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Normative and Institutional Dimensions of Rights' Adjudication Around the World

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ABSTRACT

The implications of incommensurability for rights' adjudication tend to be overlooked in much of contemporary constitutional theory. This paper criticizes the dominant "one right-answer" approach to conflicts of rights, and develops an alternative approach that is better suited to constitutional rights' adjudication in contemporary pluralistic legal orders. It is submitted that the normative reasons for having courts undertake the value-choices implicit in constitutional rights' adjudication, and for preferring certain legal methodologies over others, must reflect the role of courts in resolving social disputes in the light of specific aspects of the economic, social, and legal life of the polities in which those courts operate. It is further argued that any theory that builds from this approach needs to answer two inter-related questions: when is constitutional rights' adjudication by courts appropriate, and how rights' adjudication should be pursued.

KEYWORDS

Constitutional Law, Rights' Adjudication, Institutional Comparisons, Comparative Constitutional Law, Incommensurability.

CONTENTS

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I. Introduction

Since the Second World War, the "institutionalisation" of constitutional rights[1], the adoption of procedural paradigms such as those of "the priority of rights over the good"[2], and the idea that to each legal question there is a single right answer have led to a judicialization of the political sphere and to the development of a technocratic culture that leaves limited room for the articulation or realization of competing conceptions of the good.[3] This article criticizes these developments on the basis of concerns related to the incommensurability of rights.[4] It is submitted that the implications of this are significant, particularly when coupled with critiques of the supposed objectivity of judicial adjudication. If taken to their last consequences, accepting these premises leads to the conclusion that constitutional rights do not have an objective meaning that can be identified and applied everywhere and at all times—i.e. the incommensurability of rights and the absence of objective adjudication are fatal to claims of absolute universality and objectivity of constitutional rights.

The article is structured as follows. A first section provides an overview of the history behind the current rights' culture and of the intellectual underpinnings of the prevalent "one right-answer" approach to conflicts of rights. A second section will pursue a critique of this position and intellectual tradition. A third and last section advances an alternative approach, better suited to rights' adjudication in contemporary pluralistic legal orders. It is submitted that a humbler approach to constitutional rights' adjudication—one that is sensitive to the particular circumstances of the relevant jurisdiction—better reflects the realities of constitutional adjudication and is normatively preferable to the dominant approach. It is further argued that the normative reasons for having courts undertake the value-choices implicit in rights' adjudication, and for preferring certain legal methodologies over others, are to a large extent based on the added value that courts can bring to the resolution of social disputes in the light of specific aspects of the economic, social, and legal life of the polities in which those courts operate. Constitutional rights must fit the society in which they are applied — where they may "drip" into political discourse and "crush" unconstitutional actions. Such an institutionally-sensitive approach allows for the development of a high-level framework regarding constitutional rights' adjudication that can be applied everywhere, but that must be adapted in each jurisdiction to reflect local realities.

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1 I will use the term "constitutional rights" to refer to justiciable rights that are held to be hierarchically superior to legislatively issued rules. Even though not all constitutional rights are human rights, their legitimacy as supra-legal values derives from similar sources, and as such constitutional rights will serve as shorthand for judicially enforceable human rights.

2 John Rawls, *The Priority of Right and Ideas of the Good*, 17 Philos. & Pub. Affairs. 251, 251 (1988).

3 Martin Koskenniemi, *The Effect of Rights on Political Culture* in The E.U. and Human Rights, 99 (Philip Alston ed., 1999).

4 Issues of conceptual indeterminacy of these rights, in their adjudication will not be addressed here. On this *see* Gunnar Beck, *The Mythology of Human Rights* 21 Ratio. Juris. 312 (2008).

II . The Origins of the Rights Culture

A. Natural Law

Since the Second World War, rights discourse has established itself as a common currency of both politics and law.[5] Contemporary public discourse, especially when appealing to such core values as liberty, equality, and justice, is invariably cast in the language of rights.[6] But even though the rights revolution is a recent phenomenon, its intellectual origins go far back, to the dawn of Western civilization.[7]

From very early on, law has been associated with justice. Natural law has always based its claim to superior normative status on the existence of something—a divinely ordained order, moral rights, reason, etc.—which "naturally" prevails over whatever particular rules may be in place at any given time and space. Already in Hesiod we find an implicit adumbration of natural law or, rather, an application of the term *nomos* to domains for which we would nowadays use "natural law":

> The son of Kronos [Zeus] has appointed the following nomos for humans: that fish and beasts and winged birds should devour one another, because they have no share in justice. But to human beings he gave justice, which is far the best.[8]

The co-existence of natural law and positive rules imposed by force was nonetheless perceived as a source of conflicts, and potentially tragedy. The most famous example of such a conflict can be found in Aristotle's analysis of Sophocles' "Antigone" in his "*Rhetoric*" and, in particular, in its discussion of the conflict between Antigone and Creon, king of Thebes. The conflict was, in mundane terms, between Creon's edict requiring that Antigone's brother's body remain unburied on the battlefield, prey for carrion-eaters, and Antigone's claim to a right to bury her brother. Aristotle describes Antigone's claim as being based on natural law,[9] and that:

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5 For a good discussion of these developments, *see* Akira Iriye & Petra Goedde, *Human Rights as History*, *in* The Human Rights Revolution – An International History (Akira Iriye et al. eds., 2012).

6 Jürgen Habermas, *Human Rights and Popular Sovereignty: The Liberal and Republican Versions*, 7 Ratio Juris. 1, 8 (1994).

7 Martin Loughlin, The Idea Of Public Law 114 (2004); John Tasioulas, *Towards a Philosophy of Human Rights*, 65 Curr. Leg. Probs. 1, 26 (2012); However, some see the idea of human rights developed in the 20th century as being fundamentally innovative – Samuel Moyn, The Last Utopia: Human Rights in History (2010).

8 Anthony A. Long, *Law and Nature in Greek Thought*, in The Cambridge Companion to Ancient Greek Law, 416 (Michael Gagarin and David Cohen eds., 2005); quoting Hesiod's *Works and Days,* in The Cambridge Companion to Ancient Greek Law, 276-80 (Michael Gagarin & David Cohen eds., 2005). Greek thought saw natural law not in terms of content, but as originating from a divine source. For example, in Sophocles' *Oedipus Tyrannus* the chorus draws a contrast between legitimate law – in this case, divine law – and the tyrant's imposed rules precisely in terms of authorship. *See* Danielle Allen, *Greek Tragedy and Law* in The Cambridge Companion to Ancient Greek Law, 388 (Michael Gagarin & David Cohen eds., 2005).

9 *Id*. at 390.

> *"Universal law is the law of nature. For there really is, as everyone to some extent divines, a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other."*[10]

Greek theorists of natural law, such as Plato and Aristotle, thought right conduct and right law were both equivalent and objective facts. This identity between objective morality and natural law was shared by the Stoics. Stoicism equated nature with God, the perfectly rational and all-pervasive cause of the Universe, and took the world as a whole to be divinely and rationally administered. They argued that, by properly reflecting on the natural order, one would recognize that goodness and authentic lawfulness consist in conformity to correct reason.[11]

This Stoic idea of natural law gained widespread currency through Cicero's works on political theory. In "*The Republic"*, Cicero writes down what is for many the classic definition of natural law:[12]

> True law is right reason, in agreement with nature, diffused over everyone, consistent, everlasting, whose nature is to advocate duty by prescription and to deter wrongdoing by prohibition . . . It is wrong to alter this law, nor is it permissible to repeal any part of it, and it is impossible to abolish it completely. We cannot be absolved from this law by Senate or people, nor need we look for any outside interpreter of it or commentator. There will not be a different law at Rome and at Athens, or a different law now and in the future, but one law, everlasting and immutable, will hold good for all peoples and at all times. And there will be one master and ruler for us all in common, God, who is the founder of this law, its promulgator and its judge.[13]

This line of thought was coupled with Christianity – with its emphasis on the universality of Revelation – by Saint Paul.[14] The role of natural law in Christian doctrine and medieval thought was given its most complete expression by St. Thomas Aquinas who, together with the scholastics, identified an inaccessible first cause (i.e., God) that instituted second causes accessible to men by reason (e.g. physical laws regulating both physical phenomena and men).[15] Amongst these

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10 Aristotle, Rhetoric 1.13.1373b5: "koinon de ton kata phusin. esti gar ti ho manteuontai pantes, phusei koinon dikaion kai adikon, kan mēdemia koinōnia pros allēlous ē mēde sunthēkē." The translation is taken from William Rhys Roberts, The Works of Aristotle 11 (William David Ross ed., 1924).

