbolic has little to do with the Constitution's original idea of standing clear of God's truth."³⁴⁵ Indeed, the uptake is that it is precisely this weakness that led to the erasure of religious accommodation in *Smith*.³⁴⁶

What would it mean to "take religion seriously" in public life? If, in the first instance, this might occasion the overturning of *Smith*³⁴⁷—in line with the intentions of the Religious Freedom and Restoration Act (RFRA)—it might also be grounds for a deeper coming to terms with the proper place of religion if it is to maintain the integrity of its ritual vis-à-vis the public claims to equality it encounters. If overturning *Smith* would return the reasoning of *Yoder*³⁴⁸ and *Sherbert*³⁴⁹ to the fore, recall that these cases entertained an ornamentalism of their own, conceiving the accommodation of religious belief as compensation for a kind of disability akin to a physical disability.³⁵⁰ These considerations are not grounds for doubting the "sincerity" of held beliefs but instead methods for resisting the essentialization and tokenization of those beliefs that occur when one appeals to "sincerity" alone, without understanding the developing socio-legal context in which those beliefs are lived.

These are insights that one gleans, as does Kahn, by tracing the development of law in conjunction with the development of social practice. The Court with narrative interpretive methods ought to endeavor to do the same in order to refine law's vertical responsiveness. It might offer grounds to reflect on the moralization of the market in a new way—not simply applying (or rejecting) the principle of separation of public and private *a priori*; but understanding its critical purchase anew, in light of the concerns of this case, for judging the possible transformations of faith and public equality alike over time. If a critique of ornamentalism would reinstate the compelling interest test of pre-*Smith* jurisprudence, it would at the same time demand more forthrightly appreciating the force that faith can exert in the public sphere on others and on the commitments of the state—precisely in recognition, not disparagement, of the strength of religious convictions. This entails greater scrutiny of the kinds of

³⁴⁵ Kahn, *supra* note 342, at 16.

³⁴⁶ *See Emp. Div. v. Smith*, 494 U.S. 872, 885 (1990).

³⁴⁷ *See generally id.*

³⁴⁸ *Yoder*, 406 U.S. at 236.

³⁴⁹ *Sherbert v. Verner*, 374 U.S. 398, 409–10 (1963).

³⁵⁰ *See Kahn, supra* note 342, at 13 ("The free exercise claim is perceived as a claim that no one should suffer a disability for his or her religious beliefs."). *See generally Sherbert*, 374 U.S. at 399 (1963) (Seventh Day Adventist fired from textile mill for refusing to work on Saturday); *Thomas v. Review Bd.*, 450 U.S. 707 (1981) (Jehovah's Witness fired from factory for refusing to make weapons).

“artificial” social actors able to express such convictions, of third-party harms (a point I shall return to momentarily), and of the requirement of neutrality³⁵¹ in religious exemptions themselves.

A key ambition of narrative jurisprudence in this field, then, might be to reveal ways that religious accommodation principles ought to aim to preserve the integrity of the religious life, not merely to protect the fact of its expression. Indeed, we might conclude that certain fields of social activity might paradoxically demand curtailment of that expression, precisely to preserve its integrity as a form of commitment, not just opinion or symbolism or nostalgia in the eyes of the state.³⁵² Cover expressed the notion that “insular” communities might in fact be better served by “aggressive” judicial review that take the boundaries of their *nomoi* seriously, even as it curtails their expression.³⁵³ Far more destructive, Cover thought, is a jurisprudence that quietly disrespects the seriousness of religious conviction, even though it permits its expression.³⁵⁴ If this is a result that a proportionality analysis might also garner, narrative doctrinalism reaches that result through thicker strands of legal interpretation—and thus gives it public meaning. If categoricalism sees no room for such distinctions, proportionality articulates no broader principled reasons for them.

3. Moralized Markets and the Political Economy of Market Coercion

The question of religion’s place in the economy also implicates law’s horizontal responsiveness. The same distortions in the relationship between state and religion and the meaning of religious liberty itself also apply in the interpersonal register of the economy between private citizens. Once religious groups become interest groups, their claims can easily become distorted as mere “tactics within the larger culture wars” over the proper ordering of the private economy.³⁵⁵

Perhaps the most pressing point of comparison is *Hobby Lobby*, in which the Court interpreted the meaning of RFRA to approve a religious claim of exemption from some aspects of employer-mandated health insurance coverage.³⁵⁶ Appreciating this line of cases suggests a broader analytic framework for the core matter that Greene and others isolate in the adjudication of *Masterpiece Cakeshop*: the constraint of third-

³⁵¹ See *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) (noting in dicta that “[r]eligious accommodations . . . need not come packaged with benefits to secular entities”); *Ill. Republican Party v. Pritzker*, No. 20-2175, 2020 U.S. App. LEXIS 28118, at *9 (7th Cir. Sep. 3, 2020) (holding that “speech that accompanies religious exercise has a privileged position under the First Amendment”).

