

# THE POLITICS OF PROPORTIONALITY

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HOW RIGHTS WENT WRONG: WHY OUR OBSESSION WITH RIGHTS IS TEARING AMERICA APART. By *Jamal Greene*. Boston: Houghton Mifflin Harcourt. 2021. Pp. xxxvi, 299. \$28.

## INTRODUCTION

Jamal Greene<sup>1</sup> believes that something has gone badly awry in the way Americans think about rights. Treating them as absolutes raises the stakes of social conflict and drives a wedge between law and justice. And the American tendency to entrust rights enforcement primarily to judges only compounds the problem. Courts are institutionally inclined to declare winners and losers, leading citizens to treat each other as legal and political adversaries and, increasingly, as enemies. At a moment when political polarization is reaching historic levels, constitutional law is contributing to the problem.

Greene wants to change all of that. He thinks it can be done by encouraging us to think of rights as interests that must be accommodated together with other conflicting interests, which themselves often have the status of rights. He wants to lower the level of abstraction at which disputes are debated so that we can focus on particular facts, opening up solutions that are more balanced and less binary. And he urges us to shift responsibility from courts to democratically responsive bodies, which are institutionally designed to achieve compromise and are practiced in its art.

We begin this Review by laying out Greene's main arguments for adopting a different way of thinking about rights. In brief, *How Rights Went Wrong: Why Our Obsession With Rights Is Tearing America Apart* proposes that Americans move toward European-style proportionality review as the basis for adjudicating rights conflicts.<sup>2</sup> This approach, which emphasizes transpar-

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2. Greene's book is profitably read alongside his earlier major work on proportionality and American rights jurisprudence, and we draw on both sources in discussing his proposal. See Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 65 (2018) (arguing for American adoption of proportionality review).

ency in weighing competing rights and interests, differs from two other prominent theories of progressive constitutionalism, one that treats “rights as trumps” and invests judges with the power to determine and apply them,<sup>3</sup> and another, ascendent on the left, that largely rejects judicial review in favor of legislative supremacy.<sup>4</sup> According to Greene, proportionality provides a middle path, one that preserves a place for judicial protection of rights in our constitutional system while remedying some of the pathologies that have afflicted our legal and political culture. His important contribution already has received a great deal of attention, and rightly so.<sup>5</sup>

After describing Greene’s view, we then raise a series of questions about proportionality as a model for adjudicating rights conflicts. One is whether proportionality is justified as a matter of ideal theory. Even if it is well applied, is this approach normatively attractive? A second question is which institutions ought to apply this form of review—courts, legislatures, executive officials, or some other democratic bodies? A third is how proportionality works in practice, under nonideal conditions. Finally, Greene’s account leads us to ask about the relation between two aims that seem to motivate much of his argument, namely, reducing the level of conflict in our society and achieving a better balance of rights and interests. In short, proportionality promises to

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There is, of course, a significant literature on the philosophical foundations of proportionality review, its development and application, and objections to its use by constitutional courts in Europe and around the world. See PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES (Vicki C. Jackson & Mark Tushnet eds., 2017); PROPORTIONALITY AND THE RULE OF LAW (Grant Huscroft, Bradley W. Miller & Grégoire Webber eds., 2014); MOSHE COHEN-ELIYA & IDDO PORAT, PROPORTIONALITY AND CONSTITUTIONAL CULTURE (2013); AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS (2012) (Doron Kalir trans., Cambridge Univ. Press 2012) (2010); KAI MÖLLER, THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS (2012); ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (Julian Rivers trans., Cambridge Univ. Press 2002) (1985).

3. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi, xv (1977) [hereinafter DWORKIN, TAKING RIGHTS SERIOUSLY] (describing “rights as trumps over collective goals”); Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153, 153 (Jeremy Waldron ed., 1984) (“Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.”).

4. For recent progressive attacks on judicial review, see Samuel Moyn, *The Court Is Not Your Friend*, DISSENT, Winter 2020, at 71 [perma.cc/Z7Y5-W2WS]; Nikolas Bowie, *How the Supreme Court Dominates Our Democracy*, WASH. POST (July 16, 2021, 6:00 AM), <https://www.washingtonpost.com/outlook/2021/07/16/supreme-court-anti-democracy> [perma.cc/4R63-5WXJ]; and Eric J. Segall & Christopher Jon Sprigman, *Reducing the Power of the Supreme Court: Neither Liberal nor Conservative but Necessary (and Possible)*, N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM (Oct. 31, 2020), <https://nyujlpp.org/quorum/segall-sprigman-reducing-power-supreme-court> [perma.cc/8HLF-4YXL]. See also Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1393 (2006).

5. See, e.g., Aziz Huq, *Why Are Our Debates About Rights So Toxic?*, WASH. POST (Mar. 19, 2021, 8:00 AM), [https://www.washingtonpost.com/outlook/why-are-our-debates-about-rights-so-toxic/2021/03/17/f4dc4348-4007-11eb-8db8-395dedaa036\\_story.html](https://www.washingtonpost.com/outlook/why-are-our-debates-about-rights-so-toxic/2021/03/17/f4dc4348-4007-11eb-8db8-395dedaa036_story.html) [perma.cc/P54E-SKQE] (reviewing Greene); Samuel Moyn, *Why Do Americans Have So Few Rights?*, NEW REPUBLIC (Mar. 9, 2021), <https://newrepublic.com/article/161561/americans-rights-jamal-greene-book-review> [perma.cc/SQ6U-9SMM] (same).

deliver more peace *and* more justice. Our last question is whether implementing proportionality review today would require significant trade-offs between these ends.

In asking these questions, our aims are mainly analytical, separating out various types of considerations that might count as reasons for supporting proportionality review. But we also press beyond the boundaries of the book to ask questions about judicial politics and practice that Greene leaves aside. We consider whether proportionality should be adopted as a progressive reform strategy under polarized political conditions. The answer may turn on whether compromises for the sake of reducing social conflict could lead, paradoxically, to less peace and less justice.

## I. PROPORTIONALITY

### A. *Rights Inflation and Conflict Deflation*

Here are Greene's main contributions as we understand them. For starters, he worries that American constitutional practice too often understands rights to require binary judgments. When a right is recognized, it prevails over all countervailing considerations except perhaps a narrow set of "compelling interests."<sup>6</sup> When a right is not recognized, courts applying rational basis review accept reasons that may be entirely hypothetical and patently divorced from legislatures' actual motivations.<sup>7</sup> Either way, constitutional actors downplay or discount the rationales for regulation—just the opposite of forcing lawmakers to give reasons and then taking those reasons seriously.

Because courts are structured to declare winners, moreover, they often signal that the losers' interests are inconsequential or unimportant (pp. xxxii–xxxiii). And that raises the stakes of constitutional conflicts, which include social issues about which many people are passionate.<sup>8</sup>

Although it might seem that Greene wants to reduce the role of rights talk, actually he proposes just the opposite. He envisions a proliferation of rights

6. See, e.g., *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (holding in the context of religious free exercise that "[a] government policy can survive strict scrutiny only if it advances 'interests of the highest order' and is narrowly tailored to achieve those interests" (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993))); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020) ("When the American people chose to enshrine [the Sixth Amendment right to a jury trial] in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. . . . We are entrusted to preserve and protect that liberty, not balance it away. . . ."); *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2465 (2018) (holding that compelled subsidies for unions violate free speech under the First Amendment and that "a compelled subsidy must 'serve a compelling interest'" (quoting *Knox v. SEIU, Local 1000*, 567 U.S. 298, 310 (2012))).

7. Greene, *supra* note 2, at 101.

8. See 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 441 (Eduardo Nolla ed., James T. Schleifer trans., Liberty Fund 2012) (1835) ("There is hardly any political question in the United States that sooner or later does not turn into a judicial question.").

protections, so that more rather than fewer interests are treated as constitutionally significant. In his view, constitutional recognition should extend to a panoply of interests, including social and economic rights to education, housing, food, and health care (pp. 76–79, 94–99); protection against disparate racial impacts (pp. 107–09); rights against various forms of discrimination by private actors (pp. 3, 184–86); disability rights (pp. 172–73); and the importance of fetal life (pp. 138–39).<sup>9</sup> This “rights inflation,” as it is known in the literature,<sup>10</sup> would increase the number of conflicts that feature rights on both sides.

Rights inflation might be thought to inflame conflicts by strengthening opposing interests, but Greene believes it would actually cool passions. Those on the losing side of court decisions would feel that their interests were appreciated and valued. Widening our understanding of what counts as a right would also increase the prevalence of compromises and thereby ameliorate social conflict.

One way to find compromises, Greene believes, is to focus on facts. By paying attention to the particularities of contests, decisionmakers can find solutions that are less binary, that recognize the importance of interests on both sides, and that involve nuanced outcomes.<sup>11</sup> Here, Greene is echoing a theme in the literature on constitutional polarization, according to which principles are uncompromising and alienating, whereas pragmatic considerations can lead to understanding and conciliation.<sup>12</sup> While he does not articulate the full argument, Greene does indicate that constitutional actors can make progress

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9. See also Greene, *supra* note 2, at 50–51.

10. See, e.g., Kai Möller, *Proportionality and Rights Inflation*, in *PROPORTIONALITY AND THE RULE OF LAW*, *supra* note 2, at 155; Mattias Kumm, *Is the Structure of Human Rights Practice Defensible? Three Puzzles and Their Solution*, in *PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES*, *supra* note 2, at 51.

11. Pp. xx, xxxiii; see also Greene, *supra* note 2, at 63 (describing proportionality “as predominantly an empirical exercise”). In this regard, Greene’s view bears some resemblance to recent “least cost avoidance” theories of rights adjudication, which emphasize case-by-case analysis based on highly particularized factual determinations about the interests of parties in litigation. See Charles L. Barzun & Michael D. Gilbert, *Conflict Avoidance in Constitutional Law*, 107 VA. L. REV. 1, 53 (2021) (“Conflict avoidance demands particular, case-by-case adjudication, making disputes turns on facts.”); Aaron Tang, *Harm-Avoider Constitutionalism*, 109 CALIF. L. REV. 1847, 1904 (2021) (“[H]arm-avoider constitutionalism’s closest theoretical cousin may be . . . judicial minimalism, which advocates narrow ruling and shallowly-reasoned opinions . . .”).