11 Long, *supra* note 8, at 421-26.

12 *Id*. at 429.

13 Marcus Tullius Cicero, De Res Publica, De Legibus [On the Republic, On the Laws], 211 (Clinton W. Keyes trans., 1928).

14 *See* for example, EPISTLE TO THE ROMANS ch. 2:14–15.

15 Klaus Gunther, *The Legacies of Injustice and Fear*, *in* The E.U. and Human Rights 99, 117-8 (Philip Alston ed., 1999); Josiah Ober, *Law and Political Theory*, *in* The Cambridge Companion to Ancient Greek Law, 395 (Michael Gagarin and David Cohen eds., 2005); David Oderberg, *The Metaphysical Foundations of Natural Law*, *in* Natural Moral Law in Contemporary Society 48 (Holger Zaborowski ed., 2010).

second causes was natural law, which accorded with both to Scripture and reason, but also needed to be promulgated by those with political power.[16]

In time, this "second causes" doctrine became the seed for the move from a divine to a purely rational foundation for natural law.[17] Hugo de Grotius' statement that natural law exists: "*even if we were to suppose (what we cannot suppose without the greatest wickedness) that there is no God, or that human affairs are of no concern to Him*", implicitly allows for a complete decoupling of natural law from any theological underpinnings.[18] Despite this decoupling, early-modern secular jusnaturalism shared an assumption with religious jusnaturalism born of their common intellectual origins:

> that there exists some single principle which not only regulates the course of the sun and the stars, but prescribes their proper behavior to all animate creatures. […] At its center is the vision of an impersonal Nature or Reason or cosmic purpose, or of a divine Creator whose power has endowed all things and creatures each with a specific function; these functions are elements in a single harmonious whole, and are intelligible in terms of it alone.[19]

The parents of jusnaturalism, both of religious and secular bents, are thus Greek ethical objectivism and Christian epistemic universalism.[20] As we will see below, these are the origins of the objectivism and naturalism that underpin much of contemporary rights' theory.

B. Individual Rights

The concept of natural law reviewed thus far did not require subjective rights vested in individuals and enforceable against the community.[21] Instead, the idea of individual, subjective natural rights was originally developed by the school

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16 St. Thomas Aquinas, Summa Theologica I-II q. 90 a. 4: law is "*quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata* " [law is nothing but a rational regulation for the good of the community, made by the person(s) having powers of government, and promulgated] James E. Penner & Emmanuel Milissaris, Jurisprudence, 24 (5th ed., 2008).

17 Antonio M. Hespanha, Panorama Historico Da Cultura Juridica Europeia, 143-44 (1998).

18 Hugo de Grotius, De Jure Belli Ac Pacis [On the Law of War and Peace] (Francis W. Kelsey trans., Clarendon ed. 1925); *See* also Richard Tuck, Natural Rights Theories: Their Origin and Development, 66 (Cambridge University Press eds., 1979); Knud Haakonssen, *Hugo Grotius and the History of Political Thought*, 13 Pol. Theory 239, 240 (1985); Hespanha, *supra note* 17, at 145-47.

19 Isaiah Berlin, Against the Current: Essays on the History of Ideas, 84 (2013).

20 Gunther, *supra note* 18, at 119, 138. *Cf.* David Oderberg, Real Essentialism (2007).

21 Loughlin, *supra note* 7, at 116; more generally, John Millbank, *Against Human Rights: Liberty in the Western Tradition*, 1 Oxford J.L. & Religion, 203 (2012).

of Salamanca[22]—particularly by Luis de Molina and Francisco Suarez[23]—in its attempt to deal with Lutheran and Calvinist theories on the godliness of civil rulers and the absence of free will. Developing in particular nominalist ideas by Ockham and Mair, the school of Salamanca came to embrace the conception of the individual as a bearer of natural rights within a state of nature. As a result of these natural rights, individuals were thought to possess a right of rebellion when the (Protestant) sovereign did not keep his side of the bargain or infringed upon the precepts of natural law.[24]

The idea of grounding the rights of individuals in a state of nature previous to the creation of the state was strikingly original. Taking on a life of their own, subjective rights would eventually become a crucial conceptual toolbox in the development of modern natural law conceptions of the sovereign State.[25] It led to the development of contractualist approaches that attempted to explain how the exercise of absolute sovereignty—as developed in Bodin[26]—was compatible with natural law.[27] The contractualists, by:

> Treating right as a personal possession rather than an objective state of affairs, […] transformed the concept of jus as it had appeared in Roman law and Thomist thought. Reconfiguring the relationship between authority and right, they promoted individualist and contractualist theories of sovereignty that acknowledged the absolute authority of the sovereign.[28]

C. Towards Modern Constitutional Rights

At the dawn of the modern age, the basic subjective and objective elements required for the placement of some individual rights above general law were in place.[29] As societies secularized, intellectual debates abandoned the objective-religious foundations of the ideal political order to focus on how individuals constitute polities via a social contract in the light of their pre-political natural rights.[30] Yet,

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22 Even though a conception of individual rights derived from human rational capacity could be said to be at least incipient in 12th century glossators – *id*. at 22-25; Brian Tierney, The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 234-5 (1997); James Griffin, On Human Rights 30-1 (2008).

23 Quentin Skinner, 2 The Foundations of Modern Political Thought 155-58, 174-75 (1978).

24 Francisco Suarez, De Defensio Fidei III: Principatus Politicus O la Soberania Popular (Eleuterio Elorduy & Lucian Pereñao trans., Madrid Consejo Superior de Investigaciones Cientificas ed. 1965); On the influence of nominalist thought in this development, *see* Hespanha, *supra note* 17, at 151.

25 Skinner, *supra note* 23, at 176-78, 184.

26 Jean Bodin, Six Books of the Commonwealth (Blackwell Publishers ed. 1955).

27 Skinner, *supra note* 23, at 158-64. For a thorough analysis of these developments, *see* Martin Loughlin, The Foundations of Public Law 73-83 (2010).

28 *Id*. at 73-74.

29 It should be emphasized that the concept of political sovereign was developed alongside that of individual rights, even if only at the pre-political stage.

30 The most prominent works on the social contract as a pre-political arrangement are by Thomas Hobbes, Leviathan (2004); and Jean-Jacques Rousseau, Du Contrat Social, ou, Principes du Droit Politique [On the Social Contract, or Principles

this transition from religious to secular underpinnings of the social order left the foundations of natural law unaffected. It was typical of this epoch to consider that both the rules governing nature and society were absolute and, as such, that natural law was both objective and universal.

It was at this point that a crucial step in the conceptualization of individual rights against the state was taken: secular natural rights were moved from the pre-political to the political realm by John Locke.[31] Locke argued that the preservation of property is the main reason people contract with one another to place themselves under a governing authority; accordingly, when a system of government is established, natural rights are not alienated but merely exchanged for state-sanctioned civil rights. If government fails to discharge its responsibilities properly, power devolves back to the people, who retain a right of rebellion for the purpose of preserving their natural rights.[32]

The heirs to Locke's philosophy were the British of the Glorious Revolution and their fellow countrymen, the American colonists. For our purposes, however, the impact of this philosophy was greater in America, where the concepts of a written constitution and of individual rights that are judicially enforceable against the State were first implemented. Before independence, company charters granted by the British Crown had established—in writing—a governing framework for the colonies that neither the chartered companies nor the colonists could alter.[33] The originality of the colonists was to adopt this model for their newly independent country in the form of a formal written Constitution which included the basic rights of citizens as expressed, first, in the Virginia Bill of Rights of 1776, and, then, in the Bill of Rights of 1791.[34] The greatest innovation of this system was, arguably, to accord judges the duty to apply the Constitution in the same way as they applied "*any particular act proceeding from the legislative body",* and to set out that *"if there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute"*.[35] The result was that:

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of Political Law] (1985); On the role of the Protestant Reformation in the demise of the Catholic Church as the main source of political legitimacy, and the concurrent need to find other sources of legitimacy; *see* Jerome B. Schneewind, The Invention of Autonomy: A History of Modern Moral Philosophy (1998); *See* Charles Taylor, *The Diversity of Goods*, in Utilitarianism and Beyond, 140 (Amartya Sen & Bernard Williams eds., 1982; James Griffin, *supra* note 22, at 10.

