TRUMPING *DOBBS*

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This Essay draws upon Canadian constitutional law to analyze the Supreme Court's decision in Dobbs v. Jackson Women's Health Organization*. In his Foreword to the 2018 Harvard Law Review Supreme Court issue, Jamal Greene analogously draws upon Canadian constitutional law to illuminate aspects of U.S. constitutional law we often oversee and take for granted. He argues that rights are construed as "trumps": they are absolute. Greene contrasts this framework to Canada's, under which rights are subject to reasonable limitations pursuant to a "proportionality analysis." This Essay builds upon that work. It argues that proportionality analysis is indeed central to constitutional adjudication in Canada and most other developed countries. The Essay shows how the framework for the protection of reproductive rights set out in* Roe v. Wade *and modified in* Planned Parenthood v. Casey *incorporates key aspects of proportionality analysis. It allows for varying limitations to a constitutional right. Because these precedents significantly moved away from the existing framework of constitutional review and did not acknowledge that they sought to fundamentally change that framework, they were uniquely vulnerable. Unsurprisingly, the* Dobbs *majority sharply criticizes the balancing of values and goals that defines proportionality analysis as impracticable and inconsistent with U.S. constitutional review. More broadly, these precedents, and the* Dobbs *opinion, illustrate how U.S. constitutional law lacks the necessary tools to mediate and reconcile conflicting rights—unlike countries which adopt proportionality analysis. Its rigid framework, which many Americans tightly hold on to as a hallmark of democracy and judicial minimalism, amplifies the role of courts in fundamental, charged sociopolitical debates. This framework is inherently bound to politicize the intervention of courts and undermine their legitimacy.*

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INTRODUCTION

Supreme Court Justices agree on one thing: Justice Alito's draft opinion in *Dobbs v. Jackson Women's Health Organization*[1] should not have been leaked.[2] The leak was a breach of the trust and fundamental rules which Justices and Court personnel across the methodological and ideological spectrum have consistently upheld. Its apparent motivation, and potential consequences, were transparently political. Some expected the Court to be influenced by public outcry following the leak.[3] Others, including myself, expected the leak to make any major further modification to the draft opinion less tenable. Modifications would reveal the transactional nature of opinion drafting to a segment of the population that would neither expect nor value it. As one law professor put it on Twitter: "If you work inside the Court, you know that the most concrete impact of the leak is to lock in this opinion essentially as is. Any edits at this point reveal jockeying between Justices, undermine the majority, and Court itself. Embarassing to the majority."[4]

These concerns exemplify the problem discussed in this Essay: U.S. constitutional law lacks the tools to mediate and reconcile conflicting rights. The United States is singular amongst developed countries in rejecting proportionality analysis, an approach to constitutional review which allows the state to infringe upon constitutional rights in a way that is proportionate with the objective it seeks to achieve. As a result, U.S. constitutional law creates, often arbitrarily and unfairly, winners and losers. It delineates (and dissolves) absolute rights. When faced with competing rights, especially rights of ostensibly constitutional status, U.S. constitutional law must *pick one*—and pretend the other never

1. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

2. *See* Ariane de Vogue, *Kagan Calls Leak of Draft Opinion Overturning Roe "Horrible" and Expects Investigation Update by Month's End*, CNN (Sept. 13, 2022, 5:45 AM), https://www.cnn.com/2022/09/12/politics/kagan-supreme-court-roe-draft-opinion-leak-investigation/index.html [https://perma.cc/B9F2-UT24]; Ariane de Vogue & Maria Cartaya, *John Roberts Calls Supreme Court Leak "Absolutely Appalling"*, CNN (May 6, 2022, 8:08 AM), https://www.cnn.com/2022/05/05/politics/john-roberts-supreme-court-leak/index.html [https://perma.cc/9B5C-K7AW]. The draft opinion as leaked can be accessed at Politico Staff, *Read Justice Alito's Initial Draft Abortion Opinion Which Would Overturn Roe v. Wade*, POLITICO (May 2, 2022, 9:20 PM), https://www.politico.com/news/2022/05/02/read-justice-alito-initial-abortion-opinion-overturn-roe-v-wade-pdf-00029504 [https://perma.cc/3CYR-PZN3].

