

REMEDIES SYMPOSIUM
UPSTAIRS DOWNSTAIRS:
***MORALES-SANTANA* AND THE RIGHT TO A REMEDY IN**
COMPARATIVE LAW

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The Supreme Court's ruling in *Sessions v. Morales-Santana* has refueled a classic debate about constitutional remedies in equal protection cases.¹ How should courts respond to underinclusive legislation? Non-discrimination clauses are seldom clear about how equality is to be accomplished. The most obvious remedy, one that is generally preferred by plaintiffs, is that the benefits reserved for the advantaged group are extended to those who were disadvantaged. However, equal protection law would equally be satisfied if both groups are denied the benefit. Levelling down may be considered "the mean remedy," but it *is* usually considered a remedy. After all, the plaintiff would get equal treatment.²

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1. See, e.g., Mark Tushnet, *The Remedy in Morales-Santana (Again)*, BALKINIZATION BLOG (June 13, 2017) <https://balkin.blogspot.nl/2017/06/the-remedy-in-morales-santana-again.html> [<https://perma.cc/4NP7-9JL9>]; Mike Dorf, *Equal Protection and Leveling Down as Schadenfreude*, DORF ON LAW BLOG (June 14, 2017), <http://www.dorfonlaw.org/2017/06/equal-protection-and-leveling-down-as.html?m=1> [<https://perma.cc/MM9K-ALL2>]; Tracy Thomas, *SCOTUS Denial of Equal Protection sRemedy Jeopardizes Equality Law: What was Justice Ginsburg Thinking?*, GENDER AND THE LAW PROF BLOG (June 13, 2017) http://lawprofessors.typepad.com/gender_law/2017/06/sctous-denial-of-equal-protection-remedy-jeopardizes-equality-law-what-was-justice-ginsburg-thinking.html [<https://perma.cc/2HJA-X9H2>]; The Judgment in Morales-Santana (SCOTUS Symposium), PRAWFSBLAWG (June 13, 2017) <http://prawfsblawg.blogs.com/prawfsblawg/2017/06/the-judgment-in-morales-santana-scotus-symposium.html> [<https://perma.cc/T65F-XTJX>] (online symposium).

2. Michael Dorf, *Equal Protection and Leveling Down as Schadenfreude*, DORF ON LAW BLOG (June 14, 2017), <http://www.dorfonlaw.org/2017/06/equal-protection-and-leveling-down-as.html?m=1> [<https://perma.cc/MM9K-ALL2>]; Ian Smith, *Morales-Santana and the "Mean Remedy"*, TAKECAREBLOG (June 12, 2017), <https://takecareblog.com/blog/morales-santana-and-the-mean-remedy> [<https://perma.cc/NHU2-4VVM>].

Yet this is problematic. Not only for the plaintiff, but also for the courts. Recognizing that there are multiple options, raises the question of how to justify the choice between them. If the Constitution is silent, what “judicially manageable standards” are there to guide the remedial calculus? Much has been written about that question, but the need for clarity has remained.³ Still, there is one consolation: American judges are not alone. Throughout the western world, courts struggle with this issue. Judges in many legal systems have increasingly been engaged in a rights revolution, and equal treatment norms have been central to that enterprise.⁴ In doing so, they are frequently confronted with similar dilemmas as raised in *Morales-Santana*.⁵ What is striking however, is that there is very little comparative literature on the ways in which courts deal with this dilemma.⁶

This contribution seeks to remedy this omission. It does not attempt to contribute to the American debate about *Sessions v. Morales-Santana*. U.S. scholars do not need the Dutch to explain or ridicule their own cases.⁷ Instead I aim to broaden the debate by putting *Morales-Santana* in a comparative perspective. I discuss alternative judicial approaches to underinclusive legislation, and I briefly assess those approaches normatively, using the right to a remedy as a modest touchstone. My argument will be that there is, at present, no single “best” approach, and that a flexible approach based on proportionality and balancing is warranted.

3. See, e.g., Bruce K. Miller, *Constitutional Remedies For Underinclusive Statutes: A Critical Appraisal of Heckler v. Mathews*, 20 HARVARD CIV. RIGHTS & CIV. LIBERTIES L. REV. 79 (1985); Bruce K. Miller & Neal Devins, *Constitutional Rights Without Remedies: Judicial Review of Underinclusive Legislation*, 70 JUDICATURE 151 (1986); Evan H. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185 (1985); David M. Bizar, *Remedying Underinclusive Entitlement Statutes: Lessons from a Contrast of the Canadian and U.S. Doctrines*, 24 U. MIAMI INTER-AMERICAN L. REV. 121 (1992).

4. A. von Bogdandy, *The Past and Promise of Doctrinal Constructivism: A Strategy for Responding to the Challenges facing Constitutional Scholarship in Europe*, 7 INT’L L.J. CON LAW 364 (2009); Janneke H. Gerards, *JUDICIAL REVIEW IN EQUAL TREATMENT CASES* (2005).

5. See H. Maurer, *Zur Verfassungswidrigerklärung von Gesetzen*, IM DIENST AN RECHT UND STAAT 345-368 (H. Schneider & V. Gotz eds., 1974); Jörn Ipsen, *RECHTSFOLGEN DER VERFASSUNGSWIDRIGKEIT VON NORM UND EINZELAKT* 190 (1980) (German context); Gerards, *supra* note 4 (Dutch Context); Nitya Duclos & Kent Roach, *Constitutional Remedies as “Constitutional Hints – A Comment on R. v. Schachter*, 36 MCGILL L.J. 1 (1991) (Canadian Context).

6. Bizar, *supra* note 3 (A notable exception is the work of Bizar).

7. Indeed, for an in-depth critique of *Sessions v. Santana-Morales*, see Tracy Thomas, *Level Down Gender Equality* (April 25, 2018) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157987).

I. COMPARATIVE APPROACHES

In this section, I discuss the different ways in which courts in several jurisdictions have approached the remedial question when confronted with underinclusive legislation. What follows is not a systematic comparative account. The case law of the U.S. Supreme Court is set against some alternative paths taken by courts in other jurisdictions. These include western liberal democracies that are roughly comparable to the United States, in terms of shared constitutional values, such as the separation of powers, human rights protection, and effective judicial review. The judicial role in these jurisdictions may vary somewhat across the spectrum of strong-form and weak-form review.⁸ However, courts in all the jurisdictions included are empowered to set aside legislation if it violates norms of either constitutional or public international law.⁹ I distinguish four approaches: the second-guessing approach (which is regularly taken by U.S. courts) and three alternative paths: the rights-based approach, the separation of powers approach, and the dialogical model.