12. See, e.g., Nelson Tebbe, *Should the Left Dissent?*, 34 CONST. COMMENT. 463, 474–75 (2019) (reviewing ROBERT L. TSAI, *PRACTICAL EQUALITY: FORGING JUSTICE IN A DIVIDED NATION* (2019)) (“In response to this moment of political polarization, a trope seems to be emerging. Principled positions are characterized as divisive because they tend to stimulate defensive reactions that are equally strong, whereas pragmatic approaches promote reconciliation and offer a pathway to productive action.”).

by focusing on factual specifics rather than relying on generalized rules or abstract principles of justice.<sup>13</sup>

Interestingly, given his critique of broad principles, Greene also thinks that a more measured, case-by-case approach will allow decisionmakers to better approximate the demands of justice. While the rules that structure legal interpretation are designed to achieve formal regularity, they cannot deliver substantive fairness as effectively as particularized decisionmaking, which can appreciate the interests of all parties and give each of them their due (pp. 93–94). Because just solutions will often track the details of conflicts, the thought goes, wise decisionmakers will concentrate on the specifics of the parties and their claims rather than on principles that necessarily reside at a higher level of abstraction.<sup>14</sup>

In the book's account, the institutions best suited to resolving these types of rights conflicts are not courts but legislatures, executive agencies, juries, churches, families, and other organizations within democratic society (pp. xxii, xxxv, 7, 30, 167–68). Greene claims that at the Founding rights were not expected to be enforced exclusively or even primarily by judges; they were instead seen to be the stuff of lawmaking and jury deliberation.<sup>15</sup> Juries were entrusted with the responsibility of determining whether laws exceeded the boundaries of what was considered morally reasonable within their communities (p. 12). They could serve this role because rights originally were thought to protect majorities against the government rather than minorities from political majorities (pp. 13–18). Today as well, legislatures are often better suited to the balancing of values that Greene envisions than are courts, with their institutional tendency toward all-or-nothing outcomes (p. 8). Judges practicing proportionality will more often refer disputes to lawmakers and administrative agencies, or defer to them, rather than override their processes by exercising the power of judicial review.<sup>16</sup> Greene suggests that more judges should recognize the limitations on their institutional capacity to manage the moral pluralism of a diverse society.<sup>17</sup>

In urging us away from what he argues is the prevalent American approach to rights—binary, categorical, absolutist, and selective—Greene describes an alternative framework, the outlines of which have become familiar from the exercise of proportionality review by constitutional courts around the world.<sup>18</sup> Within this framework, judges should ask, first, whether there is

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13. See, e.g., p. xxxiii (arguing that a court denies the dignity of a losing claim “when it sidelines the particular facts, motives, and evidence . . . in favor of interpretive questions” (emphasis omitted)).

14. See p. 85.

15. See pp. 15–16.

16. See p. 193; Greene, *supra* note 2, at 120, 122–23.

17. See pp. 168–69.

18. Greene, *supra* note 2, at 58–59. There is no canonical formulation of the analytic steps in proportionality review, even though some version of them is widely accepted. Huscroft et al., *supra* note 2, at 2.

a rough relationship between the government's policy and some legitimate goal (p. 110). Second, they should see whether the government could achieve its end through means that are less burdensome or discriminatory.<sup>19</sup> Finally, courts should ask whether "the government's policy [is] seriously out of proportion to the burdens it imposes on rights" (p. 110). Even if the government's end is legitimate, and even if the means are appropriately tailored, the policy might fall if the cost to an individual right is too high.<sup>20</sup>

### B. *Against Trumps*

Greene claims that American rights jurisprudence departs from his vision in several specific ways. First, the Supreme Court discriminates between different classes of rights. Some rights—like freedom of expression and, increasingly, religious free exercise and the right to bear arms—receive heightened, almost categorical protection, while others receive none.<sup>21</sup> Discriminating in this way is what Greene calls "rightsism" (p. 58), and it leads judges to hold that many important rights have no constitutional significance whatsoever. Think of the state action doctrine and the way it has excluded claims against private discrimination.<sup>22</sup> Or the Court's decision that disparate impact with respect to race, without more, is of no constitutional significance<sup>23</sup>—a primary target of Greene's (pp. 103–09). Or how the Supreme Court has rejected socio-economic rights to basic human needs like housing, education, food, health care, employment, basic income, and so forth.<sup>24</sup>

Second and relatedly, Greene takes issue with the practice of minimizing rights by limiting enforcement to those specifically articulated in the text of the Constitution or unambiguously supported by its history.<sup>25</sup> Social conservatives, the book says, seek to reduce the power and influence of rights by

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19. These first two steps will sound familiar to American constitutional lawyers, as they track the inquiry that is central to the tiers-of-scrutiny framework. Importantly, however, proportionality review demands the government's actual reasons rather than hypothetical ones. See p. 93 ("Justice means we must confront the government's actual behavior, the legislators' or the executive's actual motives . . .").

20. See Greene, *supra* note 2, at 72 (drawing out this last difference between categorical and proportionality methods).

21. See pp. 38–56 (surveying categories of rights in the United States that receive strong protections and those that are given little or no judicial scrutiny).

22. See Lawrence Sager & Nelson Tebbe, *Discriminatory Permissions and Structural Injustice*, 106 MINN. L. REV. 803 (2021).

23. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

24. Pp. 76–79, 99; see, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (rejecting a constitutional right to education); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (housing); *Dandridge v. Williams*, 397 U.S. 471, 485–87 (1970) (public welfare).

25. Pp. xviii, 79. Those who take a minimizing or "deflationary" view of rights are closer to textualists and originalists, in the book's account, than to what we would think of as judicial

adhering closely to authoritative sources (p. xviii). But they cannot account for the panoply of recognized guarantees that are not specified by the text and did not exist at the Founding. Claiming that the Constitution says nothing about birth control and trying to end the conversation there, as Justice Hugo Black wanted to do, is a nonstarter today.<sup>26</sup> Greene argues that Black's textualist approach, which required discriminating among rights, has led to absurd and unjust outcomes. For example, the Court has issued free-speech protections for pornographers and pharmaceutical companies while holding that children who are injured (or worse) as a result of negligent state agencies are entitled to no constitutional protection whatsoever.<sup>27</sup> By focusing on interpretation guided by text, structure, and original meaning—and by actively excluding moral considerations, or at least purporting to—American courts produce a jurisprudence that is either dishonest, because it smuggles in value judgments, or impoverished, because it actively ignores moral values, leading to injustice.<sup>28</sup>

Third, Greene argues that because the Court is committed to conceiving of “rights as trumps,” its recent attempts to mitigate the culture wars by reaching narrow decisions tailored to specific facts have seemed contrived and unsatisfying. Instead of grappling transparently and forthrightly with rights conflicts, the Court has dodged difficult questions presented to it and refused to recognize competing interests. A primary example, for Greene, is *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, in which the Court ruled in favor of a Christian baker who refused service to two men, Charlie Craig and David Mullins, when they asked for a cake to celebrate their civil union.<sup>29</sup> The Court seized on statements made by members of the state civil rights agency that was handling Craig and Mullins's claim—remarks that the majority deemed to be antireligious.<sup>30</sup> But the Court left open the larger ques-

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minimalists like Cass Sunstein. See Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 8–9, 14–15 (1996).

26. P. 79; see *Griswold v. Connecticut*, 381 U.S. 479, 510 (1965) (Black, J., dissenting) (“I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”).

27. P. 3; see also Greene, *supra* note 2, at 33, 74.

28. Greene, *supra* note 2, at 74 (“Rights as trumps obscures the stakes of constitutional conflict not just by substantively ignoring or erasing inconvenient constitutional values but also by slipping those values into ill-fitting garments.”); cf. Waldron, *supra* note 4, at 1353 (“[Judicial review] does not, as is often claimed, provide a way for a society to focus clearly on the real issues at stake when citizens disagree about rights; on the contrary, it distracts them with side-issues about precedent, texts, and interpretation.”).

29. 138 S. Ct. 1719, 1724–25, 32 (2018). Greene writes: “A case about a wedding cake offers a striking study in how judges and litigants in the grips of rightsism can needlessly raise the temperature of political conflict.” P. xxxiii.

30. *Masterpiece Cakeshop*, 138 S. Ct. at 1729. Even if those remarks had expressed an illegitimate motive, they would not have sufficed to invalidate the government action under ordinary antidiscrimination law, which would have allowed the agency to show that it would have taken the same action even absent the discriminatory motive. See Leslie Kendrick & Micah

tion of how religious objections to public accommodation laws should be handled in the future, even in the case of the baker himself, who continues to face litigation for other alleged civil rights infringements.<sup>31</sup> Greene is sympathetic to the Court's solution in *Masterpiece*, which was intensely fact specific, but he still sees it as the product of "categorical" reasoning—as an attempt to avoid balancing rights to free exercise, on the one hand, and LGBTQ rights to equal treatment, on the other.<sup>32</sup> Because the majority was unwilling to weigh those rights, its decision neither addressed nor resolved the constitutional question at the heart of the case.