3. *See* Molly Callahan, *Who Leaked the Supreme Court Draft Opinion Overturning Roe v. Wade? Four Theories.*, NE. GLOB. NEWS (May 3, 2022), https://news.northeastern.edu/2022/05/03/supreme-court-draft-opinion-overturning-roe/ [https://perma.cc/MER5-97AS].

4. Amy Kapczynski (@akapczynski), TWITTER (May 3, 2022, 10:19 AM), https://twitter.com/akapczynski/status/1521494557237653505 [https://perma.cc/WBB9-CLT8]. *See also* Callahan, *supra* note 3.

existed. This rigid framework, which many Americans tightly hold on to as a hallmark of democracy and judicial minimalism, amplifies the role of courts in fundamental, charged sociopolitical debates. The intervention of courts in these debates is clumsy, heavy-handed, and generally unhelpful. As a result, the legitimacy of the judiciary is increasingly questioned.[5]

The leak of the *Dobbs* opinion was expected by some to pressure Supreme Court Justices out of a politically unpopular position, and by others to entrench it. Both groups ostensibly saw constitutional adjudication as a way to achieve political goals. The Court, in turn, was concerned about the leak because it was concerned about its legitimacy—its ability to partly extricate itself and its authority from politics and ideology.[6] As we will see, it is the nature of the interpretive tools U.S. courts have developed that sets them up for failure, politicizes their intervention, and undermines their legitimacy.

The first section of this Essay sets out the parameters of proportionality analysis. It shows how the United States is singular in strongly rejecting proportionality analysis. The second section discusses the role of proportionality analysis in reproductive rights jurisprudence.

I. U.S. CONSTITUTIONAL LAW AS AN ANOMALY

I often tell my students that Canada has a relatively long and remarkably recent rights-enshrining document.[7] The Canadian Charter of Rights and Freedoms,[8] our version of the Bill of Rights, was adopted in 1982.[9] In contrast, Jamal Greene has noted that "Americans have the shortest and oldest national constitution in the world."[10] The Canadian Charter of Rights and Freedoms is some 200 years younger than the Bill of Rights. It is unsurprising, then, that the Charter is also much longer and explicitly protects latter-generation rights,[11] such as the right to equality and to be free from discrimination.[12] In fact, the protection of these rights was in part a response to barriers to rights recognition in the United States. Subsection 15(2) of the Canadian Charter of Rights and Freedoms subtracts from the purview of subsection 15(1) (the general equality provision) "any law, program or activity that has as its object the amelioration of conditions of

5. *See, e.g.*, Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/F2HU-RMFX].

6. *See* de Vogue, *supra* note 2; Colleen Slevin, *Chief Justice John Roberts Defends Legitimacy of Court*, AP NEWS (Sept. 10, 2022), https://apnews.com/article/abortion-us-supreme-court-colorado-springs-john-roberts-government-and-politics-cdff7d291a37c3b8459e787421c633d2 [https://perma.cc/DAL5-C5WW].

7. I teach at a law school in Canada.

8. Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11).

9. On the context of the Charter's adoption, *see generally* Edward McWhinney, *The Constitutional Patriation Project, 1980-82*, 32 AM. J. COMP. L. 241 (1984).

10. JAMAL GREENE, HOW RIGHTS WENT WRONG 82 (2021).

11. *See generally* Carl Wellman, *Solidarity, the Individual and Human Rights*, 22 HUM. RTS. Q. 639 (2000).

