Note to NYU readers:

Thank you for engaging with this project. What follows are the Introduction (pp. 1-19), Chapter 3 (pp. 20-51), and Chapter 5 (pp. 52-76) of a draft book manuscript on rights adjudication in the United States. The Introduction lays out the overall argument and organization. Chapter 3 is the last of three largely historical chapters, seeking to trace how U.S. judges came to view rights in the way they typically do. Chapter 5 treats abortion rights as emblematic of the problems the U.S. model creates for rights conflicts and offers the German model as an example of an alternative framework.

These are true works in progress, so any and all comments are most welcome. You should be aware that the book is for a trade press, and so the style is more anecdotal than a typical academic monograph.

Thanks, Jamal

The Rights Epidemic:

How the Addiction to Absolute Justice Is Dividing America, and What We Can Do About It

JAMAL GREENE, 8/26/19
**INTRODUCTION.**

You have the right to remain silent. And the right to free speech. You have the right to worship, and the right to doubt. The right against race or sex discrimination. And the right to hate. The right to marry and to have children. The right to divorce and to terminate a pregnancy. The right to be a doctor, and to refuse to perform abortions. The right not to be tortured. The right to die. You might have the right to vote. You surely have the right to stay home. Perhaps you have the right to public education. And to home schooling. The right to health, and to refuse health insurance. The right to food, and to assisted suicide. The right to clean air and water. The right to sell cigarettes. The right to a home. The right to drive. The right to ride a school bus. The right to work. The right to party.

A performance artist named Karen Finley, best known for smearing chocolate over her naked body, claimed a right to NEA funding. (She lost.) A conservative advocacy group called Citizens United claimed the right to use corporate treasury funds to produce a hit piece called “Hillary: The Movie” during Hillary Clinton’s 2008 presidential run. (They won.) Two Orthodox Jewish merchants in Philadelphia claimed the right to keep their stores open on Sundays. (They lost.) Jack Phillips, a Colorado baker-cum-artist, claimed the right to refuse to make an artisanal cake for a same-sex wedding. (He won.) Two Missouri women, Ndioba Niang and Tameka Stigers, claimed the right to braid hair in an African style without completing a 1,500-hour training course and obtaining a cosmetology license. (They lost.) A group of neo-Nazis claimed the right to unite, armed with racist propaganda and semi-automatic rifles, in a public park in Charlottesville, Virginia. (They won.) A Louisiana man named George Sibley claimed that “as one of God’s children he has the right to food, clothing, and shelter.” (He lost.) A Long Island man, James Maloney, claimed the right to use his homemade nunchucks to teach his made-up “Shafan Ha Lavan” karate style to his children. (He won.)

Rights talk has gone viral. We debate policy in the language of rights. We speak solemnly of soldiers heading to battle to defend them. We wave the dog-eared constitutions that enumerate them. We kiss the hems of the robes of judges who recognize and elevate them. The Frenchman Alexis de
Tocqueville wrote in 1835 that “scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.” That was hyperbole in his time, but it rings true in our own. Rights are the commandments of our civic religion. This book is about how to get them right, and why it matters.²

Just after 10 a.m. on the morning of Sunday, May 31, 2009, a 51-year-old airport shuttle driver named Scott Roeder rose from a pew at Reformation Lutheran Church in Wichita, rested a .22 caliber handgun against the temple of an usher, Dr. George Tiller, and pulled the trigger. A prominent provider of late-term abortions, Dr. Tiller had survived the bombing of his clinic in 1985. He had survived being shot in both arms in 1993. He did not survive Scott Roeder’s bullet. He died before paramedics arrived. At his murder trial, Roeder admitted that he had killed Dr. Tiller, but he claimed a “necessity” defense. A murder defendant can claim necessity if he killed to prevent a greater harm to others. For Roeder, the “others” whose rights he was protecting were fetuses, or as he called them, “unborn children.”³

Private violence begins where the law runs out. Pimps, hitmen, and mob goons enforce contracts the government refuses to back through its police and courts. Terrorists turn to violence when they see ordinary politics as fruitless or hostile to their agenda. Vigilantes promise security or justice to those the state is unable or unwilling to protect. Roeder believed it was for him to defend those whose rights the law would not recognize.

Roeder’s act was grievously wrong but his premise wasn’t. In Roe v. Wade, the Supreme Court said fetuses did not have constitutional rights. Justice Harry Blackmun, Roe’s author, thought denying fetal rights was the price of saying women had the right to control their bodies. Either women had constitutional rights, or fetuses did. There was no middle ground, no room for compromise or negotiation. The fight over abortion has since become a war, with people like Scott Roeder styling themselves as its noble guerrillas.⁴

The story of abortion rights is a tragic example of a common but unrecognized problem in American law: We take rights too seriously. We believe that holding a right means getting to do whatever the right protects.
A right to speech means we get to spew outlandish conspiracy theories on Facebook or Twitter. A right to bear arms means we get to cheerfully carry our AR-15 across the college green. A right to abortion means a pregnant woman gets to terminate her pregnancy; a fetal right to life means she doesn’t.

