Doctrine and Discontent

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Jamal Greene, *Foreword: Rights as Trumps?*, 132 **Harv. L. Rev.** 28 (2018).

The rise of instant, personalized access has its costs and benefits. Things like time-shifting, the ability to download songs rather than whole albums, and even SSRN make each person his or her own curator. But we lose the value of communal experience: the experience of encountering an interesting document or idea together and simultaneously.

In American legal academic culture, one such event was, or is, the publication of the Foreword to the *Harvard Law Review*'s annual Supreme Court Issue. Mark Tushnet and Timothy Lynch's classic study, "The Project of the Harvard *Forewords*," provides one of the best (and only) accounts of both the Foreword's importance and its "structural constraints." The article notes the frequency with which the Foreword article, which purports to be both a definitive statement about the most recent Term of the Supreme Court and a definitive statement for each Foreword's author, disappoints. Indeed, attempting to serve both functions may contribute to that disappointment. The time constraints involved in writing the Foreword, the expectations it carries, and the fact that its authors are often selected because they have *already* often written their most important work means that most Forewords read like a "set piece," a "replay" of the author's greatest hits "in the context of the Supreme Court's most recent cases." Sometimes a Foreword fulfills *neither* function well. Aharon Barak's 2002 Foreword was essentially a valedictory précis of great work he had already written. Nor was it a helpful guide to the past Term of the Court. Indeed, in its 146 pages, it mentioned just *one* case decided that Term. Even then, it only did so in the footnotes.

Tushnet and Lynch's article deserves an update, asking whether the Foreword (or the Supreme Court issue as a whole) can or should survive in its traditional form, given that by the time it appears, the past Term has already been hashed over in countless online discussions and SSRN drafts. In the meantime, there must still be at least a few old fogies, like me, who look forward to the Foreword every year. And although Tushnet and Lynch are right that it is systematically disappointing, the occasional Foreword remains a pleasure worth waiting for and taking notice of. This is true of the latest Foreword, Jamal Greene's *Rights as Trumps?*.

Greene's article is in some ways characteristic of the structural constraints Tushnet and Lynch discuss. Its central subject—the contrast between the categorical approach to rights that is characteristic of American constitutional law and the proportionality analysis used by many modern constitutional courts—is not new or obscure, and Greene has discussed it before. But he has an important point to make about the *contemporary* relevance of that debate. In his hands, the past Term and its decisions are central to that point rather than an afterthought. His article is not tediously political; despite the potential pun involved in the title, he really is centrally concerned with "rights as trumps," not with Trump and rights. But it *is* relevant to our political and cultural situation. Most importantly, the article is unafraid to raise hard questions about even its central claims.

If Greene's Foreword were merely a plea for proportionality analysis in American constitutional law, it would be a fine introduction to that subject but perhaps less essential as a Foreword. But it is more than that. Although his "core claim" is that "a proportionality-like approach is better suited [than a categorical one] to adjudication of rights disputes within a rights-respecting democracy," the article is really elevated by certain arguments he makes along the way. These arguments are closely related to and illuminate the state of contemporary legal and political culture: its state of polarization, heated rhetoric, and doctrinal gamesmanship.

Greene argues that the categorical approach treats rights in a "zero-sum" fashion and thus "ill prepare[s] its

practitioners to referee the paradigmatic conflicts of a modern, pluralistic political order." Many modern conflicts, Greene writes, are "less momentous" than "paradigm cases" such as "racial segregation, McCarthyism, and the like." This seems both true and commendably candid. It is certainly out of step with modern legal and political culture, in which practically all arguments involve dramatic assertions of high stakes and great urgency.

That high-stakes rhetoric, Greene argues, is a natural consequence of categorical approaches to rights. Its effects distort constitutional law and politics alike. In a "mature rights culture," in which many cases involve conflicting rights claims rather than absolute and lopsided deprivations, the logic of rights-as-trumps encourages a race to the summit. The goal is to be the first to plant the flag of one's own rights claim and to cast any competing claims into the abyss. As a great, if oddly French-accented, Scottish philosopher once observed, "There can be only one." In such a contest, the competing right is often dealt with by denying that it exists at all. Litigants, and ultimately judges, are encouraged to paint "a portrait of rights on one side [and] bad faith on the other," rather than acknowledging the sincerity and seriousness of the interests of both sets of citizens, even if those claims must ultimately be weighed so that one side can be proclaimed the winner.