A. *The Second-Guessing Approach*

Justice Ginsburg's majority opinion in *Sessions v. Morales-Santana* is fairly illustrative of the standard American remedial approach to underinclusive legislation, which is based on legislative intent.¹⁰ The starting point of this approach is a threefold assumption. First, that equal treatment norms as such do not dictate a choice for either extending or nullifying the benefit.¹¹ Second, that the choice between extending or eliminating the benefit belongs to the courts and is not just a matter of policy (as we will see, this latter assumption is not universally shared).

8. See, e.g., Mark Tushnet, *Comparative Constitutional Law*, THE OXFORD HANDBOOK OF COMPARATIVE LAW 1225 (M. Reimann & R. Zimmermann eds., 2006).

9. See GW. [Constitution] art. 120, 94 (Dutch courts are enjoined from constitutional review of statutes, but they are empowered to strong-form review based on international (human rights) law); See Jerfi Uzman, Tom Barkhuysen & Michiel L. van Emmerik, *The Dutch Supreme Court: A Reluctant Positive Legislator*, CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS 645 (Alan Brewer-Carias ed., 2011).

10. *Ayotte v. Planned Parenthood of Northern New England*, 546 U. S. 320, 330 (2006) (“the touchstone for any decision about remedy is legislative intent”).

11. Although generally true, there are important exceptions. If the standard of future treatment for the advantaged class is unalterably fixed, judicial choice is limited to extending the benefit to the disadvantaged class. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (Furthermore, judicial expansion of criminal offences runs counter to *nulla poena sine lege*; See *Grayned v. City of Rockford*, 408 U. S. 104 (1972) (When a law discriminates by exempting certain groups from an offence, courts must extend the exemption.)

And third, that the option of nullification can ultimately be considered an appropriate remedy, be it perhaps not a nice one.¹²

These assumptions originate from a concurring opinion of Justice Harlan in *Welsh v. United States*, in which he argued that:

Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion.¹³

Harlan also laid the ground work for the idea that the choice between those two options was determined by legislative intent saying, “the boundaries of permissible choice may properly be considered fixed by the legislative pronouncement on severability.”¹⁴ The Supreme Court seemingly adopted this approach nine years later in *Califano v. Westcott*, when it considered a severability clause decisive justification for extending a financial aid program.¹⁵ However, in this case, such an extension was uncontroversial. In 1984, the Court more clearly confirmed the importance of Congressional intent. It reiterated that the court should not “use its remedial powers to circumvent the intent of the legislature.”¹⁶ Perhaps more importantly, the Supreme Court made it clear that it is within the judicial competence to choose either of the two remedial paths: levelling-up or down. Although extension is the preferred option, the Court stressed that it considers it an adequate judicial remedy to withdraw benefits from the favored class.¹⁷

This approach, focusing on legislative intent, is not uncontroversial. It raises the question of *whose* legislative intent should be considered decisive: the legislature enacting the statute or the current legislature?¹⁸ The conventional view assumes the former: courts should focus on Congress at the time when it passed the law. Otherwise one could hardly

12. *Gilmore v. City of Montgomery*, 417 U.S. 556, 566-567 (1974); *Heckler v. Mathews*, 465 U.S. 728, 739 (1984) (fn. 8), quoting Justice Brandeis in *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931).

13. *Welsh v. United States*, 398 U.S. 333, 362 (1970).

14. *Id.* at 364.

15. *Califano v. Westcott*, 443 U.S. 76, 89-90 (1979).

16. *Heckler v. Mathews*, 465 U.S. 728, 739 (fn. 5) (quoting Justice Powell’s concurrence in *Califano v. Westcott*).

17. *Id.* at 740 (fn. 8).

18. This question apparently sparked some discussion among the current members of the Supreme Court. *See, e.g.*, Transcript of Oral Argument at 15-1191, p. 45-48, *Sessions v. Morales-Santana*, 582 U.S. ___ (2017) (transcript of the discussion between Chief Justice Roberts and Justices Bader Ginsburg and Breyer during oral argument).

maintain that the courts are implementing congressional intent.¹⁹ The basis for this approach, thus seems to be rooted in a specific understanding of the rule of law, in which the courts implement legislative will to the extent that it is constitutional. One problem is that there usually is no way of establishing for certain what Congress would have wanted, had it been aware of any constitutional defect. This decision always involves a (varying) degree of second-guessing. Absent fallback or severability clauses, the Supreme Court usually employs presumptions to determine legislative intent.²⁰ They serve to identify the policy objectives behind the legislative scheme. Thus, the relative size of both groups, the consequences of extension for the budget, or the fact that extending would lead to discrimination of a third group, may be relevant factors to consider.²¹ Still, these presumptions can only provide circumstantial evidence at best.²²

A second problem, is that what Congress wanted the odd 40 years ago is frequently rooted in a specific historical understanding of society, which was at the heart of the unconstitutionality. It seems strained to separate the legislative elements that are nowadays considered to be discriminatory, from other elements of a given regulatory scheme. If, in 1950, Congress would allow women, but not men, in the military to take six years of paid leave for taking care of young children, then such a scheme is embedded in a very specific understanding of the role of motherhood, the relationship between women and the military, and the desirability of promoting traditional family values. To ask what Congress would have wanted had it been aware that such a difference between men and women was unconstitutional would, in a sense, constitute an invitation to rewrite history. It would thus make sense to search for alternative remedial paths.

B. The Rights-Based Approach

In stark contrast to the second-guessing approach, stands what we might call the rights-based approach of the Court of Justice of the European Union (ECJ).²³ The ECJ is of course in a very different

19. *Id.* at p. 47, Roberts C.J.

20. Caminker, *supra* note 3, at 1189.

21. *Id.* at 1189, 1208.

22. *Id.* at 1188-1189.