12. *See* Canadian Charter of Rights and Freedoms, s. 15.

disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[13] The enumerated grounds of discrimination are not limitative and are also found in subsection 15(1).[14] Our Supreme Court has noted that subsection 15(2) appears to be a response to United States case law, stating:

> In that vein, proponents of the approach that focusses on the ameliorative goal of the program, rather than its effect, argue that doing so will prevent courts from unduly interfering in ameliorative programs created by the legislature. They note that Canadian Charter drafters wished to avoid the American experience, whereby judges overturned affirmative action programs under the banner of equality. . . . If the sincere purpose is to promote equality by ameliorating the conditions of a disadvantaged group, the government should be given some leeway to adopt innovative programs, even though some may ultimately prove to be unsuccessful.[15]

Quite saliently, Canada's rights-enshrining document provides that reasonable limits to constitutional rights are acceptable and expected. The first section of the Canadian Charter of Rights and Freedoms reads as follows: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[16] This section is applied through the *Oakes* test,[17] which essentially provides for means-end proportionality analysis. The state is entitled to infringe upon constitutional rights in a way that is proportional with the importance of the objective it is seeking to achieve. This objective is weighed against the infringement of the constitutional right. The test assesses (1) the "rational connection" between the limit and the objective, (2) whether the law minimally impairs the right, and (3) the salutary and deleterious impacts of the law.[18]

Proportionality analysis is neither unique to Canada nor unusual in constitutional adjudication.[19] Very similar frameworks exist in Germany, other

13. *Id.*, s. 15(2).

14. *See* Vriend v. Alberta, [1998] 1 S.C.R. 493.

15. R. v. Kapp, 2008 S.C.C. 41 at para 47, [2008] 2 S.C.R. 483. *See also* Alberta (Aboriginal Affairs and Northern Development) v. Cunningham, [2011] S.C.R. 670 at para 41. The Court refers to the United States Supreme Court's Equal Protection case law. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Grutter v. Bollinger, 539 U.S. 306 (2003). *See also* Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 498. It is worth noting that, because Canada's Constitution was democratically enacted very recently and incorporates progressive principles in its text, it is much less vulnerable than other national constitutions to criticism regarding the scope and legitimacy of judicial review and intervention. *See also* Vicki C. Jackson, *Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors*, 75 FORDHAM L. REV. 921, 939–40 (2006).

16. Canadian Charter of Rights and Freedoms, s. 1.

17. The test was first set out in the 1986 precedent of R. v. Oakes, [1986] 1 S.C.R. 103.

18. *See id.* For an accessible summary of subsequent case law, *see Section 1 – Reasonable Limits*, GOV'T OF CAN. (last modified Apr. 14, 2022), https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art1.html [https://perma.cc/M6C4-QFLU].

19. *See* GREENE, *supra* note 10, at 110–11; Jamal Greene & Yvonne Tew, *Comparative Approaches to Constitutional History*, *in* COMPARATIVE JUDICIAL REVIEW 379 (Erin F. Delaney & Rosalind Dixon eds. 2018); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015); Vicki C. Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, 130 HARV. L. REV.

European countries, most of South America, South Korea, Hong Kong, Israel, and South Africa.[20] It is the United States that stands essentially alone in strongly rejecting proportionality analysis. In the United States, the rights protected by or inferred from the Bill of Rights are generally construed as absolute. Laws that are inconsistent with a constitutional right are almost always invalidated: the state has very limited leeway to limit constitutional rights even with a compelling policy justification.[21] This can lead to outcomes that are difficult to justify with reference to morality or public policy. For instance, enumerated rights, such as freedom of speech, routinely invalidate laws and policies that seek to serve legitimate countervailing interests—often the promotion of equality and the protection from discrimination.[22] Judges are proportionately reluctant to recognize new rights, as these rights would benefit from the same level of protection.[23] Unlike jurisdictions which adopt proportionality analysis, U.S. constitutional law lacks a general framework through which competing constitutional rights can be reconciled.[24] Judges frequently resort to "slippery slope" arguments to argue that the recognition of additional or broader constitutional rights would imperil countless laws and policies.[25] The United States is therefore a jurisdiction which overprotects a very limited number of rights. And these rights may not correspond to the population's conception of how rights should be hierarchized. As noted, proportionality analysis is rooted in the opposite premise: constitutional rights are numerous and broad, and they can, and need to, be limited accordingly. Somewhat ironically, given the age and length of its Constitution,[26] the United States would be in greatest need of an interpretive approach flexible enough to recognize new rights.

