# REVISITING EQUITY JURISPRUDENCE IN A COMPARATIVE CONTEXT: LEARNING FROM INDIA'S INTERPRETATIVE FRAMEWORK

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ABSTRACT

*The recent case of Floyd, et al. v. City of New York, et al., raises important questions about the nature and function of judicial equity power. In August 2013, the Honorable Shira Scheindlin ruled that the New York Police Department systematically violated the United States Constitution by engaging in racially discriminatory stop and frisk practices. Accordingly, the court ordered a series of very extensive equitable remedies to address the discriminatory practice, including the appointment of an independent monitor; a specific performance order mandating immediate reforms to stop and frisk practices; a joint remedy and mediation process involving community stakeholders; and an NYPD pilot program implementing the utilization of body-worn cameras by patrol officers. The decision reopened the debate regarding the scope and reach of equity jurisprudence. In the United States, the equity debate has been subject to opposing schools of thought centering on the doctrine of expansive equity and the proper role of remedial power in contemporary legal jurisprudence. When we turn our attention to jurisdictions struggling with similar tensions between the rule of law and the need to remedy systemic inequality, we gain some useful insight into the role of differing epistemological frameworks in creating alternative methods of finding the proper balance. A comparison to the Indian context is particularly useful given the intentionality with which the Supreme Court of India has expanded the equity power to remedy social injustice. The Supreme Court of India has actively expanded its equity jurisprudence to creatively adjudicate and elaborate on fundamental rights. The Supreme Court of India has rejected mechanical rule-bound adjudications, viewing them as a way for judges to insulate themselves from accountability for their decisions and from the social impact of those choices, broadly interpreting*

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*equity jurisprudence. A comparative analysis of equity jurisprudence underscores the importance of interpretation in the construction of legal jurisprudence. While the U.S. Supreme Court's analysis operates largely within a positivist framework, the activism of the Supreme Court of India resonates with feminist legal analysis by prioritizing lived experience over objective abstractions. In other words, the Supreme Court of India frames legal questions in a way that emphasizes the individual and recognizes that judges may use appropriate discretion in crafting equitable remedies for those who face systemic vulnerabilities. Thus, comparative legal analysis offers us pathways to reassess our interpretive priorities.*

## INTRODUCTION

On August 12, 2013, United States District Court Judge for the Southern District of New York, the Honorable Shira A. Scheindlin, held that the City of New York violated the Fourth and Fourteenth Amendments of the United States Constitution by promulgating a "stop and frisk" policy that had a disparate impact on racial minorities.[1] Moreover, the court held that "senior officials in the City and the NYPD were deliberately indifferent" about the effects of this policy, and that these unconstitutional effects were "sufficiently widespread that they had the force of law."[2]

Though this opinion was the subject of considerable press coverage, equally notable was Judge Scheindlin's opinion on the extensive remedies required to address these violations—a remedy that combined the violations found in the *Floyd* case with those found in the related *Ligon* case, which declared that an NYPD policy of frisking, questioning, and in some cases arresting people for trespass outside of certain public buildings violated the Fourth Amendment.[3] Judge Scheindlin ordered the appointment of a monitor to oversee reforms of the NYPD and conduct compliance reviews and a facilitator to help ensure that these reforms were carried out;[4] the revision of training manuals to eliminate racial profiling and other constitutionally impermissible language;[5] the description of all stops by police in their activity logs;[6] the increase of supervision,

1. Floyd v. City of New York, 959 F. Supp. 2d 540, 658 (S.D.N.Y. 2013).
2. *Id.*
3. *Id.*
4. *Id.* at 677–78.
5. *Id.* at 680.
6. *Id.* at 682–83.

monitoring, and discipline of officers involved in stop and frisk activity; the more effective communication of this requirement to the officers ;[7] the requirement that officers wear body cameras to monitor their activity;[8] and, perhaps most significantly, the implementation of a "joint remedial process" under which members of the NYPD would meet with a number of interested community organizations and hold town hall meetings with citizens in the effected areas to try to facilitate community healing.[9]

The breadth of Judge Scheindlin's findings and her remedies were the subject of nearly immediate debate, both in the popular press and among legal scholars.[10] The sweep of the decision, Lawrence Rosenthal claimed, imposed such a burden that it essentially created a "federal judge-run NYPD" that would simply keep police officers from enforcing the law at all, forcing them to "stay in the doughnut shops."[11] The controversy continued in October 2013 when a three-judge panel of the United States Court of Appeals for the Second Circuit stayed Judge Scheindlin's order.[12] The panel found that Judge Scheindlin, in statements pertaining to a related matter, had "run afoul" of two of the canons of the Code of Conduct for United States Judges by improperly encouraging the plaintiffs to initiate a lawsuit and by improperly defending herself in the media in response to the intense scrutiny that accompanied her rulings.[13]

By 2014, due to a change in political circumstances, the controversy over the *Ligon* and *Floyd* cases had largely subsided. Under the leadership of a new mayor, Bill de Blasio, the City of New York indicated an interest in shelving the appeals and settling the lawsuits over the stop-and-frisk policy.[14] On January 30, 2014, the Acting Corporation Counsel of the City of New York, Jeffrey Friedlander, filed a motion to partially remand the case back to the District Court for this purpose, and on February 21, 2014,

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7. *Id.* at 683–84.
8. *Id.* at 685.
9. *Id.* at 686.
10. *E.g.*, Joseph Goldstein, *Judge Rejects New York's Stop-and-Frisk Policy*, N.Y. TIMES, Aug. 13, 2013, at A1; Tom Howell Jr., *NYC Mayor Bloomberg Staunchly Defends Stop-and-Frisk Program*, WASH. TIMES, Aug. 12, 2013; David Rudovsky, *Debate: The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117 (2013).
11. Rudovsky, *supra* note 10, at 135.
12. Ligon v. City of New York, 2012 WL 2125989 (S.D.N.Y. 2012).
13. In re Reassignment of Cases: Ligon; Floyd et al. v. City of New York et al. 13-3123; 13-3088 (S.D.N.Y. 2013), *available at* https://ccrjustice.org/sites/default/files/assets/2nd%20Cir%20Panel's%2011%2013%202013%20Opinion%20Explaining%2010%2031%202013%20Order%20Removing%20Judge%20Scheindlin.pdf
14. Zachary R. Dowdy, *NYC Stop-and-Frisk Cases Back in District Court*, NEWSDAY, Feb. 21, 2014; *see also* Emily Chiang, *Reviving the Declaratory Judgment: A New Path to Structural Reform*, 63 BUFF. L. REV. 549, 605–06 (noting that DeBlasio's election rendered stop-and-frisk moot).

the Second Circuit Court of Appeals agreed, releasing the stay and remanding the case back to the District Court.[15] On April 3, 2014, the City of New York and the plaintiffs in the *Floyd* and *Ligon* cases came to the mutual agreement that Judge Scheindlin's Remedial Order would be accepted so long as the Court-appointed monitor could be appointed for a limited three-year term, rather than serving indefinitely until all violations had ceased, as was called for in Judge Scheindlin's original order.[16] On July 30, 2014, Judge Analisa Torres, who had been randomly selected by the Second Circuit to replace the removed Judge Scheindlin, denied a motion to intervene to stop the settlement between the city and the plaintiffs from going forward, a motion that was filed on behalf of the New York City Police Unions. Judge Torres found that the Police Union lacked standing and that their motion was not timely.[17]

Though the *Ligon* and *Floyd* cases may have fallen out of the headlines, the months of intense scrutiny served to highlight the debate on the role of equitable remedies and the nature and limits of the power of the federal courts. In the United States, this debate has centered on the depth and scope of the remedial powers within the historical and contemporary understandings of equity jurisprudence.[18] The jurisdiction conferred on the federal courts to entertain suits in equity is derived from the English Court of Chancery and associated with "higher notions of justice and the chancellor's conscience."[19] Both historical and contemporary

15. Declaration in Support of Motion for Limited Remand to the District Court for the Purpose of Exploring a Resolution at 1, Ligon v. City of New York, 743 F.3d 362 (2d Cir. 2014) (No. 13-03442); Ligon v. City of New York, 743 F.3d 362, 364 (2d Cir. 2014).

16. Memorandum of Law in Support of Motion for Modification of Remedial Order at 1, Floyd v. City of New York, 959 F. Supp. 2d 668 (S.D.N.Y 2013) (No. 1:08-cv-01034), *available at* https://ccrjustice.org/sites/default/files/assets/4-3-14%20Floyd%20-%20Joint%20Mem%20of%20 Law .pdf.

17. Floyd v. City of New York, No. 08 Civ. 1034 (AT), 2 (S.D.N.Y. 2014), *available at* https://ccrjustice.org/sites/default/files/assets/Floyd%20v%20City%20of%20New%20York%20-%20 July%2030%202014%20Opinion%20and%20Order.pdf.

18. Martha S. Berzon, *Madison Lecture: Securing Fragile Foundations: Affirmative Constitutional Adjudication in Federal Courts*, 84 N.Y.U. L. REV. 681, 718 (2009) (arguing that the judiciary should have the power to decide appropriate remedies in constitutional cases, but should exercise this power carefully); Missouri v. Jenkins, 515 U Günter Frankenberg, *Stranger than Paradise: Identity & Politics of Comparative Law*, 1997 UTAH L. REV. 259, 265 (1997); John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of Federal Courts*, 84 CALIF. L. REV. 1121, 1123 (1996) (arguing that broad remedial powers are not in keeping with the principle of judicial restraint and violate Article III of the U.S. Constitution); Frank Askin, *Two Visions of Justice: Federal Courts at the Crossroads*, 11 ST. JOHN'S J. C.R. & ECON. DEV. 1, 4–5 (1995) (criticizing conservative arguments against equity power as misunderstanding the historical development of remedial powers).