31 It could be argued that individual rights of divine origin were already "political" under the original formulation of the right of rebellion by the School of Salamanca.

32 John Locke, *Two Treatises on Government*, in 2 The Works of John Locke 200 (3d ed. 1728): " yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them". *See* also Loughlin, *supra* note 7, at 116-7.

33 For an elaboration of this, and for examples, *see* Loughlin, *supra* note 27, at 279.

34 Both of these could, in turn, find precedent in the British Bill of Rights 1689.

35 The Federalist No. 23 (Alexander Hamilton); It should be noted, however, that in practice this line of thought was only fully realized later on, following *Marbury v. Madison* 5 U.S. 137 (1803); and developments in the 20th century, particularly after World War II – *see* Charles R. Epp,The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective (2d ed. 1998); and Richard A. Primus, The American Language of Rights (1999).

> in furtherance of their natural rights, the state was reconstituted and the functions of government delimited. By establishing a modern constitution that laid down this formal framework of government […] citizens could now expect an independent judiciary to protect their basic rights.[36]

The intellectual underpinnings of these developments were naturalistic theories of rights understood to provide universally accepted objective principles that posed "natural" limits to those in power. The result was a mechanism for constraining public power by delimiting a sphere of individual freedom as against the State—constitutional rights[37]—which eventually became widespread. Later on, the diffusion of judicial review beyond American shores in the wake of World War II created fertile grounds for constitutional rights to spread, starting a "rights revolution".[38]

Building as they do on these blocks, constitutional rights have a number of perceived characteristics around the world. First, they are said to reflect objective values. Second, given that they are grounded in a rational order, they can be subject to "reasoning" through "logic". Accordingly, rights' reasoning based on objective readings of natural law allows one to be right about her value judgments.[39] This absoluteness is not accidental: the very purpose of constitutional rights is to create a set of non-political imperative considerations, and to limit "political" state action by implicit reference to an apolitical good society. Through their aprioristic and universal characterization, rights embody objective reason, which gives them great rhetorical power. Political disagreements in areas falling within the scope of constitutional rights are thus no longer framed as legitimate differences, but as fundamental errors.[40]

This is a tradition that to this day remains intellectually fertile, as evidenced by the number of theories of "correct" interpretation of constitutional rights that were developed and found a receptive audience over the last decades.[41] Rights'

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36 Loughlin, *supra note* 7, at 122; *See* also Richard Tuck, *The 'Modern' Theory of Natural Law*, *in* The Language of Political Theory in Early Modern Europe *(*Anthony Pagden ed., 1987). This can be contrasted to the *Déclaration des Droits de l'Homme et du Citoyen* (Declaration of the Rights of Man and Citizens) adopted in 1789 in France, which, even though famously stating in its Art. 16 that: "*Toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation des pouvoirs déterminée, n'a point de Constitution*" [Any society in which rights are not assured and the separation of powers is not established does not have a Constitution], did not require those rights to be judicially enforced, but merely to serve as guidance in the exercise of political power.

37 *Supra* note 1.

38 On the debates regarding how the relationship between natural law and natural rights was understood during this period, *see* Kenneth Cmiel, *The Recent History of Human Rights*, 109 Am. Hist. Rev. 117 (2004); Epp, *supra* note 35; and Kai Möller, The Global Model of Constitutional Rights (2012). On the reasons why the importance of human rights was recognized only after the II World War, *see* Lynn Hunt, Inventing Human Rights: A History 177-208 (W.W. Norton & Company ed. 2007).

39 Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* Left Legalism/ Left Critique 184-5 (Wendy Brown & Janet Halley ed., 2002).

40 Koskenniemi, *supra* note 3, at 101-2.

41 *See*, for example Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1986); Ronald Dworkin, Taking Rights Seriously (Harv. Univ Press ed. 1977); Ronald Dworkin *Objectivity and Truth: You'd*

discourse has now established itself as a common currency of both politics and law. Contemporary public discourse in Western countries, particularly when appealing to such core values as liberty, equality, and justice, is invariably cast in the language of rights.

III. A Critique of Rights Culture

The imposition of absolute aprioristic standards binding upon a political community—i.e. constitutional rights—coexists in tension with the principle of popular sovereignty.[42] This tension sometimes comes to the fore but is, in the main, submerged by rhetorical devices that distinguish between value-charged law-making and value-neutral judicial adjudication. The judicial adjudication of constitutional rights is premised not only on the objectivity and universality of constitutional rights, but also on its own neutrality and objectivity, which makes: *"the apparent objectivity of rights theory dovetail perfectly with the apparent objectivity of judicial method."*[43] In other words, questions about constitutional right are objective – —i.e., pre-determined and knowable, —and should be entrusted to a *cadre* of independent professionals trained in "fidelity" to the law.[44]

This view implicitly takes for granted the objectivity and neutrality of constitutional rights, and the aptness of judges to enforce them objectively and neutrally. Both premises, however, do not withstand scrutiny.

A. Against "Objective" Natural Law

There are myriad constitutional rights' theories that seek to develop principles for identifying "one right solution" to legal problems. Some theories openly ignore existing law and focus on what the law should be on the basis of some select normative factor. Normative basis for such theories include welfare maximization[45], rational principles of justice,[46] or metaphysical theories of human flourishing[47]. Other theories are more openly based on legal precepts, as is the case of Dworkin's theory of constitutional rights as trumps, Ely's reading of constitutional rights as being representation-reinforcing, Bickel's reading of constitutional rights as expressions

Better Believe, in 25 Phil. & Pub. Aff 87 (1996); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); John Rawls, Political Liberalism (Colum. Univ. Press ed. 1996). While this seems to be a mainly American endeavor, it has recently been spreading globally along with the influence of the rights' revolution: *see*, for example, Aharon Barak, *Proportionality and Principled Balancing*, 4 L. & Ethics of Hum. Rights 1 (2010).

42 Both the notions of individual rights and popular sovereignty were arguably developed in tandem as modern justifications for the legitimacy of law: *see* Habermas, *supra* note 6, at 2-6.

43 Kennedy, *supra* note 39, at 187.

44 This view is common to both classic positivistic and jusnaturalistic perspectives – *see* Duncan Kennedy, A Critique of Adjudication (Fin De Siècle), 27 (1997).

45 This underpins the "law and economics" movement.

46 John Rawls, A Theory Of Justice (Revised ed. Harv. Univ. Press 1999).

47 John Finnis, *Commensuration and Public Reason: Reason in Action*, in 1 Collected Essays (2011).

of the fundamental principles of a nation's political morality, and Möller's reading of global constitutional rights as being concerned with the protection of interests related to personal autonomy.[48] All these theories are openly normative, and seek to influence the decision of constitutional cases.

These approaches are also all monist—they assert the priority of one value over all others and elaborate theories based on that foundational value's primacy[49]—and rely on strong concepts of rationality.[50] They thereby strive to present public law (and particularly constitutional rights) as a monist version of rationalist metaphysics, according to which moral and legal answers are all both knowable and compatible with one another.[51]

It is submitted that this "monism", and its dependence on "strong" forms of rationality, are not sustainable given the impossibility of gaining access to the contents of a detailed, objective moral order. This critique is not new. It is based on value pluralism, an idea that was at the heart of Isaiah Berlin's work[52], and has since been adopted in moral philosophy. To put it very broadly, value pluralism argues that upholding an (objective) value often cannot be achieved without the sacrifice of another (also objective, and equally important) value. Central to value pluralism is the acknowledgement that that there is no clear hierarchy of moral ends. Instead, there are thought to be a multiplicity of equally fundamental values that may not only be incompatible but also incommensurable.[53] Raz has summarized its propositions as follows:[54]

(a) there is a multiplicity of values that are not merely different manifestations of one supreme value;

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48 *Supra* note 41.