Doctrinally, one result is that conflicting rights claims are resolved by categorically denying that a conflict even exists, either by rejecting one claim absolutely or via a variety of doctrinal escape hatches. In religion cases, an example of the former is the rejection in *Employment Division v. Smith* of any judicially enforceable right to accommodation in cases of religious burdens, thus eliminating the need to balance such claims against competing state or individual interests. Examples of the latter approach are legion. Take the contraceptive mandate litigation, which was statutory but closely related to constitutional law. Many lower courts in that litigation dispensed with the case by denying that any substantial burden existed in the first place. Another escape hatch, as Greene notes, is the creation of doctrinal "refuge[s]," such as the government speech doctrine. A third possibility—or inevitability—is that under such a system, seemingly categorical rules will be treated in a "dogmatic but capricious" fashion, heightened or lowered according to the majority's view of the needs of an individual case and resulting in "tacit (and therefore baffling) distortions of the categories themselves."

The political consequences are equally bad. Rights-as-trumps provides a "grammar" for political argument. Under that grammar, "[b]ecause the rights-as-trumps frame cannot accommodate conflicts of rights, it forces us to deny that our opponents have them." It encourages us to "formulate constitutional politics as a battle between those who are of constitutional concern and those who are not. It coarsens us," and exacerbates social and political polarization. The party or lawyer who finds a novel way of characterizing a "good" position as a rights claim is a bold innovator, redeeming the promise of the Constitution. The party doing the same thing on the "bad" side is a calculating conspirator, a "weaponizer," an abuser of a venerated document. The current approach creates "a world of enemies."

Greene prefers proportionality analysis. Proportionality is "not just another word for 'balancing.'" It is "a transsubstantive analytic frame…that is designed to discipline the process of rights adjudication on the assumption that rights are both important and, in a democratic society, limitable." Greene characterizes it as focused less on interpretation, as is true of the categorical approach to rights, and more on empirical analysis. The question is less whether a right exists and what it means, and more "whether the facts of the particular dispute form a sufficient basis for the government to have acted as it did."

This is hardly a "technocratic" inquiry. Questions about means-ends fit, or whether the impairment of a right is disproportionate given the competing governmental interest, necessarily involve value judgments. But those judgments turn on the justifications offered in each individual case, rather than being smuggled into categorical rulings that are destined to be stretched or narrowed as subsequent cases arise. This doctrinal approach can be unclear but is at least more transparent. And it has the benefit, in and out of court, of lowering the legal and political stakes. It forces "litigants and their fellow citizens…to acknowledge the mutual and legitimate presence within [society] of others who hold contrary values and commitments."

Greene wants "to move U.S. constitutional adjudication closer than it is now to the proportionality end" of the

spectrum. He acknowledges forthrightly that proportionality review "is not perfect, still less in practice than in theory." Among other criticisms, if categoricalism promises clarity but ends in doctrinal distortion and obfuscation, proportionality is transparent about reviewing competing interests, but vulnerable to concerns about how little guidance it gives for subsequent cases. Greene offers counter-arguments to all the criticisms he provides. But he does not treat these arguments as "trumps." Nor does he promise more certainty and clarity than proportionality review can actually provide. Admirably, he provides ammunition to those who would question proportionality review. He leaves the question as it should be: not one of which allegedly perfect system to choose, but of which imperfect system is better for law, politics, and culture in a society that presents many disputes involving competing and reasonable claims on both sides.

One might raise other questions about Greene's argument for proportionality. I offer them with *some* personal basis: as a Canadian-born-and-trained lawyer with a continuing interest in the doings of that country and an occasional outsider's perspective on the folkways of American law and politics. But I freely acknowledge that I am, by now, more of an imperfectly assimilated American insider than an outsider, and that I know less about Canadian law and legal culture than I once did.