19. Kristin Collins, *"A Considerable Surgical Operation": Article III, Equity, and Judge-made Law in the Federal Courts*, 60 DUKE L.J. 249, 266 (2010).

understandings of federal equity jurisprudence refer to "a set of rights, remedies, and procedures available ostensibly to ameliorate defects of the common law."[20] Equitable remedies were not traditionally available if there were an adequate remedy at law. However, remedies such as specific performance, injunctions, and accountings filled the gaps for which substantive common law failed to account.[21]

In connection with the redress of policies of discrimination, the contemporary debate on equity power is connected to a long history of efforts by the U.S. Supreme Court to enforce its desegregation rulings. Moreover, the limits and extent of the remedial power continue to be issues that divide the Court. On the one hand, federal equity powers are claimed to be jurisdictional powers that are limited "to those which would remedy a constitutional violation—nothing further."[22] On the other hand, they have also been held to "reflect equitable common sense."[23] While the debate continues, the trend is clear: the Supreme Court of the United States ("U.S. Supreme Court") has gradually restricted the use of equity powers to redress racial discrimination since the zenith of their use in the 1960s and 1970s. While the federal courts, pursuant to a more expansive approach to equitable remedies, may have crafted extensive and interventionist remedies, they were ultimately applied to an institutional practice that was narrow in scope. The Court used equity power to either end the *de jure* aspects of a constitutional violation or to restore the members of a class to the same position they would have held absent the constitutional violation.[24] When looking at recent majority opinions on equitable remedies, "one could reasonably conclude" that expansive federal equity power "has ceased to exist."[25] Regardless of the scope of equitable powers in United States jurisprudence, one thing remains clear: the general trend and permissible use of the U.S. Supreme Court's equity power has been understood to be limited to individualistic and aberrant transgressions, often carried out by the state, as a solution to the resulting inequity. This epistemological position does not account for the broader

20. *Id*.

21. Richard Maloy, *Expansive Equity Jurisprudence: A Court Divided*, 40 SUFFOLK U. L. REV. 641, 642 (2007) (quoting Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 920 (1987)); Askin, *supra* note 18, at 7–9 (discussing the need for broad remedial equity powers to enforce basic constitutional rights).

22. Maloy, *supra* note 21, at 643.

23. *Id*. at 645.

24. *See* Yoo, *supra* note 18, at 1127.

25. Maloy, *supra* note 21, at 642.

systemic and societal components constitutive of an underlying structural inequality.

When the U.S. Supreme Court's hesitance to use equity power is examined in comparative perspective, its resistance contrasts markedly with the liberal use of the equity power in other countries. This paper argues that the Supreme Court of India's generally more aggressive use of equity powers than the U.S. Supreme Court reflects its different historical and epistemological framework, which has allowed the Supreme Court of India to address systemic issues by implementing equity jurisprudence in an intentional and determined fashion. I contend that the main cause of the Supreme Court of India's willingness, even eagerness, to use equity powers, and of the U.S. Supreme Court's increasing hesitance to do so, lies not just in different constitutional structures or even in their different historical experiences, but rather in fundamental differences in epistemology and interpretation. In other words, these courts have different views about what the fundamental role of courts is in their respective societies. They also differ in their methods for adjudicating cases. The United States tends to subsume particular facts of cases of widespread discrimination and injustice into prefigured, abstract normative interpretations, in a way that rationalizes the injustice by elevating it to a level of formal theory, which insulates the court from accountability for the practical effects of their decisions.[26] On the other hand, the Supreme Court of India tends to reject this mechanistic application of broad legal principles to each case, instead attempting to fit remedies to the particular situations arising among individuals, reflecting their view that the Constitution of India "contains a positive grant of power to the government to take steps to eliminate inequality."[27] Because of this, the Supreme Court of India has embraced equity jurisprudence, so that "some of the most forward-looking reforms of the recent era emanated from the Supreme Court rather than the national or state legislatures."[28] Fundamentally, these observations demonstrate that comparative legal

26. Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 177–78 (1990); Richard Delgado, *Shadowboxing: An Essay on Power*, 77 CORNELL L. REV. 813, 820 (1992).

27. Eileen Kaufman, *Women and Law: A Comparative Analysis of the United States and Indian Supreme Courts' Equality Jurisprudence*, 34 GA. J. INT'L & COMP. L. 558, 617 (2006) (arguing that in the context of sex discrimination and violence against women, the Supreme Court of India is willing to consider activist remedies for gender inequality). *See also* S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 29 (2001) (arguing that the Supreme Court of India's activism should be understood in the context of the Indian political and cultural history).

28. Daniel Aguilar, *Groundwater Reform in India: An Equity and Sustainability Issue*, 46 TEX. INT'L L.J. 623, 631 (2011) (commenting on the breadth of equity jurisprudence in environmental and groundwater contexts).

analysis needs to consider epistemological positions, social attitudes, cultural norms, and historical contexts in making comparisons rather than relying on textual interpretation alone. This principle holds especially true when the object of comparison itself is the judicial remedy established to address pervasive and entrenched social problems, as is the case with equitable remedy jurisprudence.

## I. CRITICAL COMPARISON AND THE CASE FOR MULTI-PERSPECTIVAL EPISTEMOLOGY

While the U.S. Supreme Court's analysis operates largely within a positivist framework, the activism of the Supreme Court of India resonates with feminist legal analysis by prioritizing lived experience over objective abstractions.[29] In other words, when the Supreme Court of India frames legal questions in a way that emphasizes the circumstances of each individual case, they recognize that judges may use appropriate discretion in crafting equitable remedies for those who face systemic vulnerabilities.

Although there is neither a universal nor a clearly demarcated dichotomy between the two systems, since both at times operate within a positivist framework, and since individual judges at times employ remedies that may not fit squarely within a broader legal trajectory (as seen in the *Floyd* decision), analyzing the epistemological approaches that the Supreme Courts in both India and the United States have at times taken with regard to equitable remedies provides a useful comparative perspective on the constitutional jurisprudence of both traditions. Because epistemology shapes the rationale and justification that courts provide for their remedial power, a comparative legal analysis offers us pathways to reassess our interpretive priorities.[30] While the contours and autonomy of

29. For a discussion of feminist legal methods, *see* Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829. On the application of feminist legal methods and other social criticisms into normative jurisprudence, *see* Balakrishnan Rajagopal, *International Law and Social Movements: Challenges of Theorizing Resistance*, 41 COLUM J. TRANSNAT'L L. 397, 403–04 (2003) (arguing that that critical race theorists and feminists in the United States and transnational and comparative social theorists of law in Europe share criticisms of the "technocratic-rational model of law").

30. Dana Raigrodski, *What Can Comparative Legal Studies Learn from Feminist Legal Theories in the Era of Globalization*, 43 U. BALTIMORE L. REV. 349, 382 (2014) (arguing that an epistemology of objectivity should be replaced with a "concrete, experience-based, multi-perspectival epistemology"); Ann Scales, *The Emergence of Feminist Jurisprudence*, 95 YALE L.J. 1373, 1402 (1986) (suggesting that legal objectivity is flawed insofar as it applies "the tried and true scientific strategy of treating non-conforming evidence as mistaken," but that this dilemma can be overcome without resorting to a nihilistic rejection of reliable principles of law); Eric Engle, *Knight's Gambit to Fool's Mate: Beyond Legal Realism*, 41 VAL. U. L. REV. 1633, 1682–83 (2007) (suggesting that the

comparative law continue to be debated,[31] "[u]nderstanding is one of comparative law's main purposes."[32] Comparative scholarship attempts to understand the nature of law and legal change in varying contexts.[33] Comparative law offers a new dimension from which one can learn distinct jurisprudential approaches to common legal problems and reconsider their own methodological approach as applied in a local context.[34] Mary Ann Glendon suggests that a significant contribution of comparativist work is the ability to navigate between local and universal principles. "Indeed, the comparativists skill in mediating between the universal and the particular" may be the greatest service they can offer to legal discourse and pedagogy.[35] Comparative law "has the paradoxical capacity to deepen our understanding and appreciation of the particularities of legal traditions while at the same time helping us transcend their differences by relating them to one another."[36]

Comparative law can help debunk the myth that reason can help us derive universally applicable rules by presenting legal traditions, including universalized discourses such as international human rights law, as simply one of many options in a continuum of legal choices rather than an a contextual set of norms.[37] Pierre Legrand has noted that all law is a

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failure of both legal realism and critical legal studies has been an inability to develop a new epistemology that does not rely on dualism or on philosophical idealism).

31. *See* David Kennedy, *The Methods and the Politics*, *in* COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS 345, 347–48 (Pierre LeGrande & Rodderick Mundy eds., 2003) (arguing that practitioners of Comparative Law have struggled to define it in the absence of a clear political project); Mathias Reimann, *The End of Comparative Law as an Autonomous Subject*, 11 TUL. EUR. & CIV. L.F. 49, 54 (1996) (arguing that is difficult to identify the purported goal of comparative law "because it claims to be about a plethora of different things at the same time").

32. Hiram Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1070 (1999). *See also* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 170 (1991) (arguing that the insularity from global perspectives on issues such as fundamental rights prevents one from learning from the successes and failures of others).

33. Chodosh, s*upra* note 32.

34. Jaakko Husa, *Turning the Curriculum Upside Down: Comparative Law as an Educational Tool for Constructing the Pluralistic Legal Mind*, 10 GERMAN L.J. 913, 915 (2009) (citing KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (3d ed. 1998)).

35. Mary Ann Glendon, *Comparative Law in the Age of Globalization*, 52 DUQ. L. REV. 1, 24 (2014).

36. Paolo Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1236 (1998) (discussing the application of comparative analysis in the human rights jurisprudence of the European Court of Human Rights).

37. *Id.*; *see also* Paolo D. Carozza, *Continuity and Rupture in "New Approaches to Comparative Law"*, 1997 UTAH L. REV. 657, 663 (1997) (suggesting that even in more traditional conceptions of comparative law, "the value of comparative methods has always been in forcing us into sympathetic yet critical knowledge of law in another context, thereby disrupting our settled understandings,

"cultural phenomenon." If this were the case, as Legrand argues, then the job of comparativists is not just to comprehend the laws in question but to understand "the historical, social, economic, political, cultural, and psychological context," which has made legal propositions what they are.[38] The field of comparative law has already moved beyond rudimentary understandings of differential systems. In particular, comparative jurisprudence "has learned to look beyond a notion of legal systems as static and isolated entities" and to recognize the constitutive nature of legal practice and local culture.[39]

However, comparative legal scholars always run the risk of essentializing culturally embedded prescriptive rules under a veil of neutrality.[40] Consequently, critical comparativists see comparative law as entrenched in false dichotomies that are perceived to be objective.[41] Comparisons between the common and civil law tradition, self and other, or Western and non-Western approaches, essentialize classifications that are simply constructs of legal discourse.[42] Comparisons between laws tend to presume that language is transparent and is not altered when placed in a different sociocultural context. They fail, therefore, to "treat rules as actively constituted through the life of interpretive communities."[43] Instead, a more useful and productive comparative methodology requires an abandonment of essentialist claims of authenticity in favor of a recognition of alternative approaches to legal interpretation and decision-making.[44] Rather than entrenching constructed taxonomies, the goal of

provoking us to new judgments, and demanding our response with new decisions, commitments, and actions.").

