

## AMERICAN RIGHTS JURISPRUDENCE THROUGH CANADIAN EYES

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### ABSTRACT

*The U.S. Supreme Court's application of varying tiers of scrutiny to different constitutional rights has been widely criticized for severing rights from any clear connection with justice. One school of thought holds that this could be cured by importing or expanding the role for "proportionality analysis" in U.S. constitutional rights doctrines. American proponents of proportionality such as Jamal Greene, Vicki Jackson, and Supreme Court Justice Stephen Breyer have argued that U.S. courts could more transparently respect the connection between rights and justice by following the example of Canadian courts in reasoning about the proportionality of laws as "justified infringements" of rights. Furthermore, proportionality analysis, a kind of "intermediate scrutiny for all," is thought to foster a more reasonable and democratic rights discourse.*

*This Article argues that proportionality analysis may not be the cure its American proponents hope for. Comparisons between American and Canadian constitutional rights cases suggest that proportionality style reasoning conceptually devalues and distorts the connection between rights and justice. In contrast, the alternative concept of rights as absolute relations of justice appears to more transparently value constitutional rights.*

*The Article then turns to the prospective institutional effects of proportionality in the American context. A rough sketch shows that the concept of courts allowing the state to proportionately override rights appears to be as scattered across different American doctrines and tiers of scrutiny as the concept of specifying the scope of rights absolutely. The mixed record of proportionality in U.S. rights doctrines recommends drawing comparisons to Canada, where proportionality is employed under a uniform doctrine. Comparing the effects of proportionality in the U.S. and Canada indicates that this approach institutionally disrupts the democratic settlement of rights disagreements in three ways. First, proportionality analysis appears to inflate the number of rights*

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*conflicts and intensify the rhetoric of those seeking to vindicate them. Second, in many cases proportionality undermines the classic justification for entrenching rights in law and subjecting them to independent judicial review by allowing rights to be overridden according to the moral reasoning of judges. Third, hopes that proportionality might lead to more democratic dialogues negotiating the meaning of rights between courts and legislatures should be checked by how the use of proportionality analysis by Canadian courts has discouraged legislative responsibility for constructing rights. Interestingly, at least one prominent American example (Employment Division v. Smith and the Religious Freedom Restoration Act) suggests that treating rights as absolute trumps can encourage legislative responsibility for constructing the scope of rights.*

*These conclusions are primarily negative, but the Article ends with two positive lessons: The first lesson is that rights should be thought of as absolute trumps, even if they are subject to reasonable disagreement about the scope of their requirements. The second lesson is that ordinary statutory rights, such as the rights articulated by the Religious Freedom Restoration Act, should be recognized as potentially contributing to the scope of absolute constitutional rights. This could help promote a more democratically reasonable way for American institutions to settle disagreements about rights. These lessons could help reform the devaluations, distortions, and disruptions afflicting both American and Canadian rights jurisprudence.*

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## INTRODUCTION

Talk of American exceptionalism can be overblown, but U.S. constitutional rights jurisprudence is exceptional for eschewing *one* overarching standard for balancing rights. That is, it lacks a uniform doctrinal

test for balancing the interests protected by rights against broader social goals and values. While the U.S. experience with the judicial review of constitutional rights has run far longer than that of Europe or the Commonwealth, American courts have been comparatively more hesitant to embrace the idea that rights should be balanced for their ‘proportionality’ with other interests and values related to impugned laws. American courts have avoided adopting a uniform standard for analyzing proportionate “limitations” on rights such as the Canadian Supreme Court’s *Oakes* test that guides Canadian courts to assess the *legitimacy* (i.e. importance), *suitability* (i.e. rational connection), *necessity* (i.e. minimal impairment), and *balancing* (in the stricter sense of weighing interests) of the state’s “infringements” of constitutional rights.<sup>1</sup> This exceptionalism raises at least two important questions: First, to what extent does the lack of a uniform standard of proportionality analysis really insulate American rights jurisprudence from the practice of reasoning about proportionate infringements of rights? Second, to what extent is it desirable for American rights adjudication to join the rest of the world’s courts in using proportionality analysis as a way of protecting constitutional rights?

These questions are entangled in disputes about how to diagnose and cure the problems facing the American approach to constitutional rights. Nearly everyone thinks that something ails American rights jurisprudence, but one prominent camp of scholars and judges think that many of its pathologies can be traced to the exceptional hesitancy of U.S. courts to engage in the kind of proportionality analysis of rights-claims that is ubiquitous in Canadian and European constitutional law. This camp argues that although there may be elements of proportionality analysis in the doctrines U.S. courts use to assess claims concerning different rights, overall these doctrines tends to preclude balancing rights as interests against other goals and principles. They also claim that because many of the difficulties of American rights jurisprudence can be traced to this tendency to eschew or hide balancing rights, a heavy dose of the modern type of proportionality review practiced in Canada and Europe could reinvigorate its rights doctrines. American proponents of proportionality have recently offered a number of impressive arguments to advance their claims.

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<sup>1</sup> PAUL YOWELL, CONSTITUTIONAL RIGHTS AND CONSTITUTIONAL DESIGN: MORAL AND EMPIRICAL REASONING IN JUDICIAL REVIEW 16–18 (2018). The leading case in Canada on the proportionality inquiry is *R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.). *Id.* at 16 n.12.

For example, in his recent essay, *Rights as Trumps?*, Professor Jamal Greene provides a thoughtful diagnosis of U.S. rights jurisprudence and makes the case for importing proportionality analysis into its doctrines.<sup>2</sup> He argues that the American approach to rights jurisprudence is largely dominated by the “categorical” framework of understanding rights as “trumps” that are “absolute but for the exceptional circumstances in which they may be limited.”<sup>3</sup> Of course, he keenly notes that U.S. courts do not apply this rights-as-trumps framework to all rights and circumstances in the same way. To the more normative question, Greene argues that this American approach to rights-as-trumps may be justified in extreme cases of “government bigotry, intolerance, or corruption[,]” but also that the dominance of the rights-as-trumps framework has distorted the ability of Americans to appreciate the reasonable character of many of their disagreements about rights and to resolve them democratically.<sup>4</sup>

Greene is joined in making these claims by other scholars such as Vicki Jackson, who argues Canadian style proportionality analysis could help American courts achieve “transparency,” “bring constitutional law closer to constitutional justice[,]” build a “better bridge between courts and other branches of government,” and reveal “process failures” such as government partiality.<sup>5</sup> Greene and Jackson’s arguments echo earlier calls by U.S. Supreme Court Justice Stephen Breyer to promote the “active liberty” of democratic self-government by assessing the proportionality of the costs of restricting rights with their benefits.<sup>6</sup>

These arguments are highly relevant to pressing issues in American rights jurisprudence. Consider how claims about proportionality reasoning have

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<sup>2</sup> Jamal Greene, *The Supreme Court, 2017 Term—Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 38 (2018).

<sup>3</sup> *Id.* at 30.

<sup>4</sup> *Id.* at 78–79, 128.

<sup>5</sup> Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3103 (2015). See also Donald L. Beschle, *No More Tiers? Proportionality as an Alternative to Multiple Levels of Scrutiny in Individual Rights Cases*, 38 PACE L. REV. 384, 385 (2018) (asserting that the adoption of proportionality analysis based on the Canadian model will allow for a more coherent approach to cases involving individual rights); ALEC STONE SWEET & JUD MATHEWS, *PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE* 119–20 (2019) (providing an example of how the Canadian parliament’s public record of proportionality analysis bolstered an act’s status as constitutional).

<sup>6</sup> STEPHEN BREYER, *ACTIVE LIBERTY* 44 (2008).

been related to the arguments the U.S. Supreme Court heard in the case of *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*.<sup>7</sup> That case turned in part on whether New York City's (now repealed) ban on transporting licensed, locked, and unloaded handguns to homes or shooting ranges outside of the city violates the "text, history, and tradition" of the Second Amendment's right to bear arms.<sup>8</sup> Incorporating proportionality into American rights doctrine along the lines advocated by Greene, Jackson, and Breyer could have recommended treating this Second Amendment rights claim as subject to something like intermediate scrutiny that balances the particular interests of New York City against the interests of gun owners.<sup>9</sup> Greene in particular advocates for proportionality as "a kind of intermediate scrutiny for all[.]"<sup>10</sup> It has been argued that balancing these interests proportionately could have upheld the ban, or struck it down without disturbing the balancing evident in other cases.<sup>11</sup> In contrast, some critics of proportionality who think that the U.S. tiers of scrutiny approach to rights is already laden with proportionality assessments have characterized Second Amendment cases such as *New York State Rifle & Pistol Ass'n* as a chance to abandon tiers of scrutiny in favor of defining the scope of rights in relation to the "text, history, and tradition of the Constitution."<sup>12</sup> Conclusions about whether rights *are* or *should be* proportionately balanced under different tiers of scrutiny will significantly shape how American courts assess rights-claims, even beyond the Second Amendment.

The questions of what role proportionality plays or should play in American rights jurisprudence invite us to look abroad. The widespread use of proportionality analysis by Commonwealth and European courts has given a comparative dimension to arguments in favor of importing it to the American

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<sup>7</sup> N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525 (2020).

<sup>8</sup> Transcript of Oral Argument at 3, N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280).

<sup>9</sup> See Joseph Blocher, Response, *Rights as Trumps of What?*, 132 HARV. L. REV. F. 120, 131-32 (2019) (proposing that the Court in *New York State Rifle & Pistol Ass'n* might apply "proportionality review" as suggested by Greene's framework, which would align with the approach taken by federal courts in similar gun rights cases).

<sup>10</sup> Greene, *supra* note 2, at 58.

<sup>11</sup> Blocher, *supra* note 9, at 132.

<sup>12</sup> Joel Alicia and John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 42 NAT'L AFFS. 72, 73 (2019); see, e.g., *id.* (calling for the abandonment of the tiers of scrutiny approach on the basis that they have no actual grounding in the Constitution).

context. Canadian uses of the doctrine have been especially salient, perhaps because, like the United States, Canada is a common law jurisdiction with a partially written constitution, federalism, and an entrenched bill of rights in the Canadian Charter of Rights and Freedoms.<sup>13</sup> Greene, Jackson, and Breyer all point longingly to Canadian examples of judges assessing the proportionality of rights claims as illustrations of how to avoid the pathologies of right-as-trumps.

This Article argues that the proportionality approach to rights may not be the cure many American scholars take it to be. From a dissident Canadian perspective, American claims about the benefits of proportionality review fail to adequately account for the ways the rights-as-proportionality framework can (I) undermine the conceptual connection between rights and justice, thereby devaluing rights; and (II) distort disagreements about the scope and nature of rights into disagreements about the value of rights.

These arguments will compare some of the “categorical” American cases criticized by Greene and Jackson with recent cases of Canadian rights jurisprudence. These comparisons suggest that proportionality analysis is not the cure for an ailing democratic rights jurisprudence in a common-law jurisdiction. Instead, it may contribute to its pathologies. These conceptual points also entail a critique of Ronald Dworkin’s ideal of rights as individual interests trumping the interests of the community. This Article suggests that if we value the transparent connection of rights with justice, we should instead favor an account of rights as absolute relations of justice between persons situated in a political community.<sup>14</sup> This absolute view of rights should be favored because it meets the conceptual desiderata of valuing the connection between rights and justice in a transparent way. But these conceptual points do not necessarily explain the institutional effects of proportionality analysis on democracy.

In order to evaluate the institutional effect that expanding the use of proportionality might have in the U.S. context, it is necessary to sketch the role it already plays in American rights jurisprudence. Unfortunately, the very

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<sup>13</sup> The Charter is part of the Constitution Act. *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>14</sup> *See generally* GRÉGOIRE C.N. WEBBER, *THE NEGOTIABLE CONSTITUTION: ON THE LIMITATION OF RIGHTS* 12 (2009) (arguing that the U.S. Constitution can be both the foundation of democracy and subject to democratic discussion and change, meaning the “the limitation of constitutional rights will be seen to be an ongoing political process”).

devaluations and distortions of proportionality reasoning make it difficult to distinguish cases where it is employed. As such, this Article will use its distinction between rights as proportionately overridable interests and rights as absolute relations of justice to provide a brief sketch (III) of how proportionality plays a mixed role in the various tiers of scrutiny the U.S. Supreme Court applies to different rights in different circumstances.

This mixed record makes it all the more important to draw on Canadian comparisons. Canada is particularly apt for comparison because the institutional effects of the Canadian Supreme Court's use of proportionality analysis are more clear cut. By comparing the institutional effects of proportionality, primarily in the American and Canadian contexts, this Article will argue (IV) that devaluing and distorting rights can disrupt democracy by (a) inflating rights, (b) undermining the case for their entrenchment and judicial review, and (c) fostering an undemocratic form of interrogative "dialogue" about rights between courts and legislatures.

These institutional conclusions are primarily negative, but this Article is meant to also hold positive lessons. To that end, this Article outlines two constructive lessons that can be gleaned from the way proportionality analysis can devalue and distort rights to the detriment of democracy (V). The first lesson is that rights should be thought of as morally absolute, even if they are subject to reasonable disagreements about the scope of their requirements. Only by thinking of rights as morally absolute can their deep connection to justice be respected, and morally absolute rights can remain institutionally open to further specification. Statutes and judicial decisions can each protect absolute rights in spite of being institutionally open to legislative changes and doctrinal revisions. This is because such changes and revisions provide a means of further specifying their requirements in relation to changing circumstances.

The second lesson is that in order to respect democratic disagreements about vague constitutional rights, statutory rights should be recognized as potentially contributing to the construction of the scope of constitutional rights. This Article does not provide any comprehensive vision of how these lessons should influence American and Canadian rights jurisprudence. But this Article does note that these lessons are consistent with the structure of the Canadian and American constitutions, and that implementing them in cases such as *New York State Rifle & Pistol Ass'n* promises to be a complex but feasible task.

Americans sometimes threaten to “move to Canada” in the wake of their elections; they should think twice about moving Canadian rights jurisprudence to their own courts. This is an audacious argument, and one that could be thought better left to an American. That may be, but as H. L. A. Hart once noted, “there are important aspects of even very large mountains which cannot be seen by those who live on them but can be caught easily by a single glance from afar.”<sup>15</sup>

### I. DEVALUED RIGHTS

One problem with the American “categorical” approach of subjecting different types of rights to varying tiers of scrutiny is that it can disconnect rights from justice. What does this mean? On the one hand, this could mean that thinking about rights as subject to various tiers of judicial scrutiny disconnects rights from justice by allowing legislatures to override rights if they have a legitimate reason connected to their enactment (rational basis scrutiny), or if the enactment substantially promotes a state interest (intermediate scrutiny), or if it is narrowly tailored to advance a compelling state interest (strict scrutiny).<sup>16</sup> On the other hand, it could be that this approach disconnects rights from justice by artificially narrowing what judges are free to consider and balance as the interests related to a rights dispute. American proponents of proportionality analysis have generally taken the latter view regarding the devaluation of rights. In this Part, I will first explain this claim, and then argue that it is conceptually mistaken.

There are a number of recent arguments claiming to show how the “categorical” American approach to rights devalues the connection between rights and justice. Professor Greene castigates the ideal of rights-as-trumps for disassociating rights from “notions of substantive justice.”<sup>17</sup> Greene’s account of how the categorical American approach to rights devalues rights focuses on the way it shears the connection between justice and the many interests at stake in rights questions. In a similar vein, Professor Jackson draws on Mark Tushnet’s scholarship to argue that the U.S. Supreme Court’s focus on “rules”

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<sup>15</sup> H. L. A. HART, *Essay 4 American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 123, 123 (1983).

<sup>16</sup> YOWELL, *supra* note 1, at 21.

<sup>17</sup> Greene, *supra* note 2, at 70.



categorizing constitutional rights has distracted it from “the purposes of the constitutional provision the rule is intended to implement” and thus turned its attention away from “constitutional justice[.]”<sup>18</sup> Jackson shares Greene’s concern with the way categorical rights create the need for rights doctrine to consider “a fuller range of the factors that people in ordinary life consider reasonable” to “help re-establish the law’s connection to justice.”<sup>19</sup> But she also emphasizes that the American categorical approach to rights can devalue rights where it develops arbitrary exceptions to rules defining the scope of rights.<sup>20</sup> This Part will critique Greene and Jackson’s arguments to argue that proportionality analysis disconnects rights and justice by allowing rights to be overridden. The first conceptual point is that both rights-as-trumps and rights-as-proportionality can devalue rights by denying just rights claims. The second conceptual point is that rights-as-proportionality uniquely devalues rights by requiring judges to assess whether rights can be justifiably overridden. By allowing rights to be overridden, proportionality analysis *intrinsically* devalues the conceptual connection between rights and justice.

On Greene’s telling, conceiving of constitutional rights as absolute legal protections against unjust state actions demeans the consideration of other collective interests and their connection to just rights. For Greene, this is true of Ronald Dworkin’s theory of right-as-trumps, but also where American judges follow this theory by “categorizing” some rights as absolute trumps in relation to specific kinds of laws and circumstances, while leaving others less protected or unrecognized as rights.<sup>21</sup> In contrast, he thinks that Canadian judges assessing the justification of rights “infringements” use this technique to avoid arbitrarily excluding communal interests that bear on rights questions.<sup>22</sup>

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<sup>18</sup> Jackson, *supra* note 5, 3149–51. Mark Tushnet argues that Justice Breyer’s dissent in *Heller* should “be understood as about the application of legal judgment to complex settings.” *Id.* at 3149 (citing Mark Tushnet, *Heller and the Critique of Judgment*, SUP. CT. REV. 61, 71, 76–84 (2008)). In addition, Tushnet has argued that the Supreme Court’s First Amendment decisions in certain cases “represent a form of ‘judicial pathology,’ . . . [which] is connected to the ‘rule-ification’ of the area and a related ‘fear’ of making obvious judgment calls on issues of degree.” *Id.* (citing Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 105–06 (2012)).

<sup>19</sup> Jackson, *supra* note 5, at 3148.

<sup>20</sup> *Id.* at 3136–3142.