23. This rights-based approach shares some similarities with but should be distinguished from the norm-based model as was advocated by Evan Caminker (Caminker, *supra* note 3).

constitutional position as compared to the United States Supreme Court.²⁴ First of all, it is not (yet) considered the highest court of a (federal) nation state, although the EU has some federal features.²⁵ Nor is it in any formal kind of hierarchical position *vis-à-vis* member state courts. Unlike the U.S. Supreme Court, it has no appellate jurisdiction over state courts.²⁶ But again, the difference between the two courts should not be overstated. In practice, the ECJ has considerable power over national courts of the member states when it comes to applying EU law.²⁷ It essentially performs two functions: it acts both as a supreme administrative and constitutional court for the Union itself, and as the guardian of the uniform application of EU Law by national courts. In short, there are thus two ways for the ECJ to get involved in reviewing legislation against equal protection law. First, it may itself review, and subsequently nullify, EU legislation for failing to comply with the EU Treaties (including the EU Charter of Fundamental Rights). Moreover, it supervises national courts when they apply EU Law.²⁸ This implies that the ECJ's oversees, not only whether national courts apply EU Law correctly, but also whether they provide sufficient effective legal protection as required by Union law. When national legislation violates European equal treatment law, the question of how courts should proceed from a remedial perspective is thus, in theory, a shared responsibility of both the highest domestic courts and the ECJ. In practice however, the ECJ has strengthened its role by framing the remedial issue as a matter of supremacy of the EU-Treaties, which, according to its settled case law, take precedence over any kind of domestic law including national constitutions.²⁹ The remedial question is, in short, largely answered by the ECJ.

So, what does the “European” approach of the ECJ look like? Very different, to be sure. The European Court effectively denies one of the fundamental assumptions underpinning the second-guessing approach, namely the fact that the courts actually *have* a choice. By contrast, the ECJ

24. See, e.g., Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, 4 INT'L J. CON. LAW 618 (2006).

25. See, e.g., Stefan Oeter, *Federalism and Democracy*, PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 55, 56 (Armin von Bogdandy & Jürgen Bast eds., 2009).

26. See, e.g., Jan Komárek, *Precedent and Judicial Lawmaking in Supreme Courts: The Court of Justice Compared to the US Supreme Court and the French Cour de Cassation*, 11 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 399, 409 (2009).

27. See Jan Komárek, *Federal elements in the community judicial system: building coherence in the community legal order*, 42 COMMON MARKET LAW REV. 9 (2005).

28. See e.g. Rob van Gestel & Jurgen de Poorter, *Supreme administrative courts' preliminary questions to the CJEU: start of a dialogue or talking to deaf ears?*, 6 CAMBRIDGE INT. LAW JOURNAL 122 (2017).

29. *Amministrazione delle Finanze dello Stato v. Simmenthal*, 1978 E.C.R. 629.

consistently rules that victims of underinclusive legislation must be treated in the same way and made subject to the same arrangements as the advantaged class, because in the eyes of the ECJ, these arrangements form the only valid point of reference.³⁰ The Court recognizes, of course, that the legislature remains free to choose a different path to achieve equal treatment, but as long as legislators have not done so, the courts have no other option than to extend the existing benefits.³¹

The ECJ has never clarified why it considers extending the only option. That is problematic, but not surprising given the ECJ's frugal argumentative style as compared to U.S. judicial reasoning.³² One explanation might be that these judgments are pronounced in the context of the ECJ's task of supervising domestic courts. It may be that the Court uses the strict obligation to level-up as a strategic tool to force member states to faithfully comply with EU (equal treatment) law. Such an incentive may sometimes be called for due to the tendency of some domestic courts to treat EU law as a foreign body of law. The level-up remedy then serves as quasi punitive damages.³³ Basically, what the ECJ might say is: "if you mess up, we are not going to save you."

There may be some truth in such a strategic explanation. However, one would then expect the ECJ to take a different view when it reviews Union law for compliance with the EU-Treaties. After all, there are no domestic courts involved in such an exercise, just Community institutions. And indeed, the early case law of the Court displays a cautious attitude towards the EU legislature. In 1977, it declared a regulation which provided a fiscal refund scheme for some products made from maize, but not for others to violate the constitutional principle of equality.³⁴ However, the Court refrained from invalidating the refund scheme, nor

30. *See, e.g.,* Terhoeve v. Inspecteur van de Belastingdienst Particulieren/Ondernemingen buitenland, 1999 E.C.R. I-345, at 57 (domestic courts should extend tax scheme to both residents and non-residents). The roots of this approach originate from: *The Netherlands v. Federatie Nederlandse Vakbeweging*, 1986 E.C.R. 3855, at 22 (women should enjoy same unemployment benefits as men). *See also* Specht v. City of Berlin, 2014 ECLI:EU:C:2014:2005, at 93-95 (difference of treatment in civil servants pay is unjustified, but may continue for a while for lack of clear framework of reference); *Milkova v. Director of Privatization*, 2017 ECLI:EU:C:2017:198, at 66-67 (domestic courts should extend scheme for employees with disabilities to civil servants with disabilities).

31. Michael Dougan, *NATIONAL REMEDIES BEFORE THE COURT OF JUSTICE: ISSUES OF HARMONISATION AND DIFFERENTIATION* 20 (Hart Publishing 2004).

32. *See, e.g.,* Mitchel Lasser, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF TRANSPARENCY AND LEGITIMACY* (Oxford University Press 2009); Komárek, *supra* note 26, at 409.

33. J.H. Jans, S. Prechal & R.J.G.M. Widdershoven, *EUROPEANISATION OF PUBLIC LAW* 184 (GroningenL Europa Law Publishing, 2nd ed. 2015).

34. *Ruckdeschel & Co v. Customs Office Hamburg-St. Annen*, 1977 E.C.R. 1753. *See also* *Société des Fonderies de Pont-à-Mousson v. High Authority of the European Coal and Steel Community*, 1959 E.C.R. 215.

did it extend it to disadvantaged manufacturers. Instead, it considered that there were several courses of action that would lead to the elimination of the inequality, and it was “for the institutions responsible for the common agricultural policy to assess” the necessary choice of action.³⁵ In the meantime, the regulation, with its inequality, would remain in force. In later years, however, the Court seems to have abandoned that approach. It still insisted that it was up to the community legislature to adopt “such measures as may be appropriate in order to establish equal treatment.”³⁶ However, pending the adoption of the new rules, “the competent authorities must continue to apply the exemption provided for in the provision declared invalid but they must also grant it to the operators affected by the discrimination found to exist.”³⁷ It is this approach that has survived over the years. Thus, in a landmark case about passenger rights in aviation, the Court considered a difference in treatment in an EU regulation between the rights of passengers whose flights was delayed, as opposed to those whose flights were cancelled, arbitrary and thus a breach of the principle of equality. This time it did not even make any reference to the role of the European legislature. Instead, by way of interpretation, it simply extended the rules for passengers of annulled flights to the group of passengers whose flights were delayed for more than three hours.³⁸ In short, it seems irrelevant whether the inequality originates in the law of the member states, or in EU law itself.