Today, we can add the example of *Fulton v. City of Philadelphia*, which was decided after the publication of *How Rights Went Wrong*.<sup>33</sup> There, the Court found for a Catholic child-welfare agency that refused to certify same-sex couples as foster parents, despite state and local antidiscrimination rules that prohibited exclusion on the basis of sexual orientation.<sup>34</sup> Chief Justice Roberts focused on a provision of Philadelphia's contract with the agency, which he said allowed the City to grant exemptions from antidiscrimination requirements in particular cases.<sup>35</sup> He then dusted off a free exercise doctrine about "individualized exemptions" that had rarely been mentioned and that had never formed the sole basis for a holding in the Supreme Court.<sup>36</sup> Applying that obscure doctrine, Roberts held that the availability of a secular exception made the government's refusal to offer a religious exception presumptively unconstitutional.<sup>37</sup> In sum, the *Fulton* holding, though fact specific, was unpersuasive because it avoided confronting, recognizing, and balancing the competing rights claims on both sides of the litigation. As in

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Schwartzman, *The Supreme Court, 2017 Term—Comment: The Etiquette of Animus*, 132 HARV. L. REV. 133, 153 (2018) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977)). The Court's decision might also have turned on the adjudicative nature of the agency proceeding and on special concerns about bias in such proceedings. *Masterpiece Cakeshop*, 138 S. Ct. at 1732. *But cf.* Kendrick & Schwartzman, *supra*, at 153 n.119, 154 (noting that the Court did not explicitly distinguish between legislative and adjudicative contexts for purposes of applying its animus doctrine and arguing that the Court should have remanded the case for adjudication by an impartial decisionmaker in any event).

31. See *Masterpiece Cakeshop*, 138 S. Ct. at 1732; Colleen Slevin, *Baker Fined for Refusing to Make Transgender Transition Cake*, DENVER POST (June 17, 2021, 7:28 AM), <https://www.denverpost.com/2021/06/16/colorado-baker-fined-transgender-transition-cake> [perma.cc/MY3-5FCC].

32. Pp. 159–160; see also Greene, *supra* note 2, at 122 ("Justice Kennedy was able to write an opinion that deftly kept aloft both religious freedom and gay rights.").

33. 141 S. Ct. 1868 (2021).

34. *Fulton*, 141 S. Ct. at 1881–82.

35. *Id.* at 1878.

36. See Nelson Tebbe, *The Supreme Court, 2020 Term—Comment: The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 296–301 (2021).

37. That availability also fatally undermined the government's attempt to argue that the rule was necessary to enforce its equality interests, since it was willing to offer other exceptions to that rule—at least in theory, as there was no evidence that officials had ever actually granted such an exception. *Fulton*, 141 S. Ct. at 1882.



*Masterpiece Cakeshop*, the Court engaged in judicial minimalism, relying on the narrowest of grounds to evade what proportionality demands, namely, openly and honestly addressing what is morally at stake in a conflict.

### C. *A Third Way*

Courts can do better, according to *How Rights Went Wrong*. Judges should recognize a wider range of rights, they should accept that conflicting rights must be balanced, and they should realize the value of doing so transparently. They would then be empowered to craft compromises that better approximate justice and that achieve more enduring resolutions to cases involving social and political conflicts.

In advancing his case for proportionality, Greene makes an important contribution to contemporary progressive thought about the role of courts in constitutional adjudication. He argues against the standard liberal account of “rights as trumps,” which he thinks leads courts to discriminate between rights that receive categorical protection and those that do not (p. 58). This is the rightsism that has generated a profound disconnect between law and justice (p. 89) and that has encouraged a “judicial subterfuge” that hides the inevitable balancing of moral and political values.<sup>38</sup>

But he also rejects a thoroughgoing skepticism of rights-based judicial review.<sup>39</sup> Against the backdrop of an increasingly conservative Roberts Court, this skepticism holds that judicial review is inherently antidemocratic, both as a teaching of history and as a matter of political theory. Legal historians have given this view sophisticated articulation,<sup>40</sup> and recent proposals for court reform are grounded in criticisms of judicial enforcement of fundamental rights.<sup>41</sup> Against these writers, Greene still sees a role for rights discourse, including in courts, though he shares concerns about the way judicial review has been exercised and the resulting impact on the health of democratic institutions (pp. 77–78, 86).

So Greene is offering an alternative to two progressive views about the role of courts in adjudicating rights—one that confidently declares the power of judges to assert categorical rights against the views of political majorities, and another that is sharply skeptical about the role of courts in determining and enforcing fundamental rights. Not only is that contribution refreshing, at least for constitutional lawyers in the United States, but it also has considerable appeal. In what follows, we raise some questions designed to appreciate its

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38. Pp. 113, 168; see also Greene, *supra* note 2, at 65, 70–77.

39. See Greene, *supra* note 2, at 88–90.

40. See, e.g., Samuel Moyn, *Resisting the Juristocracy*, BOS. REV. (Oct. 5, 2018), <https://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy> [perma.cc/M8GL-EN52]; LAURA WEINRIB, *THE TAMING OF FREE SPEECH: AMERICA'S CIVIL LIBERTIES COMPROMISE* (2016); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

41. See, e.g., Bowie, *supra* note 4; Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703 (2021).

significance and to investigate its limits as a strategy for progressive constitutionalism.

## II. WHAT IS THE IDEAL THEORY?

A central question raised by *How Rights Went Wrong* is whether proportionality is the correct theory of adjudication, at least under the relatively ideal circumstances of a “modern constitutional democracy” (p. xxv). In this Part, we ask about three aspects of proportionality as Greene presents the theory. First, is Greene right about the ineluctable role of judgment in adjudication—that judges cannot avoid managing multiple values that sometimes conflict with one another? Second, is the rejection of discrimination among rights justified, and with it the proposal to expand the types of interests that count as rights? Third, is there warrant for lowering the level of abstraction across constitutional adjudication, so that actors focus on particularized facts?

These three elements—the role of judgment, rights inflation, and particularity in decisionmaking—could be pulled apart and combined in various ways, even though they hang together in Greene’s book. Someone could agree that constitutional adjudication always involves the exercise of judgment, for instance, while maintaining a distinction between special and general liberties. And so forth. Without taking positions on these complexities, we note some possible and familiar objections, while appreciating the appeal of proportionality for interpreting and implementing constitutional rights.

### A. *Balancing and Judgment*

Proportionality insists that adjudication involves the exercise of judgment.<sup>42</sup> For many years, American courts have been denying that they are balancing values or interests. Originalism and textualism have featured attacks on subjectivity in adjudication, and their proponents have striven to construct impersonal methods of constitutional interpretation.<sup>43</sup> Consequently, the exercise of judgment has gotten a bad name among judges. In arguing for proportionality, Greene pushes back. He recognizes the appropriate and inevitable role of discernment or prudence in adjudication.<sup>44</sup> He also rightly emphasizes the importance of transparency and honesty in legal decisionmaking.<sup>45</sup> Proportionality promotes the value of what he, following others, calls a “culture

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42. See pp. 83–86.

43. See, e.g., Antonin Scalia, Essay, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863–64 (1989) (claiming that originalism constrains judges more than competing interpretive theories); William Baude, Essay, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2229 (2017) (arguing that originalism can serve as an “internal constraint” on judicial decisions).

44. Greene, *supra* note 2, at 61 (noting proportionality’s “essential injunction that adjudicators make qualitative judgments about the law’s requirements in light of competing values and social facts”).

45. See *id.* at 93.

of justification,” which grounds the moral legitimacy of political and legal decisions in the practice of reason-giving by judges and other public officials.<sup>46</sup>

In the United States, according to Greene, resistance to judicial balancing has intensified as conservatives have advanced their own constitutional vision under the banner of originalism, which has promised to constrain judges in the name of the rule of law and democratic legitimacy.<sup>47</sup> Justice Scalia, for instance, was at once the Court’s most vocal proponent of originalism and its most vociferous opponent of judicial balancing. In a landmark decision interpreting the Free Exercise Clause, he famously wrote: “[I]t is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.”<sup>48</sup> His statement was, in part, specific to religious freedom, but it also instantiated a general concern with freewheeling adjudication.<sup>49</sup> Of course, balancing itself is not an all-or-nothing affair, insofar as it can be more or less constrained. But Greene argues persuasively that it is an ineliminable aspect of adjudication.

### B. *Categorizing Rights*

Proportionality and balancing might be limited by applying them only to those rights clearly specified in the Constitution. But like other proponents of proportionality,<sup>50</sup> Greene resists this kind of restriction. As we have seen, he criticizes American courts for discriminating among rights by giving some great protections while flatly refusing to recognize others.

Is Greene right to reject categorization of rights according to their strength or importance? Liberal and democratic political theory often *does* separate general and special rights, distinguishing ordinary preferences from basic liberties.<sup>51</sup> At times, Greene seems to want to flatten out such distinctions. He offers an example of a woman in West Germany who wanted to feed

46. See *id.* at 64–65; see also COHEN-ELIYA & PORAT, *supra* note 2, at 103–04; Kai Möller, *Justifying the Culture of Justification*, 17 INT’L J. CONST. L. 1078 (2019); cf. Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987, 1008 (2008) (arguing that adjudication is morally legitimate only if judges comply with a principle of public justification). The phrase “culture of justification” is credited to South African jurist Etienne Mureinik, who developed the idea in opposition to apartheid. See Etienne Mureinik, *A Bridge to Where? Introducing the Interim Bill of Rights*, 10 S. AFR. J. ON HUM. RTS. 31, 32 (1994).

47. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (Amy Gutmann ed., new ed. 2018); Greene, *supra* note 2, at 121 (“Justice Scalia’s reason for [his] holding [in *Smith*] was precisely the fear of a slippery slope to ‘anarchy’ that this Foreword has criticized courts for invoking.”).

48. *Emp. Div., Dep’t of Hum. Res. v. Smith*, 494 U.S. 872, 889 n.5 (1990).

49. See Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

50. See, e.g., Kumm, *supra* note 10, at 52–59 (defending rights inflation under proportionality); Möller, *supra* note 10, at 155–72 (same).

51. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 3, at 266–78 (arguing against a general right to liberty and in favor of a right to distinct liberties); JOHN RAWLS, *POLITICAL LIBERALISM* 292–94 (1993) (observing that “[t]hroughout the history of democratic thought the

pigeons in the town square despite an ordinance that forbade it. The West German constitutional court recognized that she had a right to do so, even if it ultimately found that her right to feed pigeons was outweighed by public interests in protecting property, avoiding pollution, and safeguarding public health.<sup>52</sup> American courts, by contrast, would have denied that she had a right in the first place.

The bird lover would lose either way, but in Europe she loses the right way, according to the book. Courts there ask what justice demands—taking into account the government’s motives, the evidence available, and the degree to which people are actually burdened—instead of focusing on matters of interpretation the way they would here, trying to divine the meaning of authoritative texts, historical records, or doctrinal tests (p. 93). Greene argues that American judges who purport to rely on traditional legal sources of authority end up acting on their subjective preferences, while those using proportionality review attend to justice (pp. 93–94). That might be surprising, because proportionality’s open texture might be thought to increase the ability of judges to follow their proclivities.<sup>53</sup> But Greene contends that the method encourages or even obligates them to articulate and defend their normative judgments about the proper resolutions of rights conflicts.<sup>54</sup>

Is the right to feed pigeons really equivalent in strength or significance to, say, the right to conscience or freedom of speech? Greene might admit that it is not, but he may nevertheless say that the relative importance of the right is properly factored into the overall balance of interests rather than collapsed into a threshold or categorical determination about whether a right exists in the first place.<sup>55</sup> In the bird lover’s case, the West German government did not have to adduce a very strong reason to overcome the claim—keeping the streets clean was enough—because it was seeking to overcome only a general liberty interest rather than a fundamental right.<sup>56</sup> And that seems fair enough.

Yet even among those sympathetic to proportionality and the culture of justification that it seeks to promote, there is ongoing debate about the rights proliferation that Greene endorses. There might be several reasons to resist

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focus has been on achieving certain specific liberties and constitutional guarantees, as found, for example, in various bills of rights and declaration of the rights of man” and offering an account that “assigns the basic liberties, as given by a list, a special status”); *see also* Leslie Kendrick, *Free Speech as a Special Right*, 45 PHIL. & PUB. AFFS. 87, 91 (2017) (offering an account of what makes rights “special” rather than general).

52. Pp. 92–93 (construing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 23, 1980, 54 Entscheidungen des Bundesverfassungsgerichts [BVERFGE] 143).

53. *See* Moyn, *supra* note 5 (“Proportionality, which Greene invokes, tends to be a smoke screen for transferring lots of policy choice to unelected judges, who are less accountable than legislators.”).

54. *See* Greene, *supra* note 2, at 93 (“[T]ransparency is indeed a promise of proportionality.”).

55. *See id.* at 57, 69 (“It is consistent with proportionality to assume that certain rights infringements require an unusual degree of justification above and beyond what might be required for others.”).

56. *Id.* at 57.

recognizing general rights to liberty and equality in favor of assigning special status to a set of basic rights and liberties.

First, as an interpretive matter and perhaps also as a conceptual one, the distinction between rights and interests seems to suggest a presumption in favor of weighing some interests more heavily than others. Even if rights are not conceived of categorically or as “trumps” that override all other interests, they are nevertheless commonly thought to have greater value than interests that do not give rise to rights, such as marginal improvements in public welfare. As Fred Schauer has argued, when rights and interests conflict, we do not ordinarily think that a right can be offset by just any policy preference. There must be powerful considerations on the other side, which suggests that rights have some extra weight to them.<sup>57</sup>

Second, some rights are closely associated with the status of free and equal members of a democracy—especially rights to bodily integrity, freedom of conscience, free expression, the right to vote, and protections against familiar forms of discrimination<sup>58</sup>—while some social and economic interests, even if they are usefully articulated using the language of rights, may not be tied as closely to guaranteeing the conditions necessary for cooperative self-governance.<sup>59</sup> It is not an accident that certain rights and liberties are frequently named in constitutions and human rights documents. They protect basic interests that have proven to be vulnerable to predictable and patterned forms of abuse.<sup>60</sup>

Third, a persistent concern about proliferating rights is that courts and other political institutions may have greater difficulty identifying and protecting core constitutional commitments, especially during pathological social and political moments.<sup>61</sup> We recognize, of course, that these arguments are

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57. See Frederick Schauer, *Proportionality and the Question of Weight*, in PROPORTIONALITY AND THE RULE OF LAW, *supra* note 2, at 173, 177–78 (analyzing rights in terms of assigning “rules of weight” in proportionality adjudication).

58. See RAWLS, *supra* note 51, at 304 (offering an account of “basic liberties with their priority” based on “fair terms of social cooperation among equal persons”); GEORGE LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 118 (2007) (“[S]ome civil rights . . . have a special normative role. They are important for our status as free and equal citizens who are responsible for choosing and pursuing a conception of the good life.”).

59. See Alan Patten, *Are the Economic Liberties Basic?*, 26 CRITICAL REV. 362 (2014) (rejecting the view that economic liberties warrant the level of special protection assigned to basic civil and political liberties).

60. See JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 26–27 (3d ed. 2013) (listing rights enumerated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights—together known as the International Bill of Human Rights); Stephen Gardbaum, *Human Rights as International Constitutional Rights*, 19 EUR. J. INT’L L. 749, 750–51 (2008) (observing that rights specified in “general international human rights instruments are broadly similar in substance to the rights contained in most modern constitutions”).

61. See Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 459 (1985) (arguing that “the preservation and effectuation of a limited number of relatively stable central norms should be the first priority of a constitutional regime” and that

contested,<sup>62</sup> and we mention them here not necessarily to endorse them but only to note that despite the global spread of proportionality review, there remains a live controversy over whether a general theory of rights ought to specify and give priority to some set of basic liberties.

### C. *Facts and Principles*

In addition to arguments about rights proliferation, we also wonder about another aspect of proportionality, namely, whether fact-bound adjudication is always or necessarily preferable as a normative matter. Greene's argument that courts should focus on particular "on-the-ground facts of individual cases" (p. 225) raises the question of why judges often articulate more general principles in reaching their decisions. One answer is that without such justifications, it can be difficult for courts to treat like cases alike and to develop coherence and integrity in legal doctrine over time.<sup>63</sup> Another reason for principled decisionmaking, as Greene also recognizes,<sup>64</sup> is that judges seek to provide other actors, including lower courts, with guidance for future cases. These reasons—and the others that doubtless exist—need not preclude compromises. When principles conflict or underdetermine results, factual details can matter greatly, and careful attention to them can enable creative solutions that make everyone better off. To be fair, Greene does not explicitly criticize adjudicative methods that appeal to principles of political morality. His target often seems to be originalism and other brands of legal formalism that draw attention to arcane questions of text, structure, and doctrine, and away from matters of justice.<sup>65</sup> But his effort to draw decisionmakers down to low levels of abstraction, and high levels of factual particularity, may give readers this impression.

Outside the United States, proportionality is widely recognized as the dominant approach to adjudicating conflicts involving constitutional rights.<sup>66</sup> In *How Rights Went Wrong*, Greene argues that Americans have good reason to adopt this approach—in his view, better late than never. And we agree that American rights discourse would benefit from engagement with balancing ap-

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"the process of constitutional adjudication ought to be consciously designed to reflect that priority"); see also RAWLS, *supra* note 51, at 296 ("Whenever we enlarge the list of basic liberties we risk weakening the protection of the most essential ones . . .").

62. See sources cited *supra* note 50 (arguing for rights inflation).

63. See Nelson Tebbe, Essay, *Religion and Social Coherentism*, 91 NOTRE DAME L. REV. 363, 379 (2015) (discussing the role of principles in coherence-based approaches to moral and legal reasoning).

64. See Greene, *supra* note 2, at 93–94.

65. See, e.g., p. 93.

66. See sources cited *supra* note 2.

proaches to rights, although it is worth recognizing, as he does, that some aspects of the American model may continue to be reflected within systems of proportionality, and vice versa.<sup>67</sup>

### III. WHICH INSTITUTION?

Assuming, arguendo, that proportionality is the best or most justified approach to resolving rights conflicts, which institution should implement it? Greene accepts the premise that legislatures are the better balancers,<sup>68</sup> at least ordinarily, and there is something to that assumption. Not only do lawmakers have greater political accountability and democratic legitimacy, but they represent a wider range of perspectives and have the capacity to generate more comprehensive and nuanced political compromises.

Yet the Supreme Court has a politics too—that could not be more obvious than it is right now. And today, when it comes to resolving culture-war issues, compromise may be more likely to happen at the hands of the justices than in a gridlocked Congress. Consider, for example, the Fairness for All Act, a legislative proposal for a detailed settlement between traditional religious groups and proponents of LGBTQ rights.<sup>69</sup> The bill never had a hope in Congress. Conservatives rejected it because they viewed it as insufficiently protective of religious freedom and overly protective of marriage equality. And progressives rejected the bill because it left open the possibility that its balance could be upended through application of religious freedom protections by the courts, especially through the federal Religious Freedom Restoration Act.<sup>70</sup> Debate over the Fairness for All Act did not last for even a single news cycle.<sup>71</sup>

67. See Greene, *supra* note 2, at 95 (“[O]ver time, . . . we can expect substantial convergence between the categorical and proportionality approaches.”); Vicki C. Jackson, Feature, *Constitutional Law in an Age of Proportionality*, 124 *YALE L.J.* 3094, 3167 (2015); Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in *EUROPEAN AND US CONSTITUTIONALISM* 49, 60–61, 68–69 (Georg Nolte ed., 2005).

68. See Greene, *supra* note 2, at 92 (“If most rights disputes are between parties who disagree reasonably and in good faith about the reach of constitutional rights, then most such disputes should be determined through overtly political processes.”).