This view of rights, which I call **rights fetishism**, is intuitive to many of us, but it is deeply misguided. The rest of the world treats rights differently, and for most of our history, so did we. For the Constitution’s Framers, rights were not primarily intended to protect minorities or unpopular dissenters from the “tyranny of the majority,” as we so often describe them today, but instead were designed to protect that very majority from factional capture or executive overreach. The statesmen of that generation saw the right to participate in self-government, via the ballot and the jury, as sacrosanct. But, for them, the substantive rights that we today associate with the Supreme Court’s docket — freedom of speech, the right to bear arms, rights of equality, due process of law, and so forth — were best protected by legislatures and juries, not courts. And properly constituted legislatures and juries could choose how to define and limit rights in the public interest.

The Framers’ vision of rights has more in common with modern Canada than it does with the modern United States. The Canadian model, called “proportionality,” dominates courts around the globe. Proportionality is a structured approach to balancing rights against government interests. Courts that adopt proportionality tend to recognize a wide range of rights — wider than in the United States — but the courts’ attention trains on the ways in which government can, or can’t, limit those rights. In these other countries, limiting rights is not just something the government can do in an emergency, when the time bomb is ticking. Rather, rights are inherently limited.

Rights fetishism has surprising, destructive consequences. For one thing, it breaks up the marriage between rights and justice. Take two real cases. In one, an information processing firm called IMS Health wanted to scrape data from pharmacies, including prescription practices of individual doctors, which it could then sell to drug companies wanting to better tailor
their marketing to physicians. Vermont wanted to protect the privacy of doctors and their patients, so it passed a law banning the sale of prescription data. The Supreme Court struck the law down, saying it invaded the free speech rights of drug companies.5

In the other case, a black man named Warren McCleskey was sentenced to death for shooting a white police officer in Atlanta. His lawyers presented strong evidence that murder defendants were more than four times as likely to be sentenced to death when their victims were white rather than black. They told the Supreme Court that racial bias infects the death penalty process all the way from prosecutors’ charging decisions to jurors’ assessments of witness credibility to a judge’s sentencing decision. But Justice Lewis Powell worried openly in his majority opinion that a win for McCleskey would require judges to try to excise racism from the entire criminal justice system, and so McCleskey had to lose. Four years later, the state of Georgia electrocuted him.6

Rights fetishism can shatter a court’s moral compass. IMS Health’s right to sell prescription data to drug companies is not more important than Warren McCleskey’s right to an unbiased death sentence, and no reasonable person thinks it is. But when judges approach social conflicts as if rights are absolute, they get anxious about recognizing rights. Those rights courts choose to see turn out not to be the ones that fairness or justice demand, but instead the ones judges feel like they can manage from the bench through cold recitations of textual interpretation, original intentions, and precedent.

And so according to the Supreme Court, a wealthy partisan has a right to form a corporation that spends unlimited sums on political campaigns. A public school teacher covered by a collective bargaining agreement has a right to avoid contributing to the union’s negotiation costs. Modern-day Nazis clad in SS uniforms and proudly waving swastika flags have a right to march in an Illinois suburb that thousands of Holocaust survivors call home. But Americans have no federal constitutional right to food, to shelter, to education, or to health care, and Warren McCleskey is dead. As Justice William Brennan wrote in dissent in McCleskey’s case, what the Court is worried about is “too much justice.”7
Roeder’s murder of Dr. Tiller tragically highlights a second problem with rights fetishism: it deprives us of the vocabulary to think clearly about rights conflicts. Abortion laws pit the rights of women to sovereignty over their bodies and to equal opportunity to participate in civil society against the rights of fetuses to life. A baker, a florist, or a photographer who refuses, on religious grounds, to participate in a same-sex wedding claims a right to religious freedom that competes with the right of gays and lesbians to be served without discrimination. Both sides in the battles over race-based affirmative action claim to be vindicating the right to an unbiased college admissions process. Conflicting rights can’t both be absolute, and so a conflict of rights paralyzes the rights fetishist. The conflict presents him with a Hobson’s choice: either abandon rights fetishism or insist that one side has no right. A court that takes the latter course, that sees its role as declaring who has rights and who doesn’t, can wreak havoc on ordinary politics. A claim of right is a second bite at the apple for political losers, and it is a bite cloaked in righteousness. The winner in court has no need for policy bargains, and the loser has nothing to offer. Witness our abortion politics, where the Supreme Court’s shadow has helped make the very idea of compromise feel profoundly naïve. Political negotiation has no part in this play.