³⁵² The *Smith* Court prioritized the criminal context, noting that “[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.” *Employ. Div. v. Smith*, 494 U.S. 872, 884 (1990).

³⁵³ See Cover, *supra* note 201, at 57 n. 158.

³⁵⁴ Cover, *supra* note 201, at 66–67.

³⁵⁵ Kahn, *supra* note 342, at 27.

³⁵⁶ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 690 (2014).

party harm.³⁵⁷ The narrative doctrinal approach goes further, however, to illuminate how the immediate provision of material goods relates to the structural features of economic exchange—and the costs of entangling religious accommodation within it.

Consider how the *Hobby Lobby* Court rejected the argument that the burden on religious practice in that case did not meet the statutory test of being “substantial.”³⁵⁸ The company objected to a minor element within the ACA’s comprehensive insurance schedule.³⁵⁹ And even concerning merely this element, the company’s imbrication was as indirect as possible. The actual use of contraceptive care would ultimately depend on no direct decision by the firm itself but instead on the decisions made by employees and their doctors. The firm’s objection was the private equivalent of “objecting to paying some portion of one’s taxes because of religious objections as to how that money might be used,” a highly attenuated claim that has never succeeded in court.³⁶⁰ We might observe that there is something perversely confounding about this state of affairs, when the religious claim so easily comes to be used as a weapon to overturn public regulation of key private relationships among employers and their employees. Kahn writes that the case seems to lack “seriousness” about religious liberty—for the crucial religious liberty issue is not in fact the right of the employer to relieve itself of participation in insurance schemes.³⁶¹ It is instead the right of employees who are coerced to accept limited health coverage by the imposition of their employer’s religious beliefs. “They are being compelled,” Kahn writes, “by a structure of economic power to behave in ways determined by the faith of another.”³⁶²

Here, we of course restate the concern of third-party harm³⁶³—but we do so with two main shifts of perspective. First, the appeal is made, in part, in defense of the soundness of religious protection as a principle, not merely in opposition to religious claims as such. Second, the lesson of *Hobby Lobby* is to trace the structures of political economy—an insight that makes explicit what Justice Kennedy’s opinion referred to merely in passing—the idea that commercial choices like those of Phillips could pose the danger of a “community-wide stigma.”³⁶⁴ It is through this avenue of reasoning,

³⁵⁷ See NeJaime & Siegel, *supra* note 321, at 190.

³⁵⁸ *Hobby Lobby*, 573 U. S. at 682 (Ginsburg, J., dissenting) (finding the connection between families’ religious objections and the contraceptive coverage requirement too attenuated to rank as substantial).

³⁵⁹ See Kahn, *supra* note 342, at 27.

³⁶⁰ *Id.*

³⁶¹ *Id.* at 28.

³⁶² *Id.*

³⁶³ See Frederick Gedicks & Rebecca Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L.L. REV. 343, 361 (2014) (“[T]he Court has consistently resisted religious accommodations that impose significant costs on third parties who derive no benefit from the accommodation.”); Kara Loewentheil, *When Free Exercise is a Burden: Protecting Third Parties’ in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 433 (2014).

³⁶⁴ *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1727 (2018).

in parsing the analogies to be found with *Hobby Lobby*, that the dignitarian dimensions of both claims can be realized fully and more persuasively. And it is instructive for resisting calls to moralize the terms of market exchange, while also rejecting merely the libertarian view of market provision.

Seeing the question of religious accommodation in *Masterpiece Cakeshop* in this light reveals the limitations we find in the remedy Greene ultimately supports—the appeal for Phillips “to provide a customized cake to the couple that he was not personally obligated to bake.”³⁶⁵ This solution corrects for the individual coercion but as a remedy it does not sufficiently analyze the structural factors in play that always bear the power to extract costs from some to the benefit of others. To appreciate third-party harms in this systemic sense, one must look beyond the individual provision of the goods in question and isolate the elements of political economy.

Here, narrative doctrinalism holds that a court’s historically situated judgment entails a host of background assessments, rhetorical orientations and framings, sensitivities to historical change, analogical distinctions, disclosures of new vantage points, and imaginative and self-critical insights. Each issue raised above—unrealized in the *Masterpiece*³⁶⁶ majority opinion’s interpretive work—is therefore crucial to sustaining rights-pluralism and to judicial review’s underwriting of the faculty of democratic judgment in the polity as a whole. But each is lost if we simply embrace either categoricism or proportionality alone. Indeed, *pace* Greene, even the balancing rationale of proportionality—which frames rights as limited *ex ante*—in practice relies on precisely these richer dimensions of interpretation to strike the appropriate balance; yet it denies them a place in proportionality’s justificatory methodology. Narrative doctrinalism brings to the center of adjudication what categoricism and proportionality leave at its edges.