38. Pierre Legrand, *How to Compare Now*, 16 LEGAL STUD. 232, 236 (1996). Legrand ultimately believes that these differences in cultural norms make laws incommensurable and impervious to comparison, leading his method of comparative law to be more like a methodology of contrastive law. Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 BROOKLYN J. INT'L L. 405, 431 (2007). Nevertheless, his work points to the capacities of comparativists to move beyond the "shortcomings of functionalist studies." *Id.* at 432.

39. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 677–78 (2002).

40. Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411 (1985) (criticizing "comparative legal scholarship's faith in an objectivity that allows culturally biased perspectives to be represented as 'neutral.'").

41. Omri Marian, *The Discursive Failure in Comparative Tax Law*, 56 AM. J. COMP. L. 415, 435 (2010).

42. *Id* at 436.

43. Pierre Legrand, *What Legal Transplants?*, *in* 7 ADAPTING LEGAL CULTURES 54 (David Nelkin and Johannes Feast eds, 2001).

44. Günter Frankenberg, *Stranger than Paradise: Identity & Politics of Comparative Law*, 1997 UTAH L. REV. 259, 265 (1997) (suggesting that traditional approaches to international law are paternalistic and "as much about authority and politics" as they are about intellectual pursuit); Carozza, *supra* note 37, at 663 (suggesting that even in more traditional conceptions of comparative

critical comparison is to expose the aporias of mainstream comparative law and to "suggest alternative discursive agendas."[45] In providing a more useful comparative methodology, Gunter Frankenberg identifies discursive revelations and transformations as the key to understanding different legal systems. In particular, Frankenberg suggests a three-tiered approach to comparative methodology. First, one must reflect upon the legal and non-legal (social, political, psychological, moral) dimensions of a particular jurisprudence and conceptualize the ways in which it has been fitted into a given legal framework. Second, critical comparison must deconstruct the process of legal decision making by extracting from beneath the claims of legal rationality competing political visions and contradictory norms. Finally, one must "re-introduce what the legal discourse" has ignored or marginalized.[46] Frankenberg describes the rhetorical practice of self-critically reflecting, deconstructing and reorienting discourse as the most useful methodology for comparative analysis.[47] The central tenet of such an interpretive model presumes an ability on the part of the author (and reader) to reconsider a particular epistemology. Frankenberg suggests that comparative scholars treat comparative analysis as a process of study whereby they can demystify the false dichotomies that a functionalist comparison presupposes and reconsider their own preconceptions about a given legal system.[48]

Of course, one of the main limitations of comparative study is that, while it may critically compare specific aspects of a particular legal question, it often fails to challenge the epistemology of a dominant discourse.[49] The danger in perpetuating artificial comparisons is the likelihood that such analysis simply perpetuates a hegemony of legal understanding and fails to get the reader, or the author, to the *productive* potential of critical comparison, which results from a reorientation of the underlying epistemology of a given legal discourse. In order to achieve the kind of transformative understanding that comparative analysis often seeks, one must be provided with the tools to reorient the preconceived

law, "the value of comparative methods has always been in forcing us into sympathetic yet critical knowledge of law in another context, thereby disrupting our settled understandings, provoking us to new judgments, and demanding our response with new decisions, commitments, and actions.").

45. Omri Y. Marian, *Meaningless Comparisons: Corporate Tax Reform Discourse in the United States*, 32 VA. TAX REV. 133, 140 (2012).

46. Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L. L. J. 411, 452 (1985).

47. *Id.* at 441–43.

48. Brand, *supra* note 38, at 433.

49. Husa, *supra* note 34, at 918 ("Grand theories of comparative legal science or comparative legal studies do not change the prior epistemic embedding that has already taken place.").

legal narratives that are rooted in a particular epistemology.[50] The revelation of an underlying discursive structure provides individuals with the ability to recognize and thereby reorient entrenched presumptions.[51] The value of comparative analysis, therefore, is derived not only from the implementation of a relative metric for assessing two or more disparate systems, but also from the interpretative ability of a critical and disruptive linguistic analysis to reveal textual aporias and grapple with alternative approaches to jurisprudence.[52] Ultimately, the *process* of engaging with alternative methodologies is itself useful in getting one to peer beyond their own underlying epistemological assumptions.[53]

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50. *Cf*. *id*. at 922 (explaining that a constructivist approach to education enables students to reorient their own understanding of legal principles by providing them with the tools to select and transform information).

51. *See* MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972–1977 122–23 (Colin Gordon eds., Colin Gordon et al. trans., 1980); Michel Foucault, *Human Nature: Justice versus Power*, CHOMSKY.INFO, http://www.chomsky.info/debates/1971xxxx.htm (last visited Oct. 12, 2015) ("It seems to me that the real political task in a society such as ours is to criticize the workings of institutions, which appear to be both neutral and independent; to criticize and attack them in such a manner that the political violence which has always exercised itself obscurely through them will be unmasked, so that one can fight against them. This critique and this fight seem essential to me for different reasons: firstly, because political power goes much deeper than one suspects; there are centers and invisible, little-known points of support; its true resistance, its true solidity is perhaps where one doesn't expect it. Probably it's insufficient to say that behind the governments, behind the apparatus of the State, there is the dominant class; one must locate the point of activity, the places and forms in which its domination is exercised. And because this domination is not simply the expression in political terms of economic exploitation, it is its instrument and, to a large extent, the condition which makes it possible; the suppression of the one is achieved through the exhaustive discernment of the other. Well, if one fails to recognize these points of support of class power, one risks allowing them to continue to exist; and to see this class power reconstitute itself even after an apparent revolutionary process").

52. Fiona Sampson, *Heidegger and the Aporia: Translation and Cultural Authenticity*, 9 CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 527, 533 (2006) (arguing that in terms of language orientation, an indigenous encounter with an "other" unveils an aporia in that "threat posed by such Other-ness is its revelation that there is an alternative narrative as sustainable as one's own.

53. BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE 237 (2002) (calling for a "new historical epistemology of need and difference"). It bears noting that the risk for any author making this claim is that they inevitably reproduce their own inquiry as an essentialized discourse. *See* Hiram Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1104 (1999) ("Those who explicitly object to single feature theories often fall into the trap of employing them."). However, the recognition of some potential bias in any method of inquiry itself provides some, even if limited, transparency in the end of the knowledge production, thereby allowing readers to assess the value of the alternative methodological means being discussed. *Cf*. GIORGIO AGAMBEN, STATE OF EXCEPTION 29–30 (Kevin Attell trans., 2008) (arguing that the state of exception, whereby legal rules are disrupted as a matter of oppressive governance, has become the norm in the contemporary politics, and requires a process of reorientation whereby the aporias of the domestic sphere and political sphere are deconstructed and reimagined through a politics of means that focuses on the process of open communication); JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION VOLUME 2 1–4, 44–45, 390–392 (Thomas McCarthy trans., 1987) (arguing that communicative action is a process-oriented, means-based exercise, which can be distinguished

In the context of equitable remedies, in light of the decision in *Floyd*, the most important question may be: which interpretation best remedies the systemic vulnerabilities facing certain groups or classes of individuals and creates lasting social change in accordance with legal mandates? To answer this question, this article considers the ways in which the United States Supreme Court has limited equitable remedies for alleviating systematic discrimination. This article locates the turning point against the use of equitable powers in *Milliken v. Bradley* (1974)[54] and traces the reasons for this decline to the United States Supreme Court's increasing discomfort with being directly involved in major social transformations in such cases as *Missouri v. Jenkins* (1995).[55] Next, it will contrast the Court's reticence with the sweeping rulings of the Supreme Court of India in such cases as *Maneka Gandhi v. Union of India* (1978) and *People's Union for Civil Liberties v. Union of India* (2001).[56] It will then conclude by examining the historical orientation of both the United States and Indian Constitutions in order to demonstrate that the theoretical framework informing the process of constitutional drafting created varying epistemologies that served as the foundations for the equity jurisprudence constructed by their respective Supreme Courts.

## II. U.S. JURISPRUDENCE: THE LIMITS OF REMEDIAL MEASURES IN A POSITIVIST LEGAL MODEL

The context in which the debate on equitable remedies is taking place demonstrates the limits of the positivist model in fashioning remedies necessary to address systemic violations of fundamental constitutional rights provisions. While scholars have discussed equitable powers as an aspirational goal, there has been less attention paid to the epistemological underpinnings of such an approach in the United States or in a comparative context. For example, Kent Roach, in distinguishing between the structural limitation inherent in a corrective theory of remedies and the transformative *potential* of equitable remedies, does not explain the Supreme Court's general reluctance to *employ* equitable remedies in the broad and aspirational fashion he suggests. Moreover, his approach does not account for the Supreme Court's more recent jurisprudence narrowing

from the goal-orientation of other forms of action, such as instrumental action, and provides the ability to reflect upon language and its underlying propositional and normative claims).

54. Milliken v. Bradley, 418 U.S. 717 (1974).

55. *See, e.g.*, Missouri v. Jenkins, 515 U.S. 70 (1995).

56. *E.g.*, Maneka Gandhi v. Union of India, 1978 AIR 597, 1978 SCR (2) 621 (1978).

the scope of equity power by limiting it to specific constitutional violations.[57] Though he cites certain instances in which the Supreme Court grapples with the notion of breaking away from the principle of corrective action, he notes that these instances do not "place enough weight on the interests of the plaintiffs," and that the Court has generally paid "rhetorical adherence to corrective principles."[58] This remedial approach depends largely on a causal link between governmental conduct and the resulting harm, making it "difficult to justify remedies that respond to the needs of the plaintiffs and the opportunities for reform, but cannot be deduced from the violation of the constitutional rights at stake, or perhaps even expressed in the language of rights."[59] Both the U.S. Supreme Court's reticence in employing extensive equitable measures and Justice Thomas's claim that the framers of the Constitution did not intend for the Courts to have such broad jurisdiction require explanation. To analyze these, we must turn to jurisprudential and epistemological considerations, which can then be contrasted with alternative approaches that implement equitable remedies in the aspirational form suggested, and for the purpose of effecting extensive social reform.

The U.S. Supreme Court's decisions to limit equity power find their justification in positivism. Positivist legal theory is grounded in the possibility of "describing law as it is, while legal formalism presumes that there is an objective solution to legally-defined disputes."[60] In legal positivism, in other words, a norm is valid as a norm of that system solely by virtue of the fact that at some relevant time and place some relevant agent or agents announced it, practiced it, invoked it, enforced it, endorsed it, or otherwise engaged with it. It is no objection to its counting as a law

57. Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859 (1991); *Missouri*, 515 U.S. at 92–93 (noting that equitable remedy cannot go beyond constitutional violation it attempts to redress).