49 Richard Posner, *Against Constitutional Theory*, 73 N.Y.U. L. Rev. 1, 2 (1998); Richard Posner, The Problematics of Moral and Legal Theory, 5 (1999); Robert H. Bork, *Styles in Constitutional Theory*, 26 S. Tex. L. J. 26 383, 384(1985). This paper does not take any position on the ideal method of interpreting the U.S. Constitution, nor do these criticisms (of what are mainly liberal constitutional theorists) amount to an endorsement of originalism in any of its forms.

50 According to which an action is rational if it is rationally required, and omitting it would be irrational. A prominent example of the limitations of stronger usage of "rationality" and democratic decision-making is Arrow's impossibility theorem — Kenneth Arrow, Social Choice and Individual Values (1951) — but it should be noted that the stringent implications of this theorem can be relaxed by making the decision-making process more information sensitive — *see* in particular Amartya Sen, *The Possibility of Social Choice*, 89 American Econ. Rev. 349 (1999). There is also a weaker use of rationality — adopted, for example, by Joseph Raz, The Morality of Freedom (1986) — according to which an action is rational if it has not been ruled out by reason. We will look into this in more detail in section 3 below.

51 Trevor Allan, Constitutional Justice: A Liberal Theory of the Rule of Law 290–2 (2001); Beck, *supra note* 4, at 323.

52 *Loughlin, supra* note 7, at 40; Alasdair Macintyre, After Virtue 143 (3d rev. ed. 2007). This is not to say that the intellectual tradition sustaining this approach is not long-lived: it can be traced back to the Greek Sophists, and particularly to Vico, Herder, and the Counter-Enlightenment and Romantic movements in general: *see* Isaiah Berlin, The Proper Study Of Mankind: An Anthology of Essays 243, 553 (Penguin Books ed., 2013) (1997).

53 Beck, *supra* note 4, at 317.

54 *See*, for a similar definition of value monism, Berlin, *supra* note 52, at 555.

(b) there are incompatible values, meaning values cannot all be realized in the life of a single individual, nor, when we consider values that can be instantiated by societies, can they be realized by a single society.

As a result, the difference between values is not merely quantitative but qualitative – and different values may be incommensurable.[55]

This is not to say that all questions about goods and values must always shipwreck on the rock of incommensurability—commensuration of goods and evils will usually be available as regards alternative courses of action, insofar as the deliberation about the alternatives remains in the technical domain, as in certain types of cost-benefits analysis.[56] Further, it is possible to arrive at valid reasons for choosing even when dealing with incommensurable alternatives. It is a normal part of life to grapple with competing priorities: the differences in nature and qualities of apples and oranges do not prevent us from choosing between them every time we decide to eat.[57] This can be extrapolated to judicial-making: "*Legal systems justifiably—and in fact, necessarily—authorize judges to resolve many issues that can only be justly resolved by reconciling incommensurable considerations*".[58] For example, courts are often required to calculate the amount of damages corresponding to pain, or the length of imprisonment due for committing a crime—requiring a balance between matters that do not share a common metric, or lead themselves to an obvious answer.

Despite this, if it is accepted that incommensurability exists, this has significant consequences for constitutional adjudication. Value pluralism can translate into legal uncertainty when legal norms reflect different values and: (i) there is no express hierarchy of norms or order of value which prioritizes some values over others; and (ii) there is no other accepted legal method or criteria for balancing and prioritizing conflicting values. These conditions tend to be met by constitutional law. Constitutional instruments often express incomplete agreements regarding competing legal values. Most legal orders pursue a number of different constitutional objectives without a clear hierarchical relationship, and without providing a formula on how to resolve conflicts that may arise between those objectives.[59]

Value pluralism poses a threat to the modern rights culture at a basic level, by challenging its very premise that a monist prioritization of individual and societal values is possible.[60] Disagreements on how to balance different rights, or about the specific content of individual rights, will often express rival normative conceptions of the good life or the good society. As such, when choices need to be made

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55 Taylor, *supra* note 30, at 138.

56 Finnis, *supra* note 47, at 238.

57 Amartya Sen, The Idea of Justice 242, 395 (2009).

58 Timothy Endicott, *Proportionality and Incommensurability*, *in* Proportionality And The Rule Of Law, 325-6 (Grant Huscroft et al. eds. 2014).

59 Gunnar Beck, The Legal Reasoning of the Court of Justice of the E.U. 83-84 (2012). This is particularly the case with national and international bills of rights, which will unavoidably contain values that are incompatible, incommensurable, or both. For a thorough discussion of legal uncertainty regarding rights' adjudication resulting from value pluralism, with examples drawn from the ECHR, the Human Rights Act, and the U.S. Bill of Rights, *see id*. at 86-90.

60 Beck, *supra* note 4, at 317.

between rights, some "value" will have to be sacrificed.[61] From a value pluralistic perspective:

> When rational inquiry leaves our views of the good deeply at odds, it is vain to appeal to rights. Basic human rights can be justified as giving protection against universal human evils; but even such rights clash with one another, and incompatible settlements of their conflicts can be equally legitimate. When universal evils clash, no theory of rights can tell us what to do.[62]

This limitation of monist approaches to constitutional rights can be demonstrated by reference to the monist theories reviewed above. While monists agree that there is one "correct" articulation of the "good"—i.e., they agree that objectivity is possible,—they differ as to what that "correct" normative framework should be. As noted by Sen, all these theories agree that universally applicable constitutional rights extend to everyone, and hence are said to promote some dimension of equality and non-discrimination. Discussions about whether equality is being observed are seemingly technical—after all, they require an empirical assessment of whether disparate treatment is taking place. Nonetheless, these theories invariably fall into a pattern of arguing against approaches ensuring equality in some dimension, on the grounds that they violate the more important requirement of equality in some other sphere. In other words, these theories disagree about the content of values and about their prioritization.[63] Ultimately, each of these theories advances a different conception of what is good and valuable, and thus they differ regarding the identification of the overarching good by reference to which discrimination must not be allowed.[64] In these approaches, as in all theories of rights and justice, differing views on rights ultimately spring from different views on what is "good".[65]

It should be noted that the argument thus far has been framed in ontological terms, so one might legitimately ask: "how do you know monism is not correct?" This is a valid question, but unless there is a method to access objective moral reality, value pluralism has the same bite from an epistemological as from an ontological perspective. In the absence of some demonstration of the validity and contents of naturalism—i.e. a method allowing for the discovery of the absolute, universal foundation of the "good"—monist approaches must be considered arbitrary, with their adoption merely a function of their persuasiveness.[66] This, in effect, entails recognizing, at least from a practical standpoint:

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61 John Griffith, *The Political Constitution*, 42 Mod. L. Rev. 1, 12-13 (1979). This may, to a certain extent, be the result of the "emotional", instead of rational, basis of fundamental rights — *see* John Alder, *The Sublime and the Beautiful: Incommensurability and Human Rights*, 4 Pub. L, 697, 707 (2006), building on work by Finnis and Rorty.

62 John Gray, Gray's Anatomy — Selected Writings, 34 (2015).

63 Compare, for example, the communitarian theories of Dworkin and Rawls with the libertarian theories of Nozick and Hayek.

64 Sen, *supra* note 57, at 295.

65 Gray, *supra* note 62, at 36.

66 Taylor, *supra* note 30, at 142.

> that ends equally ultimate, equally sacred, may contradict each other, that entire systems of value may come into collision without possibility of rational arbitration, and that not merely in exceptional circumstances, as a result of abnormality or accident or error—the clash of Antigone and Creon […]—but as part of the normal human situation."[67] […] "[When Creon and Antigone disagree] there is not something wrong or incomplete about the arguments they present […]. There are breakdowns and failures in ethical life of a sort that reveal the limitations and inconsistencies in a value claim itself, in its claim to be able to serve as a reason for action.[68]

B. Against Objective Adjudication

Those who reject purely monist approaches, or at the very least acknowledge that a legal problem can sometimes have more than one single solution, tend to drop grand substantive claims in favor of more limited procedural approaches. This usually leads to a defense of rights' adjudication on grounds of procedural neutrality and rationality.