69. Fairness for All Act, H.R. 5331, 116th Cong. (2019).

70. See Harry Bruinius, *Between Religious and LGBTQ Rights, What Does Fairness Look Like?*, *CHRISTIAN SCI. MONITOR* (May 13, 2021), <https://www.csmonitor.com/USA/2021/0513/Between-religious-and-LGBTQ-rights-what-does-fairness-look-like> [perma.cc/L8J4-NM5Y] (“Most religious conservatives and LGBTQ advocates rejected the concept, however.”); Tom Strode, *Fairness for All Act Draws Opposition from Both Sides*, *BAPTIST PRESS* (Dec. 13, 2019), <https://www.baptistpress.com/resource-library/news/fairness-for-all-act-draws-opposition-from-both-sides> [perma.cc/GK7Q-FDD5] (noting opposition across the political spectrum); David Crary, *LGBTQ Rights Bill Ignites Debate over Religious Liberty*, *AP NEWS* (Mar. 8, 2021), <https://apnews.com/article/joe-biden-business-religion-race-and-ethnicity-bills-7835e3ff55e04c8634ab92541bdc12b3> [perma.cc/TPH6-JZJK] (noting progressives’ concern that courts will apply religious exemptions too broadly).

71. See WILLIAM N. ESKRIDGE JR. & CHRISTOPHER R. RIANO, *MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS* 699 (2020) (reporting that Rep. Christopher Stuart, the chief sponsor of

Yet its broad vision seems to have taken hold in the Supreme Court, which is busy implementing a compromise that looks a lot like Fairness for All.<sup>72</sup> In case after case, the Roberts Court has protected civil rights for LGBTQ people—think of *Bostock v. Clayton County*, which extended employment discrimination protections to LGBTQ workers<sup>73</sup>—while at the same time ruling consistently for religious exemptions from the very same sorts of equality laws, as the Court did in both *Masterpiece Cakeshop* and *Fulton*.<sup>74</sup>

Now, Greene is not committed to rejecting judicial compromise of this kind, but in his view, legislatures still ought to be the primary actors—they have stronger democratic credentials, are practiced at harmonizing interests, and can ensure that all affected parties feel that they have been heard.<sup>75</sup> Courts should push disputes to them, not only by deferring to their existing judgments but also by actively encouraging them to get involved in balancing conflicting rights and interests.<sup>76</sup>

This is an attractive argument that again occupies a prominent place in the political and legal zeitgeist. But is it connected to proportionality review in any inherent way? Or could adjudicators operating under either the American or European models equally encourage the resolution of rights disputes by democratically accountable institutions? This remains somewhat unclear to us—and, we should add, unclear within the existing literature, which seems to lack consensus on whether proportionality is best conceived as an adjudicative method for courts or a more general approach to resolving rights conflicts that can be applied by other actors in the political process.<sup>77</sup>

the Fairness for All Act, “admitted that his bill was dead on arrival”); Nelson Tebbe & Micah Schwartzman, *Re-upting Appeasement: Religious Freedom and Judicial Politics in the 2019 Term*, 2019–2020 AM. CONST. SOC’Y SUP. CT. REV. 115, 124 (noting that the Fairness for All bill “garnered no real support among either Republicans or Democrats”).

72. See Micah J. Schwartzman, *Judicial Compromise and Political Uncertainty (or, What If You’re Not Sugar Ray Robinson?)*, BALKINIZATION (July 22, 2020), <https://balkin.blogspot.com/2020/07/judicial-compromise-and-political.html> [perma.cc/9ABR-L6D4] (noting the “emerging conventional wisdom . . . that a majority of the justices, led by Chief Justice Roberts, have reached a breakthrough by forging a nonpartisan compromise in the culture wars” and that “[t]he basic contours of the compromise are said to be following something like the Fairness for All Act”).

73. 140 S. Ct. 1731 (2020).

74. See *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (invalidating application of state public accommodations law as violating religious free exercise); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021) (granting religious exemption from city antidiscrimination ordinance); see also *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (upholding religious exemption from contraceptive coverage requirements); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (extending ministerial exception from employment discrimination law to cover religious school teachers); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (granting RFRA exemption to federal contraception mandate).

75. See pp. 30–31.

76. See p. 182.

77. See, e.g., Richard Ekins, *Legislating Proportionately*, in PROPORTIONALITY AND THE RULE OF LAW, *supra* note 2, at 343, 344–45 (noting ambiguities within existing scholarship on



## IV. HOW DO IDEAL THEORIES OF RIGHTS WORK IN PRACTICE?

The notion that “our obsession with rights is tearing America apart,” as the book’s subtitle warns, suggests a connection between legal methods and practical consequences. But does the choice between the existing American approach to rights and European-style proportionality matter in practice and, if so, how much? There are, in fact, already overlaps. We see mediation in American constitutional practice, as Greene repeatedly acknowledges, and we sometimes see binary decisionmaking abroad, including in some of Greene’s own examples. Within each system, does judicial methodology correlate with readiness to compromise or with social controversy? Even if there is some connection, we should consider the possibility that the desired outcomes are driving the choice of method and not the other way around.

A. *One Comparative Example*

Consider, for instance, Greene’s comparison of American and European approaches to the problem of public officials who raise religious objections to processing same-sex marriages (p. 155). Officials with traditional beliefs lose on both sides of the Atlantic, but the way they lose in Europe better communicates respect for their profound convictions, on his telling.<sup>78</sup> Yet, the official he follows in the United States did not lose entirely—she benefitted from a compromise of just the sort that Greene recommends, one that was crafted by the legislature, not the courts.<sup>79</sup> By comparison, the official in the UK lost in a much more binary fashion.<sup>80</sup> Greene may still be right that the way American judges handled the case did not help, or maybe even made compromise more difficult. But the story here turns out to be even richer and more interesting factually, which raises some complications for Greene’s argument.

Kim Davis was the elected clerk of Rowan County, Kentucky.<sup>81</sup> In that role, she was the head of the clerk’s office, supervising all its deputies and operations, including the processing of marriage licenses. She was elected shortly before marriage equality became the law of the land in *Obergefell v. Hodges*,<sup>82</sup> and she had been a deputy in the office even before that. When the law

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whether, or how, proportionality might be applied within legislative decisionmaking); Frank I. Michelman, *Proportionality Outside the Courts with Special Reference to Popular and Political Constitutionalism*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES, *supra* note 2, at 30, 40–50 (exploring the relevance of proportionality for various constitutional actors outside the courts); Mark Tushnet, *Making Easy Cases Harder*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES, *supra* note 2, at 303, 318 (arguing that under either republican or interest-group-based theories of legislation, proportionality “would impose a burden of rationality on legislation that it cannot bear in easy cases, and certainly cannot bear in harder ones”).

78. See p. 156.

79. NELSON TEBBE, RELIGIOUS FREEDOM IN AN EGALITARIAN AGE 175 (2017).

80. See p. 156.

81. This factual account draws on TEBBE, *supra* note 79, at 174–75.

82. 576 U.S. 644 (2015).

changed, she faced a problem because she was a committed Apostolic Christian who was theologically opposed to same-sex marriage.

Just hours after *Obergefell* was handed down, Davis announced that her office would cease processing all marriage licenses, not just ones between people of the same sex.<sup>83</sup> Her thought seemed to be that refusing to issue all licenses would not only reconcile her religious beliefs with her obligation not to discriminate against same-sex couples, but it also would remove her complicity with marriage licenses that bore her name, though they may have been issued by her deputies.<sup>84</sup> She defended against a lawsuit by citing the Free Exercise Clause and Kentucky's Religious Freedom Restoration Act, but she lost in federal court.<sup>85</sup> And that decision *was* uncompromising—Davis was found in contempt for refusing to process marriage licenses after the court ruled that her free exercise rights were not infringed, and she went to jail.<sup>86</sup> Conflicts can hardly get more binary than that!

Or so it seemed. But while Davis was imprisoned, her deputies followed the court's suggestion and began issuing marriage licenses, including to LGBTQ couples.<sup>87</sup> Not all of them had religious objections to doing so.<sup>88</sup> After a few days, the judge released Davis and ordered her to allow her deputies to continue.<sup>89</sup> The court did not explicitly recommend a political compromise to resolve Davis's case, in the way a court might have under Greene's approach. But it did suggest that Davis's deputies could issue the licenses, and it ratified that arrangement after the fact, releasing her from jail on the condition that she not interfere with it.<sup>90</sup>

While her appeal was pending, a new governor was elected in Kentucky.<sup>91</sup> Governor Matt Bevin issued an executive order removing the names of county

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83. *Miller v. Davis*, 123 F. Supp. 3d 924, 929 (E.D. Ky. 2015) (order granting preliminary injunction).

84. *Id.* at 929, 932.

85. Pp. 155–56. A federal judge ruled that free exercise did not protect against rules that are neutral and generally applicable as to religion, as *Obergefell* held, and that the state's RFRA analogue was inapplicable to federal law. *Miller*, 123 F. Supp. 3d at 930. The Sixth Circuit ruled against Davis as well. *Miller v. Davis*, No. 15-5880, 2015 WL 10692640, at \*1 (6th Cir. Aug. 26, 2015).

86. *Miller*, 123 F. Supp. 3d at 940 (“[T]he Court concludes that [the directive to issue same-sex marriage licenses] likely does not infringe upon Davis’ free exercise rights.”); *see also* Order at 1, *Miller*, No. 15-cv-44 (E.D. Ky. Sept. 8, 2015), ECF No. 89 (“On September 3, 2015, the Court held Defendant Kim Davis in contempt and jailed her for her refusal to issue marriage licenses, directly or through her deputy clerks . . .”).

87. Order, *supra* note 86.

88. *Miller*, 123 F. Supp. 3d at 932.

89. Order, *supra* note 86 (releasing Davis from custody).

90. *Id.* at 2 (“Defendant Davis shall not interfere in any way, directly or indirectly, with the efforts of her deputy clerks to issue marriage licenses to all legally eligible couples.” (emphasis omitted)).