<sup>21</sup> See Greene, *supra* note 2, at 68–69 (discussing the weakness in Dworkin’s analysis of different types of racial classifications and arguing that Dworkin’s rights-as-trumps does not obligate the courts to treat all interests in the same way).

<sup>22</sup> See *id.* at 38–40 (giving an example of the Canadian Supreme Court balancing the interests of the public against the infringement of the rights of a few).

What is Dworkin's theory of rights-as-trumps? Dworkin's mature theory of rights holds that rights protect the specific interests of individuals that "trump" the pursuit of the general welfare of the political community.<sup>23</sup> What kind of interests protect rights-as-trumps? Only individual interests threatened by prejudices and preferences inimical to citizens' "equal concern and respect" are protected by rights-as-trumps.<sup>24</sup> The interests normally protected by rights can be sacrificed for the common good only where they are justified by reasons not mired in anti-egalitarian prejudice, such as "when necessary to protect the rights of others, or to prevent a catastrophe, or even to obtain a clear and major public benefit[.]"<sup>25</sup>

Greene's critique of Dworkin's argument is itself a way of critiquing the U.S. Supreme Court's approach to fundamental constitutional rights. Greene argues that just as Dworkin's ideal of rights blinds Dworkin to the connection between certain communal interests and just rights, so too does American courts' tendency to categorize rights according to the kind of prejudice they protect against prevents judges from properly considering the true variety of rights at stake in cases. For example, Greene thinks Dworkin's ideal of rights-as-trumps leads to the devaluation of just rights interests not threatened by majority preferences or prejudices, such as the interests of whites in affirmative-actions cases.<sup>26</sup>

Greene finds evidence for his claim in Dworkin's analysis of *DeFunis v. Odegaard*.<sup>27</sup> In this case the plaintiff Marco DeFunis argued that affirmative action policies resulted in reverse racial discrimination against his admission to the University of Washington Law School in violation of the Equal Protection Clause.<sup>28</sup> Dworkin thought that the plaintiff had *no right* against the discrimination of law schools because it was motivated by principled arguments about justice rather than prejudice.<sup>29</sup> For Greene, the plaintiff's

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<sup>23</sup> See RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 329 (2011) (explaining that increased safety, as an example of general welfare, is "trumped" by the right to give unpopular speeches in public streets, as well as the right of suspected terrorists to not be locked up indefinitely without judicial review of any charges against them).

<sup>24</sup> *Id.* at 330.

<sup>25</sup> RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 191 (1977).

<sup>26</sup> Greene, *supra* note 2, at 67-70.

<sup>27</sup> 416 U.S. 312 (1974).

<sup>28</sup> *Id.* at 314.

<sup>29</sup> DWORKIN, *supra* note 25, at 237-39.

interest does not override the affirmative action program, but does constitute a legitimate rights interest that requires special consideration rather than brute dismissal.<sup>30</sup> While *DeFunis* was ultimately dismissed for mootness, Greene thinks the influence of Dworkin's frame of rights-as-trumps turns constitutional litigation into a zero-sum game that tells the losers, "they have no rights the law is bound to respect."<sup>31</sup> He claims that American courts regularly follow Dworkin in devaluing the rights interests of the losing side with their strict scrutiny analysis of the government's "compelling interest" or even scrutiny of the "rational basis" for laws abridging rights.<sup>32</sup>

While Dworkin's work is not responsible for the dominance of rights-as-trumps in U.S. law, it philosophically epitomizes the difficulties with this framework. Greene surveys how the "categorical" framework of American rights adjudication disconnects rights from justice by discounting many of the rights interests at stake in controversial cases such as *Employment Division v. Smith*,<sup>33</sup> *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>34</sup> *District of Columbia v. Heller*,<sup>35</sup> and *Citizens United v. Federal Election Commission*.<sup>36</sup> Either a baker has a right to refuse to bake a gay wedding cake as a matter of free speech that the government has no compelling interest in regulating, or he has no right to express his religious views in ways that discriminate against gay couples.<sup>37</sup> Either the right to bear arms extends to the possession of handguns by mentally sane, individual non-felons outside of schools and government buildings in the District of Columbia, or these individuals have no such rights.<sup>38</sup> And so on. The possibility that interests

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<sup>30</sup> See Greene, *supra* note 2, at 69 (stating that the theory of rights-as-trumps does not obligate courts to treat interests in the same way as trumps; nonetheless, race-based affirmative action programs must be implemented more carefully than programs that categorize others on different grounds).

<sup>31</sup> *Id.* at 79.

<sup>32</sup> See Greene, *supra* note 2, at 56 (concluding that the categorical approach informs American constitutional cases); see also Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1274, 1284–85 (2007) (providing a helpful survey of the origins of the tiers of scrutiny).

<sup>33</sup> 494 U.S. 872 (1990).

<sup>34</sup> 138 S. Ct. 1719 (2018).

<sup>35</sup> 554 U.S. 570 (2008).

<sup>36</sup> 558 U.S. 310 (2010).

<sup>37</sup> See *Masterpiece Cakeshop*, 138 S. Ct. at 1723 (considering the proper reconciliation of at least two principles: the discrimination against gay persons and the right to exercise the freedom of speech and religion).

<sup>38</sup> See *Heller*, 554 U.S. at 573 (considering whether the District of Columbia's prohibition on the possession of handguns in the home violated the Second Amendment).

related to different *just* rights might conflict in these cases is apparently ignored. Rather, these cases are discussed as evidence of an approach that “induces our identification of rights to track the categories judges are able to access, articulate, and delimit rather than the moral, political, or even constitutional justice the rights mean to promote.”<sup>39</sup>

This “categorical” approach is contrasted unfavorably with the “proportionality” approach practiced by the Canadian Supreme Court in its analysis of Charter rights. While Greene is admirably willing to discuss the shortcomings of proportionality analysis, he fails to adequately explain the way it devalues the substantive justice of the variety of rights interests it interrogates. The proportionality approach to rights devalues rights by reducing them to defeasible interests. If Marco DeFunis had an interest grounding a right against unequal racial treatment by the law that could be balanced and overridden for the greater good, then it’s hard to see why this would better recognize the connection between that right and justice than Dworkin’s approach. His rights-claim would be merely *prima facie*. Both rights-as-trumps and rights-as-proportionality appear to override DeFunis’ claim to a *just* right. In truth, *Dworkin’s* account of rights-as-trumps may be much closer to the proportionality approach than Greene realizes. This is because on Dworkin’s view, as Paul Yowell has adeptly shown, rights-as-trumps allow for balancing sufficiently important interests and thereby conceive of rights-as-*proportionate* trumps.<sup>40</sup> This raises the possibility that when Dworkin’s ideal of rights-as-trumps and other American cases devalue rights it is often because they *share* in the proportionality approach to treating rights as defeasible interests, albeit in a narrower fashion.

It is important not to get too bogged down in philosophy. Examples can help show how the rights-as-trumps or right-as-proportionality frameworks can devalue rights: Consider the similar way rights to the free exercise of religion are potentially devalued in the U.S. Supreme Court case of *Employment Division v. Smith* and the Canadian case of *Alberta v. Hutterian Brethren of Wilson Colony*.<sup>41</sup> In *Smith*, two Oregonian members of the Native American

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<sup>39</sup> Greene, *supra* note 2, at 32–33.

<sup>40</sup> YOWELL, *supra* note 1, at 40–55.

<sup>41</sup> See *Emp. Div. v. Smith*, 494 U.S. 872, 872 (1990) (considering whether the Free Exercise Clause allows Oregon to criminalize peyote, even when it is consumed for religious reasons); *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 (Can.) (upholding a Canadian law that

Church were fired from their jobs with a private company because they ingested peyote for sacramental purposes.<sup>42</sup> They were then subsequently denied unemployment compensation because they had been fired for ingesting a substance prohibited by an Oregon statute.<sup>43</sup> The plaintiffs argued that this discriminated against their First Amendment right to freely exercise their Native American religion.<sup>44</sup> The U.S. Supreme Court dismissed the claim by interpreting the right to free exercise to not protect “otherwise prohibitable conduct” that is “accompanied by religious convictions” from “government regulation.”<sup>45</sup> Justice Scalia’s majority opinion held that evaluating the impact of every regulation interfering with religious convictions in relation to the state’s “compelling interest” for doing so would be “courting anarchy.”<sup>46</sup>

Greene thinks of *Smith* as a classic case of rights-as-trumps, where the messy job of balancing all of the rights interests at stake in free exercise claims is cut off with a rule restricting the category of cases where this right can be asserted.<sup>47</sup> This devalues the rights interest of the two Oregonians seeking to freely exercise their religion by lumping it in with all manner of rights claims that would appear to require unreasonable exemption from civic obligations. But is the *categorization* of the plaintiffs’ interest as falling outside of the protection of the Free Exercise Clause really the reason why the Court devalues their right?

Would the plaintiffs’ rights be any more “valued” if the Court had followed Justice O’Connor’s concurrence by including their religious interest within the protected scope of the Free Exercise Clause, but then concluding that this interest was outweighed by the government’s interest in “preventing the physical harm caused by the use of a Schedule I controlled substance[?]”<sup>48</sup> *If* the Oregonians’ rights claim has just value, as O’Connor reasons that it does, then the way she devalues the rights-claim is not by placing it outside the

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requires Members of Hutterian Brethren, against their religious beliefs, to have their photograph taken in order to hold an Alberta driver’s license).

<sup>42</sup> *Smith*, 494 U.S. at 874.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 878.

<sup>45</sup> *Id.* at 882.

<sup>46</sup> *Id.* at 888.

<sup>47</sup> Greene, *supra* note 2, at 44–45.

<sup>48</sup> *Smith*, 494 U.S. at 905 (O’Connor, J., concurring).

category of the protected right. Rather, she devalues the rights-claim by placing it within the scope of the right, while treating the claim as a mere interest that can be *overridden* by interests lying outside of the scope of constitutional rights. The counter-factual suggests that the real reason that the Court devalued the plaintiffs' rights in *Smith* is that by setting their interest outside of the category of rights protection, the justices allowed a plausible rights-claim to be violated as one policy interest among others in the maelstrom of the "political process."<sup>49</sup>

The Canadian case of *Hutterian Brethren* showcases how the proportionality approach can devalue rights in a similar, albeit perhaps more explicit, fashion. The case involved Albertan Hutterites who objected to having their photographs appear on their driver's licenses and sought accommodation as a matter of their right to freedom of religion under section 2(a) of the Charter.<sup>50</sup> Prior to a regulatory change, there was a photographic exemption for religious objectors.<sup>51</sup> The Canadian Supreme Court's majority decision categorized the new regulation as an "infringement" of religious practice protected by 2(a) of the Charter, but used the proportionality test developed in the landmark case of *R. v. Oakes* to assess the justification for the "limitation" of this right.<sup>52</sup> The majority of the court held that the legitimate and suitable government aim of having a photo database lacking exceptions "minimally impair[ed]" the right, and that Alberta's interest in the security of its licensing system outweighed any case-by-case harm to the religious freedom of *individuals*.<sup>53</sup> The decision was highly questionable as a proper application of the "minimal impairment" branch of the proportionality test, as the majority failed to establish why the photographs of 250 Hutterites were necessary to maintain a secure licensing system in a province with 700,000 unlicensed citizens.<sup>54</sup> But it also *devalued* the Hutterites' right to religious freedom by treating it as a near inconsequential policy interest.

This devaluation was not the result of the Canadian court's categorization of the scope of the right, but rather a consequence of treating the right as an

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<sup>49</sup> *Id.* at 890.

<sup>50</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, para. 2 (Can).

<sup>51</sup> *Id.* at para. 1.

<sup>52</sup> *Id.* at paras. 35-108.

<sup>53</sup> *Id.* at para. 62.

<sup>54</sup> *Id.* at paras. 141, 143, 158 (Abella, J., dissenting).

interest worth less than the province's interest in discouraging license fraud. The Canadian court categorized the regulation as an "infringement" that would "impose some financial cost on the community and depart from their tradition of being self-sufficient in terms of transport" in proportionality with the benefits of maintaining an "effective driver's license scheme that minimizes the risk of fraud to citizens as a whole."<sup>55</sup> The Hutterites interest in religious freedom was outweighed by the province's proclaimed interest in keeping down license fraud.

Perhaps in anticipation of this critique, Professor Jackson has emphasized that there are reasons to doubt the "protective power" of the categorical approach to rights as it compares with Canadian proportionality reasoning.<sup>56</sup> Her point is not simply that the categorical approach to rights can fail to value rights, as on Greene's critical view of *Smith*, but that the categorical stance invites devaluation when it makes exceptions to rules defining the scope of rights.<sup>57</sup> She takes this lesson from the U.S. Supreme Court's recent creation of exceptions to its free speech categories, particularly in *Holder v. Humanitarian Law Project*.<sup>58</sup> *Humanitarian Law Project* involved U.S.-based non-governmental organizations seeking to provide non-violent training in international law to certain terrorist groups, like the Kurdistan Workers' Party (or PKK) in Turkey, challenging a criminal statute prohibiting material support to groups designated as terrorist organizations.<sup>59</sup> The statute was challenged as a content-based regulation as it applied to the kind of speech engaged in by the plaintiffs, but the Court nonetheless upheld the law due to the government's compelling interest in combatting terrorism.<sup>60</sup>

Jackson thinks that *Humanitarian Law Project* made an implicit exception to the Court's *Brandenburg v. Ohio* strict scrutiny standard prohibiting the content-based suppression of speech inciting violence except when such

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<sup>55</sup> *Id.* at paras. 99, 101.

<sup>56</sup> Jackson, *supra* note 5, at 3137.

<sup>57</sup> *Id.* at 3139-41.

<sup>58</sup> *Id.*; see also *Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010).

<sup>59</sup> *Humanitarian L. Project*, 561 U.S. at 10.

<sup>60</sup> *Id.* at 39-40; see also Jackson, *supra* note 5, at 3137 ("Concluding that the statute involved a content-based regulation of speech [in *Humanitarian Law Project*], the Court nonetheless upheld the statute in light of the government's interest in combatting terrorism.").

speech incites *imminent* action and lawlessness.<sup>61</sup> She notes that *Humanitarian Law Project* does not mention *Brandenburg's* precedent, and reads the majority opinion as engaged in a less-stringent analysis of whether the statute was narrowly tailored to the purpose of combatting terrorism in ways that did not unnecessarily affect protected speech.<sup>62</sup> *Humanitarian Law Project* is criticized for its alleged failure to clearly address whether national security statutes need to be less narrowly tailored to their purpose when they implicate free speech rights.<sup>63</sup> This failure to explicitly address the balancing at work in developing an exception to *Brandenburg's* rule defining the scope of speech rights against content-based suppression shows how the categorical approach can devalue rights by allowing them to be overridden, while doing so in a way that is less accountable.<sup>64</sup> Jackson's claim appears to be that while both the categorical treatment of rights-as-trumps and proportionality analysis can devalue rights by allowing them to be overridden, proportionality analysis allows courts to better protect rights by making the balancing of policy interests and rights more explicit.

But notice that the devaluation of rights is *built into* the proportionality approach, whereas it is merely incidental to more categorical approaches that treat legal rights as absolute relations of justice. This is the second conceptual point concerning how rights-as-proportionality compares to rights-as-trumps: rights-as-proportionality intrinsically devalues rights.

Consider how the two conceptual approaches to rights compare in *Humanitarian Law Project*. It may be that the Court's approach to specifying its exception to *Brandenburg* in *Humanitarian Law Project* could have been clearer and more consistent, but it does not follow that this type of exception must involve the justification of suppressing speech rights. Indeed, the majority opinion's limitation of the protection afforded to speech coordinated with terrorist groups<sup>65</sup> could be interpreted as specifying the rule in

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<sup>61</sup> Jackson, *supra* note 5, at 3137. In *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), the Court struck down a state statute on the grounds that it violated the First and Fourteenth Amendment. In other words, the Court held that "speech believed to incite violence could be banned only when the speech's character was an incitement to imminent action and likely to cause imminent lawlessness." Jackson, *supra* note 5, at 3137.

<sup>62</sup> Jackson, *supra* note 5, at 3139.

<sup>63</sup> *Id.* at 3140.

<sup>64</sup> *Id.*

<sup>65</sup> *Holder v. Humanitarian L. Project*, 561 U.S. 1, 26 (2010) ("[T]he [relevant] statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or in coordination with foreign groups that the speaker knows to be terrorist organizations." (footnote omitted)).



*Brandenburg* in relationship to the unique uncertainty of when terrorist violence is imminent. On this reading, *Humanitarian Law Project* does not quietly devalue rights, but specifies their scope in relation to specific circumstances. It develops a new rule delimiting the scope of freedom of speech. Of course, it also seems plausible that this specification could devalue speech rights because it is *mistaken* to think of speech that may support terrorist violence as unprotected; however, that is quite different from devaluing rights by doctrinally inviting courts to assess the proportionality of infringing the right to speech that supports organizations capable of imminent violence. The former method can devalue rights by failing to properly specify rights in relation to history, precedent, and perhaps even some normative judgments about the scope of rights in particular circumstances, but the latter openly requires courts to consider whether rights are more or less important in certain cases.

This contrast is also evident in *Smith* and *Hutterian Brethren*. If *Smith* had categorized the Oregonian plaintiffs' interest in using peyote within the scope of the right to free exercise of religion and then eschewed balancing, the right would not be devalued. Treating rights as just trumps can devalue rights where judgments about the scope of rights are mistaken, but not when it properly categorizes rights. Categorization can take on many different techniques of adjudication, but it does not itself devalue rights. By contrast, even if *Hutterian Brethren* had been decided in favor of the Hutterites, the requisite balancing of this right as an interest at the "minimal impairment" and strict "proportionality" stages of the *Oakes* analysis raises the possibility that this right can be overridden at the discretion of judges. This possibility devalues the right. The Hutterites do not have much when they have a right to religious freedom. They need a right and a judge who values that right.