A good example of this are defenses of balancing, a technique which plays an important role in the case law of many constitutional courts.[69] Balancing purports to be a tool for solving conflicts between individual rights. In the European—and, increasingly, global—context, balancing is traditionally associated with the principle of proportionality.[70] The best known treatment of proportionality is probably by Alexy, who draws and builds on Dworkin's conceptual distinction between rules and principles.[71] Given the global preponderance of proportionality as a test for ascertaining whether constitutional rights are infringed, we will use Alexy's approach as a basis of analysis.[72]

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67 Berlin, *supra* note 19, at 94-.

68 Robert Pippin, *The Conditions of Value*, in The Practice of Value—The Tanner Lectures on Human Values, 103 (Joseph Raz ed., 2003).

69 Donald H Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev 1091, 1101-8 (1986), describes a number of different balancing tests in the American context; Miguel Maduro, We the Court: The European Court of Justice and the European Economic Constitution 54-8 (1998) does the same in the European context. *See* also Möller, *supra* note 38, at 134-177.

70 Analyzing the potential differences between balancing and proportionality, *see* Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 Int'l. J. Const. L. 263, 268-70 (2010). Mapping the adoption of proportionality throughout the world, *see* Alec Stone Sweet & Jud Mathews, *Proportionality, Balancing and Global Constitutionalism*, 47 Colum. J. Transnat'l. L. 72 (2008).

71 Robert Alexy, A Theory of Constitutional Rights (Julian Rivers trans., 2001).

72 A number of common law countries, including the UK and the USA, are outliers internationally in their lack of reliance on proportionality, even though balancing also occurs in US constitutional law — *see* Dworkin, *supra note* 41, at 23-6; Alex Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L. J. 943, 943 (1986-1987); Jacco Bomhoff , Balancing Constitutional Rights 188-89 (2013).

For Alexy, constitutional rights are principles—i.e. standards of relatively high generality providing non-conclusive reasons for deontic decisions that may be displaced by other principles, including other constitutional rights. However, Alexy also sees constitutional rights as optimization requirements demanding to be realized to the greatest extent possible.[73] This implies that constitutional rights are value-claims with mere *prima facie* force, to which balancing is inherent. When constitutional rights and principles collide, the conflict cannot be solved by declaring that one of the principles is invalid or by building exceptions into it.[74] Instead, one must create a conditional relation of precedence for the balancing of constitutional rights in the light of the specific facts of the case. To achieve this, Alexy proposes a "Law of Balancing", which can be divided into three stages: first, establishing the degree of non-satisfaction of a first principle or right; second, establishing the importance of the competing principle or right; and third, establishing the relationship between the first two elements. This technique, if yielded properly, should create the appearance that legal adjudication leads to purely objective results.[75]

However, Alexy himself refused the existence of an objective order of values that could determine *a priori* the content of adjudication, and expressly admitted that balancing does not lead to a single correct solution in each case. Nonetheless, while it is not possible to find a single substantive answer to all moral and legal questions, he argued that it is possible to develop procedural rules or conditions for rational practical argument.[76] Balancing is thus defended as operating at a purely formal level, with its correctness a matter of discourse and of relative coherence rather than of any external, substantive standards.[77]

From an objectivist perspective, the problem is that this neutral, rational "procedural" test injects value-based considerations at two moments: when determining the relative "weight" of the principles involved,[78] and when carrying out the final balancing exercise between the "costs" and "benefits" of each principle.[79] In the absence of sensible standards for comparing and grading values, this means that this test – and every test that seeks to balance between truly different values –

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73 Alexy, *supra* note, 71 at 44.

74 *Id*., at 66; Joseph Raz, The Authority of Law, 228 (1979). Raz' position is distinct from Alexy's in that he considers that principles and rules are reasons for actions, while Alexy's view is more restricted and strictly jurisprudential.

75 Alexy, *supra* note 71, at 50-54.

76 *Id*. at 99, 365-370; Gustavo Zagrebelsky, Il Diritto Mite (The Mild Law) 170 (1992). A similar process-based theory has been advanced by Jurgen Habermas, *Law and Morality* in 8, The Tanner Lectures on Human Values (S. M. McMurrin ed., 1988).

77 Thomas McCarthy, *Practical Discourse: On the Relation of Morality to Politics* in Habermas and the Public Sphere (Craig Calhoun ed., 1992).

78 Which, as has been noted, are usually assumed to be of equal weight, which is not appropriate for situations of incommensurability — see Alder, *supra* note 61, at 717.

79 An additional problem here is that there may well be epistemic issues – e.g. regarding the effective risk of something (say, terror attacks) that may be advanced as a reason to limit constitutional rights. *See* Robert Alexy, *Formal Principles: Some Replies to Critics*, 12 Int'l J. Const. L. 511, 520-22 (2014).

contains elements of subjectivity.[80] Procedural tests fail to solve the problem created by the absence of a common metric to values – i.e. their incommensurability. Since conflicts of rights ultimately reflect competing values and different conceptions of the "good", the relevant rights' adjudication criteria will of necessity reflect an implicit (and subjective) normative preference for some conception of the good over another.[81]

In other words, "balancing" tests are neither purely procedural nor completely neutral. Instead, they require (substantive) value judgements. This means that balancing and proportionality exercises do not bring absolute transparency and objectivity to rights' adjudication.[82] When a judicial choice is made between equally ultimate, incompatible and incommensurable values, the choice will necessarily lack a purely rational justification regardless of how sophisticated the judicial analysis looks.[83] As Weber put it: "increasing intellectualization and rationalization do not […] indicate an increased and general knowledge of the conditions under which one lives".[84]

In short, rights' adjudication always requires the exercise of a certain amount of political discretion on the part of courts. This, in turn, raises the question of whether courts are competent and legitimate to pursue such a role.

IV. The Use of Rights—A Defense

At the heart of the contemporary rights culture lies a tension that has been latent since at least the Enlightenment between the search for one universal good—objectivism —and the toleration of different views of the good—pluralism.[85] Recent studies in psychology and anthropology seem to support pluralism. They have identified a cluster of different moral themes to which people subscribe, and found that different cultures seem to prioritize different clusters.[86] Of these clusters, only one —based

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80 Matthias Jestaedt, *The Doctrine of Balancing—Its Strengths and Weaknesses*, in Institutionalised Reason — The Jurisprudence of Robert Alexy 164-5 (Matthias Klatt ed., 2012). Alexy considers this problem to be inherent to any practical reason discourse: see Ruth Adler, Neil MacCormick & Robert Alexy, A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification 206-208, 288 (1989). Claiming that this requires 'external justification' in terms of legal reasoning by courts, Matthias Klatt & Moritz Meitser, *Proportionality—A Benefit to Human Rights? Remarks on the I·CON Controversy*, 10 Int'l J. Const. L. 687, 694 (2012).

81 Berlin, *supra* note 19, at 98.

82 Endicott, *supra* note 58, at 328. In the light of this, some authors have favored abandoning balancing and proportionality as a viable and rational form of judicial argumentation and decision-making: see Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 Int'l J. Const. L. 468 (2009).

83 Beck, *supra* note 4, at 323-24.

84 Max Weber, *Science as a Vocation in* From Max Weber: Essays in Sociology 139 (H. H. Gecth & C. Wright Mills eds., 1948).

85 Gray distinguishes between the universalism of such distinct thinkers as Locke, Kant, Rawls and Hayek, and the emphasis on toleration and peaceful coexistence of Hobbes, Hume, Berlin and Oakeshott — see Gray, *supra* note 62, at 22.

86 R. A. Schweder, *In Defense of Moral Realism: Reply to Gabennesh*, 61 Child Development 2060 (1991); R.A. Schweder & Jonathan Haidt, *The Future of Moral*

on autonomy —is congruent with an individual rights' culture; and, currently, this cluster seems to prevail only among well-educated westerners.[87]

These studies have identified a number of human universals.[88] However, and to put the matter rather broadly, they also found that these universals are high-level modules which details need to be filled in, are too numerous to be adopted simultaneously, and have the potential to be mutually incompatible.[89] As a result, the specific moral principles that an individual holds are the result of her background, including how she was socialized.[90]

Given the failure of both objectivist substantive theories of rights and procedural theories of rights' adjudication, the application of constitutional rights—and their judicial imposition in particular—must find some other justification. If these studies in psychology and anthropology are correct—and it is accepted that not only societies, but even individuals within the same society can legitimately have different values—it follows that any theory of social morality should focus on how to manage conflicts between the values that different people legitimately and naturally hold. Even if these studies are not correct, a similar notion that different conceptions of the good life are legitimate underlies most politically liberal regimes, and a similar focus on the part of political and constitutional theory is justified.