91. *See* Notice of Substitution of Third-Party Defendant at 1, *Miller*, No. 15-cv-44, ECF No. 155 (E.D. Ky. Dec. 9, 2015).

clerks from marriage licenses.<sup>92</sup> He declared that a middle path was possible, for the state “can readily prescribe a different [marriage license] form that reasonably accommodates the interests protected by [the state RFRA], while at the same time complying with the United States Constitution.”<sup>93</sup> Inspired by the governor’s order, the Kentucky legislature then passed a law that accommodated Davis and all other county clerks in her position.<sup>94</sup> The statute established, for the first time, a universal marriage license form that deputies were empowered to sign and that omitted the name of the clerk in charge of the office.<sup>95</sup>

The Kentucky solution was a compromise. On the one hand, it did not give Davis everything she wanted. It did not include a disclaimer that the license had been issued under a federal court order, as Davis had once ordered printed on her forms, and it did not require that deputies issue licenses in their capacities as “notar[ies] public,” as Davis reportedly had insisted.<sup>96</sup> On the other hand, it also did not give LGBTQ rights advocates everything they may have wanted. They likely would have objected that such a legislative accommodation would never have been tolerated for elected officials who object to interracial or interfaith marriages. Still, the statute accomplished something important—today, every couple that enters a Kentucky clerk’s office will receive the same marriage license issued by deputies operating in the same capacity.

This is precisely the sort of solution that Greene envisions (pp. 160–62), but it happened in the United States. By contrast, in the borough of Islington in the United Kingdom, a government clerk named Lillian Ladele also had a religious objection to personal involvement in issuing marriage licenses to same-sex couples.<sup>97</sup> She lost as well.<sup>98</sup> In fact, she lost the benefit of a preexisting compromise—before the court’s decision was handed down, she had been informally accommodated by her coworkers, who had been issuing the licenses in her place (p. 155).

What is more, it would seem that Ladele’s conflict was *easier* to resolve than Davis’s, not harder. Ladele was one of several employees in her office with the authority to issue marriage licenses, whereas Davis was the sole elected head of the Rowan County Clerk’s Office (pp. 155–56). Yet Davis was accommodated and Ladele was not—and Davis was accommodated by a state

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92. Ky. Exec. Order 2015-048 (Dec. 22, 2015).

93. *Id.* at 2.

94. Act of Apr. 13, 2016, ch. 132, § 1, 2016 Ky. Acts 578, 579 (codified at KY. REV. STAT. ANN. § 402.100 (LexisNexis 2018)).

95. *Id.*

96. This is according to court filings by the ACLU on behalf of the plaintiff. Motion to Enforce September 3 and September 8 Orders at 6, *Miller*, No. 15-cv-44 (E.D. Ky. Sept. 21, 2015), 2015 WL 5881938.

97. *Ladele v. London Borough of Islington* [2009] EWCA (Civ) 1357 [7]–[9] (Eng.).

98. *Id.* at [71]–[77].

legislature, as if following Greene's playbook of courts working with democratic institutions to resolve rights conflicts. Even if the federal court in Kentucky did not explicitly broker a compromise, it showed the way forward.

Here, Greene might reply that the UK court at least acknowledged that Ladele's right to religious freedom had been affected by "indirect discrimination"—what we would call disparate impact—something the government would have to justify (pp. 156–57). By contrast, federal courts in Davis's case did not require the government to carry a burden of justification, which might well have signaled to Davis that she had no legitimate interest.<sup>99</sup> On the other hand, Davis was ultimately aided by a governor who emphasized her right to religious freedom before concluding that it could be protected without undue harm to marriage equality;<sup>100</sup> whereas the UK borough successfully justified the restriction on Ladele's religious freedom on the grounds that its "Dignity for All" policy "required all employees to promote values of equality and diversity" (p. 157). Applying proportionality, the UK court held that accommodating Ladele was incompatible with that policy.<sup>101</sup>

### B. *An Emerging Settlement*

Which approach was more binary? Which allowed for a more particularized solution? Which involved a dialogue with lawmakers, and among national and local levels of government? The answers are not obvious, but that is our point. Moreover, these complexities are not unique to the Kim Davis controversy in the United States. In fact, the sort of solution that Greene envisions—where the *entity* is required to serve everyone equally without invidious discrimination but *individuals* within the entity are accommodated by other individuals—is relatively common, though often overlooked because it is usually developed by legislatures—state legislatures, at that—and not federal courts.<sup>102</sup>

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99. See, e.g., *Miller v. Davis*, 123 F. Supp. 3d 924, 940 (E.D. Ky. 2015) (order granting preliminary injunction) (finding that Davis's free-exercise interests were not infringed after applying rational-basis review).

100. See Ky. Exec. Order No. 2015–048 (Dec. 22, 2015) (“[T]he issuance of marriage licenses on the form currently prescribed by the Kentucky Department for Libraries and Archives . . . creates a substantial burden on the freedom of religion of some County Clerks . . .”). The governor also stated that the current form was not narrowly tailored to a compelling interest, because a less restrictive alternative was possible.

101. See *Ladele*, [2009] EWCA (Civ) 1357 [52]. The European Court of Human Rights later dismissed Ladele's claim that her firing constituted religious discrimination. *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R.215, 259–61.

102. See Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 46–52 (2015) (surveying state statutory religious exemptions in the marriage-equality context).

Consider pharmacies. Religious pharmacists have repeatedly objected to involvement in providing birth control or emergency contraception medications, which they believe to be abortifacients.<sup>103</sup> This is a conflict among rights—religious freedom versus women’s reproductive freedom and equality—and the parties understand it that way.<sup>104</sup> Among states, the majority response now is to require pharmacies to dispense the requested medicine but to allow individual pharmacists to be accommodated, as Greene notes.<sup>105</sup> And that compromise has been upheld by federal courts.<sup>106</sup>

Perhaps county clerks and licensed pharmacists *feel* less understood in the United States, even when they are accommodated, because courts do not acknowledge their objections as having the status of rights violations that require government justification. But we do not have evidence about their subjective experiences, and their responses are likely to focus more on whether they receive a remedy and less on which institution provides it.<sup>107</sup> Greene does not argue that citizens are alienated by conflict resolution in state legislatures, where competing claims are frequently resolved using the language of religious freedom. Admittedly, rights discourse in the United States is dominated by courts, and that does affect how legislatures speak about such questions. Still, it is a little hard to imagine that clerks or pharmacists feel that their religious freedom interests have been ignored by lawmakers who have accommodated them, considering that those interests were publicly articulated as the legislators’ main concern. Greene would applaud this acknowledgment of rights on both sides, and that it happened in a legislature.

Greene also believes that requiring the entity, but not the individual, to observe equality laws could work as a solution for businesses like Masterpiece Cakeshop (pp. 160–62). Wedding vendors could either delegate the provision

103. See NAT’L WOMEN’S L. CTR., PHARMACY RULES 101, at 1 (2017), <https://nwlc.org/wp-content/uploads/2017/12/Pharmacy-Refusals-101.pdf> [perma.cc/EUU4-A5FR] (“Reports of pharmacies refusing to fill prescriptions for birth control . . . or provide [emergency contraception] have surfaced in at least twenty-six states across the nation . . .”).

104. *Id.* (noting “women’s right to receive contraception in store[] without discrimination or delay”).

105. P. 161; see also NAT’L WOMEN’S L. CTR., *supra* note 103, at 2 (“Eight states—CA, IL, ME, MA, NV, NJ, WA, WI—explicitly require pharmacists or pharmacies to provide medication to patients. In seven states—AL, DE, NY, NC, OR, PA, TX—pharmacy boards have issued policy statements that allow refusals but prohibit pharmacists from obstructing patient access to medication. . . . Six states—AZ, AR, GA, ID, MS, and SD—have laws or regulations that specifically allow pharmacies or pharmacists to refuse for religious or moral reasons without critical protections for patients, such as requirements to refer or transfer prescriptions.”); *Pharmacists Conscience Clauses: Laws and Information*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/health/pharmacist-conscience-clauses-laws-and-information.aspx> [perma.cc/P8HL-75CJ] (Sept. 2018).

106. See, e.g., *Stormans, Inc. v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015).

107. Cf. David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 789 (2012) (“[O]ur results suggest that the public responds to the Court playing a central role [in resolving constitutional issues] no differently than it responds to other institutions.”).

of objectionable goods and services to individual employees who are willing to offer them, or they could contract out to nonobjecting businesses.<sup>108</sup> Objections on both sides might be raised to this compromise: egalitarians could protest that such an accommodation would never be provided to a business owner who objected on religious grounds to interracial or interfaith marriage, and religious conservatives could object that delegating to an employee or contracting out to another business does not avoid making the vendor complicit. But the arrangement could still provide some protection against subordination of LGBTQ people and some protection for religious liberty.<sup>109</sup>

Curiously, this solution is readily available under current law. If the Colorado Supreme Court's decision had been upheld in *Masterpiece Cakeshop*, the Christian baker presumably would have been able to take either of these actions.<sup>110</sup> To our knowledge, nothing in state law would have precluded them. Yet the Supreme Court felt it necessary to overturn the judgment of the state court, albeit on narrow grounds that satisfied neither side and that have not quieted the conflict between the baker and Colorado civil rights authorities.<sup>111</sup>

Greene may well be right that proportionality review is morally attractive, at least when compared with the actual practice of categorical reasoning in American courts. But we still might wonder how ideal constitutional theories

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108. P. 162; *see also* Greene, *supra* note 2, at 124 (“If the problem really was that a baker in Colorado has an obligation to serve customers without regard to their sexual orientation, but that for religious reasons Phillips could not personally bake the couple’s cake, then the Court could have (perhaps after mediation) required Phillips to provide a customized cake to the couple that he was not personally obligated to bake.”).