Of course, there are responses to this line of critique of proportionality analysis. Both Greene and Jackson admit that there are problems with proportionality analysis and limits to the feasibility of its implementation in the U.S. context. Nevertheless, both insist that rights are more valued in the Canadian world of proportionality analysis than the American realm of rights-as-trumps.

Greene's main counter-argument is that while in some cases rights will be devalued by treating them as overridable interests rather than absolute relations of justice, the greater risk is that judges will make mistakes about the

scope of rights as absolute relations of justice.<sup>66</sup> The reason that the risk of judges making mistakes about categorical rights is the greater threat is that the moral value of rights is subject to reasonable disagreement and judges are not equipped to resolve such disputes using “philosophical analysis or moral inspection.”<sup>67</sup> This counter-argument fails because, as Professor Grégoire Webber has argued, it is perfectly consistent to think of rights as absolute relations of justice while also appreciating the existence of widespread reasonable disagreement about the absolute duties and obligations that flow from just rights.<sup>68</sup> It is also reasonable to think these thoughts and conclude, as Webber does, that the logic of entrenching rights as supreme constitutional law requires judges to invalidate statutes that clearly violate rights, but defer to those subject to reasonable disagreement.<sup>69</sup>

It is possible to agree with Greene that judges do indeed risk a great deal when they strike down enactments purporting to settle reasonable disagreements about rights, yet also think that judges conceptually devalue rights by treating them as overridable interests. As Webber notes, it is necessary to distinguish conceptual arguments about whether rights can be overridden from arguments about which institutions will do the best job of overriding them or ensuring that they are not overridden.<sup>70</sup> As such, Greene’s institutional argument doesn’t answer the charge that rights are conceptually devalued by reducing them to overridable interests—whether such reduction is the outcome of miscategorizing or balancing.

Jackson’s main counter-argument is to point out how proportionality analysis is compatible with recognizing “‘core’ aspects of rights that are viewed as entirely non-abrogable and not subject to limitation by arguments from proportionality.”<sup>71</sup> She points to examples of German and Israeli courts that make extensive use of proportionality analysis, but have also categorically

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<sup>66</sup> Greene, *supra* note 2, at 87–89.

<sup>67</sup> *Id.* at 88.

<sup>68</sup> See generally WEBBER, *supra* note 14, at 147–212 (arguing that democratic legitimacy requires treating the legislature as the central forum for the specification of rights subject to reasonable disagreement about the *absolute but negotiable* scope of their duties and obligations of justice).

<sup>69</sup> *Id.* at 203–212.

<sup>70</sup> See Grégoire Webber, *Proportionality and Absolute Rights*, in PROPORTIONALITY: NEW FRONTIERS, NEW CHALLENGES 75, 94 (Vicki C. Jackson & Mark Tushnet eds., 2017) (“[W]hen it is concluded that legislation *justifiably limits* a right, legislation is to be understood as *justifiably defining* an underdefined right.”).

<sup>71</sup> Jackson, *supra* note 5, at 3158 (footnote omitted).

struck down laws as wholly inconsistent with the value of rights to dignity and personal liberty.<sup>72</sup> Furthermore, she notes that the ability of courts using proportionality analysis to exclude impermissible reasons governments offer for violating rights, as this helps shore up the judicial capacity to protect rights.

This counter-argument is unconvincing because it appears to point to examples of courts eschewing proportionality analysis in favor of an absolute conception of rights. It treats examples of absolute rights as evidence that proportionality reasoning can protect the value of rights. What these examples show is that in rare cases courts have *abandoned* proportionality reasoning to protect just rights, which suggests that proportionality may not sufficiently protect the value of rights. The result is that Jackson's counter-argument fails to grapple with the main conceptual point that proportionality intrinsically devalues rights by treating them as defeasible interests. Neither is it satisfactory to point to the ability of courts to exclude certain kinds of reasons for violating rights as a means of bolstering the ability of proportionality analysis. Excluding reasons for violating rights is in some cases simply another way of defining the absolute limits on rights. In cases where a reason for violating a right is excluded from reasoning about what should be done, the right's demands are absolute in relation to that reason. This protects rights by specifying their requirements.

Of course, it is a related but separate conceptual question whether proportionality analysis provides a more transparent mode of reasoning about the nature of rights. Transparency is the second virtue of rights-as-proportionality, according to its proponents.<sup>73</sup> In some cases, such as when we compare the way rights may have been devalued in *Smith* against the way they were devalued in *Hutterian Brethren*, it seems plausible to claim that having courts openly balancing the interests that justify overriding rights is more transparent than arbitrarily categorizing certain interests outside of rights' protection. Even if the approach in *Hutterian Brethren* intrinsically devalues rights, it may nevertheless do so more transparently than the categorical approach used in *Smith*. The following Part will evaluate this claim.

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<sup>72</sup> *Id.*

<sup>73</sup> Jackson, *supra* note 5, at 3142.

## II. DISTORTED RIGHTS

How does the American framework of rights-as-trumps compare with the Canadian framework of rights-as-proportionality when it comes to transparently tracking the full complexity of reasonable disagreements about rights issues? Those who champion importing proportionality analysis into U.S. rights jurisprudence often claim that the Canadian approach promises to be more transparent. Greene claims that rights-as-proportionality more transparently tracks the various interests at stake in rights disagreements, while rights-as-trumps obscures these interests and encourages judges to distort the meaning of rights to fit their judgments about how such interests relate to particular circumstances.<sup>74</sup> For Jackson, the Canadian framework of rights-as-proportionality promises a more “structured and transparent mode of reasoning”<sup>75</sup> that can “provide a bridge between decision making in courts and decision making by the people, legislatures, and public officials.”<sup>76</sup> To an extent, I agree with Greene and Jackson that American rights jurisprudence can inflate and confuse rights, but it tends to do so in an especially distorting fashion when it follows the framework of rights-as-*proportionate*-trumps. Indeed, the distortions of rights-as-trumps Greene and Jackson decry in cases such as *Citizens United* and *Humanitarian Law Project* are often traceable to proportionality oriented reasoning about rights as interests.

In order to explain how rights-as-proportionality conceptually distorts moral disagreements about rights, it will be useful to show how the apparent distortions of rights-as-trumps can sometimes be traced to the concept of rights employed in proportionality judgments. For Greene and Jackson, the tendency of U.S. courts to categorize rights in relation to different types of issues, agents, and circumstances distorts the empirical particularity and moral value judgments at stake in rights disagreements in favor of universal interpretive legal rules. By contrast, they take the Canadian proportionality approach to promote more transparency and attention to the particular value judgments in rights adjudication.

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<sup>74</sup> See Greene, *supra* note 2, at 70-77 (relying on *Walker v. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015) to show that modern Supreme Court justices, who are rights-as-trumps jurists, will merely assert that a key right that the federal government is supposed to protect has been violated by the state, rather than embracing the rights-as-proportionality analysis).

<sup>75</sup> Jackson, *supra* note 5, at 3142.

<sup>76</sup> *Id.* at 3144.

For example, Greene contrasts the Canadian Supreme Court's decision about how restrictions on third-party campaign spending relate to the right to freedom of expression in *Harper v. Canada*<sup>77</sup> to the U.S. Supreme Court's approach to this question in *Citizens United v. FEC*.<sup>78</sup> Jackson focuses less on direct comparisons between American and Canadian cases, and argues that the "sequencing and defined order" of Canadian proportionality "enables the Canadian justices' disagreements to focus on matters that are understandable by the parties as substantively relevant to the contested issue; such opinions also make accessible to readers the nature of the justices' disagreement, and the divergent evaluations they may give to the same factors."<sup>79</sup>

This Part will argue that Greene's comparison of *Harper* and *Citizens United* fails to properly track how proportionality judgments distort the rights at stake in both cases. In turn, the distortions of *Harper* and *Citizens United* provide evidence that the kind of proportionality reasoning Jackson locates in American cases such as *Humanitarian Law Project* would not be rendered any less conceptually distortive by restructuring rights analysis along Canadian lines.

Let's first examine Greene's discussion of *Harper* and *Citizens United*. Greene applauds the open judicial display of value laden policy judgments considering various interests in *Harper*. In *Harper*, Stephen Harper, then president of the National Citizens Coalition lobby group and future Prime Minister of Canada, challenged provisions of the Canada Elections Act, including section 350's restriction on third-party spending during a federal election to at the time of the ruling a maximum of \$150,000 nationally and \$3,000 in a given riding.<sup>80</sup> He claimed that these restrictions violated the Charter right to freedom of expression (section 2(b)) and the right to vote (section 3), but the majority of the Canadian Supreme Court held that they "enhance" the right to vote and justifiably infringe freedom of expression.<sup>81</sup> The law's restrictions on freedom of expression were found to serve the important interests of "promoting equality in political discourse" and ensuring

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<sup>77</sup> *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 (Can.).

<sup>78</sup> Greene, *supra* note 2, at 40.

<sup>79</sup> Jackson, *supra* note 5, at 3142 (footnote omitted).

<sup>80</sup> *Harper*, 1 S.C.R. at para. 3 (citing Canada Elections Act, R.S.C. 2000, c. 9, s. 350).

<sup>81</sup> *Id.* at paras. 66, 67, 146.

the “integrity” of campaign financing.<sup>82</sup> The restrictions were rationally connected to achieving these goals, and minimally impaired political expression by limiting their restriction to “the commencement of the election period” and “preclud[ing] the voices of the wealthy from dominating the political discourse[.]”<sup>83</sup> The values of equal political discourse and enhanced electoral fairness and accessibility were proportionate to the harm of preventing “unlimited political expression.”<sup>84</sup>

Greene contrasts *Harper* with the U.S. Supreme Court’s subterfuge of categorizing the third-party spending limits challenged in *Citizens United* as identity-based restrictions on free speech. *Citizens United* held that the First Amendment’s right to freedom of speech protects against the suppression of “political speech on the basis of the speaker’s corporate identity.”<sup>85</sup> The case involved a non-profit corporation funded in part by for-profit corporations that produced and distributed a documentary film criticizing then-Senator Hillary Clinton while she was a candidate for President of the United States.<sup>86</sup> The Court held that the impugned campaign finance law restricting the political expenditures of corporations and unions (the Federal Bipartisan Campaign Reform Act) discriminated against political speech on the basis of corporate identity.<sup>87</sup> The government’s justifications for these restrictions—“antidistortion,”<sup>88</sup> “anticorruption,”<sup>89</sup> and “shareholder protection”<sup>90</sup>—failed to demonstrate a compelling interest for the law under the strict scrutiny demanded by speaker-based restrictions.

The contrast Greene seeks to draw between *Harper* and *Citizens United* is that *Harper* transparently balanced the particular interests at stake in third-

<sup>82</sup> *Id.* at para.104.

<sup>83</sup> *Id.* at paras. 112, 118.

<sup>84</sup> *Id.* at para. 121.

<sup>85</sup> *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

<sup>86</sup> *Id.* at 319–20.

<sup>87</sup> *See id.* at 341 (holding that “in the context of political speech,” the Government may not impose restrictions on disfavored speakers).

<sup>88</sup> *See id.* at 349–56 (articulating the Government’s view that it can regulate a corporation’s speech when it would receive an unfair advantage).

<sup>89</sup> *See id.* at 356 (articulating the Government’s view that it can ban corporate political speech because it prevents the appearance of corruption).

<sup>90</sup> *See id.* at 361 (articulating the Government’s position that “corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate speech”).

party campaign spending, while *Citizens United* short-circuited this analysis by focusing “on the threshold question of whether the legal regime triggered strict scrutiny[.]”<sup>91</sup> But these cases provide less of a contrast than a mutual exhibition of the distortions of proportionality analysis.

Consider *Citizens United*. Greene is correct to claim that the Court’s approach to rights in *Citizens United* distorts the real question at stake in the case. As a matter of reasonable moral disagreement, American politicians and judges can be roughly divided between those who favor rights protections for both individual political expenditures and campaign contributions, and those who think both expenditures and contributions should be regulated.<sup>92</sup> This moral policy disagreement is constitutionalized, because those who favor protections for expenditures and contributions argue that these rights can be found in the First Amendment’s free speech and press clauses. Those who oppose these protections object to this legal argument. The case of *Buckley v. Valeo* (which oriented the debate around these distinctions) upheld restrictions on contributions as a means of preventing corruption, while striking down certain limits on expenditures as “direct restraint[s]” on speech.<sup>93</sup>

*Citizens United* affirms the constitutionality of limits on campaign finance but expands the protection for expenditures as a matter of a new interest in freedom from the suppression of speech based on the identity of the speaker. This is why the real question distorted by *Citizens United* is not “whether the speech being regulated is of relatively low or high value[.]”<sup>94</sup> That would presuppose that expenditures count as constitutionally protected political speech. As Michael McConnell has argued, the real question at stake in *Citizens United* was “whether a group outside the news industry is constitutionally entitled to disseminate to the public through mass communications media a commentary about a candidate for public office within a certain number of days before an election.”<sup>95</sup>

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<sup>91</sup> Greene, *supra* note 2, at 42.

<sup>92</sup> See Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 456 (2013) (“The distinction between contributions and expenditures survives in the Supreme Court only because the two sides are at odds about how to resolve it.”).

<sup>93</sup> *Buckley v. Valeo*, 424 U.S. 1, 21, 45 (1976).

<sup>94</sup> Greene, *supra* note 2, at 40.

<sup>95</sup> McConnell, *supra* note 92, at 422.

Justice Kennedy's opinion for the majority actually starts off by appearing to inquire into the scope of the right at stake in the case, but it confusingly defines the right by treating it as an interest to be balanced. The protection for speaker-based speech restrictions is extended by balancing the government's anti-distortion interest against the interest in free political expression.<sup>96</sup> Freedom from speaker-based speech suppression is defined as part of the right to free political expression, because the restriction of certain viewpoints can take the form of limiting what kinds of speakers can engage in political speech.<sup>97</sup> The government discriminates against the identity of the speaker when it restricts the political speech of wealthy individuals, corporations, unions, and non-profits.<sup>98</sup> Although media companies are exempted from the impugned restrictions, hypothetical limits on the expenditures of a wealthy media company would involve suppressing their political speech on the basis of their identity.<sup>99</sup> This outcome is not only at odds with precedent, but the original meaning of the First Amendment would not "permit the suppression of political speech by media corporations."<sup>100</sup> The further inference is that freedom from speaker based restrictions constitute part of citizens' interest in free political expression. The inference is the key to how the right is hazily defined by balancing the value of the government's interest in preventing distortion against a general interest in freedom from identity-based restrictions. The Court concludes that the latter must prevail because if it did not it would jeopardize the higher value of freedom of speech.

The majority opinion then moves on to balance the value of freedom from identity-based restrictions on political speech with the government's interests in preventing "*quid pro quo* corruption."<sup>101</sup> The Court dismisses the government's aim in preventing corruption as "[t]he anticorruption interest is

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<sup>96</sup> See *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (noting the government's interest in anti-distortion and the competing First Amendment interest in preventing the government from fining or jailing a group of citizens merely because of their political speech).

<sup>97</sup> See *id.* at 350 ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity.").

<sup>98</sup> See *id.* at 350-52 (noting that the Government cannot limit individuals' or corporations' political speech on account of their wealth).

<sup>99</sup> See *id.* at 352 (arguing that the First Amendment prevents corporations' political speech from being limited because they are classified as "wealthy").

<sup>100</sup> *Id.* at 353.

<sup>101</sup> *Id.* at 359.



not sufficient to displace the speech here in question.”<sup>102</sup> It then evaluates the governmental interest “in protecting dissenting shareholders from being compelled to fund corporate political speech.”<sup>103</sup> This interest is balanced against freedom of speech, but found to be an unacceptable reason that would, like countering distortion, “allow the Government to ban the political speech even of media corporations.”<sup>104</sup>

My reading of *Citizens United* indicates how balancing rights as interests involves distorting moral judgments that distract courts from transparently specifying the legal scope and content of rights. The way the Court treats the freedom from speaker-based restrictions on political expenditures as part of the protected interest in political speech allows its analysis to rely on the moral importance of freedom of speech. The Court does not look to how the original meaning, precedent, or tradition concerning the Free Speech and Press Clauses define the right at stake. It examines the reasons and means by which the interest in freedom from identity-based speech restrictions can be justifiably violated. It finds that restrictions on the speech of certain speakers are justified due to “an interest in allowing governmental entities to perform their functions[,]”<sup>105</sup> but few others match the moral importance of free political speech.

But does allowing speaker-based restrictions on expenditures license the restraint of political viewpoints? Against what standard do the justices find that the interest in freedom of expression is justifiably infringed by laws implementing government functions?

These questions arise because the argument assumes rather than proves that what is at stake in the case is the right to be free from speaker-based speech suppression. Those who reasonably question extending the scope of the right to freedom of speech to protect against most speaker-based regulations are caricatured as endorsing the state regulation of media expenditures due to their failure to sufficiently value citizens’ interest in speaking freely. This newly minted right exposes long accepted restrictions on corporate and union campaign contributions as unjustifiable speaker-based restrictions,<sup>106</sup> mischaracterizes many good faith proponents of regulating independent

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<sup>102</sup> *Id.* at 357.

<sup>103</sup> *Id.* at 361.

<sup>104</sup> *Id.* (citation omitted).

<sup>105</sup> *Id.* at 341 (citation omitted).

<sup>106</sup> McConnell, *supra* note 92 at 449.

political expenditures as agitators for media regulation, and fails to account for the potentially distinctive freedoms protected by the freedom of speech and the press. These are distortions of the disagreement between those who favor protections for third-party expenditures and those who wish to regulate such spending. But Greene is mistaken to attribute such distortions to rights-as-trumps. They are the fruit of conceiving of the right against speaker-based speech suppression as an interest that cannot be *proportionately* trumped by laws advancing most other interests. They flow from the very kind of value judgment Greene celebrates in *Harper*.