In pluralistic societies, we need common institutions that allow many forms of life to co-exist. Constitutional rights—which often express specific values—are one such institution.[91] Constitutional rights and their judicial adjudication can thus be justified on practical grounds, and particularly on the basis of their suitability to facilitate pluralism and the co-existence of different but equally legitimate life choices.

This "institutional" perspective on constitutional rights has a number of implications. First, it means that the content of individual rights will vary from society to society, and may evolve—as is commonly observed in practice—because this content is the outcome of struggles between alternative views about what a good society should be like.[92] Secondly, and more importantly to our purposes, it implies that a defense of rights' adjudication must go beyond abstract claims of objectivity and neutrality. The defense must be about the specific discursive and

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Psychology: Truth, Intuition and the Pluralist Way, 4 Psychol. Sci. 360, 362-63 (1993); R.A Schweder, N.C. Much, M. Mahapatra & L. Park, *The "Big Three of Morality" (Autonomy, Community and Divinity) and the Big Three Explanations of Suffering*' in Morality and Health (A. Brandt & P. Rozin eds., 1997).

87 The literature has categorized this segment of the population as WEIRD – both in a descriptive (Western, Educated, Industrialized, Rich and Democratic) and comparative (as in a minority in the context of Human History, and even current world population) sense. See J. Henrich, S. Heine & A. Norenzayan, *The Weirdest People in the World?*, 33 Behav. & Brain Sci. 61 (2010).

88 Donald Brown, Human Universals (1991). For a full list of universals, see Steven Pinker, The Blank Slate: The Modern Denial of Human Nature (2002), Annex.

89 Jonathan Haidt & C. Joseph, *The Moral Mind: How 5 Sets of Innate Intuitions Guide the Development of Many Culture-Specific Virtues, and Perhaps Even Modules* in The Innate Mind, 367 (Peter Carruthers et al. eds., 2007).

90 Jonathan Haidt, The Righteous Mind 131-33 (2012); Schweder & Haidt, *supra* note 86, at 363-64.

91 Gray, *supra* note 62, at 38.

92 Koskenniemi, *supra* note 3, at 105.

political practices[93] underpinning rights' adjudication in individual polities—and it must explain why such practices should be preferable to other decision-making processes.[94]

At least in the Western world, constitutional rights are an integral part of contemporary legal and political discourse. Even if constitutional rights cannot, by themselves, solve political and social disputes, they frame these disputes and define their terms.[95] Constitutional rights operate as guiding principles around which some communal values and individual interests can be organized, and, in liberal systems, set the primary conditions for the pursuit of personal conceptions of the good.[96]

Constitutional rights are particularly useful in the resolution of social disputes because they *straddle*. On the one hand they are *"legal rights embedded and formed by legal argumentative practice (legal rules)"*. On the other, they constitute a normative framework said to "exist" prior to and outside the legal system, exerting its influence *"in the form of an assertion about how an outside right should be translated into law."*[97] In the way they straddle, constitutional rights point not only to the inter-relationship between politics and law, which are: "*two distinct ways of managing the inevitable social facts of agreement and disagreement"*. They also serve as mechanisms of institutional choice, since: "*to submit a political controversy to legal resolution is to remove it from the political domain"* and leave it to courts.[98]

Even if conflicts between constitutional rights merely reflected conflicts of political claims—*contra* their perceived pre- and a-political nature —courts could still legitimately resolve such conflicts. This would be a matter of institutional choice—and institutional choices ultimate depend on the relevant historical, social and institutional context in which they are made.

From an "institutional" perspective, two main questions need to be addressed in the context of rights' adjudication. The first question is a matter of institutional choice, which is usually disguised as an issue regarding jurisdiction—when should courts be competent to deal with issues under the *aegis* of constitutional adjudication? The second question is a matter of practice—how should constitutional adjudication proceed?[99] While each of these questions merits a level of attention that exceeds the

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93 Practice here means: "*a set of rules for the regulation of the behavior of a class of agents, a more-or-less widespread belief that these rules ought to be complied with, and some institutions, quasi-institutions, and informal processes for their propagation and implementation*." Practices provide reasons for adopting a specific mode of action (e.g. rights' adjudication), but do not necessarily serve to delineate the scope of specific actions (e.g. the precise content of a constitutional right). See Charles R. Beitz, The Idea of Human Rights 8-9, 42 (2009); and, more broadly MacIntyre, *supra* note 52, at 253.

94 Beitz, *supra* note 93, at 102.

95 Joseph Raz, *More on Explaining Values*, in The Practice Of Value—The Tanner Lectures on Human Values 154 (Joseph Raz ed., 2003).

96 Rawls, *supra* note 2, at 255-60.

97 Kennedy, *supra* note 39, at 187. See also H.L.A. Hart, *Are There Any Natural Rights?*, 64 Phil. Rev. 175 (1955).

98 Robert Post, *Theorizing Disagreement: Reconceiving the Relationship Between Law and Politics*, 98 Cal. L. Rev. 1319, 1343 (2010).

99 The relationship between these questions is not merely sequential. The way constitutional rights are construed is arguably relevant to normative assessments of whether courts are better options to arbitrate between different political values than legislative or administrative bodies.

scope of this article—and, under the terms of any institutional theory like the one sketched above, the answers to these questions must ultimately be identified at the relevant jurisdictional level—an attempt is below made to sketch their basic contours.

A. When Should Courts Decide?

Prima facie, courts face structural limitations that would seem to make them unsuitable to engage in the political role inherent to constitutional rights' adjudication. Courts often lack expertise and resources; have high administrative costs; are subject to information biases in favor of those sufficiently organized to participate in the judicial process; may decide issues without hearing some of the affected interests; do not have the advantage of determining when to adopt politically charged decisions; and lack democratic legitimacy.

However, institutional choices occur in a world of second-bests. The question is not whether courts are ideally suited for politically charged adjudication; it is how they compare to legislatures and governments. In particular, political processes can be subject to both majoritarian and minoritarian biases which may make the allocation of decision-making powers to courts appropriate. Majoritarian biases occur when the majority adopts decisions that ignore or disproportionately harm the interests of minorities. A particular concern is with acts where: "*prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities*."[100] On the other hand, minoritarian biases may occur when a minority group of some sort benefits from better access to the seats of power through personal influence, organization, information, or sophistication. Under these conditions, minorities may impose losses that are spread out across the majority of people in a way that makes political reaction unlikely or unfeasible.[101] The trade-off is thus between political processes that have better information and greater democratic legitimacy, but that are subject to both majoritarian and minoritarian biases; and an adjudicatory process with less information, resources and democratic legitimacy, but that suppresses some of those biases, particularly through the independence and specialization of judges.[102]

In a democratic context, there will normally be a presumption that politically controversial topics are best left to democratically legitimate bodies. And yet, from a comparative institutional perspective there may be situations where courts may be the preferable decision-making body, even if those situations will usually only arise extraordinarily—e.g. situations where the decision affects civil liberties and human rights (in particular situations concerning the prevention of outcomes which are morally intolerable for the relevant polity, or even for humanity as a whole), or where the protection of the integrity of the political process is at stake.

An important, yet subtle consideration which is relevant for any institutional comparative choice is the iterative relationship between the process through which the relevant bodies reach their decisions and the identification of the entity better

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100 United States v. Carolene Products Co., 304 U.S. 144,153 n.4 (1938).