109. Greene praises the holding in the *Ashers* case, but that was a different situation, as he recognizes. Pp. 152–55. There, a customer asked for a cake to celebrate LGBTQ rights, complete with an image of Bert and Ernie, the logo of an organization called QueerSpace, and the words “Support Gay Marriage.” A UK court upheld the Christian bakers’ refusal to fill the order, saying that they had discriminated on the basis of the message, not on the basis of the customer’s identity. P. 153; *see Lee v. Ashers Baking Co.* [2018] UKSC 49, [2020] AC 413 (appeal taken from N. Ir.). The bakers would not have created that cake for any customer.

That makes *Ashers* distinguishable from *Masterpiece*. It is more like a set of cases that also occurred in Colorado, where a customer named William Jack asked three bakeries to produce cakes bearing messages that condemned marriage equality using religious imagery and scripture. Colorado authorities found no discrimination on the basis of religion. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S.Ct. 1719, 1730 (2018). As Justice Kagan put the point in her concurring opinion in *Masterpiece*, the bakeries had turned away William Jack on the basis of his message, not his identity, just as in the *Ashers* case. *Id.* at 1733 (Kagan, J., concurring); *see also* *Lexington Fayette Urb. Cnty. Hum. Rts. Comm’n v. Hands On Originals, Inc.*, No. 2015-CA-000745-MR, 2017 WL 2211381 (Ky. Ct. App. May 12, 2017) (ruling in favor of a t-shirt company that refused to produce shirts bearing words supporting the local pride festival on the ground that the refusal did not constitute discrimination on the basis of sexual orientation).

110. Greene argues that the Court should have denied certiorari, *see* Greene, *supra* note 2, at 120, which would have left the Christian baker with the same remedies described above. *See supra* text accompanying note 108.

111. *See* Slevin, *supra* note 31.

work in nonideal conditions. Does the difference between binary and proportional decisionmaking drive results or affect the intensity of political polarization around the culture wars?<sup>112</sup> It is difficult to know how to answer such questions in the abstract. And looking to specific conflicts, as in *Ladele* or *Masterpiece*, may not yield a clear reason for preferring one approach over the other.

#### V. PEACE OR JUSTICE?

A major theme of *How Rights Went Wrong* is the importance of ameliorating the political polarization that is gripping the country. Greene believes that rights discourse is heightening tensions between liberals and conservatives over cultural issues such as reproductive freedom, gun rights, and freedom of speech. He says that “the job of the courts in a pluralistic democracy . . . [is] to work to resolve conflicts, to ratchet them down rather than up” (p. 163). This is a striking claim, and we want to draw attention to it by asking: is Greene right that the job, or at least *a* job, of American courts should be to ameliorate social strife—in short, to seek peace? If so, should courts prioritize that aim over seeking justice? Or does pursuing one aim facilitate pursuit of the other? And if courts should aim to ratchet down conflicts, how can they do that effectively?

In considering the first question, we agree with Greene that conflict resolution—seeking peace—can be a legitimate goal of constitutional decisionmaking. Commentators sometimes call this the “settlement function” of legal institutions.<sup>113</sup> A harder and ancient question is whether peace may be pursued at the expense of justice. For Greene, this conflict does not seem to arise. He implies instead that proportionality review simultaneously eases tensions *and* increases the relevance of justice to legal outcomes. By focusing on cases in their particularity, he thinks solutions can be found that promote both objectives. But in some situations that may not be possible, and if judges nevertheless decide to pursue peace, we then have to ask: at what cost?<sup>114</sup>

Even if we assume that proportionality can be effective in reducing tensions to some degree, we must also ask how it should be implemented and by whom. When peace is pursued independently of justice, and when tradeoffs are possible, legal decisions may become a matter of strategy. The selection of

112. Compare Huq, *supra* note 5 (“[It is not] clear that the polarization over rights is a result of how courts explain themselves, as Greene suggests.”), with Greene, *supra* note 2, at 84 (“[T]o say that rights as trumps contributes to social alienation and political polarization is not to say that it is the sole or even a significant cause, nor is it to say that proportionality will substantially alleviate these ills.”).

113. See e.g., Robert F. Nagel, *Judicial Supremacy and the Settlement Function*, 39 WM. & MARY L. REV. 849, 855 (1998); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997).

114. Cf. AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 8 (2010) (“[I]n actuality peace and justice stand to each other as *competing* goods . . . . The tension is due to the possibility of a trade-off between peace and justice: to gain peace, we may be forced to pay in justice.”).

a judicial approach to adjudicating rights may be a function, at least in part, of which ends take priority. Under these nonideal conditions, strategic decisionmaking might be justifiable, but it does raise distinct issues.

Consider who is likely to implement a proportionality method. Greene's book has a refreshing third-way tone, yet realistically it will be read, or at least taken most seriously, by political liberals and progressives.<sup>115</sup> Were they to adopt a conciliatory method unilaterally, they would risk an unyielding response from the right. And that imbalance could shift substantive constitutional law in a conservative direction, possibly without accomplishing much in the way of deescalation.<sup>116</sup> This phenomenon, which Joseph Fishkin and David Pozen have called "asymmetric constitutional hardball," has become pervasive in our contemporary politics.<sup>117</sup>

To the degree that unilateral efforts toward compromise shift the range of respectable constitutional argument to the right, they also may reintroduce tension between the goals of peace and justice. Those who lean toward the political left may believe that a moderated position is warranted as a matter of principle, but they may find the actual outcome skewed after their cooperative gestures are met with forceful resistance. And suddenly a strategy of reconciliation that is compatible with justice yields outcomes that subvert the aim of bringing law and justice into alignment.

How to respond to a conservative constitutional revolution is a difficult question, to which there are no obvious or easy answers. As Pozen has pointed out, the most persuasive justification for resisting a proportionality approach may be that forceful dissent is necessary precisely to achieve the ultimate goal of a constitutional culture that is more tolerant, nuanced, and thoughtful.<sup>118</sup> At least under some historical conditions, the way to ratchet down in the long term may be to ratchet up in the short term.

Consider an example. The Roberts Court is in the process of remaking the law of religious freedom, most evidently as to the Establishment Clause and

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115. For example, it borders on the utopian to imagine conservatives and libertarians in the United States accepting proposals to constitutionalize socioeconomic rights, as required by the "rights inflation" urged by Greene and other proponents of proportionality. See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 20–23 (2005) (offering a realist explanation, based on the appointment of politically conservative Supreme Court justices, for why the United States is exceptional among developed democracies in rejecting socioeconomic constitutional rights).

116. For a similar worry, see Moyn, *supra* note 5 ("Greene's comments on the abortion and gay rights areas sometimes read like invitations to cede even more ground to American conservatives on cultural issues, in an era when the Supreme Court has let them win on so many other fronts. It is hard to believe less social conflict would result, if only conservatives would get their way even more often.").

117. Joseph Fishkin & David E. Pozen, *Essay, Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).

118. See David E. Pozen, *Hardball and/as Anti-hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 949, 955 (2019).



more stealthily with respect to the Free Exercise Clause.<sup>119</sup> In the area of government funding of religious activities, for instance, the Court is moving from a separationist paradigm to a neutrality paradigm, under which taxpayer support of even core religious activities is constitutionally permissible as long as funding is administered in a manner that is evenhanded among religious and nonreligious actors.<sup>120</sup> Although the Court has not yet taken the final step of overruling *Mitchell v. Helms*, whose controlling opinion by Justice O'Connor still prohibits the "actual diversion" of direct public funding to religious activities,<sup>121</sup> it is on the brink of doing so.<sup>122</sup> How did we get here, and how have the more liberal members of the Court responded?<sup>123</sup>

In 2017, when the Roberts Court still had only five Republican appointees, it decided *Trinity Lutheran v. Comer*.<sup>124</sup> Missouri had a program that subsidized the resurfacing of school playgrounds with safer material made from recycled tires.<sup>125</sup> Trinity Lutheran, a church with a preschool, applied for the funding and would have received it but for a provision in the Missouri constitution that prohibited any tax dollars from flowing to religion.<sup>126</sup> Thirty-eight states have such provisions, which provide for a relatively strict separation of church and state.<sup>127</sup> The Court ruled for the church, saying that the state could not exclude church schools from its funding program without violating the Free Exercise Clause.<sup>128</sup> Justice Sotomayor filed a strong dissent, joined by Justice Ginsburg, finding not only that the state was permitted to exclude religious schools but also that it was required to do so by the Establishment Clause.<sup>129</sup>

Justices Breyer and Kagan voted with the conservative majority. Perhaps they agreed with the result in principle. Yet that account is somewhat difficult

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119. See Richard Schragger & Micah Schwartzman, *Establishment Clause Inversion in the Bladensburg Cross Case*, 2018–2019 AM. CONST. SOC'Y SUP. CT. REV. 21, 24–29 (discussing the collapse of Establishment Clause doctrine); Tebbe, *supra* note 36, at 292–95 (discussing recent and significant changes in free-exercise jurisprudence).

120. See Micah Schwartzman & Nelson Tebbe, *Establishment Clause Appeasement*, 2019 SUP. CT. REV. 271, 276–77 ("In government funding, the Court has all but rejected the *Lemon* framework . . . in favor of a 'neutrality' model, which not only allows but sometimes requires state funding of religion.")

121. 530 U.S. 793, 840 (O'Connor, J., concurring in the judgment).

122. See *infra* text accompanying notes 140–142 (discussing the Court's grant of certiorari in *Carson ex rel. O.C. v. Makin*, 979 F.3d 21 (1st Cir. 2020)).

123. The following account draws on Tebbe & Schwartzman, *supra* note 71, at 126–30.

124. 137 S. Ct. 2017 (2017).

125. *Trinity Lutheran*, 137 S. Ct. at 2017.

126. *Id.* (citing MO. CONST. art. I, § 7).

127. *Id.* at 2037 (Sotomayor, J., dissenting).

128. *Id.* at 2024–25 (majority opinion).