58. Roach, *supra* note 57, at 882–83. *See also* Paul Gertz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 729–32 (1986) (discussing the corrective aspiration of judicial remedies for violations of equal protection and remedies for unlawful school segregation, which narrowly furnish "remedies for identified acts of discrimination").

59. *Id*. at 861.

60. Margaret Davies & Nan Seuffert, *Knowledge, Identity, and the Politics of Law*, 11 HASTINGS WOMEN'S L.J. 259, 266 (2000); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 955 (1987) (suggesting that legal formalism assumes a "rationality of law" which "lies in a moral order immanent to legal material" so that "formalism postulates that juridical content can somehow sustain itself from within"); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 359 (1973) (suggesting that legal formality is a mechanical application of rules in which a judge "resolutely limits itself to those aspects of the situation which, *per se*, trigger his response").

that it was an appalling norm that those agents should never have applied.[61]

Thus, according to a positivist framework, legal norms are valid insofar as they refer to laws that have been implemented. A correlation to this observation is that laws have clearly interpretable meaning. Because the positivist model presupposes systemic validity, it fashions a remedy based on correcting procedural inadequacies. Such a model fails to account for the normative consequences of a social system in which inequalities are endemic and internalized.[62] Moreover, legal formalism presumes that the process of legal decision-making eclipses any further normative considerations of the resulting rule. Both models presume that inequity results from irrationalities within the procedural structure of the legal system, rather than viewing the legal system as operating within larger systems of inequality. Instead of centering on the remedial practices necessary to ensure that plaintiff's interests have been vindicated, the U.S. Supreme Court has limited its equity jurisprudence to an institutional responsibility to correct acts that resulted in the constitutional infringement.[63]

The solution to a case of discrimination for positivists is to alter procedural guarantees provided by the legal system, not to alter the nature of the system itself.[64] However, this model fails to account for the experience of vulnerability and further does not incorporate the remedial methods that use external social actors who either contribute to, or are constitutive of, the underlying structural inequality. Because the dominant understanding of remedies in American constitutional jurisprudence is that remedies are designed to correct a harm that the state or state actors have inflicted upon individuals, plaintiffs must generally establish a causal connection between the act and the resulting harm. "A sense of unease and

61. John Gardner, *Legal Positivism: 5 ½ Myths*, 46 AM. J. JURIS. 199, 200 (2001).

62. RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 7 (2001) (discussing the basic tenets of critical legal studies, including the notion that "racism is ordinary" and "difficult to cure or address"); Nicole Gonzalez, Van Cleve & Lauren Mayes, *Criminal Justice through 'Colorblind' Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 LAW & SOC. INQUIRY 406, 412 (2015) (discussing how "colorblind ideology is institutionalized in the law through a narrowing legal definition of racism In the fields of international and comparative law, *see* Peter Halewood, *Conceptualizing Violence: Present and Future Developments in International Law: Violence and the International Word*, 60 ALB. L. REV. 565, 569 (1997) (discussing critiques of legal positivism from the standpoint of feminist international legal theory and of critiques of statism).

63. Susan Poser, *Termination of Desegregation Decrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 323–24 (2002).

64. *See* Davies & Seuffert, *supra* note 60, at 266–67 (suggesting that "internal criticism" of the existing system is acceptable within legal formalism, while challenges to "legal objectivity" are not).

illegitimacy surrounds remedies which are not tailored to identified violations."[65] In the positivist model, a court's willingness to act to remedy an inequity is based on their recognition that the procedure outlined to protect vulnerable groups has been improperly applied to a given context.[66] However, pursuant to an alternative legal epistemology, such as that implemented by the Supreme Court of India, the court first recognizes that some act of injustice, often based on governmental policy, has created a particular kind of vulnerability and the experience of imbalance, for which it then fashions a remedy to address the inequality.[67]

It is important to note that the epistemological approach taken by the Supreme Court of India can be distinguished from a broad interpretive approach sometimes taken by the U.S. Supreme Court.[68] While broad constructionism in the United States certainly fashions a greater remedy beyond a narrow reading of a given constitutional provision, by accounting for the context and contemporary application of the fundamental constitutional principle, the epistemology does not go beyond the presumptions that limits the positivist model. In other words, even in a case like *Brown v. Board of Education*, in which the U.S. Supreme Court issued a second opinion regarding the appropriate remedial measures for school desegregation, the Court designed equitable remedies based on the presumption that the *de jure* segregation was an aberration of the equal protection doctrine and the root cause of the experience of inferiority. Accordingly, the legal remedy of non-discrimination policies presumed that the irrationalities of the system are based on an improper understanding of an otherwise available legal remedy, not that the system itself must be altered to address the impact of the constitutional violation.

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65. Roach, *supra* note 57, at 898.

66. Kelly D. Hine, *Comment: The Rule of Law Is Dead, Long Live the Rule: An Essay on Legal Rules, Equitable Standards, and the Debate Over Judicial Discretion*, 50 SMU L. REV. 1769, 1779 (arguing that positivism, formalism, realism, and moralism represent logically distinct elements in the development of equitable remedies).

67. Manoj Mate, *The Rise of Judicial Governance in The Supreme Court of India*, 33 B.U. INT'L L.J. 169, 180 (discussing the ways in which the Supreme Court of India "expanded the scope of its equitable and remedial power in a series of human rights cases that it decided during the late 1970s and early 1980s" and how public interest legislation was actively solicited by the court as part of this process).

68. *See* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION 24 (Jack Balkin et al. eds., 2002) (arguing that *Brown I* changed the kinds of arguments that constitutions and politicians could plausibly make).

## III. THE GRADUAL NARROWING OF EQUITABLE REMEDIES BY THE UNITED STATES SUPREME COURT

In 1954, the U.S. Supreme Court famously ruled in *Brown v. Board of Education* that "separate educational facilities are inherently unequal" and that segregating public school students by race was therefore a violation of the Fourteenth Amendment's Equal Protection Clause.[69] As a result of this decision, the U.S. Supreme Court needed to shape broad measures of equitable relief for desegregation, an issue that they took up in a reargument of the *Brown* case to determine remedial measures in 1955 (popularly known as *Brown II*). In that decision, the U.S. Supreme Court explicated a clear philosophy in favor of producing active and localized remedial measures. Chief Justice Earl Warren, writing for the U.S. Supreme Court, made clear that "in fashioning and effectuating the decrees, the courts will be guided by equitable principles."[70] He therefore directed local courts of equity to make decisions to carry out desegregation that would be "characterized by a practical flexibility."[71] Depending on the particular local situation, Chief Justice Warren specified that the remedial measures could be quite extensive depending on the practical conditions involved, such as: problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools, on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems.[72]

Fundamentally, the Warren Court's remedies were premised on the notion that broad-based structural reforms to society would be necessary to uproot segregation by "root and branch" and that the Supreme Court would defer to district courts in crafting remedies that were appropriate to each specific situation.[73] However, epistemologically, a review of *Brown II* reveals that the district court's remedial power rested with the institutional dimensions of racial discrimination, including problems associated with school administration and revision of local laws and policies related to the institutional violation.[74] Therefore, even an approach

69. Brown v. Bd. of Educ. (Brown I), 347 U.S. 483, 495 (1954).
70. Brown v. Bd. of Educ. of Topeka (Brown II), 349 U.S. 294, 300 (1955).
71. *Id.*
72. *Id.* at 300–01.
73. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2–3 (1979).
74. *See Brown II*, 349 U.S. at 300–01 ("To that end, the courts may consider problems related to administration [of school districts]. They will also consider the adequacy of any plans the defendants

considered to represent a broad structural reform was limited to the administrative and institutional transgressions that constituted the constitutional violation. In fact, in subsequent decisions, courts have held that "*Brown I* did not require public schools to be racially integrated, but only prohibited school districts from engaging in intentional discrimination in the school admissions process."[75] The fact that *Brown I* did not offer any immediate relief shows the limited extent to which the decision took into account the actual and immediate experience of subordination among segregated students.[76] Moreover, despite the "symbolic effect" that *Brown I* had "as a matter of phenomenology," *Brown II* failed to even provide any specific relief order.[77]

While in the two decades following *Brown* the U.S. Supreme Court's remedial powers were seen as having provided the basis for some substantial integration of the schools and the proliferation of non-discrimination provisions, those remedies were based on the removal of institutional barriers to discrimination.[78] Moreover, critiques of the remedial jurisdiction are not based on claims that such interventions have resulted in a drastic reorientation of the remedial power or the reordering of a social structure that systematically reproduces constitutional violations, but rather on the basis of federal overreach and intervention in matters of local concern, overriding the autonomy of local institutions, and depriving them of decision-making authority.[79] Linguistically, even broad remedial actions in the United States, such as those in *Brown II*, do not transform the discursive structure of remedial power inherent in the positivist model, as they rely on facially neutral terminology to achieve

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may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.").

75. Reginald Oh, *Race Jurisprudence and the Supreme Court: Where Do We Go From Here?: Discrimination and Distrust: A Critical Linguistic Analysis of the Discrimination Concept*, 7 U. PA. J. CONST. L. 837, 853 (2005) (referring to Briggs v. Elliot, 132 F. Supp. 776 (E.D.S.C. 1955)).

76. Roy L. Brooks, *Brown v. Board of Education Fifty Years Later: A Critical Race Theory Perspective*, 47 HOW. L.J. 581, 601 (2004) (arguing that the remedies in *Brown* fail to take culture and value systems into account).

77. Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, WIS. L. REV. 627, 636–38 (1993).

78. J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978 66 (1981); Mark C. Rahdert, *Obstacles and Wrong Turns on the Road from Brown*: *Milliken v. Bradley and the Quest for Racial Diversity in Education*, 13 TEMP. POL. & CIV. RTS. L. REV. 785 (2004) (arguing that in the decades after *Brown*, "our society made substantial progress in eliminating from the law most overt forms of racial discrimination").