One question is armchair-sociological. It concerns proportionality and the role of elites. The kinds of "empirical" questions that proportionality seeks to answer may not involve "balancing." But the standard proportionality test for courts in Canada and elsewhere is not *much* more detailed than a balancing inquiry would be. If proportionality has any tractability and predictability, does the stability come from the *test*? Or is it a product of shared values and consensus on the part of the fairly narrow, elite community that purports to apply it? At least when I still lived in Canada, it seemed to have much more to do with the latter. Proportionality "worked" because the Canadian legal and political elite was a mandarinate. It was increasingly diverse among some dimensions but still narrow along others. Among other things, it was heavily concentrated in a few (mostly eastern) cities but drew very little representation from elsewhere in Canada. Judges and other members of that community could speak intelligibly to each other in the general language of proportionality because they already shared and assumed the values that were submerged within their applications of the test.

Assuming that this picture contains some truth, we might ask several questions. First, if the virtue of proportionality's "culture of justification" lies in its reliance on the "'rationality and reasonableness'" it demands from government, and on the promise that the empirical nature of this inquiry "invites parties with a diverse set of commitments to remain invested in the constitutional system rather than alienated from it," is that investment likely to hold if "rationality and reasonableness" mostly consist of the shared values of an elite class? How transparent will the language of proportionality really be to outsiders under those circumstances, no matter how legible it is to those on the inside? Why remain invested in the system if you suspect that your reasons and interests will forever be viewed as "unreasonable" by this class?

Second, what happens if the mandarinate becomes more diverse along ideological or cultural lines? Will a proportionality test still be workable under circumstances in which there are fewer shared assumptions and values? Conversely, what happens if the elite remains relatively exclusive and is ultimately resented and challenged? Something of the latter case seems to me to have occurred in Canada once the Western provinces gained political power and the restrictive nature of the mandarinate became more salient. The consensus view among elites in the places I know best, like Toronto, was that this new constituency was disastrous and the new regime a bunch of wreckers. Maybe so. But they were also doubtlessly refreshing to many Canadians. It is perhaps unsurprising that the same period also saw increased contestation over the Canadian Supreme Court nomination process, and a slowly growing scholarship questioning the conventions of Canadian constitutional law and urging more—well, more categorical—approaches. Given the rise of populism and relative decline or isolation of elites in many places other than the United States, this seems a timely question. Is the world of proportionality analysis, and of its advocates, a genuine bridge between contending sides—or a place that seems calm and moderate only because it's an island, sheltered from the rest of the world?

This leads to a final question, one asked by Greene himself: Can we get there from here? Although law and politics may share a "grammar" or "style," they may *both* come from the broader culture rather than influencing each other. As Greene observes, the rights-as-trump style of American legal and political argument may be perpetuated by existing polarization, "producing a cycle from which escape will be challenging." That is an understatement. Slyly referencing Ronald Dworkin, Greene writes that his approach offers a first step on "the path to rebuilding American politics, a feat that is…worthy of Hercules." Perhaps the most important fact about Hercules is that he doesn't exist. Although Greene usefully shows that categoricalism is not an inevitable approach to American constitutional review, it may be that it has use in an already diverse and divided system, in which the shared values necessary for proportionality are absent. Even if that's not so, it may be that Americans—including American legal elites—are, so to speak, constitutionally wedded to high-stakes, zero-sum conflict and to "rhetoric over judgment." They may not really want to rebuild American politics.

These questions are not intended to score points on Greene's article. (As they suggest, however, I have my doubts about the optimistic and prophetic tone of Greene's conclusion and its call for constitutional "redemption.") Indeed, one of the most praiseworthy aspects of Greene's article is that it openly supplies its *own* questions and criticisms, neither limiting itself to easy questions nor suggesting that his own answers are sure to satisfy. Beyond that, Greene's Foreword nicely manages to be both an excellent introduction to his own work *and* a pertinent look at the recent work of the Supreme Court. It is an equally useful introduction to proportionality in constitutional law, for those who are still in need of education on this topic. Last and far from least, it serves as a worthwhile reminder that we need not treat every dispute as a horn sounding the Last Trump (to indulge in a final pun). Instead, we should give thought to what both law and politics ought to be like, given the "less momentous" contests of competing rights that characterize a "modern, pluralistic political order."

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