This understanding of *Citizens United* contrasts with *Harper*'s outcome but largely mirrors its method. Whereas *Citizens United* finds that speaker-based expenditure restrictions violate citizens' interest in freedom of speech, in *Harper*, the Crown "concedes" that its restrictions on individual third-party campaign spending "infringes" the Charter's right to freedom of expression.<sup>107</sup> Citizens' interest in freedom of expression is subsequently balanced against the "pressing and substantial" interests of "equality in the political discourse" among others.<sup>108</sup> Restricting third-party expenditures is "rationally connected" to promoting egalitarian political discourse because unequal resources for purchasing advertising will enable the unequal influence of some "to dominate the electoral discourse[.]"<sup>109</sup> The restrictions "minimally impair" freedom of expression because advertising is unlimited before an election period, there are "few obstacles" to citizens creating, joining, and contributing to parties, and advertisement unrelated to "a candidate or political party" is unlimited.<sup>110</sup> The restrictions are "proportionate" because their "salutary effects[.]" such as promoting the "political expression of those who are less affluent or less capable of obtaining access to significant financial resources" trump the "deleterious effect" of not allowing third parties "unlimited political expression."<sup>111</sup> The interest in equal political expression trumps the interest in free expression.

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<sup>107</sup> *Citizens United*, 558 U.S. at 372; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, para. 66 (Can.).

<sup>108</sup> *See id.* at para. 91 (noting that equality in political discourse is achieved by restricting participation in the electoral system for those with substantial financial resources).

<sup>109</sup> *Id.* at para. 107.

<sup>110</sup> *Id.* at paras. 112-14.

<sup>111</sup> *Id.* at paras. 120-21.

*Harper* may be more explicit in its use of proportionality and arrive at an outcome more amenable to Greene’s judgment, but it distorts rights in the same fashion as *Citizens United*. Justice Bastarache’s majority opinion in *Harper* concludes that citizens’ interest in freedom of expression is proportionately infringed by third party expenditures to promote equal political expression.<sup>112</sup> Just as *Citizens United* assumes the rights interest it should prove, *Harper* assumes that third-party spending restrictions infringe citizens’ interest in freedom of expression even as its proportionality analysis appears to turn on the conclusion that promoting equality of “political expression” *protects* this interest.<sup>113</sup> This oddly implies that third-party spending is protected by freedom of expression, but nevertheless *should* be infringed to serve citizens’ interest in equal political expression. The Canadian Supreme Court thereby distorts the question of whether freedom of expression protects third-party expenditures by assuming that it does, but then reasoning that other interests related to political expression justify acting *against* this right.

*Citizens United* and *Harper* are just two cases concerning a particular rights question, but they provide a sense of how the rights-as-proportionality framework can distort disagreements about the *scope* of rights into confused disagreements about the *value* of rights.

Cases like *Harper* and *Citizens United* also suggest that Jackson is mistaken to place hope in fixing the kinds of distortion she finds in *Humanitarian Law Project* by restructuring American rights jurisprudence to more closely resemble the Canadian approach.

Although Jackson has insightfully explored the way proportionality has played a role in doctrines concerning the Eighth Amendment and Due Process Clause,<sup>114</sup> she joins Greene in advocating for the expansion of this role to achieve more transparent protections for rights. I have argued that *Citizens United* can be read as collapsing the categorical approach into a proportionality judgment. This resembles Jackson’s characterization of *Humanitarian Law Project* as a demonstration of how proportionality judgments can be disguised by the categorical approach. The difference is that

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<sup>112</sup> *Id.* at para. 146.

<sup>113</sup> *Id.* at para. 120.

<sup>114</sup> Jackson, *supra* note 5, at 3104–05.

Jackson goes one step further and argues that *Humanitarian Law Project* shows the *inevitability* of using proportionality judgments to make exceptions to categorical rules for defining rights.<sup>115</sup>

As mentioned above, she takes this inevitability to show that critics of proportionality underestimate the way the categorical approach can devalue rights by overriding them. She also thinks the inevitability of proportionality judgments means that rights will be better protected by making its exercise more explicit and subject to doctrinal rules.<sup>116</sup> Proportionality analysis simply disciplines the inevitability of adjudicating conflicts between the interests related to rights in a more explicit fashion than the categorical approach. But if rights can be devalued by proportionality judgments, what is it about making such judgments more explicit, as in *Harper*, that will better protect them?

The problem facing Jackson's argument is that the way proportionality devalues rights also distorts them. Just as *Citizens United* and *Humanitarian Law Project* could be thought to devalue rights by balancing freedom of speech against other interests, they would then both distort disagreements about the scope of rights as disputes about the value of rights. *Citizens United* distorts the question of about the scope of freedom of the press as a question about the value of the freedom from identity-based speech suppression. *Humanitarian Law Project*, on Jackson's reading, takes the question of whether speech that could aid terrorist violence is protected by the right against content-based speech suppression and distorts it as a question about the value of free speech when weighed against the state's interest in combatting terrorism. The way *Harper* makes its value judgment about the proportionality of infringing freedom of expression explicit does not express the disagreement about how the scope of freedom of expression relates to third-party campaign expenditures any more clearly.

It does not clarify a disagreement about the scope of rights to make their resolution "explicitly" turn on a judgment about their value. To riff on a line from the late Justice Scalia, this a bit like insisting that using a measuring tape to weigh a rock would be more accurate than estimating its length with the

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<sup>115</sup> See *id.* at 3139 (arguing that *Humanitarian Law Project* shows that during times of major security threats, courts tend to apply a "less stringent means-ends test of whether the prohibition [on free speech] could be said rationally to serve the government's asserted interests").

<sup>116</sup> *Id.* at 3192.

naked eye.<sup>117</sup> Breaking out a measuring tape is not going to help clarify a disagreement about how much a rock weighs. It is going to confuse ordinary folks and rock specialists alike. However, it is worth qualifying how this conceptual argument relates to more empirical claims. It may be conceptually true that proportionality distorts rights; it is a separate question whether such distortions are in fact common or inevitable in American rights jurisprudence. The ways that U.S. courts often use doctrines to resist making proportionality judgments about rights helps underline why Jackson is mistaken to think of such judgments as inevitable.

### III. AMERICAN PROPORTIONALITY?

So far, I have argued that the framework of rights-as-proportionality *conceptually* devalues and distorts constitutional rights. However, this does not quite address Greene and Jackson's *institutional* arguments for why rights-as-proportionality promises to improve the way American institutions resolve disagreements about rights. They not only claim that proportionality analysis can clarify the connection right and justice, but also that the institutional consequence of courts employing this approach will be a more democratic form of rights protection.<sup>118</sup> In Greene's words, incorporating proportionality analysis into American rights jurisprudence will help U.S. institutions better respect what he rightly cherishes and calls "a democratic people's first-order right to govern itself."<sup>119</sup> Pointing out how rights-as-proportionality can devalue and distort rights does not directly address the institutional argument that proportionality can help American courts and legislatures resolve rights disagreements more democratically.

This is partly because the conceptual devaluation and distortions of proportionality analysis could have varying effects on particular institutional and political contexts. It is also partly a question as to what extent proportionality analysis actually informs the way American judges reason about rights under the tiers of scrutiny. If proportionality judgments overriding rights are widespread, then this will could help undermine the case

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<sup>117</sup> Here, I draw on Justice Scalia's famous declaration that balancing rights is like trying to decide "whether a particular line is longer than a particular rock is heavy." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

<sup>118</sup> Jackson, *supra* note 5, at 3194; Greene, *supra* note 2, 128.

<sup>119</sup> Greene, *supra* note 2, at 128.

for expanding its role in U.S. rights adjudication to more transparently value rights. As such, before assessing how proportionality analysis can institutionally disrupt the American model of rights protection, it will be useful to offer a rough sketch of the extent to which proportionality informs current doctrines concerning constitutional rights.

This brief account does not follow the “hornbook sketch” of the tiers-of-scrutiny framework where certain classifications and rights are matched to particular standards of review.<sup>120</sup> As was the case in *Citizens United*, it is possible for supposedly categorical cases of strict scrutiny to rely on proportionality judgments to strike down laws. On closer inspection, the concept of courts allowing the state to proportionately override rights appears to be as scattered across different doctrines and rights as the concept of avoiding such proportionality judgments by specifying the scope of rights.

How prevalent is the disguised kind of proportionality judgment of *Citizens United* in American tiers of scrutiny analysis? Although reading *Citizens United* as a proportionality case indicates that American rights adjudication may be less dominated by rights-as-trumps than Greene argues, I make no claim to properly answer the empirical question of to what extent supposedly categorical American cases collapse into proportionality reasoning. This Part merely offers a brief sketch of the mixed record of American uses of proportionality.<sup>121</sup> Some cases use the tiers of scrutiny in ways that eschew proportionality reasoning about overriding rights, while others appear to disguise such proportionality judgments. American rights jurisprudence appears to be a mixture of rights-as-trumps and rights-as-proportionality.

There are clearly strands of American rights adjudication that treat the defined scope of rights as trumps. In some cases, resisting proportionality takes the form of refusing to expand the scope of rights and leaving their definition to the political process. We have already seen how, rightly or wrongly, the U.S. Supreme Court refused to balance the right to free exercise of religion in the majority opinion in *Smith* by holding that this right did not

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<sup>120</sup> Greene, *supra* note 2, at 46.

<sup>121</sup> Cf. SWEET & MATHEWS, *supra* note 5, at 97–119 (offering an alternative account of proportionality’s relationship to the tiers of scrutiny that differs from this Article’s but supports the basic claim that the record is mixed).

extend to “otherwise prohibitable conduct.”<sup>122</sup> Another example is *Washington v. Glucksberg*, in which the U.S. Supreme Court refused to recognize the right to assisted suicide in the Fourteenth Amendment’s Due Process Clause.<sup>123</sup> Instead, it insisted that fundamental rights must either be textually based or “objectively, deeply rooted in this Nation’s history and tradition[.]”<sup>124</sup> This essentially constituted a move away from the balancing of due process rights, however tenuous it may have proven.

Various constitutional rights have also been protected against balancing by judicial decisions *defining* the scope of rights using different doctrinal tests, including compelling interest analysis under strict scrutiny. American judges have sometimes used rational basis review and strict scrutiny to define and defend the scope of different constitutional rights. In rational basis review cases with bite, judges have sometimes justified striking down laws due to the relationship between certain groups and their right to equal protection under the law. Such cases often involve judges’ sense that animus threatens the equal rights of groups such as hippies,<sup>125</sup> gays and lesbians,<sup>126</sup> short-term state residents,<sup>127</sup> the mentally disabled,<sup>128</sup> and others. These cases might show evidence of the inconsistency of the tiers of scrutiny, but they also involve attempts by the Court to articulate how the scope of the right to equal protection of the laws shields certain groups from specific kinds of animus. These cases strike down laws for violating the equal protection of the laws from public policy rooted in prejudice. This is arguably a haphazard way of defining rights, but it does not involve justifying the benefits of such laws against the “infringement” of an equality right.

There are many strict scrutiny cases, in particular in free speech doctrine, that treat the scope of rights as a trumps. *Citizens United* notwithstanding, in

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<sup>122</sup> *Emp. Div. v. Smith*, 494 U.S. 872, 882 (1990).

<sup>123</sup> *Washington v. Glucksberg*, 521 U.S. 702, 705–06 (1997).

<sup>124</sup> *Id.* at 720–21 (internal quotation marks omitted) (citations omitted).

<sup>125</sup> *See* U.S. Dep’t of Agric. v. *Moreno*, 413 U.S. 528, 532–34 (1973) (holding that the Food Stamp Act creates an irrational classification in violation of the Due Process Clause of the Fifth Amendment by intending to prevent hippies and hippie communes from participating in the food stamp program).

<sup>126</sup> *See* *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (finding no rational basis for amendment to state’s constitution that would deny gays and lesbians the protection of antidiscrimination laws).

<sup>127</sup> *See* *Zobel v. Williams*, 457 U.S. 55, 56 (1982) (finding no rational basis for an Alaskan law distributing oil-revenues in an unequal fashion favoring long-term over short-term state residents).

<sup>128</sup> *See* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (finding no rational basis for permit requirement imposed on a home for people with intellectual disabilities).

modern free speech cases strict scrutiny has tended to exclude not only any governmental interest in suppressing speech based on its content or viewpoint,<sup>129</sup> but even the *judicial* assessment of the value of speech.<sup>130</sup> Whether or not these rules properly delimit the scope of the right to free speech, they seek to *define* the scope of the right as freedom from governmental restrictions on expression on the basis of the moral value of speech.

But proportionality style reasoning also permeates judicial reasoning about many rights. In some cases, proportionality is openly used as a way of dealing with rights that appear to require historically evolving standards that can be applied across individual cases. An example of this is found in the Court's standard for scrutinizing the proportionality of sentences under the historically "evolving standards of decency" of the Eighth Amendment's protection against cruel and unusual punishment.<sup>131</sup> Proportionality judgments also openly appear under the Takings Clause in the heightened scrutiny given to how conditions on zoning permits relate to the effects of the planned usage of property.<sup>132</sup> In at least one older case, the Supreme Court has even explicitly used the governmental interest in national security to justify upholding a law entailing the compulsory disclosure of an organization's membership that it found "may in certain instances infringe constitutionally protected rights of association."<sup>133</sup>

Other cases and areas of law may come closer to the camouflaged proportionality analysis at work in *Citizens United*. In some strict scrutiny cases, the Court asks whether the government has a compelling interest and

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<sup>129</sup> See, e.g., *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (citations omitted)); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (same).

<sup>130</sup> *United States v. Stevens*, 559 U.S. 460, 470 (2010) ("The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.").

<sup>131</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>132</sup> See e.g., *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013) (explaining that the government cannot "condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use."); *Dolan v. City of Tigard*, 512 U.S. 374, 392, 398 (1994) (stating that the government must show a "'rough proportionality' between the harm caused by the new land use and the benefit obtained by the condition" (citation omitted)).

<sup>133</sup> *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 90-91 (1961) (citation omitted).



minimally overrides a right, but disguises this as an *empirical* inquiry. Paul Yowell has convincingly argued that this was the case in *Brown v. Entertainment Merchants Association*.<sup>134</sup> *Brown* concerned a California law that prohibited the sale of violent video games to minors and whether that law suppressed speech in violation of the First Amendment.<sup>135</sup> Justice Scalia's opinion relied on his own review of empirical evidence to reject a submission by the state of California purporting to show a causal link between exposure to violent video games and psychological harm to children.<sup>136</sup>

Proportionality judgments can also be disguised by *historical* reasoning about the original meaning of rights. This is arguably even true of *District of Columbia v. Heller*, a case alternately celebrated and castigated (depending on whom you ask) for its majority opinion's clarion call against the kind of interest balancing advocated by Justice Breyer.<sup>137</sup> *Heller* joins *Citizens United* as one of the more controversial Supreme Court cases in recent history. The case involved a five-justice majority opinion, penned by the late Justice Scalia, holding that the District of Columbia's requirement that all firearms be disabled at all times and its ban on handguns violated the original meaning of the Second Amendment's protection for citizens' right to bear arms.<sup>138</sup>

*Heller* does more than *Citizens United* to specify the scope of the right under consideration by making the historical case that the right to bear arms was meant to protect the natural right to self-defense.<sup>139</sup> That is probably enough to show that requiring firearms to be disabled at all times violates the purpose protected by the right.<sup>140</sup> But Justice Scalia's denunciation of *both* legislative and judicial balancing is followed up by the claim that banning handguns violated the purpose of the right to bear arms because "the American people" consider "the handgun to be the quintessential self-defense

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<sup>134</sup> YOWELL, *supra* note 1, at 37.

<sup>135</sup> *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 788–89 (2011).

<sup>136</sup> *Id.* at 800.

<sup>137</sup> *See* *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) ("Like the First [Amendment], [the Second Amendment] is the very *product* of an interest balancing by the people—which JUSTICE BREYER would now conduct for them anew." (emphasis in original)).

<sup>138</sup> *Id.* at 625, 636.

<sup>139</sup> *Id.* at 635.

<sup>140</sup> *See id.* at 630 (concluding that, by requiring firearms in the home be inoperable at all times, it is "impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional").

weapon.”<sup>141</sup> That is not a conclusion premised on historical evidence. This judgment seems to turn on the *value* of handguns as a means of serving the interest in self-defense, which Justice Scalia thinks would be disproportionately impaired by banning handguns. Professor Nelson Lund has described this argument as potentially engaging in “covertly Breyer-esque judicial interest balancing[.]”<sup>142</sup> This reading of *Heller* indicates that *Citizens United* might not be alone in masking proportionality reasoning under originalist pretensions.

The foregoing sketch indicates that American rights jurisprudence has a mixed record when it comes to using proportionality analysis. In some cases of strict scrutiny, proportionality is used to uphold or strike down laws; in some cases of rational basis “with bite,” categorical judgments are used to define the scope of rights as trumps. A more in-depth analysis would trace the history of different uses of proportionality analysis in the development of the tiers of scrutiny under the Burger, Rehnquist, and Roberts courts,<sup>143</sup> in the earlier period where Justice Black contested the balancing of rights,<sup>144</sup> and even farther back in the substantive due process of the *Lochner* era.<sup>145</sup> But a survey of current American rights doctrines shows that proportionality style reasoning is not a thing of the past, nor an unchallenged feature of the present. The record is mixed, and this makes it difficult to say whether proponents of proportionality are correct to trace the institutional disruption of rights disagreements to right-as-trumps.

In at least some cases, their claims appear to target rights-as-proportionate-trumps; that is, they appear to trace the devaluation and distortion of right to proportionality style reasoning. But it is difficult to say how widespread this is because one must look beneath the tier of scrutiny deployed to find out whether a court is using doctrine to balance or specify constitutional rights. In turn, this makes it difficult to evaluate how institutionally disruptive the rights-as-trumps or rights-as-proportionality frameworks might be in the American

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<sup>141</sup> *Id.* at 629.

<sup>142</sup> Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1355 (2009).

<sup>143</sup> See generally Fallon, *supra* note 32, at 1297-1302 (explaining that the general formula for strict scrutiny remained largely the same, but the Burger, Rehnquist, and Roberts courts added types of “intermediate scrutiny”).

<sup>144</sup> See Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 877-79 (1960) (stating that the balancing rights test gives the government too much power and ignores the already carefully balanced intricacies of the Constitution).