79. *See* Yoo, *supra* note 18, at 1176 (citing the Court's rationale in Lewis v. Casey, 516 U.S. 804 (1996), which criticized the lower court for: (1) failing to defer to prison authorities in deciding how to guard prisoners; (2) enmeshing the judiciary in minute details of institutional design; and (3) failing to allow the state institutions an opportunity to participate in the decision-making process).

results. In fact, the Supreme Court shifted its rhetoric of integration in *Brown I* to one of "non-discrimination" in *Brown II*, precisely to "slow down the move toward actual integration of schools."[80] This linguist shift "allowed the [Supreme] Court to contend that racial segregation is unconstitutional because laws requiring and enforcing it were 'activated by bias and prejudice, and thus for that reason alone . . . violat[ive of] the Constitution.'"[81] Accordingly, the facially neutral remedy of non-discrimination would be understood to have been achieved when whites and blacks were afforded an equal opportunity to attend the same school, regardless of broader social and cultural factors.[82] Courts no longer needed "to consult the plaintiffs' interests to define the scope of the violation, all they had to do was use the test the [Supreme] Court had established to identify the violation," thus shifting the focus to the "question of what remedy was sufficient to cure the violation."[83]

By the early 1970s, the Burger Court began to pull back from broad remedies for discrimination. In *Swann v. Mecklenburg*, while the Court reaffirmed the constitutionality of broad remedial powers, they also held that remedies must be tailored to a specific constitutional violation.[84] Thus, the Court in *Swann* "candidly acknowledges the interplay of educational and residential segregation, yet steers away from a more comprehensive resolution of the problem of racial segregation."[85] The modest erosion of remedial powers continued in *San Antonio v. Rodriguez* (1973).[86] In that case, the Court ruled that the economic disparities in school funding in San Antonio, Texas did not amount to impermissible discrimination because "to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory."[87] Even as *San Antonio v. Rodriguez* was a harbinger of limited equity jurisprudence in the future, the U.S. Supreme Court's reasoning reflected a structuralist and positivist

80. Oh, *supra* note 75, at 843.

81. *Id.* at 850 (citing ALBERT P. BLAUSTEIN & CLARENCE CLYDE FERGUSON, JR., DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL SEGREGATION CASES 150–53 (1957)).

82. *Id.* at 848–53 (arguing that the emphasis on the word "discrimination" for the subordination of African-Americans in *Brown II* changed the purpose of *Brown I* from integration to non-discrimination, which allowed them to fashion a facially neutral positivist remedy).

83. Poser, *supra* note 63, at 343.

84. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

85. Hayman & Levit, *supra* note 77, at 640–41.

86. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 54–55 (1973).

87. *Id.*

epistemology that saw racial discrimination as an abstract problem to be understood in a vacuum, a perspective that failed to take the actual injuries of inequality into account. As Camille Walsh has noted, the case "was the outcome of legal discourse that did not engage with complex identities" and was specifically "rooted in the fallacious premise of equal protection jurisprudence that only one category of protection could exist at a time."[88]

The Court's crucial retreat from equitable remedies accompanied its decision in *Milliken v. Bradley* (1974). The case concerned a suit alleging that segregation in Detroit schools was a result of "official policies" promulgated by Detroit Public School System officials.[89] At trial, the District Court found that "governmental actions and inaction at all levels, federal, state and local, have combined, with those of private organizations, such as loaning institutions and real estate associations and brokerage firms, to establish and to maintain the pattern of residential segregation throughout the Detroit metropolitan area."[90] Having reached this conclusion, however, the District Court was presented with a conundrum: as a result, in part, of this residential segregation, by 1974 the vast majority of people within the Detroit Metropolitan Area were not white.[91] Accordingly, the District Court required the Detroit Board of Education to submit desegregation plans that encompassed not only the Detroit city limits, but also the larger three-county metropolitan area. On appeal, the Court of Appeals affirmed that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan."[92]

By a 5–4 decision the U.S. Supreme Court reversed, and, in so doing, moved away from the deference to district courts to decide equitable remedies in segregation cases. The Court argued, in language that reminds one of the criticism of Judge Scheindlin's decisions in *Ligon* and Floyd, if such a sweeping remedy were to be implemented:

> [I]t is obvious from the scope of the inter-district remedy itself that absent a complete restructuring of the laws of Michigan relating to school districts the District Court will become first, a *de facto*

88. Camille Walsh, *Erasing Race, Dismissing Class: San Antonio Independent School District v. Rodriguez*, 21 BERKELEY LA RAZA L.J. 133, 134 (2011).

89. Milliken v. Bradley, 418 U.S. 717, 723 (1974).

90. *Id.* at 724.

91. Reynolds Farley, *Population Trends and School Segregation in the Detroit Metropolitan Area*, 21 WAYNE L. REV. 867, 870–71 (1974).

92. Milliken v. Bradley, 418 U.S. 717, 735 (1974).

> "legislative authority" to resolve these complex questions, and then the "school superintendent" for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.[93]

The decision went on to explain that the remedy was beyond the scope of the violation, violated principles of local autonomy in school control, and engaged in improper "racial balancing" rather than the appropriate goal of creating a "unitary" school system.[94] When considering what caused this shift, part of the explanation was certainly political: only William O. Douglas remained on the court from the *Brown* decisions, and four of the justices who decided *Milliken* had been appointed by President Richard Nixon, who was perceived as an opponent of forced desegregation. Those four justices were considerably more conservative than those that they replaced.[95] The Burger Court favored narrow, procedural, and formalist distinctions. Their adoption of the idea that remedies needed to be tailored to "violations"—a specific past act of discrimination—implies that the problem was not structural in nature but rather concrete and based on individual acts of derogation from social expectations. This interpretation means that the doctrinal response would never be sufficient to address a structural problem, but will be limited to correcting a specific wrong and nothing beyond that.[96] The juridical approach of "tailoring" the remedy to a specific violation "stands equity jurisprudence upside down."[97] In essence, the Burger Court reversed the syntax of the relationship between remedy and right: rather than the courts being required to devise *whatever* remedy was necessary to *secure a right*, the Burger Court after *Milliken* saw equitable relief as doing *only* what was minimally necessary to *remedy a violation*.[98]

The logical result of the rhetorical shift effectuated by the court in *Milliken* is the decision reached by the court in *Missouri v. Jenkins* (1995). The case evaluated a District Judge's remedy to a long-standing school segregation dispute in the Kansas City area.[99] While the United States

93. *Id.* at 743–44.
94. Rahdert, *supra* note 78, at 794.
95. Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1008 (1994).
96. *Id*.
97. Rahdert, *supra* note 78, at 799.
98. *Id.*
99. Missouri v. Jenkins, 515 U.S. 70, 137–38 (1995).

District Court avoided the inter-district busing scheme rejected in *Milliken*, it did order a series of sweeping remedies, which resulted in a proposal to establish six magnet schools and conduct substantial and expensive capital improvements to schools as a means of attracting a diverse student body.[100] In a 5–4 decision, the U.S. Supreme Court held that this remedy was too expansive, and that the District Court's remedies are limited to "those which would remedy a constitutional violation—nothing further."[101] Justice Thomas demonstrated that some on the court were willing to question the entire enterprise of equity jurisprudence. In his concurrence, he suggested that equitable powers were simply a means to "vest judges with the discretion to escape the constraints and dictates of the law."[102] Yet according to the four dissenters, to truncate equity powers in such a way would not only make it impossible for segregation remedies to be effective, but also would violate common sense.[103]

The historical roots of this proceduralist approach to constitutional jurisprudence can be traced back to constitutional design. In fact, the constitutional framework in the United States has been concerned with establishing a baseline of procedural guarantees, regardless of whether those procedures provided direct improvement of a structural problem or the most useful outcome in connection with application or implementation. The United States Constitution was designed to facilitate the resolution of disputes that might otherwise be intractable by providing some common ground, i.e., some minimal procedure that was available to facilitate a basic solution.[104]

Sometimes, in the familiar formulation, it is more important that things be settled than that they be settled right, and the provisions of the Constitution settle things. The Constitution tells us how long a President's term will be, how many senators each state will have, whether there are to be jury trials in criminal cases, and many other things. Even if the rules the Constitution prescribes are not the best possible rules, they serve the very

100. *Id.* at 76–79.

101. Maloy, *supra* note 21, at 643; Poser, *supra* note 63, at 295 ("At the remedial stage of desegregation litigation, the primary judicial principle guiding the courts is that the relief ordered must remedy the constitutional violation.").

102. Missouri v. Jenkins, 515 U.S. 70, 133 (1995); Maloy, *supra* note 21, at 644–45.

103. *Missouri*, 515 U.S. at 174 (Souter, J., dissenting) ("But there is no apparent reason to reverse that decision, which represented the judgment of a unanimous Court, seems to reflect equitable common sense, and has been in the reports for two decades.").

104. Mark Tushnet, *Common Law, Common Ground and Jefferson's Principles*, 112 YALE L.J. 1717, 1719 (2003).

valuable function of providing an answer so that we do not have to keep reopening those issues all the time.[105]

Accordingly, the goal of the United States Constitution is largely a functional one, focused heavily on procedural remedies that do not have to be revisited time and time again. While the Constitution specifically granted equitable powers to courts of law, there was considerable debate as to the extent and purpose of that power. While Federalists argued that it was necessary to empower the federal courts with equity jurisdiction, Anti-federalists were concerned with the impact on common law jurisprudence if a single court had the jurisdiction to decide both issues of law and equity. The fact that in the American context, the equitable power was merged within the province of an independent judiciary, and did not derive its power from any executive prerogative, as seen in the English tradition, indicates that the court's equity power was meant to be tempered in accordance with what procedure dictates, the rule of law, and judicial restraint.[106] The debate surrounding equitable remedies remains mired in these institutional dimensions, with a focus on the proper balance of power rather than the restructuring required to vindicate a perceived injustice.

### *A. Expansive Remedies and the Supreme Court of India*

In India, the formulation of constitutional principles was in part a response to the inequities that existed during British rule in India. In the colonial context, Indian High Court decisions could only be appealed to the Privy Council in London because no parallel court existed in India.[107] The 1935 Government of India Act, which influenced the constitutional framework, established a new Federal Court in New Delhi.[108] The Supreme Court of India was seen as taking on the jurisdiction of the Privy Council, which included discretionary appeals through special leave.[109] In addition, the Supreme Court of India was given original jurisdiction to

105. *Id*. at 1719–20. *See also* Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1035–36 (2014) (noting the United States Constitution entrenches very challenging amendment rules that are only valid "when they adhere to the procedures detailed in the text of Article V" in order to create a document with some flexibility without the ease of changeability).

106. Poser, *supra* note 63, at 308.

107. Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 173, 178 (2013).

108. *Id.* at 178.