Rather than a strategic tool to influence domestic actors, it seems that the Court simply regards extending to be the only legitimate way forward for the courts. This view may, alternatively, be explained by the Court’s repeated emphasis on two other principles that are considered fundamental to EU law: legal certainty and effective legal protection. It might be that the Court simply considers nullification of benefits for third parties as contrary to the judicial function. Such a view has been defended in the domestic constitutional law of some European member states.³⁹ However, this theory is neither uncontroversial nor widely followed. It has been rejected on the grounds that such a rigid insistence on extending

35. *Id.* at 1772.

36. *Van Landschoot v. Mera*, 1988 E.C.R. 3456, at 3463 (no. 22).

37. *Id.* at 3465.

38. *Sturgeon v. Condor Flugdienst*, 2009 E.C.R. I-10923.

39. *See, e.g., Pieter van Dijk, De houding van de Hoge Raad jegens de verdragen inzake de rechten van de mens, DE PLAATS VAN DE HOGE RAAD IN HET HUIDIGE STAATSBESTEL 173-209* (Zwolle, B. Baardman ed. 1988) (arguing, unfortunately in Dutch, that only legislatures are empowered to withdraw existing rights from persons that are not party to the litigation).

is highly unworkable in practice.⁴⁰ And yet, the principled view that recognizing multiple acceptable policy outcomes, does not imply a *judicial* choice between those outcomes, remains somewhat attractive.

C. *The Separation of Powers Approach*

Courts applying the separation of powers approach follow a similar reasoning to the U.S Supreme Court. They assume that equal treatment does not dictate a specific policy outcome. Moreover, like SCOTUS, they consider levelling down, be it reluctantly, to be an adequate judicial remedy. However, these courts consider the choice between levelling-up or down a political decision that should be left to the legislature. They stay well out of the way of political decision making, and thus refuse to provide any remedy at all other than declaratory relief. One finds this approach in the Netherlands, but also by some members of the U.S. Supreme Court. Indeed, it seems to be advocated by Justices Thomas and Alito in *Sessions v. Morales-Santana*.⁴¹

The classic example is a judgment of the Dutch Supreme Court in the 1980's, ironically also about a discriminatory scheme for acquiring citizenship. In those days, the law on Dutch citizenship granted foreign women married to a Dutch (male) citizen the right to acquire Dutch nationality by a simple formal declaration. However, the same kind of generosity was not bestowed upon foreign husbands of female citizens.⁴² When this law was challenged on grounds of non-discrimination, the Dutch Supreme Court declined to review it.⁴³ It considered that to abrogate the right for women was just as lawful as extending the right to men, and to choose between the two options would be to encroach upon the political prerogative of Parliament. Thus, because the court would be unable to provide redress, it saw no reason to proceed any further. And so, the Court left open the question whether the statutory provision violated a non-discrimination clause and it turned down the plaintiffs claim.

40. S.K. Martens, *De grenzen van de rechtsvormende taak van de rechter*, 75 NEDERLANDS JURISTENBLAD 2000, 747 (2012).

41. *Sessions v. Morales-Santana*, 137 S. Ct. 1678 (2017) (Thomas, J., concurring).

42. It may be interesting to note, although hardly relevant for our present inquiry, that this was a very deliberate legislative choice. Both the government and Parliament expressly considered women with foreign husbands 'irrational', 'not morally impeccable' and possible victims of 'foreign fortune hunters'. For those who read Dutch, see Betty de Hart, 'ONBEZONNEN VROUWEN': GEMENGDE RELATIES IN HET NATIONALITEITSRECHT EN HET VREEMDELINGENRECHT ('"IRRATIONAL WOMEN": MIXED RELATIONSHIPS IN IMMIGRATION AND NATIONALITY LAW') 218 (Amsterdam 2003).

43. SCN judgment of 12 Oct. 1984, NJ 1985/230, ECLI:NL:HR:1984:AG4874 (*Citizenship Case*).

The Court was widely criticized for its Citizenship Judgment, both for its refusal to review the merits of the case and the lack of a remedy.⁴⁴ In 1998, it responded to its critics in a landmark judgment about an underinclusive tax exemption.⁴⁵ This time, the Court expressly considered that the impugned law violated international equal treatment law. It then examined whether it could provide relief, stressing that this question warranted a careful balancing of two principles: effective legal protection and the need for judicial restraint. The result, the Court concluded, was that it would provide relief unless that would involve policy making or political choices. If that were the case, the courts should leave the matter for Parliament, *at least for the time being*.⁴⁶ This last remark is important: it shows that the Court does consider the judiciary ultimately empowered to decide the remedial issue when Parliament knowingly leaves the violation intact. Rather, its restraint is of a relative nature: it is a matter of judicial policy, rather than of competence. However, although the Dutch legislature has often been slow to respond, the Court has never actually intervened. Moreover, the Court does not require the legislature to deal with past violations or attach retroactive effect to its amendments.⁴⁷ Needless to say, this may have serious consequences for the victims of ongoing unequal treatment.

The fact that the Dutch courts consider their approach as one of restraint, rather than of competence, stands in stark contrast to the somewhat comparable approach advocated by Justices Scalia and Thomas. In *Miller v. Albright*, Justice Scalia argued, along the same lines as the reasoning of the Dutch Court, “that the complaint should be dismissed because the courts had no power to provide the relief requested.”⁴⁸ He went on to add that, “It is in my view incompatible with the plenary power of Congress . . . for judges to speculate as to what Congress would have enacted if it had not enacted what it did.”⁴⁹ This comes very close to the approach taken by the Dutch Supreme Court in its *Citizenship Case* of 1984: because the courts should not second-guess

44. Erika de Wet, *The Reception Process in the Netherlands and Belgium*, A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 229, 241 (H. Keller & A. Stone Sweet eds., Oxford University Press 2008).

45. SCN judgment of 12 May 1999, NJ 2000/170 (Labour expenses deduction).

46. *Id.* para. 3.15.

47. *E.g.*, SCN judgment of 14 June 2002, BNB 2002/289, ECLI:NL:HR:2002:ZC8146 (Labour deduction II).