2348 (2017); Vicki C. Jackson, *Pockets of Proportionality: Choice and Necessity, Doctrine and Principle*, *in* COMPARATIVE JUDICIAL REVIEW 357 (Erin F. Delaney & Rosalind Dixon eds. 2018).

20. *See* Greene, *Rights as Trumps?*, 132 HARV. L. REV. 28, 56–59 (2018); Greene & Tew, *supra* note 19; Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 19, at 3099; Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, *supra* note 19; Jackson, *Pockets of Proportionality: Choice and Necessity, Doctrine and Principle*, *supra* note 19.

21. *See generally* GREENE, *supra* note 10; Greene, *Rights as Trumps?*, *supra* note 20; Richard Fallon, *Implementing the Constitution*, 111 HARV. L. REV. 54, 79 (1997); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006) (finding that only 30% of laws are upheld under a strict scrutiny analysis).

22. *See* GREENE, *supra* note 10, at xxvi–xxvii, 106, 168; Greene, *Rights as Trumps?*, *supra* note 20, at 48, 50, 55, 71–74, 87; Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L. REV. 715, 736 (2010).

23. *See* GREENE, *supra* note 10, at 84, 106, 159–60; Greene, *Rights as Trumps?*, *supra* note 20, at 48, 50, 54–56, 71–72, 106.

24. Proportionality analysis allows for both the limitation of constitutional rights in furtherance of an important state interest and the mediation of competing constitutional rights.

25. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); Washington v. Davis, 426 U.S. 229, 248 (1976). Courts are especially reluctant to recognize latter-generation rights, such as the right to substantive equality, as these rights are necessarily broader. They are also more likely to conflict with other constitutional rights, such as freedom of religion. This approach disproportionately affects and contributes to the continued marginalization of disadvantaged communities. *See also* Wellman, *supra* note 11; GREENE, *supra* note 10, at 171–94 (discussing the recognition of disability rights); Greene, *Rights as Trumps?*, *supra* note 20, at 32, 56, 71–76, 106.

26. As noted, the United States has the "shortest and oldest national constitution in the world." GREENE, *supra* note 10, at 82.

This framework often tends to amplify the role of the courts in charged sociopolitical debates. Because courts cannot mediate conflicting rights and interests, they recognize the rights of one litigant to the detriment of another's and often prevent the state from achieving legitimate and salutary objectives. As noted, the rights that prevail may not match the population's conception of how rights should be hierarchized. Arguably as a result—and unsurprisingly—many perceive the courts to lack the legitimacy to move society to the dichotomic ends of charged sociopolitical debates.[27] As a natural response to these incentives, various groups in turn constitutionalize their claims to reap the outsize benefits of constitutional adjudication.[28]

II. *DOBBS*, *ROE*, *CASEY*, AND PROPORTIONALITY

The framework for the protection of reproductive rights set out in *Roe v. Wade*[29] and modified in *Planned Parenthood v. Casey*,[30] and the reasons set forth by the *Dobbs*[31] majority for overturning these precedents aptly illustrate the issues discussed in the previous section in a number of ways.

Both iterations of the constitutional framework for the protection of reproductive rights can be construed as attempts to incorporate into U.S. constitutional law a more flexible conception of constitutional rights. They allow the right to be limited more easily than other constitutional rights and mirror some aspects of proportionality analysis. The *Casey* framework is more flexible, and the assessment of circumstances pursuant to it is correspondingly more subjective. The sharp criticism by the *Dobbs* majority of this subjectivity—or indeterminacy—shows how foreign these frameworks were to U.S. constitutional law.