<sup>145</sup> YOWELL, *supra* note 1 at 57-62.

context. This renders the clear doctrinal usage of proportionality analysis in Canada a useful point of comparison for evaluating the arguments of proportionality's American proponents. In the following Part, I shall argue that Canadian style proportionality could institutionally disrupt the democratic resolution of disagreements about American constitutional rights.

#### IV. DISRUPTED RIGHTS

At a glance, it might seem unfair to look to Canada in order to understand the impact of expanding proportionality analysis in the United States. The Canadian model of rights protection is the object of much comparative adoration. While the U.S. Supreme Court is usually the prime piñata for critics of the democratic credentials of judicial review,<sup>146</sup> these critics have often been less willing, with some entertaining exceptions,<sup>147</sup> to beat up on the Canadian Supreme Court. This is partly due to Canadian courts' use of proportionality analysis and partly a matter of the ability of the federal and provincial legislatures to enact laws "notwithstanding" judicial rulings on certain rights.<sup>148</sup> Proportionality analysis is taken by some comparative scholars to help mitigate the democratic pathologies of judicial review across constitutional contexts.<sup>149</sup> The open use of proportionality in the Canadian context is envied by its American proponents as a key ingredient in what is idealized as a more democratic model for protecting rights.

But the comparison is at the very least useful because the mixed record of proportionality in the United States makes it hard to distinguish which cases employ this methodology. The fact that Canadian courts openly use

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<sup>146</sup> See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1348, 1650 (2006) (arguing that judicial review of legislation is "inappropriate as a mode of final decisionmaking in a free and democratic society" and noting that critics attack judicial review in America).

<sup>147</sup> See, e.g., JAMES ALLAN, *DEMOCRACY IN DECLINE: STEPS IN THE WRONG DIRECTION* 25-30 (2014) (comparing and contrasting the Canadian Supreme Court to the U.S. Supreme Court, and noting that the Canadian court has a number of differences, including selection process and lack of bicameralism, by which the author ultimately concludes that the Canadian court is less democratic than the United States court).

<sup>148</sup> Canadian Charter of Rights and Freedoms § 33, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

<sup>149</sup> See, e.g., Stephen Gardbaum, *Proportionality and Democratic Constitutionalism*, in *PROPORTIONALITY AND THE RULE OF LAW: RIGHTS, JUSTIFICATION, REASONING* 259, 270 (Grant Huscroft, Bradley W. Miller, & Grégoire Webber eds., 2014) (considering conflicts between two constitutional rights from within the culture of democracy perspective).

proportionality to justify “infringements” of rights, and Canada shares many constitutional features with the United States, makes comparing the two contexts instructive. More controversially, the comparison is also fair because proportionality’s devaluations and distortions of rights disrupt the ability of Canadian institutions to democratically resolve disagreements about rights.

Of course, it is important to note that American proponents of proportionality do not simply want to cut and paste the Canadian “*Oakes* test” into the U.S. context. For example, neither Greene nor Jackson recommends uniting all rights analysis under *one* uniform *Oakes* style proportionality test.<sup>150</sup> Greene is also careful to write that in cases where there is no reasonable disagreement that rights are threatened by prejudice, rights-as-trumps should guide American rights jurisprudence.<sup>151</sup> He also thinks the paradigm cases of American constitutional rights jurisprudence now concern “the potential overreach or clumsiness of a government acting in good faith to solve actual social problems[.]”<sup>152</sup> Jackson is more circumspect, arguing that proportionality may not be appropriate for certain rights such as the First Amendment’s protection for freedom of speech,<sup>153</sup> while benefitting others such as the Fourth Amendment right against unreasonable searches and seizures.<sup>154</sup>

In spite of these caveats, Greene and Jackson both claim that reforming the various strands of U.S. rights adjudication to resemble Canadian proportionality doctrine will clarify rights disagreements and better value their connection to justice. They both think that this will have the institutional effect of allowing courts and legislatures to resolve rights disagreements in more

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<sup>150</sup> Greene, *supra* note 2, at 60; Jackson, *supra* note 5, at 3166–67. At a Stanford Constitutional Law Center conference on proposing amendments that would improve the U.S. Constitution, Greene advocated amending the Constitution to qualify *all* of its rights to “limitations justified in a free and democratic society.” Jamal Greene, Professor of Law, Columbia University, Panel at “A Big Fix: Should We Amend Our Constitution?” at Stanford Law School’s Constitutional Law Center (May 12, 2017). This amendment drew on the exact language of section 1 of the Canadian Charter that the Canadian Supreme Court used in *Oakes* to characterize “limits” on rights as “infringements” justified by proportionality analysis. I was fortunate enough to comment on and criticize this proposed amendment in light of the Canadian experience.

<sup>151</sup> Greene, *supra* note 2, at 127–28.

<sup>152</sup> *Id.* at 128.

<sup>153</sup> Jackson, *supra* note 5, at 3168.

<sup>154</sup> *Id.* at 3169.

democratic ways, while also better protecting rights.<sup>155</sup> They join Justice Breyer and other comparative scholars such as Stephen Gardbaum in thinking that proportionality could help appease democratic skepticism about American judicial review.<sup>156</sup> Unfortunately, scholars such as Greene and Jackson fail to fully appreciate how proportionality's devaluation and distortions of rights can institutionally disrupt democracy by contributing to (a) rights inflation, (b) undermining the classic justification for rights entrenchment and judicial review, and (c) encouraging a pathological type of rights dialogue between courts and legislatures.

### A. Rights Inflation

The proportionality approach inflates the moral currency of rights in democratic discourse. This contributes to the institutional disruption of how courts, legislators, and ordinary citizens democratically deal with disagreements about rights. Proponents of proportionality make the contrary case that it is rights-as-trumps that impoverishes political discourse by inflating constitutional rights. For instance, Greene thinks that rights-as-trumps have been partly responsible for the dark "legal *Guernica*" of a hyperbolic and oversensitive politics of unreasonable disagreement.<sup>157</sup> He claims this "dulls the constitutional conscience of political actors by refusing to account for the *constitutional* right of the community to embody its political vision in the law."<sup>158</sup> This is not new. Mary Ann Glendon and others have long made similar arguments.<sup>159</sup> But what Greene's account of the "inflated" deontic moral value of rights fails to emphasize is how language inflating the value of rights can stoke politically unreasonable rights rhetoric by allowing rights to be overridden while expanding the scope and number of rights interests.

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<sup>155</sup> Jackson, *supra* note 5, at 3142-44; *see also* Greene, *supra* note 2, at 60. Greene argues for moving American rights jurisprudence in the *direction* of the Canadian emphasis on the "frames" of standards over rules, particularism over universalism, empiricism over interpretation, and justification over authority: "[t]he plea of this Foreword will be to move U.S. constitutional adjudication closer than it is now to the proportionality end of those frames." *Id.*

<sup>156</sup> *See, e.g.*, Gardbaum, *supra* note 149, at 260 (arguing that proportionality should enhance democracy).

<sup>157</sup> Greene, *supra* note 2, at 31-32.

<sup>158</sup> *Id.* at 65 (emphasis in original).

<sup>159</sup> *See generally* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (arguing that rights history in America has focused on individualism and liberty, but has failed to champion rights of the community).

It is hard to trace the effects of different conceptions of rights on popular political discourse and institutional reasoning, but it seems plausible to say that much of what Greene thinks of as the discursively pathological effects of rights-as-trumps talk can really be attributed to rights-inflation. While proportionality's devaluation of rights is hardly the single cause for the inflation of rights, it has likely contributed to it.

Proponents of proportionality argue that the way rights-as-trumps discounts many of the complex interests constituting moral disagreements about rights inflates the value of rights. Rights are disconnected from justice by categorizing their protection for certain interests to trump and exclude the consideration of other reasonable and relevant interests. According to Greene, this treats only some interests as valuable and incentivizes the "zero-sum" approach to many American rights disagreements where rights are "on one side, bad faith on the other" and "conflict is reconcilable only at wholesale, and without mercy to the loser."<sup>160</sup> The inflated value of having one's cherished interest christened as a "right" lowers the value of treating competing interests as reasonable.

This lays the blame for the "zero sum" nature of rights questions on how the legal categorization of rights excludes and devalues interests reasonably related to such questions. This account would actually entail the widespread *deflation* of rights, in the sense of a constitutional culture where rights are highly respected and rarely vindicated. In truth, much of the rancorous and hyperbolic character of modern rights talk can, at least in part, be traced to the ready willingness to equate interests with rights and the explosion of the number and types of interests that can be thought of as rights. These are the sources of rights-*inflation*. And proportionality reasoning encourages both of these things.

Equating interests with rights does not invite reasonable compromise but can instead embolden a rhetorical game that involves the denigration of conflicting interests—even interests closely identified with the rights in question. Part I of this Article argued against Greene that rights are disconnected from justice not by categorization, but by treating rights as mere defeasible interests. While almost any method of adjudication can devalue the justice of rights by mistakenly defining or applying a right, proportionality

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<sup>160</sup> Greene, *supra* note 2, at 32.

analysis is distinguished by its willingness to treat rights as interests subject to interest balancing.<sup>161</sup> It is also possible to conceive of rights as protecting certain interests, but without allowing such interests to be balanced once they have been defined in relation to the persons and acts they protect. When rights are interests prone to being overridden and balanced, the true standards for evaluating which of the interests implicated in a rights dispute should be vindicated becomes largely a matter of judicial moral judgment.<sup>162</sup>

In courts, this incentivizes litigants to convince judges to either identify their preferred interests with a right, or subordinate rights to their interests. Conversely, they must denigrate and tarnish relevant interests that are at odds with their own. This is why the majority opinion in *Citizens United* concentrates on lecturing the dissent for not valuing free political speech rather than on explaining why the interest in freedom from speaker-based expenditure restrictions constitute part of freedom of speech. Outside of courts, the all-or-nothing character of the moral disagreements can be encouraged by the idea that even interests thought to define the core meaning of rights, e.g. the right of newspapers to publish political criticism of the government as freedom of the press, can be overridden for the sake of higher interests. In legislatures, the idea that rights questions involve balancing interests could paradoxically wash the hands of legislators of responsibility for rights because all reasonable legislation seeks to balance interests. Why worry about overriding rights when courts assume that this is the business of most rights related legislation and adjudication?

The hyperbolic, winner-take-all character of much rights rhetoric and argument may also be partly traceable to the proliferation of the number and scope of interests considered to be protected by rights. Where rights interests are ubiquitous it becomes all the more important to assert the value of the rights interests one prefers and deny any merit to conflicting interests. It is an open question of how much the judicial use of proportionality analysis influences or is influenced by the inflation of rights as commonplace interests in popular political morality. But it seems likely that proportionality reasoning has some influence on political discourse, as it undoubtedly deflates rights by expanding the scope and number of interests they protect. Greene himself

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<sup>161</sup> YOWELL, *supra* note 1, at 27–30.

<sup>162</sup> Greene, *supra* note 2, at 109–14.

cites Kai Möller’s unabashed observation that a feature of proportionality analysis is “the increasing protection of relatively trivial interests as (prima facie) rights.”<sup>163</sup> He also discusses the use of proportionality by the German Federal Constitutional Court to find that the “right to free development of one’s personality” under Basic Law’s Article 2(1) protects “the feeding of pigeons on streets and in public places as an expression of love of animals.”<sup>164</sup> While this is only one case, it indicates how rights inflation can disrupt democratic rights discourse in a fashion similar to the way monetary inflation can upset an economy.

The German Court justified the law restricting this right as a means of serving “the interest of the community as a whole” by preventing property damage while only exercising a “very limited interference with the freedom to exercise the love of animals.”<sup>165</sup> Although Greene does not necessarily agree with this degree of rights inflation, he thinks it “useful . . . as a contrast dye” with the categorical approach.<sup>166</sup> He notes that American courts would be unlikely to entertain such a right, as these kinds of claims only fall under substantive due process if they implicate fundamental rights involving “personal choices central to individual dignity and autonomy”<sup>167</sup> or essential to the American “scheme of ordered liberty”<sup>168</sup> or “deeply rooted in this Nation’s history and tradition.”<sup>169</sup> This restricts the number and scope of rights interests recognized by U.S. courts, and Greene thinks this orients American rights discourse towards its scorched earth trajectory.

But isn’t a citizen challenging a local ordinance against feeding pigeons as a violation of her “right to develop her personality” a sign of a societal breakdown in good-faith reasonable disagreement about rights? Arguing that a right to develop one’s personality by feeding pigeons should outweigh a community’s rules for protecting its property projects absolute value onto a right and denigrates reasonable interests related to it. Neither a system that

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<sup>163</sup> *Id.* at 58 (quoting KAI MÖLLER, *THE GLOBAL MODEL OF CONSTITUTIONAL RIGHTS* 3 (2012)).

<sup>164</sup> *Id.* at 57 (citing Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 23, 1980, 54 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 143 ¶ 2(d) (Ger.)). **Error! Hyperlink reference not valid.**

<sup>165</sup> 54 BVerfGE 143 2(d). All translations of German language cases are author’s own.

<sup>166</sup> Greene, *supra* note 2, at 57.

<sup>167</sup> *Id.* (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015)).

<sup>168</sup> *Id.* (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010)).

<sup>169</sup> *Id.* (quoting *McDonald*, 561 U.S. at 767).



allows such frivolous and unreasonable assertions of rights to clog its courts' dockets, nor a society that supplies such assertions is treating rights reasonably.

The Canadian Supreme Court's uses of proportionality analysis have stopped short of recognizing a right to feed pigeons in parks, and it has even admitted that "[t]here is no free-standing constitutional right to smoke 'pot' for recreational purposes."<sup>170</sup> In spite of that admission, the majority of the court went on to justify infringing the "liberty interest" of the recreational pot user, robbing their admission of its force.<sup>171</sup> Justices Arbour and LeBel dissented because they judged that the societal interests advanced by the law criminalizing marijuana possession was disproportionate to the liberty interest of the smoker.<sup>172</sup> Justice Deschamps also dissented on the grounds that J.S. Mill's principle that only harm to others can justify infringing liberty is incorporated into the Charter principles of "fundamental justice," and marijuana use merely harms the user.<sup>173</sup> Assessing liberty as an abstract interest inflated the scope of the right to encompass smoking pot for recreational purposes.

There are other examples where Canadian courts have used proportionality to puff up rights, even if only to override them. Consider the question of child pornography. Unlike the U.S. Supreme Court's categorization of child pornography as outside the scope of free speech,<sup>174</sup> the Canadian Supreme Court has used proportionality analysis to recognize the possession of child pornography as an interest protected by the freedom of expression.<sup>175</sup> The court accepted the government's proportionality justification for infringing this right and even claimed that "the possession of child pornography *must be forbidden* to prevent harm to children."<sup>176</sup> As Grégoire Webber et al. have noted, this inflates the idea of the right to freedom of expression to such an extent that for the court "there are

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<sup>170</sup> R. v. Malmö-Levine, [2003] 3 S.C.R. 571, para. 87 (Can.).

<sup>171</sup> *Id.* at para. 89.

<sup>172</sup> *Id.* at para. 280.

<sup>173</sup> *See id.* at para. 295 ("[M]oderate use of marijuana is harmless. Thus, it seems doubtful that it is appropriate to classify marijuana consumption as conduct giving rise to a legitimate use of criminal law in light of the *Charter*.").

<sup>174</sup> *New York v. Ferber*, 458 U.S. 747, 763-64 (1982).

<sup>175</sup> *See R. v. Sharpe*, [2001] 1 S.C.R. 45, paras. 5, 27 (Can.) (balancing the limitation to freedom of expression against the harm that possession of child pornography can cause to children).

<sup>176</sup> *Id.* at para. 29 (emphasis added).

conclusive reasons for acting *contrary* to the right: for the legislature to respect the pornographer's freedom of expression would be to act *unjustly* or *unjustifiably*.<sup>177</sup> This is one more example of how this approach has encouraged a confused rights discourse that has warped Canada's ability to treat rights reasonably. Of course, the mixture of rights-as-trumps and rights-as-proportionality in the American tiers of scrutiny makes it more difficult to say whether courts have contributed to rights inflation in the United States.<sup>178</sup> But the link between Canadian and German uses of proportionality analysis and rights inflation is not encouraging.

A healthy rights discourse, where political actors are responsible and electorally accountable for sorting out disagreements about rights, will not feature widespread attempts to elevate trivial interests above democratic decision-making. When a central bank heedlessly prints money, prices can skyrocket, and people can become desperate to afford even basic items. Analogously, proportionality's complicity in stretching and proliferating rights can act as a reason for the polarized desperation of rights-claims that are worth less due to their increased supply.

### *B. Undermining Enumeration and Judicial Review*

Two important reasons why many critics of judicial review are uneasy with the entrenchment of bills of rights is that they fear that such legal rights will not settle most moral disagreements about rights,<sup>179</sup> while inviting unelected courts to nevertheless use enumerated rights to reverse democratic settlements.<sup>180</sup> Courts treating rights as just trumps does risk reversing past democratic settlements to moral disagreements about the meaning of enumerated rights. However, treating rights as interests that are subject to proportionality analysis can *unsettle* moral agreements and compromises related to enumerated rights by reversing democratic settlements about unenumerated rights beyond any legal mandate for adjudication. This undermines a key justification of

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<sup>177</sup> GRÉGOIRE WEBBER ET AL., LEGISLATED RIGHTS: SECURING HUMAN RIGHTS THROUGH LEGISLATION 38 (2018) (emphasis in original).

<sup>178</sup> Thank you to Dan Walters for helping to clarify this point.

<sup>179</sup> See JEREMY WALDRON, *The Core of the Case Against Judicial Review*, in POLITICAL POLITICAL THEORY: ESSAYS ON INSTITUTIONS 195, 211 (2016) (arguing that bills of rights do not resolve moral disagreements about rights).

<sup>180</sup> See *id.* at 226–33 (arguing that judicial review of indeterminate rights is a less democratic decision procedure than a majoritarian one).

entrenchment and feeds rather than assuages the democratic fears of critics of judicial review.