48. *Miller v. Albright*, 523 U.S. 420, 422 (1998) (Scalia, J., concurring).

49. *Id.* at 457.

legislative intent, it is inappropriate to reach the merits of the case.⁵⁰ Both approaches clearly appeal to separation of powers concerns. Moreover, they both hint vaguely at some political question doctrine, be it in different ways. Justice Scalia seems to suggest that immigration and citizenship are fields that are constitutionally reserved for a coordinate branch.⁵¹ The Dutch Supreme Court, on the other hand, is more concerned with a lack of judicially discoverable standards to choose between levelling-up or down.⁵² Moreover, as I remarked before, where Justice Scalia framed the matter as one of competence, the Dutch Supreme Court was careful to emphasize that its restraint was a matter of constitutional courtesy. This difference seems perhaps somewhat formalistic, but it is significant.

D. *The Dialogic Approach*

There has been a fair amount of talk about constitutional dialogue lately. The modern use of the metaphor, which originates from Canadian constitutional law, continues to dominate the debate on constitutionalism and judicial review.⁵³ The concept has many dimensions, one of which is the notion of remedial dialogue: the idea that the shaping of judicial remedies may contribute to a meaningful dialogue between courts and legislature.⁵⁴ Using the temporal effects of their judgments, courts may allow legislatures time to remedy defective legislation. This should achieve a unique balance between the competing ideals of effective rights protection and democratic self-determination. Leaving aside the matter of whether that is actually realistic, I discuss two examples of remedial dialogue in the context of underinclusiveness, drawn from two very different courts: the Supreme Court of Canada and the Federal Constitutional Court of Germany (the *Bundesverfassungsgericht*, or BVerfG).

50. SCN judgment of 12 Oct. 1984, NJ 1985/230, ECLI:NL:HR:1984:AG4874 (*Citizenship Case*).

51. *Baker v. Carr*, 369 U.S. 186, 217 (1961).

52. *Id.* at 226.

53. Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue between Courts and Legislatures (or perhaps the Charter of Rights Isn't Such a bad Thing after All)*, 35 OSGOODE HALL L.J. 75 (1997); Kent Roach, *THE SUPREME COURT ON TRIAL: JUDICIAL ACTIVISM OR DEMOCRATIC DIALOGUE* (Toronto 2001).

54. The work of Kent Roach is of fundamental in this respect: *See, e.g., Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity*, 35 U.B.C. L. REV. 211 (2001); Kent Roach, *Constitutional, Remedial, and International Dialogues About Rights: The Canadian Experience*, 40 TEXAS INT. L.J. 537 (2005).

i. The Supreme Court of Canada

When confronted with underinclusive legislation, Canadian courts traditionally focus on legislative intent.⁵⁵ In the 1992 landmark case of *Schachter v. Canada*, then Chief Justice Antonio Lamer listed five remedial options while recognizing that “a court has flexibility in determining what course of action to take following a violation of the Charter [of Rights and Freedoms, JU].”⁵⁶ Guidance could be drawn from the hypothetical preferences of the legislature. To that end, the judgment extensively discussed a range of factors that were indicative of legislative preferences, such as budgetary considerations and the relative size of the two groups involved.⁵⁷ However, in the case at hand (concerning a social assistance scheme which distinguished between natural and adoptive parents), the Court concluded that ascertaining the legislative objectives was difficult.⁵⁸ Lamer C.J. stressed that the Court should be weary of extending benefits under these circumstances.⁵⁹ Invalidation of the scheme was the appropriate remedy. However, he also observed that striking down would deprive eligible persons of a benefit without providing any relief to the respondent. He solved that difficulty by turning to a device he had developed seven years earlier in *Re Manitoba Language Rights*.⁶⁰ In that case, the Court had suspended its declaration of invalidity in order to give the legislature time to work out a solution. In *Schachter*, Lamer C.J. argues at length that delayed declarations should be considered exceptional, given that they allow a finding of unconstitutionality to persist. Only when a declaration of invalidity threatens public safety or the rule of law, may it be considered appropriate.⁶¹ The Court then conveniently added one other category: delayed declarations of invalidity could also be appropriate when the law under review is underinclusive and striking it down would result in the loss of rights by third parties.

The Court, in *Schachter*, stressed that “the question whether to delay the application of a declaration of nullity should turn not on considerations of the role of the courts and the legislature but rather on considerations relating to the effect of an immediate declaration on the public.”⁶² And

55. See, e.g., Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA LAW REV. 322, 340 (2016).

56. *Schachter v. Canada*, 2 S.C.R. 679, 695 (1992).

57. *Id.* at 709, 711.

58. *Id.* at 722.

59. *Id.* at 723.

60. *Re Manitoba Language Rights*, 1 S.C.R. 721 (1985). See also *R. v. Swain*, 1 S.C.R. 933 (1991).

61. *Schachter*, 2 S.C.R. at 715-716.

62. *Id.* at 717.

yet, in later years, Canadian courts seem to have abandoned this approach in practice, if not in theory. They rarely justify delaying their judgments with reference to the costs of legal discontinuity, nor do they weigh those costs against the costs of temporarily maintaining an unconstitutional state of affairs.⁶³ It rather seems as if Canadian courts no longer regard suspension as an emergency measure but rather as a standard dialogic device to remand sensitive issues to the legislature for consideration. This allows them to circumvent the difficult choice that U.S. courts face, but it also protects them, at least to some extent, from many of the downsides of the rights-based approach (which can have immense budgetary implications) or the separation of powers approach (which falls short in terms of effective legal protection).

ii. The German Constitutional Court

The innovative approach taken by the Supreme Court of Canada has been met with much enthusiasm in other parts of the world. Several courts have carried out similar experiments.⁶⁴ But perhaps the most interesting example in terms of comparison comes from a jurisdiction where remedial delay has been around for more than 50 years, without actually calling it dialogue. The Federal Constitutional Court of Germany (FCC) has always maintained that unconstitutional laws are automatically void.⁶⁵ And yet since 1961, it regularly turns a blind eye when confronted with underinclusive legislation. In those cases, instead of declaring legislation invalid, it declares it “merely unconstitutional” (“bloß verfassungswidrig”).⁶⁶ Usually such a declaration is accompanied by some kind of interim arrangement. This arrangement applies until the legislature has replaced it with a scheme of its own. A mere declaration of unconstitutionality does not affect the validity of the law, but it does usually trigger a situation in which courts and agencies may no longer apply it to existing and future cases.⁶⁷ Moreover, they should suspend those existing cases until Parliament has replaced the unconstitutional

63. Sujit Choudhry & Kent Roach, *Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies*, 21 SUPREME COURT LAW REV. 205, 232 (2003).

