LAW & LIBERTY

Leaving Rights Talk Behind?

Thomas Berry

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In 2017, the Supreme Court heard arguments in a case called *Masterpiece Cakeshop*. At issue was whether the First Amendment gave a baker the right to decline to design and create a cake for a same-sex wedding. At the argument, the baker's lawyer was asked how her client differed from an Alabama restaurant that had once claimed a First Amendment right to serve only white customers. Conversely, the couple's lawyer was asked how his clients differed from a hypothetical customer requesting a cake celebrating Kristallnacht.

To many lawyers in the audience that day, these questions may have prompted flashbacks to the tough Socratic grilling of the law school classroom. Perhaps some hopefully imagined that they would soon get the chance to field similarly grueling questions in front of our highest court.

To Jamal Greene, these questions represent everything wrong with the way America does constitutional law. In Greene's new book *How Rights Went Wrong*, the Columbia law professor sets out a vision of a far different constitutional culture than the one we have today. Greene argues that "the modern American approach to rights encourages not just the parties but also the rest of us to tie our opponents' claims to the most extreme possible position." The bakeshop case, in Greene's view, is Exhibit A for that problem. At every stage, "the parties, the amici, the media, and the judges ratcheted the stakes of the case *up* rather than *down*."

So how exactly did rights go wrong? Greene pins the blame on the judicially created "two-track system" for adjudicating claims of constitutional rights violations. In a nutshell, "specific constitutional rights and those involving racial discrimination receive special treatment from courts; all others receive none." That approach puts enormous weight on the question whether a judicially recognized category of constitutional right has been infringed, like the freedom of speech or the free exercise of religion. That interpretive and binary question will usually be decisive to the outcome of a case.

Why is this approach problematic? Greene argues that by building our rights doctrine into a system of discrete constitutional *rules* rather than more flexible *standards*, judges too often

struggle to resist slippery slope reasoning. If the freedom not to endorse a same-sex wedding trumps a state's public accommodation law, then how can a court avoid the conclusion that the freedom not to endorse an *interracial* wedding has the same effect? Conversely, if there is no First Amendment right for a baker to decline to participate in a wedding, how can a court avoid the conclusion that there is no First Amendment right to decline to participate in an event whose message nearly all Americans would consider heinous?

What's the solution? Greene argues that we should follow the lead of many other modern constitutional democracies in adopting a judicial standard called "proportionality." This approach eschews broad categorizations and instead focuses on the particularities of each case, in a process Greene calls "rights mediation." A court mediates competing rights by "deciding how far my right goes as it comes predictably into conflict with the rights of others." To Greene, this process "is about paying unwavering attention to the *facts* of the parties' dispute." A court must ask "what the government has done to us and why it has done it: Is the government motivated by bigotry? Is it responding to evidence? Is the benefit the government is seeking proportionate to the burden placed on those affected by its actions?"

Adopting proportionality in America could have two major effects. First, it could (comparatively) strengthen claims for "unenumerated" rights like economic liberty, which currently receive the absurdly deferential "rational basis" review and thus nearly always lose. Echoing my colleague Clark Neily, Greene notes that rational basis review is an "anemic constitutional category" that "simply abdicates the Court's reviewing function." Greene's prime example of his preferred approach in an economic liberty case is the dissent by Justice John Marshall Harlan in the case *Lochner v. New York* (1905), a dissent which attempted to mediate the individual's right to freedom of contract with the government's right to protect the health and safety of workers. Although Harlan sided with the government, Anthony Sanders of the Institute for Justice has noted that adopting Harlan's approach "would make winning cases in this area a lot easier than it is today" for those on the side of individual economic liberty, because Harlan's approach "permits more balancing of the rights and interests on both sides than the rational basis test."

But proportionality could also (comparatively) weaken claims for enumerated rights like freedom of speech, which currently receive a "strict scrutiny" standard of review under which government regulations usually lose. For example, in the realm of affirmative action, Greene calls for courts to give "substantial deference to those political and administrative decision-makers struggling to accommodate the various competing interests in good faith and with sensitivity." Under Greene's preferred approach, *all* rights claims would thus receive the same standard of review, one lying somewhere between the two extremes of rational basis and strict scrutiny. As he pithily summarizes, "U.S. courts recognize relatively few rights, but strongly. They should instead recognize more rights, but weakly."

Key to Greene's pitch for such a regime is that "it would lower the stakes" of rights conflicts. "Different factual contexts, different stakes, and different legislative motives call for different outcomes." Under proportionality, there would be no inherent inconsistency in ruling *for* a baker in a dispute with a same-sex couple and then ruling *against* a baker in a subsequent dispute with an interracial couple. Each individual decision would not stand as a landmark ruling in the culture wars but rather as a narrow, fact-bound resolution of the dispute at hand based on the

weight of the competing interests. Losing parties would know that "on different facts, with different burdens on the plaintiff or weaker justifications for the law, they might win tomorrow."