109. *Id*. at 178–79. *See also* Sathe, *supra* note 27, at 36 (noting the Court struck down relatively few statutes during this period).

hear fundamental rights cases.[110] The discourse surrounding the role of the new court involved notions of liberalizing jurisdiction that ensured that "the ordinary man gets full justice."[111] Moreover, in framing justiciable fundamental rights for the new Constitution, members of the Constituent Assembly of India consistently expressed concern that articulations of fundamental rights in other constitutions, such as that of the United States, were inconsistently enforced.[112] As such, Section 32 of the Constitution of India guarantees "right to move the Supreme Court by appropriate proceedings for the enforcement" of fundamental rights, and original petitions for redress of violations of fundamental rights continue to be filed directly with the Supreme Court of India.[113]

However, in the early years of the development of an independent Indian nation, the Indian courts proceeded cautiously. Even after the 1935 Government of India Act, "the courts continued to both construe the legislative acts strictly and to apply the English common law methods for safeguarding individual liberties."[114] In 1950, the first year of the Supreme Court of India 's existence, it deferred to the legislature in holding that the preventative detention of an individual who was not being accused of a crime violated neither Article 19's guarantee of freedom of movement nor Article 22's protection against unlawful detention.[115] The "uncomfortably restrictive view of 'personal liberty'" articulated in this case, *A.K. Gopalan v. State of Madras* (1950), was consistent with the Court's desire to defer to the legislature, and was significant in that "it did not have to fulfill the tests of other fundamental rights."[116] Moreover, in the first decades of the Supreme Court of India's existence, it consistently adopted

110. Robinson, *supra* note 107, at 179.

111. *Id.*

112. N.G. Ranga, *Speech to the Constituent Assembly, January 20, 1947*, CONSTITUENT ASSEMBLY DEBATES: PROCEEDINGS, Aug. 11, 2015, *available at* http://parliamentofindia.nic.in/ls/debates/vol2p1.htm ("in framing that Constitution we will have to see that there is a charter of fundamental rights. We are agreed upon that, but that will not be enough. Several other countries also have had their charters of fundamental rights. Yet these fundamental rights have been neglected by their own governments."); Sardar Vallabhbhai Patel, *Interim Report of the Subcommittee on Fundamental Rights, April 28, 1947*, CONSTITUENT ASSEMBLY DEBATES: PROCEEDINGS, Aug. 11, 2015, *available at* http://parliamentofindia.nic.in/ls/debates/vol3p2.htm ("We are of the opinion that fundamental rights of the citizens of the Union would have no value if they differed from Group to Group or from Unit to Unit or are not uniformly enforceable.").

113. INDIA CONST. art. 32.

114. Sathe, *supra* note 27, at 37.

115. A.K. Gopalan v. State of Madras, (1950) 1950 SCR 88 (India).

116. Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000)*, 14 AM. U. INT'L L. REV. 413, 439 (1998–1999).

a narrow view of property rights that protected elite landlords.[117] Most significantly, it ruled Indira Gandhi's declaration of emergency constitutional, despite its questionable legal justification and the fact that the declaration justified "flagrant violations of civil liberties by the Executive."[118]

But even in its decisions on property rights, the Supreme Court of India demonstrated its willingness to act decisively. In *L.C. Golaknath v. State of Punjab* (1967), the Supreme Court of India ruled that fundamental rights, as articulated in the Constitution, could not be removed or altered by amendment. In doing so, it "effectively declared a constitutional amendment unconstitutional."[119] The Court's explanation for this decision reflected an epistemological view that an active judiciary was necessary to maintain rights meant to be reserved for the people:

> The Constitution has given a place of permanence to the fundamental freedoms. In giving to themselves the Constitution the people have reserved the fundamental freedoms to themselves. Article 13 merely incorporates that reservation. The Article is however not the source of the protection of fundamental rights but the expression of the reservation. The importance attached to the fundamental freedoms is so transcendental that a bill enacted by a unanimous vote of all the members of both Houses is ineffective to derogate from its guaranteed exercise. It is not what Parliament regards at a given moment as conducive to the public benefit but what Part III declares protected, which determines the ambit of the freedom. The incapacity of Parliament therefore in exercise of its amending power to modify, restrict, or impose fundamental freedoms in Part III arises from the scheme of the Constitution and the nature of the freedoms.[120]

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117. *Id*. at 484. *See also* Jayanth K. Krishnan, *Scholarly Discourses, Public Perceptions, and the Cementing of Norms: The Case of the Indian Supreme Court and a Plea for Research*, 9 J. APP. PRAC. & PROCESS 255, 263, 266 (2007) (discussing decisions that *zamindars* required compensation for lands taken and upholding bank shareholder's rights to property).

118. Sripati, *supra* note 116, at 440. *See also* John Ferejohn & Pasquale Pasquino, *The Law of Exception: A Typology of Emergency Powers*, 2 INT'L J. CONST. L. 210, 216, 232 (2004) (citing the Emergency as an abuse of power and an example of using emergency powers to defeat "legitimate competitors for office" rather than enemies).

119. Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary*, 19 POL'Y STUD. J. 140, 146 (1990).

120. I. C. Golaknath & Ors v. State of Punjab & Anrs., *(*1967) 1967 SCR 762 (India), *available at* http://indiankanoon.org/doc/120358/.

Though this decision was eventually modified in *Kesavananda Bharati v. State of Kerala* case in 1973, the Court continued to limit amendments to the Constitution to those that did not change the "basic structure" of rights.[121]

Moreover, by the mid-1970s the Supreme Court of India, concerned over public perception of its complicity in allowing the abuses of the Emergency, moved much more definitely toward enforcing fundamental rights and encouraging public interest litigation.[122] The Supreme Court of India's epistemological approach to the adjudication of rights and the implementation of remedial measures begins with its broad interpretation of constitutional provisions. For example, the Supreme Court of India created a constitutional synthesis between the Directive Principles identified in the Indian Constitution, which largely pertained to non-justiciable and generally non-binding social and economic rights, and the justiciable civil and political rights. In its interpretation of Article 21, the right to life was defined as "the right to life with dignity."[123] In the *People's Union for Civil Liberties v. Union of India and Others* (PUCL, 2003), the Court held that this right includes the right to food. Although the right to food would otherwise fall under a Directive Principle, the Court incorporates this right into Article 21, "thereby transforming it into a justiciable and enforceable fundamental right."[124]

In India, public interest litigation ("PIL") or social action litigation, to which it is also referred, has been "repeatedly used to protect the interests of disadvantaged groups as well as address matters of public concern."[125] Several key features of PIL have reoriented formal procedural rules in order to increase accessibility and remedial protections. Discussion during the Constituent Assembly debates often focused on the ability of the "masses to invoke the aid of the law as against the State, as against the Government and its incumbents from time to time in order to see that these

121. Baar, *supra* note 119, at 145.

122. Varun Gauri, *Fundamental Rights and Public Interest Litigation in India: Overreaching or Underachieving?*, 1 INDIAN J. OF L. & ECON. 71 (2009) (claiming that public interest litigation in India originated "in the late 1970s when the judiciary, aiming to recapture popular support after its complicity in Indira Gandhi's declaration of emergency rule, encouraged litigation concerning the interests of the poor and marginalized, and to do so loosened rules and traditions related to standing, case filing, the adversarial process, and judicial remedies"). *See also* Sripati, *supra* note 116, at 441 (noting that the Emergency catalyzed a "metamorphosis" of the court, which was henceforth no longer willing to defer to other branches in enforcing fundamental rights).

123. Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 MICH. J. INT'L L. 691, 709 (2010).

124. *Id*.

125. Konakuppakatil Gopinathan Balakrishnan, *Singapore Academic of Law Annual Lecture 2008: Growth of Public Interest Litigation in India*, 21 SAcLJ 1 (2009).

fundamental rights are actually enforced."[126] The enumeration of constitutional remedies in the framing of the Indian Constitution was intended to allow any citizen to petition the Supreme Court of India for violations of fundamental rights guaranteed in the Indian Constitution.[127] The Supreme Court of India has made it clear that any member of the public who has sufficient interest, "even if not directly involved," can seek judicial redress pursuant to Article 226 of the Indian Constitution.[128] In one case in 1980, for example, the Supreme Court of India took epistolary jurisdiction over a journalist who had written an expose about prisoner abuse in Bihar after an attorney sent the court the article. The Supreme Court of India eventually ordered the State of Bihar to provide medical treatment for the detainees.[129] By 1962, the Supreme Court of India had heard more than 3,800 cases brought by writ petitions on behalf of individuals who may not otherwise have had access to the court.[130]

The success of social action litigation in India often requires the Court to circumvent formal legal procedures, including threshold requirements for standing and political questions.[131] In diluting the requirements for *locus standi*, for example, the Court has allowed social activists and lawyers to bring cases on behalf of individuals who were unaware of their legal entitlements or unable to pursue an option of litigation due to cost. In addition, the Court established an epistolary jurisdiction in which it considered particular matters pertaining to fundamental rights violations through letters addressed to sitting judges.[132] Moreover, the Court has reoriented the nature of the adversarial proceedings in order to ensure some lasting governmental accountability for systemic violations. In such proceedings, "the orientation of proceedings is usually more akin to

126. *See* Ranga, *supra* note 112.

127. Rohit De, *Rebellion, Dacoity, and Equality: The Emergence of the Constitutional Field in Postcolonial India*, 34 COMP. STUD. OF SOUTH ASIA, AFRICA & THE MIDDLE EAST 260, 265 (2014).

128. SUBHASH KASHYAP, OUR CONSTITUTION: AN INTRODUCTION TO INDIA'S CONSTITUTION AND CONSTITUTIONAL LAW 257 (5th ed. 2014).

129. Susan D. Susman, *Distant Voices in the Courts of India: Transformation of Standing in Public Interest Litigation*, 13 WIS. INT'L. L.J. 57, 58 (1994).

130. De, *supra* note 127, at 265.

131. Baar, *supra* note 119. However, it may be important to note that broad remedial protections come at the cost of finality. The Court often uses jurisdiction through interim orders and directives, which do not establish broader accountability for systemic violations. Ultimately, the cost of broad and progressive social reform may be the lack of sustainability and enforcement. *Id*.