More fundamentally, both the frameworks and the arguments advanced to overturn them portend how similar attempts to introduce proportionality analysis into U.S. constitutional law will fare. *Roe* and *Casey* were always at risk because they lacked transparency. They introduced frameworks through which *varying* limitations to a constitutional right could be justified, but they did so without a transparent or coherent theoretical underpinning. Pursuant to its case law, the Court could not recognize a competing constitutional fetal right. Neither could it conceive of a right of quasi-constitutional status that would justify a proportionate limitation to a constitutional right. The Court therefore articulated this constitutional or quasi-constitutional competing right using the familiar concept of "interest," and it naturally struggled to coherently articulate how such an "interest" could be so strong and vary in significance.[32] This left the *Roe* and *Casey* frameworks uniquely vulnerable: first, because they were indeed inconsistent with traditional U.S. constitutional law frameworks and, second, because they

27. *See* Jones, *supra* note 5; GREENE, *supra* note 10, at 143, 152.
28. *See* GREENE, *supra* note 10, at xxvi–xxvii, 86, 99, 143, 159–60.
29. 410 U.S. 113 (1973).
30. 505 U.S. 833 (1992).
31. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).
32. *See Roe*, 410 U.S. at 155–56; *Casey*, 505 U.S. at 869–71.

failed to recognize, or even acknowledge, how they sought to change these constitutional law frameworks.

Roe, *Casey*, and *Dobbs* also illustrate how untenable traditional U.S. constitutional law frameworks have become. These frameworks *require* such clumsy, inflexible, and opaque reasoning. They provide unsatisfactory, and often inconsistent solutions, to sociopolitical debates. And they simply cannot accommodate the growing diversity and significance of rights-claiming that is all but inevitable in contemporary society.

Let's take these in turn. First, both *Roe* and *Casey* sought to incorporate into U.S. constitutional law a more flexible conception of constitutional rights. As noted, U.S. constitutional rights are construed as almost absolute. They generally lead to the invalidation of a legal provision that conflicts with them.[33] *Roe*, which constitutionalized abortion access, varied the extent to which the state could limit abortion access over stages of pregnancy, drawing certain distinctions related to fetal viability and pregnancy trimesters.[34] While one could argue that these guidelines simply defined the ways in which courts assess the state's interest pursuant to a strict scrutiny analysis, this is not how courts usually conduct a strict scrutiny analysis, and the resulting framework provided the state greater leeway to limit a constitutional right.[35] The *Roe* framework was criticized, including by the *Dobbs* majority, for its arbitrariness. Justice Alito quotes one scholar as follows:

> One prominent constitutional scholar wrote that he "would vote for a statute very much like the one the Court end[ed] up drafting" if he were "a legislator," but his assessment of *Roe* was memorable and brutal: *Roe* was "not constitutional law" at all and gave "almost no sense of an obligation to try to be."[36]

The steps of a constitutional test could never be found in the text of a constitutional provision: some degree of interpretation is always necessary to apply constitutional rights. This argument is therefore best construed as one regarding the extent, and corresponding legitimacy, of this interpretive exercise. Justice Alito is critical of an interpretation which significantly went beyond the text of the provision, both in establishing a constitutional right and in defining it. These preferences are tied to originalism, an interpretive constitutional doctrine.[37] As discussed in the previous section, a general (though varying) reluctance to interpret the Constitution broadly and progressively is a distinctive attribute of U.S.

33. *See generally* Greene, *Rights as Trumps?*, *supra* note 20; GREENE, *supra* note 10; Fallon, *supra* note 21, at 79; Winkler, *supra* note 21.

34. *Roe*, 410 U.S. at 163–65.

35. *See id.* at 155–56.

36. *Dobbs*, 142 S. Ct. at 2241 (citing John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920, 926, 947 (1973)).

37. *See generally* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017); Stephen E. Sachs, *Originalism: Standard and Procedure*, 135 HARV. L. REV. 777 (2022); William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015); Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism As Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179622.

constitutional law.[38] In contrast, courts in most countries which adopt proportionality analysis are more willing to engage in broad and progressive interpretation. As an example, Canada's Constitution is interpreted pursuant to the living tree doctrine, which provides that the Constitution is "a living tree capable of growth and expansion within its natural limits."[39] It should not be "cut down . . . by a narrow and technical construction [but given] a large and liberal interpretation."[40] The *Roe* framework would be uncontroversial to a Canadian legal audience, which would construe the role of the Court as fleshing out constitutional provisions through detailed tests and standards.