64. See e.g. the judgment of the Constitutional Court of South Africa in *Minister of Home Affairs v. Fourie*, 1 S.A. 524 (2006) (Court grants Parliament a grace period in order to implement same-sex marriage). See also: Holning Lau, *Comparative Perspectives on Strategic Remedial Delays*, 91 TULANE L. REV. 259 (2016). (noting the strategic use of remedial delay in this case).

65. See e.g.: the *Südweststaat* (‘Southwest State’) judgment of the FCC, 1 BVerfG 14 (1951).

66. See BVerfGE 13, 248 (1961) (judgment of December 13, 1961).

67. BVerfGE 317, 217 (1974) (Descendants nationality judgment).

norm, at which time they should decide these cases under the new rule or, if applicable, under any transitional scheme the legislature has devised.⁶⁸

That is the general rule. However, the FCC sometimes, by way of interim measure, proclaims that the unconstitutional norm continues to be applicable, be it modified and only for a certain amount of time.⁶⁹ Thus, in a case in which the legislature had discriminated between married couples and registered partners for the purposes of a fiscal scheme, the Court ordered the continued application of the scheme for married couples in the interest of legal certainty. It ordered however, that by way of interim measure, the courts were to temporarily extend the benefit to registered partners.⁷⁰ Similarly, in a case somewhat comparable to *Sessions v. Morales-Santana*, it considered it necessary, given the fundamental importance of clarity about the status of nationality for children, to order the continued application of a law that conferred German nationality to descendants of German fathers, but not of German mothers.⁷¹ However, it added specific instructions, which essentially secured that all children born before the entry into force of the new legislation would ultimately secure German citizenship.

The German Constitutional Court is, compared to the Supreme Court of Canada, far more vocal about the legislative duties following a declaration of unconstitutionality, meticulously supervising the legislative process. Parliament is under a legal obligation to change the law.⁷² Moreover, the FCC has explicitly ruled that the new rule should have retroactive effect, at least to the date of the FCC's original judgment.⁷³ The period before the FCC's judgment is covered by a more flexible regime: Parliament *can*, in some circumstances, be required to make some kind of arrangement for the victims of the unconstitutionality, but this need not necessarily amount to full reparation.⁷⁴ What the Court basically does, is that it balances the need to provide redress to the victims of an unconstitutionality with other legitimate interests, such as the rights of third parties and the need for sound public finance.⁷⁵

All this is to secure legislative involvement in the remedial process, while at the same time safeguarding, as much as possible, the rights of both the litigants and those who are in a comparable position. Mere

68. *Id.*

69. The landmark judgment is: BVerfGE 119, 331 (Hartz IV).

70. BVerfGE 133, 377 (2013).

71. BVerfGE 317, 217 (1974).

72. BVerfGE at 217; BVerfGE 82, 126 (Notice period judgment).

73. BVerfGE 87, 114 (1992) (Allotments judgment).

74. *Id.*; see also, BVerfGE 133, 377 (2013) (Married couples and registered partners judgment).

75. See e.g., BVerfGE 87, 153 (1992) (Basic subsistence minimum judgment).

declarations nowadays constitute a very substantial percentage of the FCC's findings of unconstitutionality. However, this practice has remained controversial. It has been criticized as too activist by those who consider the judicial interim measures as too great an intrusion to the legislative sphere.⁷⁶ Others, by contrast, complain that the Court does too little to meet its judicial obligation to provide effective redress.⁷⁷ That last question is particularly relevant for the topic of our present inquiry, and it is to the principle of effective legal protection I now turn.

II. IUS UBI, IBI REMEDIUM AS AN INTEGRATED FRAMEWORK

Having outlined four different approaches to the problem of underinclusive legislation, the question presents itself: which one is best? Unfortunately, this short essay is hardly the place to flesh out a normative theory capable of evaluation. Its chief purpose was to broaden the debate on *Morales-Santana* by bringing in a comparative perspective. However, it would be very impolite to the reader not to offer some brief thoughts on the normative aspect. In order to do this, we shall need some kind of framework. Such a framework may be found in the principle of effective legal protection, more commonly referred to by the Latin maxim *Ubi Ius, Ibi Remedium*.⁷⁸ This principle is part of constitutional heritage in many parts of the world. Widely considered a vital part of the rule of law, it is included in many constitutions.⁷⁹ In the common law world it has long been, “a settled and invariable principle . . . that every right, when withheld, must have a remedy, and every injury its proper redress.”⁸⁰ So much so, that it became an inextricable part of U.S. constitutional history

76. E.g. R. Lamprecht, *Oligarchie in Karlsruhe: Über die Erosion der Gewaltenteilung* ('Oligarchy in Karlsruhe: About the Erosion of the Separation of Powers'), 47 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3272 (1994).

77. Michael Sachs, *Bloße Unvereinbarerklärung bei Gleichheitsverstößen? Probleme einer Entscheidungspraxis des BVerfG* ('Mere Declarations of Incompatibility for Violations of Non-Discrimination? Problems of a Remedial Practice of the FCC'), 1 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVWZ) 657 (1982); Michael Sachs, VERFASSUNGSPROZESSRECHT ('CONSTITUTIONAL PROCEDURE') 60 (Heidelberg 2004).

78. See, e.g., Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004). See also Tracy Thomas, *Leveling Down Equality*, 9 CONLAWNOW [2018] [forthcoming], for a very similar approach from a domestic perspective.

79. See, e.g., Dinah Shelton, REMEDIES IN INTERNATIONAL HUMAN RIGHTS 465 (Oxford University Press 2005); GRUNDGESETZ [GG] [BASIC LAW], art 19.4; C.E., B.O.E. n. 53.2 (Spain); Constitución Política de los Estados Unidos Mexicanos, CPEUM, art. 103, Diario Oficial de la Federación [DOF] 05-02-1917 (Mex.).