101 Neil Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 Mich. L. Rev. 657, 671-75 (1988).

102 Neil Komesar, Imperfect Alternatives — Choosing Institutions in Law, Economics, and Public Policy (1994).

suited to decide certain matters. The way courts construe constitutional rights will be relevant to the desirability of having them decide constitutional rights' questions in the first place. This can be exemplified by reference to balancing and proportionality. While it may be considered a disadvantage that balancing and proportionality leave a wide margin for subjectivity, these legal techniques also acknowledge the existence of clashes of rights and recognize that there is no ready-made answer to them.[103] What is more, they provide discursive structures through which litigants can plead their cases and engage with their opponents' arguments, and create a measure of predictability regarding how courts frame their decisions.[104] Proportionality in particular can be perceived as providing a regulated argumentative framework that assists courts in accommodating conflicting values in individual cases in a way that is acceptable to all participants.[105] Proportionality and balancing may lead to uncertainty, but they also have the advantage of allowing for the control of arbitrary and purely subjective decisions—and thereby providing a mechanism to ensure the (bounded) rationality of judgements.[106] It also allows interested parties to participate in a process of legal alchemy through which controversial, politically charged decisions are transformed into natural, unproblematic developments of previous legal practice. As has been noted:

> (given a steady case load), fidelity on the part of the court to a particular framework will entrench that mode of argumentation as constitutional doctrine. To the extent that arguing outside of the framework is ineffective, skilled legal actors will use the framework, thereby reproducing and legitimizing it.[107]

This may well be deemed a comparative institutional advantage of courts over other institutions—including democratic representative bodies—as decision-making *loci.* In certain cases, it might be preferable that the subjective value assessment inherent to some political decisions occurs under conditions that are subject to rational control and criticism: legal reasoning aspires to objectivity[108], and submits subjective decisions to a discursive practice restricted by a series of conditions, such as respect for the law, consideration for precedent, and other rules.[109] What is more, courts will usually be able to decide on the basis of the particular facts of a case without needing to engage with the large-scale societal questions underlying it. Courts may adopt incompletely theorized decisions that reflect the limited

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103 Xavier Groussot, *Rock the KaZaA: Another Clash of Fundamental Rights*, 45 Common Mkt. L. Rev. 1745, 1762 (2008).

104 Similarly, Kai Möller, *Proportionality: Challenging the Critics*, 10 Int'l J. Const. L. 709, 726 (2012).

105 Another way to frame this is to say that proportionality provides as a mechanism that ensures a level of reasonableness in the resolution of legitimate disagreements: i.e. "*it is not necessary for everyone to actually agree with the results, [but] the result must be justifiable in terms that those who disagree with it might reasonably accept*" — Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review,* 4 Law & Ethics Hum. Rts. 142, 168 (2010).

106 Alexy, *supra* note 71, at 107, 387.

107 Stone Sweet & Mathews, *supra* note 70, at 89.

108 Neil Maccormick, Practical Reason in Law and Morality 192 (2008).

109 Alexy, *supra* note 71, at 370-387.

amount of societal consensus on the relevant topic. This mechanism is well suited to pluralist societies and an important source of social stability, allowing decisions to be reached on controversial topics without requiring the generalized imposition of certain value judgements with which the parties and segments of societies may strongly disagree.[110]

In other words, judicial practice, the issue to be decided, and the relevant social, institutional and political environment are all relevant to the comparative institutional choice of whether courts should make the value choices implicit in constitutional rights' adjudication. In particular, courts may be better placed to decide charged political questions if they do so within an operative and cognitive framework that recognizes such practice as legitimate—e.g. when courts are explicitly granted jurisdiction to decide such cases in the first place. Importantly, such operative and cognitive frameworks are usually time- and place-specific, which means that the relevant comparative institutional choice depends on the particular socio-legal context in which it occurs.

B. How Should Courts Decide?

While context is crucial to determine whether courts should adjudicate on constitutional rights' cases (and to identify which constitutional rights should be subject to judicial adjudication), it is also important to the way courts should decide cases.

Even if constitutional adjudication needs to decide between values that will often be incommensurate, this does not mean that there will be no sound reasons for courts' decisions on questions involving those values. A first step in the analysis of a constitutional right is to look at its normative foundation, and identify the "good" that it seeks to protect. This is crucial not only in order to take the right seriously, but also to determine the normative content of specific constitutional rights. While this content may not be precisely defined, it will be limited to a number of normatively acceptable possibilities.[111] This leads us to a second step: if—as it is often the case—there are multiple normative bases for a constitutional right and there is no definitive answer as to which is to be preferred, consideration should be given to all legitimate normative bases—i.e. normative pluralism should be embraced. Accepting the existence of a plurality of justificatory arguments underpinning constitutional rights has the potential to strengthen those rights—because they will benefit from added normative justification(s). At the same time, this plurality of normative bases creates some space for courts to take into account the individual, cultural and legal considerations which may be relevant to the adjudication of individual cases.[112]

A particularly relevant consideration regarding constitutional adjudication between multiple incommensurable values is that the absence of one right solution does not mean that one is unable to identify which solutions are wrong. Furthermore, while collisions between values cannot be avoided, deciding between

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[110] Cass Sunstein, Legal Reasoning and Political Conflict 5, 44 (1996); Alder, *supra* note 61, at 709.

[111] Jeremy Waldron, *Is Dignity the Foundation of Human Rights?*, in Philosophical Foundations of Human Rights 125-133 (Rowan Cruft et al. eds., 2013).

[112] *Id.* at 4-5; Kwame Anthony Appiah, The Ethics of Identity 73-83 (2005).

them need not be irrational.[113] Monist, "one-right-answer" approaches necessarily rely on strong rationality. However, there are other (weaker) forms of rationality according to which an action is rational if it has not been ruled out by reason.[114] Similarly, there are mechanisms that, through bounded rationality, seek to deal with indeterminate and incommensurable choices.[115] The basic idea being advanced here is that, through reliance on partial rankings, limited agreements and comparative judgements, reasonable public choices can be reached via practical reasoning.[116] The reasons adopted in this respect may well be pragmatic, consequentialist, and time- and agent-bound. These reasons may apply at a particular point in time but lapse fairly quickly, apply in certain societies but not others, or be reasons for courts to interpret rights in a particular way that do not extend to other cases. In other words, the particular application of specific values included in constitutional rights may depend on aspects of the economic, social, and legal life of a country, or even on the particularities of individual cases.[117]

Even if practical reason is unable to achieve a full commensuration of incommensurable things or to arrive at a single right solution, it can still hold the ring by disqualifying countless "solutions" as contrary to reason and wrong.[118] While issues of incommensurability remain, they can be circumvented—decisions can still be made, the same way one can choose between apples and oranges without much problem, even if the reasons for adopting these decisions will have to be pragmatic, and grounded on the institutional context and the nature of the decision-making process. Conflicts between values can thus be softened and managed in the light of specific contexts, particularly when a fragile balance that will avoid intolerable situations and choices can be reached.

In societies coherent enough to solve their problems peacefully, disagreements about incommensurable values will be contained within a framework of shared views: they will be instances of bounded disagreement that only make sense in a context of bounded pre-agreement according to which different people may legitimately stake opposing claims regarding certain matters. Importantly, in most contemporary Western societies, it is accepted that (some of) these disagreements can be addressed through rights' adjudication.[119] Naturally, not every conceivable

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113 Klatt & Moritz, *supra* note 80, at 697.

114 Raz, *supra* note 50, at 322-24. This builds on the distinction between "strong" and "weak" forms of rationality reviewed earlier in this note.

115 On bounded rationality, see Herbert Simon, *A Behavioral Model of Rational Choice*, 69 Q. J. Econ. 69 99 (1955); Herbert Simon, Models of Thought (1979). Relating the use of practical rationality to situations of weak rationality, see Möller, *supra* note 104, at 721-24.

116 Sen, *supra* note 57, at 241-43.

117 Isaiah Berlin, The Crooked Timber of Humanity 18-20 (2013); Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, in Between Authority and Interpretation: On the Theory of Law and Practical Reason 367 (2009).