Casey addressed some of this criticism.[41] The Court did away with *Roe*'s pregnancy-stage framework and replaced it with a more universal, broader standard, ruling that "only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause."[42] The undue burden standard could not be similarly criticized for its distance from the constitutional text or its specificity (and, correspondingly, its purported arbitrariness). It bore the promise to be more responsive to specific impugned legal provisions and factual circumstances.[43] Nonetheless, the *Casey* standard shared similarities with the *Roe* standard. It sought to incorporate into U.S. constitutional law a more flexible conception of constitutional rights. It similarly provided the state greater leeway to limit a constitutional right and moved away from the typical framework where absolute constitutional rights almost always trump inconsistent legal provisions.[44] As a result, it was subject to similar criticism regarding the extent to which it allows courts to intervene in a sociopolitical debate. Justice Alito is as critical of *Casey* as he is of *Roe*. He dismisses the undue burden standard as unworkable and highlights how different judges tasked with such a subjective exercise can (and do) come to different conclusions.[45] While *Roe* provided less discretion to courts in individual cases, both *Roe* and *Casey* staked a significant role for courts: in *Roe*, by defining a standard through the trimester framework and, in *Casey*, by requiring courts to review whether a restriction to reproductive rights constitutes an undue burden. This type of judicial intervention is typical in countries which adopt proportionality analysis. Legislation is, by default,

38. *See generally* Greene, *Rights as Trumps?*, *supra* note 20; GREENE, *supra* note 10; Baude, *supra* note 37; Siegel, *supra* note 37.

39. Edwards v. Canada (A.G.), [1930] 1 D.L.R. 98, 106–07. The interpretive doctrine was extended to the Canadian Charter of Rights and Freedoms shortly after its enactment in the precedent of Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, 509. *See also* Reference re Same-Sex Marriage, 2004 S.C.C. 79 at para 22; Jackson, *Constitutions as "Living Trees"? Comparative Constitutional Law and Interpretive Metaphors*, *supra* note 15, at 934 ("Although not uncontroversial (especially in Charter cases), the Canadian Court's 'living tree' metaphor appears to be an accepted part of the legal discourse").

40. *Edwards*, 1 D.L.R. at 107.

41. 505 U.S. 833 (1992).

42. *Id.* at 874.

43. *Id.* at 874–76.

44. *See generally* Greene, *Rights as Trumps?*, *supra* note 20; GREENE, *supra* note 10; Winkler, *supra* note 21.

45. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2272–75 (2022).

subjected to judicial review, and it is the role of the judicial branch to assess whether the infringement of a constitutional right is proportionate with the objective the state seeks to achieve.[46] The *Casey* standard is essentially proportionality analysis. It requires an assessment of the significance of the infringement with the objective the state seeks to achieve.[47]

Both *Roe* and *Casey* had roots in inherently unstable grounds. They were inconsistent with broader U.S. constitutional law frameworks and provided a flexibility that was foreign to contemporary U.S. constitutional law. They lacked theoretical coherence. The *Roe* and *Casey* courts struggled to frame the novel standards with reference to existing doctrines and concepts. Both precedents arguably elide an adequate and transparent discussion of how their standards relate to the usual "scrutiny" standards of constitutional review.[48] This led to conflicting and unclear precedents. It was only several years ago, in *Whole Woman's Health v. Hellerstedt*,[49] that the Supreme Court finally clarified how the undue burden standard relates to other standards of review—although the extent to which it theoretically reconciled the standards is debatable. The *Roe* and *Casey* courts had to frame the issue through the familiar concept of a state "interest." The reasons why a state interest would or should fall without the scope of the existing standards of review remained unclear. Both precedents highlighted the importance of protecting "prenatal life,"[50] "potential life,"[51] or "fetal life."[52] The significance of the personal and religious convictions which underpin this interest was argued to justify state regulation of abortion. The resulting state interest is stronger than analogous state interests asserted in relation to other constitutional rights. It bears significance of quasi-constitutional status. In both precedents, however, the Court stopped short of reframing the broader framework of constitutional review. Given these frameworks, it could not recognize a countervailing *constitutional* interest.[53] As noted in the previous section, U.S. constitutional law lacks the tools to recognize and mediate conflicting constitutional rights.[54] When courts are faced with two rights of ostensibly constitutional status, they recognize the existence of *one*.