The second benefit, in Greene's view, is that judges would be more comfortable entertaining novel claims for constitutional rights, even "positive" rights like minimum governmental guarantees of food, shelter, and education. If judges simply issued more fact-intensive rulings and trusted themselves to eventually draw the line at the appropriate place on the slippery slope, Greene argues they would no longer have to fear opening up courts to creative new categories of rights claims.

Greene's book is characteristically thoughtful, provocative, and elegantly written. Nonetheless, there are several reasons to remain skeptical whether America should join the list of nations that have adopted a proportionality approach to constitutional rights.

The first is the fundamental question of where constitutional rights come from. In Greene's view, we cannot determine which rights the Constitution protects by playing "a lawyer's game of textual manipulation and comma parsing" with "the Constitution's vague, sparse language." (Indeed, Greene dismisses text-based approaches to applying constitutional rights as "arcane inquiries into the placement of commas" and "cold dissections of commas" no fewer than four times—a put-down that gets old.)

Rather than looking to original meaning or intent, Greene argues that rights should be enforced by a "sensitive process of moral or political deliberation." According to Greene, judges should "align rights with what individuals need in order to flourish." But for those who believe that constitutional rights *do* in fact have a determined meaning that can be found in text and history—a meaning that constrains judges' power to define rights—Greene's arguments are likely to be nonstarters no matter their potential pragmatic benefits.

The second concern is predictability and guidance to lower courts. Greene argues that proportionality "has the benefit of accuracy more than predictability." But loss of predictability may be a more serious problem in America than in most nations that have already adopted proportionality. In many European countries, only one court is empowered to decide questions of constitutional rights (Germany's Federal Constitutional Court is an influential example).

By contrast, the American federal court system comprises hundreds of lower-court judges empowered to interpret and apply the Constitution (not to mention the many state court judges who also have that authority). As Justice Antonin Scalia pointed out in a 1989 essay, a balancing approach would give greater leeway to lower federal courts, who could always distinguish the facts of a particular case from any that came before. The Supreme Court would be able to do no more than "take one case now and then, perhaps, just to establish the margins of tolerable diversity." Indeed, proportionality may have already affected the Canadian legal system in just such a way; the Canadian Supreme Court has held that lower courts may depart from precedent when they find "a change in the circumstances or evidence that fundamentally shifts the parameters of the debate," a much more permissive justification for departure than currently exists in the United States.

To be comfortable with proportionality in America we have to ask not just if we're comfortable with the nine justices of the Supreme Court drawing the line on difficult questions of competing interests, but also with the diverse set of lower-court judges each drawing their own lines (a

disproportionate number of whom have prior professional experience arguing *for* the government rather than against the government).

Such unpredictability and variation in the lower courts would be problematic because the mere *uncertainty* over whether a particular act is protected can make people err on the side of caution. This "chilling effect" is well known in the First Amendment context. It is often invoked as a justification for bright-line rules, like the high bar of "actual malice" required for a public figure to win a libel claim.

Greene criticizes the bright-line reasoning behind two Supreme Court First Amendment decisions involving a Westboro Baptist Church protest at a soldier's funeral and personalized license plates with Confederate imagery. In neither case was the Court willing to weigh the value of the speech at issue, and in Greene's view that was a mistake. He knocks the Court's "absolutist posture" that "the government is almost never allowed to burden speech because of the speech's content or the speaker's identity or viewpoint."

Greene dismisses fears that jettisoning this rule would open the door to tyranny. "We must stop pretending that protecting grieving families from political agitators or letting a state keep hate symbols off its license plates threatens the Republic."

Perhaps not if SCOTUS were the only adjudicator. But consider the federal district judge whose values and life experiences differ the most from your own. Abandoning the "absolutist" rule would mean *that judge* might have the opportunity to weigh how valuable he thinks your speech is. As Canadian constitutional theorist Geoffrey Sigalet has noted, proportionality review "elevates courts to making moral and empirical judgments about the value of rights" and requires courts to "rely on moral intuitions." Such an approach inevitably "privileges the powers of whichever side or faction of a rights disagreement shares relevant moral values" with the judge or judges deciding a case.

The worry, then, isn't so much sliding down a slippery slope. It's that plenty of judges are already planted firmly at the far ends of the jurisprudential bell curve. To be comfortable with proportionality in America we have to ask not just if we're comfortable with the nine justices of the Supreme Court drawing the line on difficult questions of competing interests, but also with the diverse set of lower-court judges each drawing their own lines (a disproportionate number of whom have prior professional experience arguing *for* the government rather than against the government).

It's when we find ourselves being judged by those skeptical of our own values that these words have the most comfort: "I know my rights."

Thomas Berry is a research fellow in the Cato Institute's Robert A. Levy Center for Constitutional Studies and managing editor of the Cato Supreme Court Review.