118 Finnis, *supra* note 47, at 252-53.

119 Raz, *supra* note 95, at 51. This is similar to, and builds on, the sharing of rules of language necessary for communication: disagreement must be preceded by agreement about the framework in which it occurs; *see* Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason 62-63 (2009), following Wittgenstein's rule-following argument in *Philosophical Investigations* (1958).

social disagreement can—let alone should—be solved this way.[120] In many cases (undoubtedly the greater part), rights' adjudication will not be the best option to address these disagreements. Judicial deference on the grounds of lack of democratic legitimacy will usually be appropriate.[121]

On the other hand, the alternative institutional options may be even less apt than courts; in extreme cases, there may be no way to arbitrate between different societal claims other than by a contest of force. Legal and political processes ultimately seek to stave off recourse to violence in the resolution of societal disputes. One way this has been pursued in Western political and legal culture is through the implementation of distancing devices for certain forms of decision-making—i.e. mechanisms for the settling of disputes in a way that is as independent as possible of the personal tastes of the relevant decision-makers.[122]

These distancing mechanisms include not only the creation of neutral courts comprising impartial judges—with all inherent institutional protections against external influence and interference—but also distinct modes of legal reasoning. Even when facing situations with different legitimate solutions, judges are expected to invoke only those reasons that are recognized by law.[123] This explains why judges go to great lengths to ensure that legal reasoning with law-making consequences is usually similar to, and continuous with, decisions interpreting and applying law.[124] Even in cases where the reasons for choosing between different possible interpretations are incommensurate, reliance on formal legal reasoning can serve as a distancing device that legitimates court decisions before the relevant community. [125]

It is a common understanding of a shared "story" about the contents and existence of a legal order that makes such a legal order authoritative within a community. Similarly, it is the obeisance to social practices and shared understandings by a legal community, which are in turn in accordance with a more general common understanding of what is legitimate law, that determines what judges can legitimately decide.[126] For courts to operate at all, every agent and organization participating in judicial processes must, in order for such participation to make sense, share in a common legal culture that provides the background for the participants' cognitive frameworks.

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120 Sen, *supra* note 57, at 396. Implicit in this observation is the fact that courts have been adjudicating on an increasing number of matters, as a result of what has been deemed "rights inflation" — *see* Möller, *supra* note 38, at 3-6.

121 Virgilio Afonso da Silva, *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, 31 Oxford J. Legal Stud. 273, 292-93 (2011). It should be also remarked that issues of epistemic competence of the relevant decision-making bodies, amongst other factors, may also come into play.

122 Raz, *supra* note 117, at 368-69.

123 Raz, *supra* note 74, at 200 and 208; Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. Rev. 335, 336 (2009).

124 Karl Larenz, Methodenlehre Der Rechtswissenchaft [Methodology of Law] 519 (1991); Barry Friedman, *The Politics of Judicial Review*, 84 Tex. L. Rev. 257 (2005).

125 Raz, *supra* note 117, at 369. Concerning the use of various such devices as means to address concerns with the lack of judicial legitimacy and competence to pursue constitutional rights' adjudication, *see* Christopher McCrudden, *The Pluralism of Human Rights' Adjudication,* in Reasoning Rights: Comparative Judicial Engagement 18-27 (Liora Lazarus et al. eds., 2014).

126 Robert Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 1 (1982); Gerald Postema, *Implicit Law*, 13 Law & Phil. 361, 369-371 (1994).

The existence of these shared cognitive frameworks usually goes unremarked because it is unremarkable; it is part of what has been called the "tacit dimension"—propositions and opinions shared by a group and deemed so obvious that they are never fully articulated or systematized.[127] In the cognitive setting common to Western legal traditions, decisions are arrived at through deliberation and analogical reasoning, and presented as relatively redundant, self-evident, incremental extensions of available legal materials. Control of whether the relevant parameters of legal reasoning have been complied with in a legal decision is ensured by the interactive nature of law practice: *ex-ante* because cases are brought and argued before courts by lawyers trained and imbued in the spirit and grammar of a specific legal community; and *ex post* through systems of appeal, and the criticism from an interpretative community that recognizes a number of commonly accepted parameters as authoritative for the correctness of interpretation.[128] In this context, extra-legal considerations are, like background principles and values, mediated through the existent institutional setting and a common culture of legal reasoning. Such culture imposes standards—for example, of consistency and coherence with the contents of the relevant statutes and legal precedents—by which the correctness of legal interpretation is to be judged. Judicial decisions are not valid only because they are issued by a judge, but because they are issued by a judge within a specific setting in a duly reasoned manner which is accepted in the context of a specific legal order.[129]

While recourse to certain modes of legal reasoning can be seen as an advantage for courts over other decision-makers when making the type of value choices inherent to rights' adjudication, such an advantage can come with a cost—an increased perception of judicial interference in political processes, and a focus on the lack of (democratic) legitimacy of courts.[130]

One way to address this is to abandon the pretense that legal reasoning about constitutional rights' can lead to a single right solution. Instead, courts should focus on why they have been chosen to deal with conflicts of constitutional rights, and on the powers that such a choice grants them. Prudential reasons—including local and situation specific reasons—should be brought to the fore and given greater prominence. This should create a sense of judicial humility for rights' adjudicators. Striving for reason but recognizing that subjectivity and discretion play their part, courts should reflect on their—and others'—limitations when adjudication constitutional rights' cases. As Isaiah Berlin noted:

> If there is only one solution to the puzzle, then the only problems are firstly how to find it, then how to realize it, and finally how to convert others to the solution by persuasion or by force. But if this is not so […], then the path is open to empiricism, pluralism, toleration, compromise.[131]

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127 Michael Polanyi & Amartya Sen, The Tacit Dimension (2009).

128 Gerald Postema, *"Protestant" Interpretation and Social Practices*, 72 Law & Phil. 283, 310-312 (1987); Loughlin, *supra* note 27, at 178-80.

129 In other words, judicial adjudication is a device giving formal and institutional expression to reasoned argument; *see* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 366 (1978).

130 Loughlin, *supra* note 7, at 130 (quoting Koskenniemi, *supra* note 3, at 100).

131 Berlin, *supra* note 19, at 98.

V. Conclusion

If one takes value pluralism seriously, one must acknowledge that an objective and universal order of values underpinning constitutional rights either does not exist or is not accessible. Those few values that are globally and consensually accepted as truly fundamental may still be justifiably called "human rights". Even in the context of universally acknowledged human rights, however, much will remain to be settled through appropriate collective decision-making procedures. While these procedures may not require a single necessary outcome to the balancing of constitutional rights, they are not procedures where values and reasons play no role—on the contrary, these are arenas where "weak" forms of reason prevail and where pluralism can flourish.[132]

Given the lack of access to an objective moral order and the absence of purely objective decision-making procedures, constitutional theory can focus on the institutional context in which decisions between incompatible constitutional rights—or, more precisely, between the values underpinning such rights—must be made. The resolution of social disputes through rights' adjudication, and the protection of certain fundamental values enshrined as judicially enforceable rights, is socially acceptable in the Western world because they build on a long intellectual and practical tradition of natural law and subjective rights. However, constitutional rights provide normative grounds that are too weak to ground a sense of community on their own, and are almost always insufficiently concrete to be fully policy-orienting. From a value pluralist perspective, while buying into the fiction of a single good society may seem to provide a way to avoid the tragedy of incompatible and contested goods, this is ultimately a myth. As none other than Rawls noted:

> there is no social world without loss — that is, no social world that does not exclude some ways of life that realize in special ways certain fundamental values. By virtue of its culture and institutions, any society will prove uncongenial to some ways of life.[133]

A further cost of embracing rights' adjudication without acknowledging value pluralism may well be the judicialization and bureaucratization of politics, and the politicization of law. Ignoring that the content of constitutional rights is ultimately socially constructed allows for their instrumentalization in struggles for power by different groups and bodies who claim to have "right" on their side—and who will usually also claim that those who do not share their conception of the "good" are ignorant, ill-informed or just plain evil. Poorly used, constitutional rights can be tools of social fragmentation.

The benefits and costs of rights' adjudication will ultimately need to be balanced on a case-by-case basis. Rights' adjudication is merely one among a plurality of conflict-solving procedures and institutions through which political and social disputes are addressed. Courts may have a role to play in rights' adjudication, but they also have a responsibility to understand the context in which they operate,

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[132] Raz, *supra* note 95, at 155.
[133] Rawls, *supra* note 2, at 265-66.

the humility to allow for the possibility that some questions are best left to other decision-making bodies, and the wisdom to take (most) rights as legal-political argumentative stepping-stones in the exercise of practical reason.

Constitutional rights are ultimately like water—they can adapt to the institutional context in which they are applied, but they can also erode and sculpt that context. Properly deployed, constitutional rights can be sources of vitality and rejuvenation for the institutional recipients into which they are poured. As such, constitutional theory should pay attention to the specific institutional conditions in which constitutional rights can be appropriately deployed—and try to better understand the local conditions under which recourse to constitutional rights can either enliven political life or risk drowning it instead.