46. *See* GREENE, *supra* note 10, at 110–11; Greene, *Rights as Trumps?*, *supra* note 20; Greene & Tew, *supra* note 19; Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 19; Jackson, *Thayer, Holmes, Brandeis: Conceptions of Judicial Review, Factfinding, and Proportionality*, *supra* note 19; Jackson, *Pockets of Proportionality: Choice and Necessity, Doctrine and Principle*, *supra* note 19; Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11), s. 1.

47. *See Casey*, 505 U.S. at 887–98; Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 607–09 (2016).

48. *See* Roe v. Wade, 410 U.S. 113, 155–56 (1973); *Casey*, 505 U.S. at 871.

49. *Whole Woman's Health*, 579 U.S. at 607–09.

50. *See, e.g.*, *Roe*, 410 U.S. at 150.

51. *See, e.g.*, *id.* at 163.

52. *See, e.g.*, *Casey*, 505 U.S. at 860.

53. On a contrasting approach in Germany, *see* GREENE, *supra* note 10, at 129; Jackson, *Constitutional Law in an Age of Proportionality*, *supra* note 19.

54. *See* GREENE, *supra* note 10, at 84, 106, 159–60; Greene, *Rights as Trumps?*, *supra* note 20; Winkler, *supra* note 21.

CONCLUSION

While growing political polarization in the United States is a nuanced and complex phenomenon,[55] it is probably fair to say that abortion debates have played a disproportionate, almost absurd role in American judicial and political discourse. Abortion indeed "presents a profound moral issue on which Americans hold sharply conflicting views."[56] But it is hard to argue that it inherently warrants to drive and inflame the political jockeying of Supreme Court appointments over many decades.[57] As becomes plain from this Essay's analysis, it is the Supreme Court's interpretive frameworks that set it up for failure, politicize its intervention, and undermine its legitimacy. The Court lacks the tools to mediate—or even recognize—conflicting rights. When presented with a nuanced and tense sociopolitical debate, it must constitutionalize a right (or none at all). In doing so, it creates winners and losers and incentivizes others to resolve similar debates through the court system.

While this reluctance of courts to substantively review most legislative decisions is exalted as a hallmark of democracy and judicial minimalism, it is really the opposite. Unlike courts in countries which adopt proportionality analysis, U.S. courts must intervene in a way that inevitably lacks sophistication. They do not engage in a robust yet deferential review of the reasons why the state seeks to limit certain rights. They do not allow for consistent limitation of constitutional rights. They either overreact or stand down. A system where the state can proportionately limit constitutional rights is indeed one that tasks its judiciary with a broader and stronger mandate to review government action. But it is necessarily also one that gives legislatures *more* leeway to limit constitutional rights.

55. *See generally* CASS R. SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION (2021); Markus Prior, *Media and Political Polarization*, 16 ANN. REV. POL. SCI. 101 (2013); Brandy Zadrozny, *"Carol's Journey": What Facebook Knew About How It Radicalized Users*, NBC NEWS (Oct. 26, 2021, 11:50 AM), https://www.nbcnews.com/tech/tech-news/facebook-knew-radicalized-users-rcna3581 [https://perma.cc/B2PG-A8RQ]; GREENE, *supra* note 10, at 143.

56. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022).

57. *See, e.g.*, GREENE, *supra* note 10, at 160–64; Siegel, *supra* note 37; Linda Greenhouse & Reva B. Siegel, *Before (And After) Roe v. Wade: New Questions About Backlash*, 120 YALE L.J. 2028 (2011).