80. William Blackstone, COMMENTARIES IN THE LAWS OF ENGLAND 23 (Oxford University Press 1765).

when Chief Justice Marshall quoted it in *Marbury v. Madison*.⁸¹ Its importance is highlighted, moreover, by the fact that it is considered a core human right, featuring in several international conventions.⁸²

Ius ubi, ibi remedium is important, but it is also a highly complex fundamental right. On its face, it gives the impression of absoluteness. Most documents, either in constitutional or in public international law, fail to include any limitation clause to the right to a remedy. Moreover, in many cases, such as *Marbury v. Madison*, the principle is presented as an unyielding imperative. However, as Fallon and Meltzer have rightly stressed, this “apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule, and its ideal is not always attained.”⁸³ Or, as Dinah Shelton observed in the context of international human rights law: “[t]he latin maxim ubi jus ibi remedium . . . is not, and perhaps cannot be, strictly observed in practice. Rights have gone unremedied in the past, and some will go unremedied in the future.”⁸⁴ The law of constitutional remedies is, by definition imperfect, the great promises of Blackstone, constitutions, and human rights notwithstanding. Effective legal protection is, in other words, a qualified right. This means that the principle allows itself to be balanced against other principles, such as legal certainty, the separation of powers, and democratic self-governance. But how should we reconcile this with the principle’s unyielding aura?

The answer lies in, what one might call, a *functional approach* to effective legal protection. Constitutional remedies basically perform two legal functions.⁸⁵ On a microlevel they prescribe full reparation of individual violations and measures to secure future norm compliance. On a more structural level, they also serve to reinforce the rule of law. Both constitutions and human rights instruments presuppose a functioning institutional system that is designed to ensure that governments respect constitutional values and generally act within the boundaries of the law. As Fallon and Meltzer have rightly stressed: “Of the two functions performed by constitutional remedies, providing effective remediation to individual victims is the more familiar, but ensuring governmental faithfulness to law is, if not the more fundamental, at least the more

81. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

82. See, e.g., International Covenant on Civil and Political Rights, Art. 2.3; European Convention on Human Rights, art. 13; Inter-American Convention, art. 25.

83. Richard H. Fallon & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARVARD L. REV. 1731, 1778 (1991).

84. Shelton, *supra* note 79, at 21.

85. I derive this account from Fallon & Meltzer, *supra* note 83, at 1787.

unyielding.”⁸⁶ Distinguishing between these two sides of the coin may be helpful to identify the interaction between the two. Although the microlevel function allows for balancing, whereas at the macrolevel, the principle is virtually absolute, the latter’s unyielding character does influence this microlevel balancing exercise. In other words, the consequences of a specific case for the protection of a given right at the structural level may raise the weight of providing a remedy at the microlevel.

Furthermore, the fundamental right to a remedy may also perform a more socio-theoretical function in that it forces the main protectors of rights, the courts, to rationally justify the outcome of this balancing exercise. Human rights institute, what German scholar Mattias Kumm has referred to as “a practice of Socratic contestation”: they require the authorities to give sound reasons for their claims.⁸⁷ The way it works is that courts, using proportionality as a framework of reference, critically scrutinize legislative or executive claims underpinning the exercise of power. Such “Socratic questioning” may reveal “a great deal of thoughtlessness, platitudes, conventions, or brute power-mongering that dresses up as wisdom, but falls together like a house of cards when pressed for justifications.”⁸⁸ Usually this “rationalist human rights paradigm” is enforced by the courts *vis-à-vis* governments and legislatures.⁸⁹ However, there is no reason why it should not also be applied to the judicial function itself. In the context of the duty to provide effective remedies, this means that courts must justify their remedial choices with reference to concrete and, as much as possible, evidence-based reasons.⁹⁰ The proportionality test, as it is used—in one form or another—may serve as a useful tool to guide this exercise.⁹¹

What this all means for present purposes, is that we should first recognize that *ius ubi, ibi remedium* does allow for certain exceptions. However, these exceptions should be based upon a clear and specific countervailing principle. It is, for instance, possible that providing a

86. *Id.* at 1789.

87. Mattias Kumm, *The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review*, 4 *LAW & ETHICS OF HUMAN RIGHTS* 140 (2010).

88. *Id.* at 153.

89. Mattias Kumm, *Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review*, 1 *EUROPEAN JOURNAL OF LEGAL STUDIES* 2 (2007),

90. Thomas, *supra* note 78, at 1643 (arguing for strict scrutiny when evaluating the denial of a remedy).

91. See, e.g., Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere But Here?*, 22 *DUKE J. OF INT. & COMPARATIVE LAW* 291 (outlining the general structure of the proportionality principle).

specific remedy would be inconsistent with legal certainty (in case of withdrawing rights from third parties), or that striking down a discriminatory exception to a criminal offense for the advantaged class is prohibited by *nulla poena sine lege*. It is also possible that courts would want to avoid a specific remedial outcome out of respect for the legislature. These concerns are, however, far too abstract to justify remedial restraint as such. We need to specify precisely what the principles we identified dictate in a specific case. One might for instance, in the case concerning underinclusive legislation, argue that remedial restraint is based on a very specific substantive perception of the separation of powers, which grounds the necessity for judicial restraint in the idea of collective self-determination.⁹² In other words: the notion of collective self-determination dictates that courts should be wary of crafting remedies that impede on the primacy of the political process. However, that is only the first step of the analysis because then, the court will need to specify exactly why this principle dictates restraint in the specific context of the case at hand. Moreover, the exception to the right to a remedy should be narrowly construed in light of the specifics of the case at hand. There is no *one size fits all* outcome in constitutional remedies.

III. APPLYING THE FRAMEWORK: SOME OBSERVATIONS

What does this all mean for the four approaches I identified before? The answer is fairly simple when it comes to the separation of powers approach taken by the Dutch courts. That approach, on the surface, seems to include a balancing of two principles: effective legal protection and judicial restraint. However, at closer sight, hardly any balancing takes place at all. Instead, there is a bright-line rule dictating that in cases of underinclusiveness, courts should leave the remedial matter for Parliament to decide. Even if Parliament would eventually change the law, it is unclear whether the original claimant would benefit of the new scheme. Moreover, it would be very unlikely indeed that victims of past violations would obtain redress. Such an approach thus immediately falls short in terms of effective legal protection.