Moral disagreements about rights questions are complicated by constitutionally enumerated rights, as evidenced in *Citizens United* and *Harper*. Where a right is not only subject to vigorous good faith moral disagreement, but also touches on rights enumerated in a constitutional bill of rights, legal arguments about the meaning of the relevant enumerated rights are inevitably pulled into the political sphere. The most trenchant critics of judicial review go so far as to decry the very entrenchment of rights because they think this gravitational pulling of law into politics distorts moral disagreements about rights and grants courts undemocratic powers in resolving them.<sup>181</sup>

The most influential argument along these lines holds that where there are basically functional democratic and judicial institutions, and where citizens engage in numerous good faith disagreements about rights *left unsettled by a bill of rights*, it will violate the right of citizens to an equal say in resolving such questions for an unelected court to determine the meaning of such rights as part of its interpretive task.<sup>182</sup> Notice that presupposing that legally entrenched rights are indeterminate distinguishes this argument from the distinct Jeffersonian claim that even the judicial enforcement of the determinate meaning of entrenched rights generates inter-generational inequalities.<sup>183</sup>

With Greene, we can accept the force of this argument without rejecting constitutional bills of rights and judicial review *tout court*.<sup>184</sup> But our analysis of the rights devaluation and distortions of proportionality analysis allows us to see how it can exacerbate the difficulties pointed to by critics of rights entrenchment and judicial review. Greene accepts the points scored by these

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<sup>181</sup> See generally RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* 28 (2007) (arguing that incorporating a bill of rights can produce rather than restrain arbitrary rule).

<sup>182</sup> See WALDRON, *supra* note 179, at 199 (arguing that judicial review is undemocratic because it privileges a small number of unelected judges to determine the final resolution of issues about rights and disenfranchises ordinary citizens).

<sup>183</sup> See generally Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 12 *THE PAPERS OF JAMES MADISON* 382 (Charles Hobson et al. eds., 1979) (considering whether one generation of men is entitled to bind another later generation of men).

<sup>184</sup> Greene, *supra* note 2, at 88.

critics, but then chalks them up as counting against rights-as-trumps.<sup>185</sup> He claims that critics of judicial review should be placated by proportionality analysis because it addresses the interests at stake in rights questions directly, “rather than through the smoke of precedent and doctrinal formulae.”<sup>186</sup>

Allowing judges to weigh rights as interests devalues even the clear meaning of entrenched rights by permitting them to be overridden. As such, proportionality analysis erodes one of the conditions that could help justify constitutional judicial review: that it values and enforces the past democratic enactments of a political community.

And Greene and Jackson’s hope that proportionality will transparently address the interests at stake in rights questions is betrayed by the way it distorts rights while allowing judges to control their meaning. Proportionality analysis encourages litigants to present their disagreements about rights not as concerning the scope of any given right, but rather as what Jeremy Waldron calls a “rights-misgiving” about taking a right “to an extreme or applying it in cases where other important interests (for example, survival or security) are much more urgently engaged.”<sup>187</sup>

This elevates courts to making moral and empirical judgments about the value of rights in public policy controversies without any direct accountability to citizens. Those who object to *Citizens United* extending freedom of speech to protect against laws targeting speakers based on their identity are caricatured as insufficiently valuing free speech; those opposed to the restrictions on third party freedom of expression upheld in *Harper* are cast as insufficiently valuing equal political expression, or even seeking to dominate their fellow citizens.<sup>188</sup> In both cases, the courts rely on moral intuitions to interfere with a reasonable disagreement about the moral meaning of entrenched rights.<sup>189</sup>

That reliance on moral intuitions pulls the rug out from Alexander Hamilton’s famous justification of judicial independence in relation to the “knowledge of the laws” possessed by judges.<sup>190</sup> One does not rely on

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<sup>185</sup> See *id.* (“[R]ights as trumps front-loads questions of rights definitions that judges . . . address mechanistically.”).

<sup>186</sup> *Id.*

<sup>187</sup> Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 SUP. CT. L. REV. (2d) 7, 17-18 (2004).

<sup>188</sup> *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, para. 107 (Can.).

<sup>189</sup> *Id.*; see also *Citizens United v. FEC*, 558 U.S. 310, 356 (2010).

<sup>190</sup> THE FEDERALIST NO. 81 (Alexander Hamilton).

knowledge of law to assess whether restrictions on third-party spending justifiably infringe the right to freedom of expression. The judgment that a right can be justifiably infringed is at least partly a moral one, although it's unclear what moral standard renders the different interests at stake in such disagreements commensurable.<sup>191</sup> It is difficult to democratically justify the shielding of such moral judgments by constitutional independence, as there is no reason to think that judicial judgments about the moral value of freedom of speech or equal political expression deserve to be privileged over those of zookeepers, librarians, or any other societal role. This also arbitrarily privileges the powers of whichever side or faction of a rights disagreement shares relevant moral values with a majority of the court.<sup>192</sup>

This problem will not comfort the critic of judicial review. On the contrary, it ought to contribute to democratic skepticism about entrenching rights that are subject to judicial proportionality analysis.

### C. *Interrogative Dialogue*

In response to these arguments, proportionality's American fans might reply that it allows for the renegotiation of rights commitments made in the past through a democratic kind of "dialogue" between courts and legislatures. This strand of thinking could rely on the distinct premise that *even if* legal rights could settle and guide moral rights disagreements, the constriction of entrenched legal rights in the past suppresses the equal right of living citizens to settle their disagreements in the *present*. On this argument, rights inflation could be limited by sensible proportionality judgments about rights made by interactive negotiations between courts and legislatures, and these negotiations could democratically free citizens from the grip of rigid commitments made by past generations. Or perhaps Greene and Jackson might contend that moral disagreement about the meaning of rights extends radically to the methods for interpreting their meaning, such that rights must be continually renegotiated in dialogues between courts and legislatures about their present value.

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<sup>191</sup> See FRANCISCO J. URBINA, A CRITIQUE OF PROPORTIONALITY AND BALANCING 46-74 (2017) (explaining the incommensurability objection to proportionality).

<sup>192</sup> F.L. MORTON & RAINER KNOPFF, THE CHARTER REVOLUTION AND THE COURT PARTY 162 (2000).

Either argument would appear to follow the Canadian Supreme Court's suggestion in cases such as *R. v. Mills*,<sup>193</sup> *Vriend v. Alberta*,<sup>194</sup> *Sauvé v. Canada (Chief Electoral Officer)*,<sup>195</sup> and even Chief Justice McLachlin's dissent in *Harper*,<sup>196</sup> that legislative replies to judicial decisions create a "dialogue between and accountability of each of the branches [to one another]" that has "the effect of enhancing the democratic process[.]"<sup>197</sup> The problem with this counter-argument is that proportionality analysis encourages what I have argued elsewhere is an undemocratic *interrogative* type of rights dialogue.<sup>198</sup>

The general promise of dialogue is that it will allow legislatures to respond to judicial decisions, and courts to further review such replies, and so on, such that rights are democratically negotiated and protected by both legislation and adjudication.<sup>199</sup> Proportionality analysis orients courts to interrogate legislative reasons and means for violating rights rather than reviewing the consistency of laws with the scope and nature of rights.<sup>200</sup> In turn, this could orient legislatures and citizens influenced by judicial decisions to an inflated understanding of rights as interests. Because courts using proportionality categorize most legislative enactments as justified or unjustified "infringements," this could encourage legislatures to get in the habit of infringing rights. It could also become natural for citizens to get in the habit of electorally holding their legislatures accountable for justifiably or unjustifiably infringing rights.<sup>201</sup> Interactions between elected legislatures and unelected courts will resemble interrogations about a criminal's reasons for breaking the law rather than the

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<sup>193</sup> *R. v. Mills*, [1999] 3 S.C.R. 668, para. 57 (Can.) ("This Court has also discussed the relationship between the courts and the legislature in terms of a dialogue . . .").

<sup>194</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493, paras. 137-42 (Can.) (describing the interaction between the branches of Canadian government as a "dialogue").

<sup>195</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, para. 17 (Can.) (portraying the posture of courts towards legislatures as alternating between deference and vigilance).

<sup>196</sup> *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, para. 37 (Can.) ("Parliament's good faith is advanced . . . by the ongoing dialogue with the courts . . .").

<sup>197</sup> *Vriend*, 1 S.C.R. at para. 139.

<sup>198</sup> Geoffrey Sigalet, *On Dialogue and Domination*, in CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS 85, 86 (Geoffrey Sigalet et al. eds., 2019).

<sup>199</sup> Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, *The 'What' and 'Why' of Constitutional Dialogue*, in CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS, *supra* note 198, at 1, 4.

<sup>200</sup> Sigalet, *supra* note 198, at 109.

<sup>201</sup> *Id.* at 123.

whether or not the law was broken.<sup>202</sup> The legislature is “presumed guilty until proven utilitarian.”<sup>203</sup> Insofar as such rights disagreements become election issues, the citizens will be habituated to voting about whether the governing political parties in the legislature unjustifiably violated or justifiably infringed rights. The effect of dropping questions of the scope of rights from jurisprudence could contribute to erasing such questions from the democratic process.

It may be that the moral value of entrenched rights should be up for renegotiation. Alternatively, it could be true that moral disagreement clouds the ability of methods of adjudication to guide moral disagreements about rights. Either way, it does not follow that courts will protect democracy by renegotiating rights in this interrogative fashion. In either case, enabling courts to interrogate the reasons and means by which legislatures may override rights could discourage legislative and popular concern for renegotiating the scope and nature of rights. This is because negotiating the value of rights, even in the face of moral disagreement about the methods of interpreting their legal meaning, presupposes the need for some degree of legislative control over their scope and nature. We cannot democratically renegotiate the value of a right if we don’t care for what the scope of that right is. And as discussed above, proportionality analysis will orient legislatures to negotiate misgivings about the value of rights rather than disagreements about the scope of rights. This undemocratically cedes control of the scope of rights to unelected courts and corrupts rights disagreements.

Of course, legislatures may end up articulating judgments about the scope of rights when they are mischaracterized as contesting judicial value judgments about the proportionate “infringement” of rights. And it also seems plausible that factors other than proportionality analysis are responsible for discouraging legislatures from articulating their own judgments about the scope of rights. It may be that what really gets in the way of legislatures articulating the scope of rights are complex rules of standing, precedent, *res judicata*, or the basic idea that articulating the scope of constitutional rights falls to the adjudicative function. These considerations do not change the truth that framing legislative replies to judicial decisions as justified infringements of rights can make it *more* difficult for legislatures to articulate their own views about the scope of

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<sup>202</sup> *Id.* at 108.

<sup>203</sup> *Id.*

rights. In the distorting light of judicial decisions using proportionality analysis, disagreements with courts about the scope of rights will be cast as objections to rights themselves, sometimes even by factions within the coalitions controlling the legislature. Even if variables such as rules of standing, precedent, *res judicata*, and respect for the judicial authority over the scope of constitutional rights are the primary obstacles to legislative participation in rights dialogues, there is reason to think that proportionality analysis can *compound* these difficulties. This feature of proportionality analysis can be discerned across both the Canadian and American contexts.

The comparison of Canadian and American rights jurisprudence is once again instructive. Basic features of Canadian constitutionalism appear to reduce the ability of variables other than proportionality analysis to obstruct legislative articulations of rights at odds with prior judicial decisions. Although it shares something like the American state action doctrine,<sup>204</sup> compared to the United States, Canada has a much looser standing regime for rights claims, lacks a political question doctrine,<sup>205</sup> and its supreme court is comparatively less strict about precluding re-litigated rights claims under *stare decisis* and *res judicata*.<sup>206</sup> Politically, the federal Canadian Senate lacks the democratic legitimacy of the U.S. Senate, and the provincial legislatures are unicameral, making laws easier to pass in response to controversial judicial decisions.<sup>207</sup>

Yet in spite of what looks like a more welcoming constitutional environment for legislative participation in dialogues about the scope of rights, there is evidence suggesting that proportionality analysis has discouraged such dialogue. Even in cases where Parliament appears to articulate its own understanding of rights, proportionality appears to exacerbate the difficulties it faces in doing so. Conversely, there are American uses of right-as-trumps that appear to have encouraged more robust Congressional articulations of

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<sup>204</sup> See *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 574 (Can.) (“The *Charter* does not apply to private litigation completely divorced from any connection with the government.”).

<sup>205</sup> See *Operation Dismantle Inc. v. La Reine*, [1985] 1 S.C.R. 441, 465–66 (Can.) (rejecting the political question doctrine in the section of her concurrence endorsed by the majority).

<sup>206</sup> See *Canada (Attorney General) v. Bedford*, [2013] 3 S.C.R. 1101, paras. 42–44 (Can.) (agreeing that “the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional.”).

<sup>207</sup> Reference Re. Senate Reform [2014] 1 S.C.R. 704, para. 60, and Constitution Act, 1867 section 24 (Governor General’s appointment of Senators); see, e.g., sections 69 (for the unicameralism of the Ontario legislature), (U.K.), 30 and 31 Vict., c. 3.



constitutional rights. This is in spite of the features of American constitutionalism that might present greater obstacles to such constructive responses. And in the case of at least one such prominent response, the U.S. Supreme Court seems to have used proportionality analysis to help shut down a more constructive rights dialogue.

Consider a recent Canadian example. The Parliament of Canada arguably contested the understanding of the Charter rights to life, liberty, and security of person animating the supreme court's invalidation in *Carter v. Canada (Attorney General)* of criminal restrictions on aiding and abetting assisted suicide.<sup>208</sup> In *Carter*, the court invalidated these restrictions as violations of the right to life, liberty, and security of person "insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition . . . that causes enduring suffering that is intolerable to the individual in the circumstances[.]"<sup>209</sup> This standard was explicitly tied to the circumstances of the plaintiffs in *Carter*,<sup>210</sup> and Parliament and the provincial legislatures were invited to respond "should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons."<sup>211</sup> Parliament eventually took up this invitation with a bill that restricted access to medically assisted dying to consenting adult patients whose "natural death has become reasonably foreseeable, taking into account all of their medical circumstances" and are "in an advanced state of irreversible decline in capability[.]"<sup>212</sup>

The evidence from the preamble to the bill, debate in the House of Commons and the Minister of Justice's "*Charter* statement" on the rights consistency of its bill all suggest that the government sought to restrict the scope of the right to die to protect the rights of underage, disabled, elderly, and other vulnerable persons, and to generally prevent suicide. The enactment's conditions were arguably more restrictive than the court envisioned, and constitutional experts were quick to claim that, in not

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<sup>208</sup> *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, paras. 2-3 (Can.).

<sup>209</sup> *Id.* at para. 127.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at para. 126.

<sup>212</sup> An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), S.C. 2016, c 3, s 241.2(1)(b), (d).

conforming to the court's decision, the government's legislative proposal was inconsistent with the Charter.<sup>213</sup>

In the face of these objections, the Minister of Justice, Jody Wilson-Raybould, emphasized that judicial understandings of rights are not final as “nobody has a monopoly on interpreting the Charter[.]”<sup>214</sup> She signaled her support for Parliamentary autonomy in specifying the scope of Charter rights by remarking that:

it falls to Parliament not only to respect the court's decision, but also to listen to diverse voices and decide what the public interest demands. It is never as simple as simply cutting and pasting the words from a court's judgment into a new law.<sup>215</sup>

Canadian legal scholars such as Dennis Baker are correct to characterize the government's legislative proposal as an independent legislative articulation of the scope of rights.<sup>216</sup> What such arguments miss is how the judicial use of proportionality analysis in *Carter* was used to characterize *any* deviation from the judicial scope conditions on the right to die as a violation of the right itself. Indeed, this contributed to the attempted political sabotage of the provisions of the bill reflecting Parliament's independent judgment on the scope of the right to assisted suicide. Once the initial bill passed to the Senate, the Liberal Senator Serge Joyal noted that the government's bill was “an initiative to limit the class of people who have received the right according to the Supreme Court to resort to medical assistance in dying.”<sup>217</sup>

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<sup>213</sup> *Presentation to the Standing Senate Committee on Legal and Constitutional Affairs, Bill C-14 (medical assistance in dying)*, 1st Sess., 42nd Parliament (2016) (statement of Peter W. Hogg, a prominent constitutional expert, arguing that Bill-C-14 attempted to establish a limitation to the right granted in *Carter* that was inconsistent with the ruling itself); 150(50) DEBS. OF THE S., 1st Sess., 42nd Parliament, at 1135–36 (June 15, 2016) (statement of Hon. Claudette Tardiff arguing that since the goal of medically assisted death was compassion, Bill C-14 was too restrictive), <https://sencanada.ca/en/speeches/speech-by-senator-serge-joyal-during-the-third-reading-of-bill-c-14-medical-assistance-in-dying-amendment-joyal/>.

<sup>214</sup> 148(55) H. OF COMMONS DEBS., 1st Sess., 42nd Parliament, at 3310 (May 13, 2016) (statement of Hon. Jody Wilson-Raybould).

<sup>215</sup> 148(45) H. OF COMMONS DEBS., 1st Sess., 42nd Parliament, at 2581 (Apr. 22, 2016) (statement of Hon. Jody Wilson-Raybould).

<sup>216</sup> Dennis Baker, *A Feature, Not a Bug: A Coordinate Moment in Canadian Constitutionalism*, in CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS, *supra* note 198, at 397, 397.

<sup>217</sup> 150(45) DEBS. OF THE S., 1st Sess., 42nd Parliament, at 935 (June 8, 2016) (statement of Hon. Serge Joyal).

The unelected Senator's rhetoric used proportionality analysis to reject narrowing the scope of the right to die because, in *Carter*:

[t]he court was already seized with an allegation from the lawyers of the government that the prohibition for everyone not to have access to medical assistance in dying could be saved . . . to protect the vulnerable, to enhance the sanctity of life, to prevent suicide . . . objectives of social policies that are certainly sound but that are too broad to deprive a person who is adult, competent, in a grievous and irremediable health condition and suffers intolerably from having access to medical assistance in dying.<sup>218</sup>

Senator Joyal's reasoning shows how proportionality can orient what should be debates about the scope of a right towards a debate about the justification for *depriving* citizens of a right. Those who supported the government's bill were forced to defend its specifications of who should have the right to medically assisted dying as contesting the permitted reasons for infringing this newly discovered right.