V. CONCLUSION: THE EQUALITY OF OTHERS

At stake in narrative doctrinalism is ultimately the question of what it means to judge—and the relationship of judgment to democratic pluralism. What warrant do judges have to resolve disputes among deeply held rights and the citizens who hold them?

On the account I have developed, rights are neither trumps nor pragmatic interests, but nodal points whose obligations take particular shape over time. They assume a narrative character. Their scope of application is not unlimited; but neither is their meaning timeless. Rights have pasts and futures and thus demand historically grounded interpretation, which the judge is properly tasked to articulate. Sensitivity to this historically grounded, expressive character of rights is what preserves their plural (non-absolute) nature and thus attunes citizens to the competing meanings rights might yet be imagined to compel. Judicial opinions thereby also become acts of persuasion that speak faithfully but imaginatively to the plural constitution of political life. This view notably gives us reason to think judges may in fact be *better* than other actors at contending with pluralism, at least insofar as we think judges are uniquely well-situated to engage in the form of historically situated reasoning that narrative doctrinalism prescribes.

³⁶⁵ Greene, *supra* note 4, at 124.

³⁶⁶ See generally *Masterpiece Cakeshop*, 138 S. Ct. 1719.

My main foil in this Article was the recent revival of interest in proportionality analysis as a suitable substitute for Dworkinian categoricalism in the American constitutional understanding of rights and adjudication. As I have argued, proportionality fails to afford judicial decisions the textual narrative structure that democratic judgment requires. Looking more attentively, we understand that an act of balancing or weighing is conditioned upon a deeper exploration of the contours of constitutional meaning: what principles mean for citizens today, in relation to what they meant or might have meant in the past, and what they might yet mean in the future. Only with this kind of hermeneutic knowledge can constitutional principles be truly balanced against one another. Only with such knowledge can citizens orient themselves within a changing constitutional order. Proportionality's rationalist assumptions render it liable to forget this knowledge, to look past the fragility and plurality of normative worlds—in very much the same way the absolutism of categorical doctrines does. It suggests to courts, falsely, that they need not put much at risk when they rule, for they speak from a position of objectivity read from a universally accessible scale of value.

Seeing balancing in this way thereby refocuses the efforts of the Court on the difficult work of interpretation. As Mark Antaki writes, channeling Cover, “To judge is not simply to weigh, but to locate oneself in and tell a story.”³⁶⁷ What makes courts distinctive as state actors with jurisgenerative capacity is the way they reason through the meaning of an authoritative body of texts as part of a political project that endures over time. One needs community to maintain a world of meaning, and one maintains community by holding on to the course—however discontinuous or disjointed—of a shared narrative arc. The dominant rationalism of justificatory discourses—as we see in categoricalism and proportionality—is, for this task, insufficient. It should be supplemented by a narrative form of doctrine.

Civic commitment to law depends on courts' ability to acknowledge forthrightly the plural grounds that can always inform their judgments. We commit to pluralistic law only when it invites its own revision in time. When the law fails to do so, when it retreats closer to the holistic tones of modern state law, its authority recedes, and its capacity to imbue a pluralistic legal order with requisite political commitment weakens. Such a task and criterion are of course demanding and difficult. “But this is as it should be” Cover writes, “[t]he invasion of the *nomos* of the insular community ought to be based on more than the passing will of the state.”³⁶⁸

As active as the mode of narrative judgment is, it presents legal judgments as situated and, as such, self-limiting. James Boyd White writes, “We can and do make judgments, but we need to learn that they are limited and tentative; they can represent what we think, and can be in this sense quite firm, but they should also reflect that all this would look quite different from some other point of view.”³⁶⁹ Such claims place into the textual record not only their own background presumptions about the world; they also attempt to outline the uncertain, finite extent of their own reach. They rehearse for themselves, their interlocutors, and their publics the diversity of a

³⁶⁷ Antaki, *supra* note 140, at 298.

³⁶⁸ Cover, *supra* note 201, at 67 n.195.

³⁶⁹ WHITE, *supra* note 123, at 264.

contested past and the semantic cultural resources necessary to revive another possible future that might one day become authoritative.

Reading or thinking about a judicial opinion crafted in a narrative vein, a citizen might say: here, look, the Court illuminated something important about our public lives—about the experience we have of living together and of what we have asked the government to do. And it has suggested ways to think about the ongoing terms of that public life. Not all of the judgment was persuasive to me—and the decision may have depended strictly on little of it—but the narratives contained here track much of what I take to be fundamental about my public concern. And it has helped me make sense of it for myself.