132. *Id.* at 1–2; *see also* Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 122 (1985), *available at* http://scholar.valpo.edu/twls/vol4/iss1/6 (noting the grants of epistolary jurisdiction, allowing individuals to directly petition the Supreme Court of India for redress through the venue of personal letters); Baar, *supra* note 119, at 142 (noting the novelty of epistolary jurisdiction as a judicial procedure and describing how it leads to judges soliciting cases).

collective problem solving, rather than an acrimonious contest between counsels."[133] The Court regularly uses socio-legal means to assist in the adjudication of cases by among other things, appointing fact-finding commissions to conduct independent research on a particular subject matter and report back to the court. It also pushes the boundaries of constitutional remedies by establishing a process of "continuing mandamus," which enables the Court to regularly issue directions and oversee and monitor the implementation of its directives by executive agencies.[134] The Court has even taken over the direction of administration in particular arenas from the executive, with expenses borne by the state. By doing so, the Court undertakes "those very administrative decisions, which the state should have taken in the first place."[135]

In defense of the activist orientation of the Supreme Court, Chief Justice Konahuppakatil Gopinathan Balakrishnan explains:

> The main rationale for 'judicial activism' in India lies in the highly unequal social profile of our population, where judges must take proactive steps to protect the interests of those who do not have a voice in the political system and do not have the means or information to move the courts. This places the Indian courts in a very different *social role* as compared to several developed nations where directions given by 'unelected judges' are often viewed as unjustified restraints on the will of the majority. It is precisely this countermajoritarian function that needs to be robustly discharged by an independent and responsible Judiciary.[136]

The historical context and the resulting structure of the Supreme Court lent themselves to the establishment of a Court with a "flexible, human rights

133. *See* Balakrishnan, *supra* note 125, at 2; s*ee also* Ashok Desai and S. Muralidhar, *Public Interest Litigation: Potential and Problems*, *in* SUPREME BUT NOT INFALLIBLE-ESSAYS IN HONOR OF THE SUPREME COURT OF INDIA 159, 165 (2000) ("In PIL there are no winners or losers and the mindset of both lawyers and judges can be different from that in ordinary litigation. The Court, the parties and their lawyers are expected to participate in resolution of a given public problem.").

134. *See, e.g.*, Ashoka Kumar Thakur v. Union Of India And Ors, Writ Petition (civil) 265 of 2006 (India) (in adjudicating the validity of the provision for reservations in educational institutions, the Court approved a twenty-seven percent ceiling conditioned upon a review of the quota every five years).

135. *See* Baxi, *supra* note 132, at 122.

136. Balakrishnan, *supra* note 125, at 4 (emphasis added); *see also* Kashyap, *supra* note 128, at 258 ("In recent years, under what has come to be called judicial activism, the Supreme Court has issued directions to control pollution, to check the evil of child prostitution, to revive a sick company to protect the livelihood of 10,000 employees, to look into the danger to safety in building a dam, to segregate the children of prostitutes from their mothers, to provide insurance to workers in match factories, to protect the Taj Mahal from environmental pollution, etc.").

oriented approach to constitutional interpretation."[137] The history of the Supreme Court of India comes out of a constitutional moment in which the Court was regarded as the guardian of a nationalist social revolution that was supposed to forge a single Indian people out of the variegated castes and cultures of the colonial state. Therefore, the principles incorporated into the Constitution account for the vulnerabilities of the average citizen who would likely not have substantial economic resources. The Directive Principles, which are non-binding guidelines for framing law and policy in India, delineate the need for substantial and progressive social change, and recommend a "temporary and modifiable" approach to improving social conditions.[138] According to the Directive Principles, the provisions of the Constitution were "not erected as the barriers to progress."[139] Instead, the Court was charged with changing a country that embraced hierarchy into one that "internalized the liberal values of equality and freedom of expression for all its citizens."[140]

Moreover, the structure of the Court contributes to a revisionist approach to constitutional adjudication. The Supreme Court of India operates as a polyvocal court, in which separate panels of judges (usually no more than two or three) agree to take on and hear a case.[141] Unlike the U.S. Supreme Court, the Supreme Court of India does not speak in a single voice. Any given bench may have a slightly different interpretation of a statutory provision, which in many ways increases the uncertainty of the precedential effect of any single panel decision.[142] However, this also permits the Court to constantly revisit and reinterpret established laws. Judicial clusters can push precedent in new directions if judges seek to proactively shape jurisprudence.[143] This reinterpretation of fundamental provisions in light of contemporary needs has enabled the Court to create a vast public interest litigation jurisprudence, which "would have been far less likely without the Court's panel structure."[144]

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137. Birchfield & Corsi, *supra* note 123, at 710.
138. *Id*. at 711.
139. Chandra Bhavan Boarding and Lodging, Bangalore v. State of Mysore, (1970) 1970 SCR 600, 601 (India).
140. Robinson, *supra* note 107, at 182.
141. *Id*. at 184.
142. *Id*. at 186.
143. *Id*. at 189.
144. *Id*. at 188.

## IV. EXPANSIVE REMEDIAL PROTECTIONS AND THE BROAD INTERPRETIVE LENS

One of the key features of Supreme Court of India jurisprudence since the 1970s is the issuance of broad remedial measures through the mechanism of public interest litigation to ensure governmental accountability and implementation of judicial directives.[145] The Supreme Court of India, in utilizing a broad interpretative framework that connects the adjudication of law with lived experience, begins to craft expansive remedial measures that address systemic inequalities, including discrimination. The Court, in fact, has claimed that it must be given a larger participatory role in particular cases because it has a responsibility to step into the shoes of those perceived to be vulnerable, in order to put them "on a footing of equality with the rich in administration of justice."[146] Moreover, broad remedial measures are needed for a violation of fundamental rights because the purpose of public law is not only to "civilize public" power but also to ensure citizens that their rights will be protected from arbitrary and capricious actions.[147]

The Court refers to its constitutional grant of authority in granting broad remedial powers, not to correct a procedural error, but to correct a social injustice.[148] Rather than serving as a protector of the judicial system, the court sees itself as doing what is necessary to prevent vulnerability:

The Court stated that Article 32 of the Constitution of India,

> does not merely confer power on this Court to issue a direction, order or writ for enforcement of the fundamental rights but also lays down a constitutional obligation on this Court to protect the fundamental rights of the people and for that purpose this Court has all incidental and ancillary powers including the power to forge new remedies and fashion new strategies designed to enforce the

145. Burt Neuborne, *The Supreme Court of India*, 1 INT'L J. CONST. L. 476, 503 (2003) (explaining how, in the wake of Emergency in the 1970s, "the Court dramatically expanded its remedial powers, often taking operational control of failing government institutions and requiring systematic efforts to mitigate the effects of past injustices"); *see also* Sathe, *supra* note 27, at 67–68 (noting that the Supreme Court of India relies on the precedent of broad use of English writs to extend its judgments beyond the remedies requested by a petitioner, which allows them to "mold relief to meet the particular requirements of this country").

146. Ashok Desai & S. Muralidhar, *supra* note 133, at 159, 160.

147. Shri D.K. Basu v. State of West Bengal, 1 S.C.R. 416 (1996); *see also* Sam F. Halabi, *Constitutional Borrowing as Jurisprudential and Political Doctrine in Shri D.K. Basu v. State of West Bengal*, 3 NOTRE DAME J. INT'L & COMP. L. 73, 104 (2013) (emphasizing that D.K. Basu v. State of West Bengal emphasized the structural ability of courts to ensure the fundamental rights of citizens).

148. M.C. Mehta v. Union of India, 1 S.C.R. 395, 405 (1987).

> fundamental rights. It is in realization of this constitutional obligation that this Court has in the past innovated new methods and strategies for the purpose of securing enforcement of the fundamental rights, particularly in the case of the poor and disadvantaged who are denied their basic human rights and to whom freedom and liberty have no meaning.[149]

The Court's willingness to craft extensive remedies based on broad readings of constitutional provisions is perhaps best expressed in *Maneka Gandhi v. Union of India* (1978). Maneka Gandhi, married to the son of Prime Minister Indira Gandhi and grandson of Prime Minister Jawaharlal Nehru, challenged a decision by the Government of India to revoke her passport in July 1977. Three months prior an election drove her husband and Indira Gandhi out of their seats in Parliament and ushered in a majority for the Janata Party led by Morarji Desai.[150] While the remedy of ordering the government to return the passport may be modest, the language of the decision is indicative of the integrative and synergistic view that the Court has constructed on constitutional rights and remedies. In particular, the Court argued that, rather than separately examining violations of Article 19, protecting freedom of speech, and Article 21, protecting personal liberty, where perhaps no violations of any individual provision can be established, constitutional provisions should be read together as a fluid whole. Violations that combined aspects of each, as in denying someone the right to travel and express themselves internationally, may still constitute a constitutional violation. Thus, they could not be viewed as "watertight compartments" hermetically sealed from one another.[151] Integrating rights as part of an essential, indivisible whole is necessary to implement the very purpose of the constitution, as they are:

> [A]ll parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow unimpeded and impartial justice (social, economic and political), freedom (not only of thought, expression, belief, faith and worship, but also of association, movement vocation or occupation as well as of acquisition and possession of reasonable property), or equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and

149. *Id.*
150. PRANAY GUPTE, MOTHER INDIA: A POLITICAL BIOGRAPHY OF INDIRA GANDHI 448 (2012).
151. Maneka Gandhi v. Union of India, 1978 AIR 597, 623.

> of fraternity (assuring dignity of the individual and the unity of the nation) which our Constitution visualizes. Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat very objects of such protection.[152]

Moreover, in implementing constitutional rights as a fundamental whole, remedies had to be crafted that were sensitive to the needs of individuals and represented practical solutions rather than appeals to abstract formalism. "The tests of reason and justice cannot be abstract," Chief Justice Mirza Hameedullah Beg explained, because they would in that case be "divorced from the needs of the nation."[153] The *Maneka Gandhi* case was therefore significant not only for its political importance but for its robust assertion of the interconnectedness of constitutional rights and of concrete procedures for their implementation.[154]

These concerns were raised again most poignantly in the case of *People's Union for Civil Liberties v. Union of India.* The case was submitted by a civil liberties league as Public Interest Litigation, a category of litigation created through Article 32 of the Constitution of India, which states that "the right to move the Supreme Court by appropriate proceedings for the enforcement" of any of the fundamental rights delineated by the Constitution "is guaranteed."[155] The right at issue in this case was a constitutional right to food. This right was derived from Article 21, which guarantees that "no person shall be deprived of his life or personal liberty except according to procedure established by law."[156] In *Francis Coralie Mullin v. Administrator* (1981), the Supreme Court of India had reasoned that:

> Every limb or faculty through which life is enjoyed is thus protected by Article 21 and a fortiorari, this would include the faculties of thinking and feeling. Now deprivation which is inhibited by Article may be total or partially neither any limb or faculty can be totally destroyed nor can it be partially damaged. Moreover it is every kind of deprivation that is hit by Article 21, whether such deprivation be permanent or temporary and, furthermore, deprivation is not an act

152. *Id.* at 623–24.
153. *Id.* at 624.
154. Sripati, *supra* note 116, at 442 (noting that the *Maneka Gandhi* decision clarified and restored procedural due process rights).
155. INDIA CONST. art. 32.
156. *Id.* art. 21.