The Senator used the court's proportionality judgment to convince a majority of his Senate colleagues that Parliament could not consider interests such as suicide prevention in crafting its response to *Carter* without violating the newly discovered constitutional right to assisted death. The Senate sent a version of the bill without the impugned conditions back to House.<sup>219</sup> Although the Senate's amendments were rejected and the House's version of the bill was eventually enacted, it is quite striking that, even in the case of a bill meant to *enact* a novel right articulated by a supreme court overturning its own precedent,<sup>220</sup> political factions of a *governing party* managed to use the language of proportionality to characterize the prospective law as a *violation* of that right.

Overall, the Canadian experience indicates that interrogative dialogue reduces the chance the legislators and their voters will contest the scope limits and valuations judges place on rights using proportionality analysis. This is partly because of the way proportionality-based decisions empower minority political factions to sabotage legislative responses to judicial decisions as in *Carter*, but also because legislatures generally have little appetite for appearing to contest judicial valuations of rights. The federal and provincial legislatures have only rarely responded to judicial decisions invalidating their statutes as

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<sup>218</sup> *Id.* at 938.

<sup>219</sup> *Id.* at 939.

<sup>220</sup> *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 521-22 (Can.).

unjustified infringements of Charter rights.<sup>221</sup> And unlike American legislatures, section 33 of the Charter grants them the ability to formally insulate their legislation from judicial invalidation for renewable periods of five years.

Critics of judicial review have tended to blame the reluctance of Canadian legislatures in using the notwithstanding clause on the widespread perception that laws invoking section 33 override Charter rights.<sup>222</sup> The thought is that this forces legislatures that disagree with judicial decisions “to pretend to be brushing rights aside, whereas it might want to say that it is brushing aside mistaken interpretations of rights.”<sup>223</sup> What these critics fail to appreciate is how the Canadian proportionality approach to rights developed in *Oakes* turns even most *ordinary* statutes into “infringements” of rights.<sup>224</sup> Canadian judges have combined their understanding of dialogue with proportionality to uphold legislation that comports with their values, but rarely to countenance real disagreement.

How does this compare to the American context? It may be implausible to say that a more democratically constructive form of dialogue informs interactions between American courts and legislatures about rights. Certainly, both the U.S. and Canadian Supreme Courts make occasional institutional claims to be the exclusive interpreter of constitutional rights.<sup>225</sup> In both contexts, these claims of supremacy are at odds with the potential for dialogues between the branches that construct the scope of rights. However, there are American legislative responses to judicial decisions where rights-as-trumps appears to have encouraged the legislative construction of rights. Conversely, proportionality style reasoning appears to have contributed to judicial attempts to shut down rather than engage with such legislative constructions.

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<sup>221</sup> See Emmett Macfarlane, *Dialogue or Compliance? Measuring Legislatures' Policy Responses to Court Rulings on Rights*, 34 INT'L POL. SCI. REV. 39, 47 (2012) (determining that the legislature only responds with genuine dialogue in 17.4% of cases where a judicial decision finds that the legislature has unjustifiably infringed upon Charter rights).

<sup>222</sup> See, e.g., Waldron, *supra* note 187, at 34–39.

<sup>223</sup> *Id.* at 38.

<sup>224</sup> *Id.* at 34–39 (failing to mention how proportionality incentivizes understanding Canadian statutes as rights misgivings).

<sup>225</sup> See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (per curiam) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution.”); *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 17 (Can.) (discussing that the court should not defer to Parliament’s interpretation of the Charter as “part of a dialogue”).

Consider the legislative response to the U.S. Supreme Court's 1990 refusal in *Smith* to find rights to the free exercise of religion in "otherwise prohibitable conduct" motivated by religious convictions.<sup>226</sup> The Court was clear that it preferred to leave the protection of such rights to the political process.<sup>227</sup> Congress responded in 1993 with a law, the Religious Freedom Restoration Act ("RFRA"), that enacted federal statutory protections requiring the government to justify burdens it imposes on religious exercise as the "least restrictive" fashion and to further a "compelling governmental interest."<sup>228</sup> These requirements were essentially statutory protections for the more substantive understanding of the scope of the Free Exercise Clause rejected in *Smith*.<sup>229</sup> They applied to the federal government, but also to the states pursuant to Congress' power under Section 5 of the Fourteenth Amendment to "enforce" the Amendment by passing "appropriate legislation."<sup>230</sup>

The Congressional deliberations about RFRA were explicitly critical of the Supreme Court's refusal to recognize a more substantive right to religious free exercise.<sup>231</sup> Both the Senate and the House exhibited open criticism of *Smith* as a mistaken interpretation of the Free Exercise Clause that would leave many important religious practices open to interference by formally neutral laws and regulations. For instance, the Senate Committee on the Judiciary heard testimony regarding how *Smith* entailed the constitutionality of facially neutral

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<sup>226</sup> *Emp. Div. v. Smith*, 494 U.S. 872, 882 (1990).

<sup>227</sup> *Id.* at 890.

<sup>228</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, § 3, 107 Stat. 1488, 1489 (codified at 42 U.S.C. §§ 2000bb), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>229</sup> Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 161 (1997).

<sup>230</sup> U.S. CONST. amend. XIV, § 5.

<sup>231</sup> See *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 1-2 (1992) (statement of Sen. Kennedy) (criticizing the elimination of the "compelling interest test" that required stronger justification by the Government in order to interfere with the free exercise of religion); *Religious Freedom Restoration Act: Hearing on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 102d Cong. 33-34 (1992) (statement by Mark E. Chopko, General Counsel, on behalf of U.S. Catholic Conference) (arguing that while the "compelling interest test" was not a "panacea" for religion, the implications in abrogating from that test nonetheless loom large for religious institutions); *Religious Freedom Restoration Act: Hearing on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 101st Cong. 49 (1991) (statement by Rev. John H. Buchanan, Jr., Chairman, People for the American Way Action Fund) ("We are united in support of this legislation because it seeks to protect the fundamental principle of religious freedom, which was indeed undermined by the Supreme Court in the *Smith* decision.").

laws requiring autopsies over the religious objections of animist and Jewish families,<sup>232</sup> the use of neutral zoning laws to close down churches,<sup>233</sup> neutral rules withdrawing the accreditation of residency programs in Catholic hospitals that refuse to perform abortions on religious grounds,<sup>234</sup> etc. Congress took up Justice Scalia's challenge by weighing what he referred to in *Smith* as the "social importance" of ordinary laws with the "centrality of religious beliefs" to conclude that protecting the full scope of the right to free exercise was more important than maintaining the full enforcement of social policies.<sup>235</sup> RFRA arguably exemplified a quintessential legislative judgment about the value of the policy discretion that would be displaced by fully protecting the scope of a right while directing courts to the quintessential adjudicative task of applying the scope of that right on a case-to-case basis.<sup>236</sup>

As we shall see, the Supreme Court's reaction to RFRA was antithetical to constructive dialogue. Even so, RFRA itself can be understood as a legislative construction of the right to free exercise that was spurred by a judicial refusal to engage in proportionality analysis. Congress was likely emboldened by Section Five of the Fourteenth Amendment's explicit authorization to "enforce" the rights it incorporates against the states by "appropriate legislation."<sup>237</sup> Whereas debates in the Canadian Parliament about *Carter* were framed by its language as concerning whether limits on state-funded medically assisted dying were proportionate *infringements* of the right to die, the response to *Smith* involved robust disagreement with the Court about the scope of the right to the free exercise of religion. Scalia's refusal to balance rights in *Smith*<sup>238</sup> resulted in Congress taking responsibility for extending the scope of the right to religious free exercise *as a trump* to be applied across individual cases by courts. To be sure, the contrast cannot be wholly attributed to the Canadian Supreme Court's use of proportionality analysis in *Carter* and the U.S. Supreme Court's refusal to balance right in *Smith*. But it does suggest

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<sup>232</sup> *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the S. Comm. on the Judiciary*, 102d Cong. 9 (1992).

<sup>233</sup> *Id.* at 64.

<sup>234</sup> See *id.* at 72 (noting testimony of Prof. Douglas Laycock (citing *St. Agnes Hosp. v. Riddick*, 748 F. Supp. 319, 319 (D. Md. 1990))).

<sup>235</sup> *Emp. Div. v. Smith*, 494 U.S. 872, 890 (1990).

<sup>236</sup> McConnell, *supra* note 229, at 192.

<sup>237</sup> U.S. CONST. amend. XIV, § 5.

<sup>238</sup> *Smith*, 494 U.S. at 889.

that understanding rights-as-trumps may not be as inimical to constructive dialogue as proponents of proportionality might think.

What happened after RFRA indicates why it is implausible to say that American courts and legislatures robustly engage in democratic and constructive dialogues about rights. However, once again proportionality style reasoning played a role in undermining such dialogue. For a period, litigation under RFRA allowed a number of successful free exercise claims against laws and regulations that might have been upheld under *Smith*.<sup>239</sup> But government defendants soon challenged the constitutionality of the RFRA as it applied to state and local governments. One of these challenges, *Flores v. City of Boerne* (pronounced “Bernie”), arose from a suit filed by the Catholic Archbishop of San Antonio on behalf of a church contesting the City’s refusal to approve any remodeling plan that would damage the church building.<sup>240</sup> The district court ruled RFRA to be an unconstitutional violation of “the doctrine of the Separation of Powers by intruding on the power and duty of the judiciary.”<sup>241</sup> The case made its way to the Supreme Court solely on the question of the constitutionality of RFRA, and in a 6-3 majority opinion by Justice Kennedy the Court held the law unconstitutional as it applied to state and local governments.<sup>242</sup>

The majority opinion in *Flores* combined a proportionality judgment with a raw assertion of judicial supremacy. It held that the application of Congress’ understanding of the Free Exercise Clause to state and local governments violated the separation of powers and federalism.<sup>243</sup> The Court framed the choice concerning Congress’ exercise of the Section 5 power as either allowing

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<sup>239</sup> See, e.g., *Equal Emp. Opportunity Comm’n v. Cath. Univ. of Am.*, 83 F.3d 455, 467-70 (D.C. Cir. 1996) (holding that the EEOC’s and plaintiff’s claims against Catholic University were barred by the Free Exercise and Establishment Clauses, and by RFRA); *W. Presbyterian Church v. Bd. of Zoning Adjustment*, 862 F. Supp. 538, 544-46 (D.D.C. 1994) (holding that plaintiff Church’s program was religious conduct falling within the protections of the First Amendment and RFRA); *Bessard v. Cal. Cmty. Colls.*, 867 F. Supp. 1454, 1462-65 (E.D. Cal. 1994) (holding that requiring plaintiffs to take an oath that violates their religious tenets as a condition to being considered for public employment violates their right to free exercise); *Porth v. Roman Cath. Diocese*, 432 N.W.2d 195, 197 (Mich. Ct. App. 1995) (holding that RFRA bars the application of Michigan’s Civil Rights Act to defendant’s conduct).

<sup>240</sup> *Flores v. City of Boerne*, 73 F.3d 1352, 1354 (5th Cir. 1996).

<sup>241</sup> *Flores v. City of Boerne*, 877 F. Supp. 355, 357 (W.D. Tex. 1995).

<sup>242</sup> *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

<sup>243</sup> *Id.*

substantive power by which congressional majorities could change the Constitution,<sup>244</sup> or remedial power, by which Congress can enact mechanisms such as causes of action, fines, etc., to “prevent, as well as remedy, constitutional violations” exclusively defined by the Court.<sup>245</sup>

The Court then relied on dubious history<sup>246</sup> about the reconstruction era to affirm the remedial view and reject the substantive understanding of Section 5.<sup>247</sup> This historical justification of the remedial view eschewed any discussion of a middle ground between allowing Congress to change the Constitution, or restricting it to remedying violations of rights as interpreted by the Court.<sup>248</sup> The Court used this remedial view to treat RFRA’s disagreement with *Smith* about the scope of free exercise rights as an attempt to enact “a substantive change in constitutional protections.”<sup>249</sup> RFRA was then assessed for whether the means by which it prohibited state action to remedy or prevent unconstitutional state action “was proportionate.”<sup>250</sup> The statute was found to be disproportionate for targeting neutral state laws that would have been upheld under *Smith*,<sup>251</sup> for the lack of evidence of widespread religious discrimination it was supposed to remedy,<sup>252</sup> and for the burdens it placed on traditional state functions.<sup>253</sup>

Jeremy Waldron has provocatively characterized the kind of “dialogue” exemplified by *Flores* as analogous to Ring Lardner’s dialogue from *The Young Immigrants*:

Are you lost daddy I arsked tenderly  
Shut up, he explained.<sup>254</sup>

This captures the Court’s assertion of judicial supremacy in the place of any attempt to grapple with the possibility that Congress could be correct as a

<sup>244</sup> *Id.* at 529.

<sup>245</sup> *Id.* at 517.

<sup>246</sup> See McConnell, *supra* note 229, at 176, 183 (arguing that the legislative history relied on by the *City of Boerne v. Flores* Court supports only that “Congress was not intended to have authority to pass general legislation determining what the privileges and immunities of citizens should be”)

<sup>247</sup> *Flores*, 521 U.S. at 520–24.

<sup>248</sup> See McConnell, *supra* note 229, at 165 (arguing that the Court’s refusal to explain the “grounds for [the] disagreement or why Congress was mistaken” closed the door on the possibility of congressional interpretation of the clause).

<sup>249</sup> *Flores*, 521 U.S. at 532.

<sup>250</sup> *Id.* at 533.

<sup>251</sup> *Id.* at 532.

<sup>252</sup> *Id.* at 530–32.

<sup>253</sup> *Id.* at 533–35.

<sup>254</sup> Waldron, *supra* note 187, at 45 (citing Ring W. Lardner, *THE YOUNG IMMIGRANTS* Ch. 10 (1920)).



matter of interpreting the Free Exercise Clause. But it may also catch the fit between this one-sided conversation and the concept of rights informing the proportionality analysis conducted in the wake of the Court's assertion of exclusive interpretive authority.

*Flores's* use of proportionality analysis allowed the Court to skirt directly engaging with the interpretation of the scope of free exercise rights articulated in RFRA. The Court assessed the proportionality of Congress' judgment in RFRA that the free exercise of religion deserves heightened protection, even in facially neutral laws that seriously burden religious practices. Congress prioritized rights-as-trumps over the value of a degree of policy discretion for itself and the states. The Court denied Congress the power to prioritize rights-as-trumps for the states, and then judged that the value of the states' "traditional general regulatory power" outweighed how RFRA could realize the value of its own view of the Free Exercise Clause.<sup>255</sup> If the Court had counter-factually adopted a rights-as-trumps approach, it could deny Congress the power to articulate the scope of free exercise and then proceed to reiterate why, *even if it did have this power*, the scope of the right articulated in RFRA's was an interpretive mistake. Instead, proportionality analysis enabled the Court to interrogate Congress' view of free exercise as a mistaken judgment about the value of free exercise as it relates to the value of federalism.

One Canadian and one American example of dialogue certainly does not provide definitive insight into how proportionality reasoning affect interactions between courts and legislatures about rights. These examples do suggest that the conceptual devaluations and distortions of rights-as-proportionality can have negative institutional effects on the ability of courts and legislatures to democratically negotiate the meaning of rights.

In the Canadian context, there are less arduous formal institutional barriers to a Parliament featuring a majority government in the House of Commons articulating its own understanding of *Charter* rights in disagreement with prior judicial decisions. Yet the use of proportionality analysis in *Carter* created an obstacle to a majority government attempting to *enforce* a Supreme Court judgment. And a Quebec court recently invalidated Parliament's attempt to restrict assisted suicide to individuals with a reasonably foreseeable death as a disproportionate infringement on the right announced in *Carter*.<sup>256</sup>

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<sup>255</sup> *Flores*, 521 U.S. at 534.

<sup>256</sup> *Truchon c. Canada (Procureur Générale)*, [2019] C.S. 3792, para. 587 (Can. Q. C.S.).

That casts a shadow over claims that proportionality encourages courts to listen to legislative deliberation about rights and legislatures to take responsibility for such deliberation.

In the American context, the Supreme Court made a clear statement about the scope of the free exercise right as a limited trump in *Smith*, and thereby left room for Congress to disagree and articulate an alternative interpretation of that right in RFRA.<sup>257</sup> This indicates that judicial refusals to balance rights can promote legislative responsibility for rights, even where legislation such as RFRA can face potential opposition from the executive and the judiciary. The use of proportionality reasoning in *Flores* to shut down engagement with a strong Congressional articulation of rights does not support the claims of American proponents of rights-as-proportionality.

The interrogative quality of *Carter* and *Flores* orient dialogues towards the question of whether the legislature has learned to properly balance the value of rights, and judicial values must have the last word. That's not exactly a recipe for democratic negotiations about the scope and nature of rights. Given the admirable concern for the need to democratically settle reasonable disagreements about rights among proportionality's proponents, the Canadian experience with proportionality analysis should serve as a warning rather than an exemplar.

## V. TWO CONSTRUCTIVE LESSONS

This Article has argued that proportionality analysis can devalue and distort rights in ways that disrupt democracy. This does not show that American rights jurisprudence is wholly afflicted with proportionality analysis, but it does point out how strands of proportionality style reasoning are responsible for the devaluation and distortion of some U.S. constitutional rights—even if such reasoning is not explicitly deployed in a uniform doctrine resembling the Canadian *Oakes* test. It shows how the Canadian proportionality approach to rights is much less exemplary of treating rights reasonably than many Americans may think. This Article does not develop an alternative vision for how American rights jurisprudence might better protect rights while realizing the democratic settlement of moral disagreements that implicate rights. However, the comparison between American and

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<sup>257</sup> Emp. Div. v. Smith, 494 U.S. 872, 889 (1990).

Canadian rights jurisprudence does suggest two important constructive lessons for both countries.