129. *Id.* at 2027 (Sotomayor, J., dissenting).

to square with their dissents in other nonestablishment cases.<sup>130</sup> Another explanation is that they voted strategically, trying to influence the majority opinion with respect to the issue that everyone saw coming down the road: whether states could create voucher programs that included only secular schools. So maybe they sided with the majority to persuade its members to include an important footnote that distinguished between exclusions of religious entities, which was prohibited, and exclusions of religious uses, which might be permitted.<sup>131</sup> If this conjecture is correct, then Justices Breyer and Kagan opted to join the majority—rather than dissent—in order to complicate or perhaps forestall the Roberts Court’s drive to weaken the separation of church and state.

If that was their plan, it was derailed by the Court’s decision only three Terms later in *Espinoza v. Montana Department of Revenue*.<sup>132</sup> There, the Court ruled against another school funding scheme that excluded religious schools based on the state constitution—this time, Montana’s. The state had provided a mechanism for taxpayers to support tuition for religious schools, aided by a tax credit. But according to the state supreme court, the Montana Constitution prohibited using the tax credit to support religious schools.<sup>133</sup> The Supreme Court reversed that judgment, holding that Montana’s restriction on religious funding amounted to religious discrimination under the Free Exercise Clause.<sup>134</sup>

This time, Justices Breyer and Kagan dissented—joining Ginsburg and Sotomayor—but their delay meant that the majority had less difficulty than it otherwise might have. With the framework already established in *Trinity Lutheran*, it was easy for the Court to invalidate Montana’s program. And the crucial footnote in *Trinity Lutheran*, distinguishing between religious status and religious use, proved to be a speed bump at most. Although Justice Breyer wrote an opinion arguing that the exclusion of religious schools was equivalent to an exclusion of religious uses, considering how central religious observance is to most church schools,<sup>135</sup> his argument was easily absorbed by the majority.<sup>136</sup> Chief Justice Roberts even highlighted that “[s]ome Members of the Court,” namely Justices Gorsuch and Thomas, “have questioned whether

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130. Schwartzman & Tebbe, *supra* note 120, at 295 (discussing Justice Breyer’s dissent in *Zelman v. Simmons-Harris*, 536 U.S. 639, 717 (2002)); *id.* at 292 (discussing Justice Kagan’s dissent in *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 169 (2011)).

131. See *Trinity Lutheran*, 137 S. Ct. at 2024 n.3; see also Schwartzman & Tebbe, *supra* note 120, at 291 (suggesting that Justice Kagan may have “extracted footnote 3 in exchange for her vote”).

132. 140 S. Ct. 2246 (2020).

133. *Espinoza v. Montana Dep’t of Revenue*, 435 P.3d 608 (Mont. 2018).

134. *Espinoza*, 140 S. Ct. at 2262–63.

135. *Id.* at 2284–85 (Breyer, J., dissenting).

136. See *id.* at 2256 (majority opinion) (“This case [like *Trinity Lutheran*] turns expressly on religious status and not religious use.”).

there is a meaningful distinction between discrimination based on use or conduct and that based on status.”<sup>137</sup>

So although the Roberts Court has not yet formally invalidated the constitutional prohibition on tax dollars flowing directly to religious observance, it has done everything but make the announcement. Chief Justice Roberts observed in *Espinoza* that “[w]e have repeatedly held that the Establishment Clause is not offended when religious observers and organizations benefit from neutral government programs.”<sup>138</sup> Technically, that statement was dicta because the Montana program involved indirect aid, which can flow to religious uses, not direct aid.<sup>139</sup> But it is only a matter of time.

As we write, the Court is considering yet another case in this line, *Carson v. Makin*.<sup>140</sup> Maine allows towns to pay the tuition of children attending private schools on a per capita basis, but it excludes “sectarian” private schools.<sup>141</sup> The First Circuit upheld that policy, reasoning that the state had excluded religious use, not religious status.<sup>142</sup> Though it is conceivable that the Supreme Court will reverse that decision by treating it as a system of indirect aid that improperly discriminates against religious entities, it is also possible that it will formalize the end of the separation rule crafted by Justice O’Connor in *Mitchell*.

For our purposes here, the merits of the constitutional issues are not so important. More interesting is what this story tells us about how liberals and progressives have responded to a conservative majority that is remaking an area of constitutional law. Justices Breyer and Kagan likely urged the majority to draw a fact-specific line in *Trinity Lutheran* between state exclusion of religious entities and state defunding of religious uses. They deployed that distinction to find common ground in the particular case, which was about playgrounds, after all, not worship or prayer or theological instruction. Not only that, but Justice Breyer proposed a balancing approach that was reminiscent of proportionality. He called for “judgment-by-judgment” analysis that turned on specific circumstances,<sup>143</sup> and he insisted that where free-exercise and nonestablishment values conflict, “there is ‘no test-related substitute for

137. *Id.* at 2257 (expressing “doubt,” in an opinion joined by Justice Thomas, “about the stability” of the status-use distinction drawn by the *Trinity Lutheran* majority).

138. *Id.* at 2254.

139. The Supreme Court ruled that indirect aid could support even core religious uses in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The practical implication of the Court’s holding is that “[t]he money will thus pay for eligible students’ instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension.” *Id.* at 687 (Souter, J., dissenting).

140. *Carson ex rel. O.C. v. Makin*, 979 F.3d 21 (1st Cir. 2020), *cert. granted sub nom. Carson v. Makin*, No. 20-1088, 2021 WL 2742783 (U.S. argued Dec. 8, 2021).

141. *Id.* at 25.

142. *Id.* at 38.

143. *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2290 (2020) (Breyer, J., dissenting) (quoting *id.* at 2260 (majority opinion)).

the exercise of legal judgment.”<sup>144</sup> This famous and perceptive line could have been taken from *How Rights Went Wrong*. But when the Court reached a case that was about the state’s discretion to fund essential religious activities in *Es-pinoza*, the majority was uninterested in particular facts that would have allowed it to dispose of the case narrowly.<sup>145</sup> The conservative majority is not engaged in retail adjudication; rather, it is now making wholesale changes to the doctrine.

Stepping back from this example, the larger question for liberals and progressives is whether to give up their votes for the sake of partial and temporary compromises—whether justice is to be traded for peace. And even if judges do not consciously or explicitly balance these ends, a further question remains, namely, whether pursuing a strategy of “ratcheting down” social conflicts is effective or rather self-defeating. Unilaterally offering compromises may fail in situations like the examples above. Such a strategy may also backfire, allowing constitutional law to shift even further away from justice than it would have otherwise.<sup>146</sup> Paradoxically, a desire for harmony may provide the strongest argument against attempting to ameliorate disagreements and in favor of sharpening them through clear and powerful dissent.<sup>147</sup>

Greene makes room for these complexities surrounding the implementation of proportionality. In his earlier work, he acknowledges that “prevailing polarization itself likely contributes to the rights-as-trumps instinct, producing a cycle from which escape will be challenging.”<sup>148</sup> But he argues that “even if judicial method plays a minor role in our relational problems, aspirational thinking remains valuable here, as for normative legal scholarship more generally.”<sup>149</sup> We agree entirely about the value of aspirational thought and scholarship, and we think others will benefit, as we have, from engaging with the arguments of *How Rights Went Wrong*. Yet a book that identifies pressing problems of judicial practice, and that movingly and eloquently urges significant changes in response, invites further thinking about how those changes are to be implemented given our existing political realities.<sup>150</sup>

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144. *Id.* at 2291 (Breyer, J., dissenting) (quoting *Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer, J., concurring in judgment)).

145. Chief Justice Roberts explicitly rejected Breyer’s balancing approach, insisting instead on the categorical rule that strict scrutiny applies whenever a government discriminates on the basis of religious status. *Id.* at 2259–60.

146. See Schwartzman & Tebbe, *supra* note 120, at 303–04.

147. Cf. Douglas NeJaime & Reva Siegel, *Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy*, 96 N.Y.U. L. REV. 1902, 1957 (2021) (“Court decisions do not always or even generally settle conflict . . . Rather, they may provoke or escalate conflict and in this way enable political integration of subordinated groups.”).

148. Greene, *supra* note 2, at 84.

149. *Id.*

150. Cf. *id.* at 85 (clarifying that the theory “defends the place of proportionality in modern systems of judicial review, including the United States”).

## CONCLUSION

In *How Rights Went Wrong*, Jamal Greene offers a powerful indictment of our nation's constitutional culture, giving example after example of how rights and justice have come apart. Although his book is meant for a wide audience, it presents an especially important challenge for liberals and progressives. In the face of an increasingly polarized and conservative Supreme Court, there are large questions of strategy looming for the center and for the left. What ends should motivate theories of constitutional adjudication? Should those theories aim to promote reconciliation and depolarization? Should they seek to establish justice under conditions of pluralism and reasonable disagreement? And how are these purposes related to one another? If they are in tension, how should we think about tradeoffs between them, both as a matter of ideal theory and under existing, nonideal conditions?

These are not the only questions that Greene's book raises, but we think they are among the most important. For many progressives, there is now a strong democratic impulse to abandon the courts, much as there was in the early 1930s.<sup>151</sup> Pulling in the other direction is a commitment to the spirit of the civil rights era, in which courts worked heroically, if briefly and incompletely, to recognize and entrench rights of free and equal membership in American democracy.<sup>152</sup> Proportionality promises a middle path, one that respects democratic institutions while preserving a place for courts in resolving social conflicts and facilitating more tolerant and understanding forms of self-government. It is an attractive view grounded in values of transparency, reasonableness, and justification. In the American context, it will continue to meet resistance with respect to its conception of rights and its implications for institutional design. But whether proportionality can deliver under conditions of severe polarization, at least without significant setbacks to justice, strikes us as the more immediate and pressing issue in considering its prospects as a response to the current social and political moment.

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151. See sources cited *supra* note 4.

152. See NeJaime & Siegel, *supra* note 147 (rejecting general skepticism of judicial review as antidemocratic and arguing that substantive due process cases that protect equal rights and opportunities, such as *Lawrence* and *Obergefell*, are democracy-promoting within the *Carolene Products* framework).