> which is complete once and for all: it is a continuing act and so long as it lasts, it must be in accordance with procedure established by law. Therefore any act which damages or injures or interferes with the use of any limb or faculty of a person either permanently or even temporarily, would be within the inhibition of Article 21.[157]

Reasoning that an inability to eat constitutes a "deprivation of life and limb," the PUCL argued that the failure of certain promised government schemes to feed the poor in Rajasthan constituted a violation of Article 21 when interpreted in light of Article 47 of the non-justiciable "Directed Principles of State Policy," which directs the state to regard raising the level of nutrition as among its "primary duties."[158] The court agreed and ordered a broad remedy vastly increasing payments by the Government of India to food programs, setting out a minimum provision of grains and nutritious food and the implementation of specific procedures for food distribution.[159]

In *Kesavananda Bharati v. State of Kerala*, the Court held that the interlocking of procedural fundamental rights and the non-justiciable socio-economic Directive Principles were necessary as the two provisions were always meant to supplement one another. *Both* provisions aim at the same goal of "bringing about a social revolution and the establishment of a social welfare state."[160] In doing so, the Court reoriented the concept of justiciable rights enumerated in the Constitution for the express purpose of addressing a social problem that would otherwise fail to constitute a cognizable remedy under traditional conceptions of justiciability. For example, the Court goes on to recognize a right to livelihood and housing for pavement dwellers being displaced due to commercial construction projects and the right to health in the provision of immediate medical assistance when needed in emergency cases.[161]

Finally, in *Municipal Council of Ratlam v. Varichand*, the Supreme Court recognized as valid the standing of a group of citizens who were subjected to the health and environmental impacts of an open drain, which caused both harsh odor and disease.[162] The Court argued that certain rights may pertain to groups of citizens rather than merely to individuals. They

157. Francis Coralie Mullin v. Adm'r, (1981*)* 1981 SCR 516, 518 (India).
158. INDIA CONST. art. 47.
159. People's Union for Civil Liberties v. Union of India, Writ Petition (civil) 196 of 2001 (2007); Birchfield & Corsi, *supra* note 123, at 698
160. *See* Balakrishnan, *supra* note 125, at 8.
161. *Id.*
162. Municipal Council of Ratlam v. Varichand, (1980) 1980 AIR 1622, 1623 (India).

cited the Constitution's Preamble as providing the foundation for the legitimation of a shift from "the traditional individualism of *locus standi* to the community orientation of public interest litigation." In doing so, they recognize that when formal procedural rules fail to adequately remedy the issues that face "ordinary men," it is the Court's role, with authority claimed from the Constitution itself, to step in to fill this socio-legal vacuum by changing the nature and structure of the juridical rules themselves.

The Supreme Court of India's aggressiveness rests on a tradition of extensive judicial equitable remedies for constitutional violations in Indian jurisprudence. They were willing to create justiciability, otherwise lacking pursuant to prevailing interpretations of constitutional remedies. They were even willing to specify costly and substantive actions in compelling the government to act, i.e., to give substantial food aid to a wide portion of the population, and its willingness to reorient procedural threshold requirements.[163] It also speaks to the court's recognition that in cases of "entrenched institutional behavior," which violate fundamental rights, broad relief is necessary "to bring the behavior of an institution in line with constitutional and statutory requirements."[164] Despite the court's deferrals to other branches of government in the 1950s and 1960s in its narrow interpretation of constitutional principles, the tradition of allowing for broad remedies is often traced to the drafting of the Constitution. At that time, members of the Constituent Assembly worked to guarantee greater social and economic rights than were granted in previous versions of Indian constitutional schemes and agitated for a constitution in which "social and economic rights" would "play a prominent part."[165] India was, after all, "ultimately established as a social welfare state," and therefore the Indian Constitution provides for "comparatively easy incorporation of human rights principles into Indian Constitutional Law."[166] Reflecting on the socio-legal tradition of the Supreme Court of India, Justice Balakrishnan noted that while "the device of PIL may have its detractors,

163. Balakrishnan, *supra* note 125, at 13 (explaining that the court deliberately gave "elaborate directions about the proper publicity and implementation of the said scheme").

164. Emma C. Neff, *From Equal Protection to the Right to Health: Social and Economic Rights, Public Law Litigation, and How an Old Framework Informs a New Generation of Advocacy,* 43 COLUM. J.L. & SOC. PROBS. 151, 167 (2009).

165. *Speech of Mr. R.K. Sidhwa, in Supplementary Report on Fundamental Rights*, CONSTITUENT ASSEMBLY OF INDIA DEBATES: PROCEEDINGS Vol. V, Aug. 30, 1947, *available at* http://164.100.47.132/LssNew/constituent/vol5p11.html.

166. Birchfield & Corsi, *supra* note 123, at 706–07.

it has played an invaluable role in advancing our constitutional philosophy of social transformation and improving access to justice."[167]

Needless to say, the Supreme Court of India's recognition of the need for broad remedies and the Court's willingness to grant such broad relief in cases from food aid to the right to travel does not imply that the Government of India is able to provide such equitable relief in an efficient manner. Indeed, the disconnect between the articulation of rights in the Indian Constitution and by the Courts and the actual application of those rights—or lack thereof—by lower courts, police, and local government is profound. It is unclear whether local populations fully comprehend the rights that are available to them, particularly when so much of government business in India is conducted in either English and Hindi, neither of which are the mother tongue of the majority of Indians.[168] Yet it is noticeable that, in a country whose political and constitutional culture supports the broad understanding of social justice and economic and social rights, broad and equitable remedies are applied by the courts without the same level of interpretive consternation that is prevalent in the post-1970s constitutional jurisprudence of courts in the United States.

## CONCLUSION

This article has shown that comparing equity jurisprudence should involve more than just a discussion of the structural and functional differences in law and interpretation. Instead, it argues that such comparisons should involve analyzing particular historical and cultural circumstances during which shifts in the interpretation of equity jurisprudence arise, which gives rise to an appreciation, in a comparative context, of how judicial interpretation changes over time. Even more importantly, such comparisons must analyze differences in the nature and purpose of constitutional jurisprudence. These epistemological differences

167. Balakrishnan, *supra* note 125, at 15.

168. Sujata Gadkar-Wilcox, *Intersectionality and the Under-Enforcement of Domestic Violence Laws in India*, 15 U. PA. J.L. & SOC. CHANGE 455, 468 (2012); Anuradha Saibaba Rajesh, *Women in India: Abysmal Protection, Peripheral Rights and Subservient Citizenship*, 16 NEW ENG. INT'L & COMP. L. ANN. 111, 112 (2010) (noting the complex socio-cultural factors that play a role in the context of women's legal and social empowerment); NASREEN MALIK, THE WRITTEN LEGAL ENGLISH ANALYSIS OF DISTINCTIVE STUCTURES AND IMPLICATIONS FOR PROFESSIONAL PROFICIENCY 3 (2015) (Ph.D. Thesis, University of Kashmir), *available at* http://shodhganga.inflibnet.ac.in/handle/10603/32966 (explaining that in complex English-language legal discourse, "the literature indicates that it is discourse deficiency which tends to prevent non-native speakers (NNSs) from participating fully and appropriately"); *Abstract of Speakers' Strength of Languages and Mother Tongues*, CENSUS OF INDIA (2001), *available at* http://www.censusindia.gov.in/Census_Data_2001/Census_Data_Online/ Language/Statement1.aspx.

can reveal divergent cultural assumptions about the nature and purpose of law that, in turn, reflect the different social circumstances in which equitable remedies are deployed. The epistemological limitations of the positivist model are rooted in the history and purpose of legal jurisprudence. In order to truly understand the scope of constitutional approaches taken in different contexts, it is important to understand the historic and political circumstances in which they arise.[169]

Since the 1950s, the jurisprudence of equitable remedies moved in opposite directions in the United States and India. In the United States, the broad remedial powers needed to enforce desegregation decisions led to a widening of the scope of remedial actions. Starting in the 1970s, however, reactions against these broad remedial powers reversed the trend and led to a narrowing of the use of equity power that has continued to the present. The narrowing of federal equity jurisprudence based on a positivist and formalist understanding of the purpose of legal remedies, as well as a restrictive reading of the scope of the Article III remedial power centering on the alleviation of a procedural error, has shifted the conversation regarding rights violations away from the needs of a given social group at any particular moment in history and entangles the court and the public with formal "side-issues about precedent, texts, and interpretation."[170] In India, very different historical circumstances led to the opposite trajectory. In the 1950s, the courts were hesitant to use their broad equity powers, choosing instead to give deference to parliamentary interpretations and to legislative actions to enforce fundamental rights. By the 1970s, however, the widespread perception of the abuse of Constitutional powers by the legislature during the Emergency of 1975–77 gave rise to a much bolder use of equity power through the mechanism of Public Interest Litigation to provide the social reforms that were envisioned by the Constituent Assembly and outlined in the Constitution.

The varying approaches taken by the Courts serve to highlight differences in epistemological assumptions of the nature and purpose of law. While the framers of the United States Constitution focused on procedural equity as a response to arbitrary and tyrannical exploitation of political power, the Constituent Assembly intended for the Supreme Court to have broad remedial power in addressing the experience of inequality

169. Carozza, *supra* note 37, at 663.

170. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (arguing that the process of judicial review in the United States often shifts constitutional conversations from public debates about social remedies to procedural debates about legal jurisprudence).

felt by vulnerable communities under the British Raj, despite the fact that there was some facially neutral and generally applicable procedure in place to address violations of the law. This difference in epistemology, coupled with the narrowing of equity jurisprudence in the United States over time, explains why Judge Sheindlin's decision in the *Floyd* case, which would not have been at all unusual if it had been decided in the context of Indian constitutional jurisprudence, caused such controversy in a U.S. context. This epistemological distinction changes the fundamental scope and purpose of legal remedies. As Chief Justice Chandrachud articulated, the Indian Constitution "is not intended to be the arena of legal quibbling" based on abstract legal specialists, rather "it is made for the common people" and should be generally construed so that they can understand and appreciate it.[171] More importantly, its "moral authority" comes from shifting the focus of judicial review from a narrow, doctrinal approach to social welfare to "the humanitarian concept of the protection of the weaker section of the people."[172] Ultimately, the discursive framework of constitutional discourse helps shape the nature, function and purpose of legal remedies.

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171. Baxi, *supra* note 132, at 111.
172. *Id*. at 112.