The first lesson is that treating rights as absolute relations of justice that cannot be overridden is compatible with democratic legislatures helping to establish their scope in the face of moral disagreement about such rights. Not only are statutory rights conceivable as absolute moral rights, they tend to be quite institutionally secure against all branches of the state but the legislature.<sup>258</sup> This should be clear to students of the Westminster constitutionalism, as disagreement about rights in systems featuring Parliamentary sovereignty are resolved by statutes that are fairly immune to changes or overrides by judicial and bureaucratic officials.<sup>259</sup> This is why even fundamental rights, such as U.K. citizens' right to vote, can be conceived of as morally absolute. Their constitutive statutory requirements cannot be overridden without being formally changed,<sup>260</sup> but remain subject to reasonable disagreement about their scope in certain cases,<sup>261</sup> and only institutionally subject to change by the Queen-in-Parliament.

If an adult U.K. citizen fulfills and follows the statutory requirements qualifying them to vote for a Member of Parliament in their constituency, their right is morally and institutionally secured against being 'infringed' or changed by a judge or elections official in the name of the general welfare.<sup>262</sup> Their specified right also remains morally absolute against democratic changes given widespread *political* commitment to its protection, even while it is institutionally not absolute against such changes enacted by the U.K. Parliament.<sup>263</sup> This idea that statutory provisions can establish morally absolute

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<sup>258</sup> YOWELL, *supra* note 1, at 25.

<sup>259</sup> *Id.* at 26.

<sup>260</sup> See, e.g., Representation of the People Act 1983, c.2, § 3 (Eng.) ("A convicted person during the time that he is detained in a penal institution *in pursuance to his sentence* is legally incapable of voting at any parliamentary or local government election." (emphasis added)).

<sup>261</sup> Cf. Hirst v. United Kingdom (No.2), 42 Eur. Ct. H.R. 849 (2005) (finding the U.K.'s blanket ban on prisoner voting violated the European Convention on Human Rights' Article 3 right to free elections). The decision did not invalidate the impugned statute, but it did spark a debate about prisoner voting in the U.K. that has not yet been resolved.

<sup>262</sup> Geoffrey Sigalet, *Proportionality's Reductio Ad Monitum*, 23 REV. CONST. STUD. 341, 347-48 (2018) (citing YOWELL, *supra* note 1, at 25) (describing the example in common law jurisdictions of a Conservation Officer being disallowed from violating a fisherman's right to fish in the name of the general welfare).

<sup>263</sup> See generally BELLAMY, *supra* note 181, at 3-4 (arguing that in working democracies, the effort to constrain rights in reference to those outlined in written constitutions ignore the natural development of rights as contained in the political process).

rights tends to escape Canadians suffering from pre-1982 amnesia and Americans overly keen on contrasting statutory and constitutional law. Elevating the moral and democratic importance of statutory rights provisions is much more consistent with the Anglo-American tradition of constitutionalism than denigrating the justice of constitutional rights by subjecting them to proportionate statutory infringements.

The second lesson is that in order to settle moral disagreements about rights more democratically, it is necessary for courts to countenance statutes as potentially specifying the absolute scope and nature of *constitutional* rights. This may seem a bridge too far given the axiom of constitutionalism that entrenched constitutional rights are not subject to change by ordinary statutes. We need not abandon a commitment to constitutionalism to admit that entrenched rights are often vague and underspecified two term jural relations of the form “*A* has the right to *X*.”<sup>264</sup> Statutory rights often have a three term jural relation between a right-holder *A*, an action  $\varphi$ , and *B*, a person or set of persons with no right to interfere with *A*’s right.<sup>265</sup> That enables them to help resolve the finer points of moral disagreements about the scope of vague constitutional rights.<sup>266</sup> And if we admit that ordinary statutes can articulate morally absolute rights with democratic input, then it seems reasonable that statutes can help construct the meaning of fundamental rights.

In the contexts of the American and Canadian constitutional bills of rights, recognizing statutory rights constructions will involve judicial review. Judicial review of the constitutionality of statutory rights is actually necessary to help distinguish purely statutory rights from those bearing on the scope of entrenched rights, while also remedying violations of such rights.<sup>267</sup> This is aptly demonstrated by RFRA, which required the co-ordinate participation of the judiciary to protect a Congressional articulation of free exercise rights.<sup>268</sup> But this second lesson is incompatible with the Canadian and American Supreme Courts’ occasional claims to judicial supremacy, such as the

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<sup>264</sup> YOWELL, *supra* note 1, at 25–26.

<sup>265</sup> *Id.* at 26.

<sup>266</sup> See generally WEBBER ET AL., *supra* note 177, at 125–42.

<sup>267</sup> See Sigalet, *supra* note 262, at 355–56 (“Adjudication helps make such ordinary legal rights more specific and absolute by using legal techniques of reasoning to apply their meaning across different parties and empirical facts.”).

<sup>268</sup> See, e.g., *City of Boerne v. Flores*, 521 U.S. 507 (1997).

American Supreme Court's declaration in *Boerne* that it is the exclusive interpreter of constitutional rights.<sup>269</sup>

Sharing interpretive power is constitutionally sound because both the U.S. Constitution's Article VI and the Constitution Act, 1982, Section 52 require the supremacy of their respective constitutions, and neither grants any institution absolute authority over what the constitutions demands.<sup>270</sup> And even judicial declarations of judicial supremacy such as *Boerne's* are often belied by future judicial decisions accepting legislative constructions of rights at odds with precedent.<sup>271</sup> Extra-judicial constitutional construction is a legal and political reality in both American<sup>272</sup> and Canadian constitutional law.<sup>273</sup> Coordinating the construction of constitutional rights between the branches also follows James Madison's argument in *The Federalist No. 37* that legally vague constitutional provisions should be "liquidated" or constructed by "series" of *both* legislative "discussions" and judicial "adjudications."<sup>274</sup>

<sup>269</sup> See, e.g., *Flores*, 521 U.S. at 536 (Stevens, J. concurring) ("When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed."); *Sauvé v. Canada* (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 17 (Can.) ("The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of 'if at first you don't succeed, try, try again'").

<sup>270</sup> U.S. CONST. art. VI, cl. 2 (subjecting all branches of the federal and state governments to the Constitution as "the supreme Law of the Land"). The Constitution Act of 1982 declares the Constitution of Canada to be the supreme law. Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c I (U.K.).

<sup>271</sup> See *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436–39 (2006) (upholding an injunction under RFRA prohibiting the federal government from prosecuting a religious sect under facially neutral statutory provisions for using sacramental hallucinogenic tea because it lacked a "compelling interest").

<sup>272</sup> See, e.g., Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004); LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); GREG WEINER, *THE POLITICAL CONSTITUTION* (2019).

<sup>273</sup> See, e.g., DENNIS BAKER, *NOT QUITE SUPREME* (2010); CHRISTOPHER MANFREDI, *JUDICIAL POWER AND THE CHARTER* (2d ed. 2001).

<sup>274</sup> THE FEDERALIST NO. 37, at 183 (James Madison). For a more complete account of Madison's departmentalist ideal of such "liquidation," see generally Will Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (explaining the concept of constitutional liquidation to provide an understanding of the role of history in constitutional law). For other similar accounts of constitutional construction, see KEITH WHITTINGTON, *CONSTITUTIONAL INTERPRETATION* 5–14 (1999); Lawrence B. Solum, *The Interpretation-Construction Distinction* 27 CONST. COMMENT. 95 (2011).

Together, these lessons indicate that a more democratic rights jurisprudence will recognize statutes as sources constructing the scope and nature of just rights, without giving up the judicial role of remedying violations of rights in particular cases and circumstances. How exactly this should influence the doctrines of American and Canadian rights jurisprudence is well beyond the scope of this article. There are a number of adjudicative methods and sources of law that might be used to better integrate statutes into the construction of constitutional rights. And there is no reason why evidence of the original meaning, longstanding practices implicating rights, precedent setting judicial decisions and statutes, and even moral reasoning concerning rights cannot all help legislatures and courts specify the morally absolute scope of constitutional rights.<sup>275</sup> Reforming the way courts and legislatures approach rights to respect the moral absoluteness of rights while relaxing the institutional absoluteness of judicial decisions about rights promises to be a complex task.

Courts, legislators, and scholars undertaking this complicated task run the risk of legally warping reasonable moral disagreements about rights, but this is simply one of the risks of constitutionally entrenching rights as fundamental law. The risk inherent in reconciling the many principles, methods, and types of evidence available to delimit entrenched rights is offset by the reward of democratically protecting the morally valuable rights entrenched in a constitution. That being said, it's worth dealing with the pragmatic objection to the task of reforming rights jurisprudence along the lines I have suggested.

Perhaps U.S. proponents of proportionality will seize on and defend some of the cases of balancing this paper has traced to strands of American rights jurisprudence. They may object that extricating balancing will require radically uprooting the compelling interest test in strict scrutiny cases, or, following the proposal of Justice Thomas' and other commentators, trashing the tiers of scrutiny altogether.<sup>276</sup> Canadian commentators may similarly object to reforming the proportionality framework embodied in *Oakes*. It is possible to respond to these criticisms by biting the bullet and arguing for overturning the tiers of scrutiny and *Oakes*. Even so, recent Canadian jurisprudence indicates that it is plausible to renovate doctrines entangled in proportionality style reasoning so that they guide courts to reason about the content and scope of absolute rights. This suggests that opponents of proportionality may not

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<sup>275</sup> Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015).

<sup>276</sup> See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2328 (2016) (Thomas J., dissenting) ("[Tiers of scrutiny] labels now mean little.").

need to advocate outright opposition to the tiers of scrutiny to curtail the disruption of rights.

In the recent case of *Frank v. Canada*, the majority of the Canadian Supreme Court balked at Justices Côté and Brown’s questioning the *Oakes* test’s legacy of conflating the constitutionality of “limitations” with potentially “justified infringements” of rights.<sup>277</sup> But, as Justices Côté and Brown’s dissent in *Frank* makes elegantly clear, even the minimal impairment and balancing steps of the *Oakes* test could be renovated to justify how reasonable a court’s judgment about the *scope* of a right is.<sup>278</sup> They look to the statutory means of restricting the right to vote to citizens residing in Canada for five-years and, rather than attempting to justify this restriction as an infringement of rights, they find reasons why it is a reasonable means “to define and shape the boundaries of a positive entitlement which, as such, necessarily requires legislative specification.”<sup>279</sup>

This would reorient the *Oakes* inquiry towards establishing why the legislation specifies the scope of the right rather than violating it. In cases where rights are violated, the minimal impairment and proportionality prongs could be similarly subverted away from attempting to justify an infringement, and towards supporting the reasons why legislation violates the scope of a right.

If *Oakes* could be reformed, then so too could American strands of proportionality style reasoning. The variegated American approach could be reformed by breathing new life into the kind of tradition oriented test for establishing the scope of due process rights in *Washington v. Glucksberg*, and extending this to other rights.<sup>280</sup> Instead of rejecting the tiers of scrutiny, the Court could emphasize how governmental interests in limiting rights must help *specify* the scope and boundaries of rights. The live question concerning the scope of the Second Amendment right to bear arms at stake in *New York State Rifle & Pistol Association Ltd. v. New York* was held to be rendered moot by New York State amending its firearms licensing statute and New York City loosening its restrictions on firearms transportation.<sup>281</sup> But Justice Alito’s

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<sup>277</sup> *Frank v. Canada* (Attorney General), 2019 SCC 1 at paras. 120-125 (Côté, J. and Brown J., dissenting).

<sup>278</sup> *Id.* at paras. 160-172.

<sup>279</sup> *Id.* at para. 124.

<sup>280</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>281</sup> *N.Y. State Rifle & Pistol Ass’n v. New York*, 140 S. Ct. 1525 (2020).

dissent (and Justice Kavanaugh's concurrence) show that similar future cases could become a chance for the Court to explain how a government's interest in restricting the transportation of handguns can or cannot be found in the "text, history, and tradition" defining the scope of the Second Amendment right.<sup>282</sup>

When inquiring into the City's justification for restricting the transportation of firearms to second homes or shooting ranges outside of the City, Justice Alito rejected both historical and public interest arguments.<sup>283</sup> Interestingly, Justice Alito starts his analysis by reviewing *Heller's* holding about how the scope of the right to bear arms extends to the right to keep a handgun in the home for self-defense, and to transport such guns for maintenance, lawfully transferring ownership, and "to gain and maintain the skill necessary to use it responsibly."<sup>284</sup> He then turns to the historical evidence in the founding era for laws that prevented gun-owners from practicing outside of city limits. The City argued that founding era municipalities restricted the places firearms could be used within their jurisdiction, but Justice Alito dismisses this because the petitioners were claiming the "right to practice at ranges and competitions *outside the City*, and neither the City, the courts below, nor any of the many *amici* supporting the City have shown that municipalities during the founding era prevented gun owners from taking their

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<sup>282</sup> Transcript of Oral Argument at 3, *N.Y. State Rifle & Pistol Ass'n v. New York*, 140 S. Ct. 1525 (2020). Consider what might have happened if the case had not been rendered moot. On the one hand, it could have made strategic sense for Justice Breyer et al. to argue that the original textual meaning, history, and tradition of the Second Amendment compel *deference* because they are sufficiently indeterminate regarding whether blanket bans on the transportation of short-barreled weapons would have been understood to violate the right to bear arms. This would be presumably more acceptable to several of his fellow justices than repeating his balancing argument in *Heller*. On the other hand, Justice Kavanaugh et al. might be tempted to find new evidence for why handgun transportation bans might have been unacceptable at the founding, or, perhaps more promisingly, at the time of the Reconstruction Amendments that incorporate the Second Amendment against the states. Note that in the sequel to *Heller*, then-Judge Kavanaugh, considering an automatic weapons ban at the D.C. Circuit, explicitly argued that *Heller* bound lower courts with the implicit "clear message" that "[c]ourts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulations." *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

<sup>283</sup> *N.Y. State Rifle & Pistol Ass'n*, 140 S. Ct. at 1544 (Alito, J., dissenting).

<sup>284</sup> *Id.* at 1541.



guns outside city limits for practice.”<sup>285</sup> He finally looks to the “public safety” arguments and finds them facially weak and unsubstantiated.<sup>286</sup>

Justice Alito’s reasoning appears to be primarily informed by rights-as-trumps, but some questions remain concerning his inquiry into the public safety justification. The way he defines the scope of the rights eschews the proportionality approach of treating the right to bear arms as an overridable interest that extends to all examples of citizens having their use of firearms restricted by law. And his historical inquiry appears oriented towards establishing the scope of the right to transfer arms as it related to municipalities.

But his public safety analysis may leave room for the City to justifiably violate the (presumptively) historically determinate right to transfer arms given the proper demonstration that travel restrictions promoted public safety. In order for the Court to avoid using heightened scrutiny as a kind of balancing inquiry, arguments such as the public safety justification must be blended into the analysis of the text, history, and tradition establishing the scope of the right. This wouldn’t be hard to do. For example, Justice Alito could have noted that *in order* for public interest justifications to be on the table, the City must show that these were historically acceptable grounds for municipalities to restrict travel with firearms in the founding or reconstruction eras. Given the historical question marks over *Heller* surveyed in Part III above, this approach might also give the City and Justice Breyer much to say in response.

Outside of the Second Amendment, the Court could also turn away from proportionality style reasoning by reversing its increasing trend of using its compelling interest analysis to uphold violations of rights such as freedom of speech,<sup>287</sup> and instead use it to explain why various asserted government interests fail to exempt a statutory provision or regulation from the scope of a right.

It’s difficult to see how such reforms are more radical than moving towards the example of the majority of the Canadian Supreme Court in *Frank*. The

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<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 1544.

<sup>287</sup> *See, e.g.,* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015) (upholding speech restrictions on fundraising by state judicial candidates); Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2712 (2010) (upholding speech restrictions on provision of material support to international terrorist organizations).

majority in *Frank* found basic statutory qualifications on the right to vote such as residency requirements to be infringements of that right in need of philosophical justification. The right to vote existed in Canada before the 1982 patriation of the *Charter* and its section 3 enumeration of the right. The pre-1982 statutory right to vote was *constituted* by laws specifying the very kinds of qualifications that the Court now unreasonably views as “infringements.”<sup>288</sup>

### CONCLUSION

Arguments for reforming American rights jurisprudence to incorporate proportionality analysis seek the goals of better valuing rights and clarifying disagreements about rights for the betterment of democracy. These goals are clearly admirable. But introducing or expanding the role of proportionality analysis into the way American courts analyze rights questions may prove an unreasonable means of achieving these interests. Canadian eyes may see more clearly where such means will lead, and the view isn’t pretty for those with a healthy distaste for rights inflation, unaccountable judicial law-making, and bad faith dialogues about rights between elected officials and judges. The means are not so much disproportionate to these ends as inimical to them.

The silver lining is that thinking through why proportionality analysis is unlikely to “lower the stakes of politics” provides us with basic insights about how to reform Canadian and American rights adjudication to more democratically protect the value of rights and the clarity of our disagreements about them.<sup>289</sup> Courts must treat rights as morally absolute, but democratically accommodate disagreements about the scope of their obligatory requirements by institutionally recognizing legislative and traditional sources of meaning. The need for these lessons would not surprise H. L. A. Hart, who once noted that the two most remarkable aspects of American jurisprudence for the English lawyer are the U.S. Supreme Court’s declaration of its power to invalidate Congressional statutes and its doctrine of finding procedurally sound laws to be invalid violations of due process because they “did not satisfy the requirement of vague undefined standards of reasonableness or

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<sup>288</sup> Dominion Elections Act, S.C. 1920, c. 46 (Can.).

<sup>289</sup> Greene, *supra* note 2, at 80.

desirability.”<sup>290</sup> He found these phenomena “hard to justify in a democracy.”<sup>291</sup> Proportionality analysis makes it even harder to justify the legitimacy of constitutional judicial review. Clipping back proportionality judgments may make it easier.

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<sup>290</sup> HART, *supra* note 15, at 124–125.

<sup>291</sup> *Id.* at 125.