The American approach produces a more complicated picture. Obviously, a decision to level-up would not be problematic in terms of effective legal protection. With regard to the possibility of levelling-down, one might argue that such a course of action would constitute an

92. See Christoph Möllers, *THE THREE BRANCHES: A COMPARATIVE MODEL OF SEPARATION OF POWERS* 92 (Oxford University Press, 1st ed. 2013).

adequate, be it a “mean” remedy. Thus, Michael Dorf argues that although the Court could not give Morales-Santana the relief he sought, it did ultimately issue a constitutionally adequate remedy.⁹³ The reasoning behind this is that the victims of underinclusive legislation do not rely on a substantive constitutional value, they “just” want to be treated equally. Levelling-down would accomplish that. However, this reasoning is incomplete. It fails to recognize that the relevant point of reference is not future applications of the law, but past applications. If a court intends to remedy the situation levelling-down, it is required, not only to refuse the benefit to future applicants of the advantaged class, in order to achieve full equal treatment. It must also somehow “take back” what was already given. That is something the courts are fundamentally unequipped to do. Doctrines such as *res iudicata* and *nulla poena sine lege* would resist such a course. Thus, levelling-down is problematic under the right to an effective remedy.

The second question is whether levelling down may still be justified because of the need to respect legislative intent. I hardly think it does. First of all, applying the framework set out previously, it is unclear exactly what justifies the second-guessing approach. Is it to enforce, as much as possible, the legislative will of a former legislature? Or is it to preserve the space for collective self-determination by the present legislature? And how can levelling-down *really* be said to serve collective self-determination? Courts under the second-guessing approach tend to, well, second-guess. Their reasons for choosing either this way or that can seldom be evidence-based. Moreover, they need to rely on assumptions that are highly difficult to substantiate. This means that the second-guessing approach may easily lead to arbitrariness. Last but not least, focusing on legislative intent makes it difficult to balance the different interests involved in the remedial calculus. What, for instance, if fear of levelling-down would lead to a chilling effect on litigation? Should adults think twice of arguing an age discrimination complaint in court concerning a law that exempts juveniles from life imprisonment?⁹⁴ Or should a court steer well away of even finding a violation because it would otherwise have to take away the benefits of (vulnerable) third parties?⁹⁵ In other words, this is where the structural level of the right to a remedy

93. Dorf, *supra* note 2.

94. *Khamtokhu & Aksenchik v. Russia*, no. 60367/08 Eur. Ct. H.R. (2017).

95. This is what eventually happened in *Khamtokhu & Aksenchik*.

comes into play.⁹⁶ Such a perspective would dictate the courts involved to extending rather than to invalidating.

Obviously, the rights-based approach is comparatively more favorable from a remedial perspective. Still, it can be problematic in terms of collective self-determination. Ironically, this approach suffers from the same lack of balancing as the others. By prescribing levelling-up as the only possible option, the ECJ runs the risk of overextending a relatively minor legislative scheme. That could seriously jeopardize legitimate government interests. Of course, such a course could still be justified, but the rights-based approach has no way of filtering unnecessary cases out. Again, the structural level of protecting constitutional rights is relevant here. Because if levelling-up is the only possible remedy, courts might well become excessively cautious when reviewing legislation. Of course, legislatures can respond by enacting new legislation, but they have a strong political incentive not to withdraw benefits. Moreover, such a “ping pong” effect between courts and legislature can have disruptive effects in terms of legal certainty.

Finally, how should the dialogic approach be evaluated? First of all, the dialogic remedy does enjoy a few advantages over the other three approaches. It avoids the problem of second-guessing by referring the matter to the legislature, thus allowing room for collective self-determination. Democratic self-determination is also distinctly better off under the dialogic model than under the rights-based approach because the legislature may balance the different interests involved, instead of having one automatic remedy bestowed upon it. Last but not least, although the dialogic and the separation of power approach share their aspiration of leaving the legislature room for maneuver, litigants under the dialogic model are distinctly better off. Unlike under the separation of powers approach, courts under the dialogical approach formulate a remedy which takes effect at some later point in time. Moreover, both the Supreme Court of Canada and the German FCC frequently (if not always) retain jurisdiction so that they may continue to supervise legislative deliberations. Both aspects greatly increase the chances of redress for the original claimants.

And yet there remain some challenges for the dialogical model, the most important of which is the fact that the remedial quest under the dialogical model is in danger of being turned into a socio-political, rather than a legal enterprise. Theories underpinning the idea of constitutional

96. See, Nitya Duclos & Kent Roach, *Constitutional Remedies as “Constitutional Hints”*: A Comment on *R. v. Schachter*, 36 MCGILL L.J. 1 (1991) for a similar approach.

dialogue usually focus on the structural level, rather than on the consequences for individual litigants. There is much to be said for such an approach.⁹⁷ However, viewing the outcome of a case in terms of general policy, does come at a cost. It may result in the courts overlooking the position of the individual litigant, whose interests should, after all, be at the heart of the remedial calculus. Thus, the question surely must be what happens if the legislature does change the law. Can the original claimant benefit from such a change of law? Most constitutionalists talking dialogue, seem to be little interested in that question.⁹⁸ It is highly relevant, however, because legislatures have a tendency of solving the matter prospectively only. This leaves it up to the courts to devise a remedial structure which ensures that litigants are not forgotten in this political game between the institutions. There is still much work to be done in that respect. However, the approach taken by the German Constitutional Court may provide us with some clues in this respect. It provides the legislature with relatively clear guidance as to what is required in terms of retrospectivity. Moreover, as we have seen, the court has specifically outlined the duties of regular courts and executive agencies with respect to the effects of its declaration of unconstitutionality for ongoing cases, thus ensuring that litigants are not forgotten. Developing such a framework is difficult to be sure, but necessary nonetheless.

IV. CONCLUSION

In the world of constitutional remedies, the problem of underinclusiveness may be described as the ultimate litmus test. It puts courts before complex and interconnected constitutional issues. The United States Supreme Court has tried to close Pandora's box by invoking legislative intent. Comparative analysis shows, however, that legislative intent is neither a necessary nor even a convenient basis for remedial policy. A more flexible approach that builds upon proportionality and dialogue would enable courts to reconcile the fundamental right to a remedy with collective self-determination. Our efforts should be directed towards refining such an approach. That is the challenge for the years to come.

97. See, e.g., Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZONA L. REV. 559 (1991) (stressing the need to address constitutional defects on a more structural level).

98. But see Choudhry & Roach, *supra* note 55; Aruna Sathanapally, *BEYOND DISAGREEMENT: OPEN REMEDIES IN HUMAN RIGHTS ADJUDICATION* (Oxford University Press, 1st ed. 2012).