Worse, rights fetishism in the face of rights conflict degrades our relation to the law, and to each other. By denying the loser any claim of right, the court tells him not just that he has lost but that he does not matter. To him, his interests and projects are important, perhaps even essential, but he is made an outsider to the law. He may become suspicious of political institutions. He may choose to participate in civic life sparsely, or even subversively. Literally an outlaw, he may, like Roeder, decide to take the law into his own hands.

His opponent in the rights conflict is not just a fellow citizen who disagrees with him about policy, but rather is an enemy out to destroy him. When the stakes are that high, polarization should not just be expected but is indeed the only reasonable response. Law becomes reducible to winners and losers, to which side you are on, which tribe you affiliate with. Politics is reduced to a relation of friend and enemy, recalling the dystopian
political vision of the Nazi theorist Carl Schmitt. When, say, affirmative action becomes a question of whether the Constitution cares about the black or the white applicant, or when a case about wedding cakes becomes a case about whether one party is an anti-religious bigot or the other a segregationist, we aim for each other’s jugulars, as we should.

This dark, polarized picture of rights recognition and enforcement once had a place in our collective life. Sometimes your political opponent really is out to destroy you — to preserve your subservience, to deny your citizenship, to enshrine your social and economic inferiority in law. The Civil War and its long-simmering aftermath stand as violent testament to the inadequacy of the Framers’ original vision of rights. The local politics that that generation relied on can threaten rights as much as protect them. Sometimes, as during the Jim Crow era, local governments threaten rights flagrantly and in bad faith, and courts are called upon to respond with courage and resolve. The idea that rights are sacred, to be interfered with in only the most emergent of circumstances, is premised on this kind of pathological government.

Thus, the Supreme Court’s proudest moment, its decision in Brown v. Board of Education ending legalized racial segregation in public schools, models what it means to stand up to that kind of systemized, state-sanctioned bigotry. But it is a mistake to view Brown as a case about the importance of rights: as the eminent legal scholar Herbert Wechsler pointed out in his famous 1959 critique of Brown, the white parents’ rights of association were also at stake, and they lost. Brown, rather, is a case about white supremacy. It was not about the definition of rights; it was about the government’s pathological behavior, illicit motives, and bad faith. Fighting Jim Crow calls for fetishism about the rights of one side. Fighting patient protection laws or campaign finance reform or affirmative action policies or the myriad other government responses to complex social problems in our chaotic cosmopolitan world calls for a language of reconciliation, negotiation, and judgment.

None of which is to say that rights shouldn’t matter. Of course they should. But we must recover the Framers’ ultimate lesson, which is that the indispensable right in a democracy is the right to participate in one’s own
governance. That is the right a state denies when, for example, it keeps blacks from voting or participating equally in civil society; when the government investigates college professors or prosecutes labor organizers for espousing communism; or when a state outlaws birth control, keeping women permanently homebound. The right to self-governance is also denied, though, when the fruit of self-governance — the law — is too easily spoiled by a competing claim of right. A twenty-first century court doesn’t earn its pay by declaring rights, but rather by reconciling them. Until we can turn the language of rights that dominates our politics into a language of reconciliation, the American experiment — the audacious belief that liberalism and pluralism are not just compatible but are mutually constitutive — will be in peril. The last century gave us the constitutional tools to fight political exclusion. In this century, we need the tools to build a politics of pluralism.

This book charts a course for courts to participate in rather than frustrate our collective governance. U.S. courts recognize relatively few rights but strongly. They should instead recognize more rights, but weakly. They should devote less time to the arcane legalisms — the probes of original intentions, pedantic textual analysis, and mechanical application of precedent — that they use to determine whether the Constitution protects a right and more time to the facts of the case before them: What kind of government institution is acting? Is there good cause, grounded in its history, procedures, or professional competence, to trust its judgments? What are its stated reasons? Are those reasons supported by evidence? Are there alternatives that can achieve the same ends at less cost to individual rights? Knowing that courts will ask these kinds of questions makes other government actors ask them too as they craft their own policies and structure their own behavior. It makes rights recognition and enforcement a shared enterprise, one that is of, by, and for all the people and not just the judges.

Chapter 1 starts at the founding. The men who drafted the U.S. Constitution were sharply attuned to rights. Six of the thirty-nine signers of the Constitution had also signed the Declaration of Independence, which speaks grandly of the “unalienable” rights to life, liberty, and the pursuit of
happiness. But the founding Fathers’ rights were not ours. The Framers did not, by and large, think of rights as exemptions from laws and regulations, as we do today. They thought that rights were best vindicated through local political institutions, namely elected officials, juries, churches, and even the militia. Individuals could not generally claim an exception from a local law that was validly enacted and substantively reasonable. The rights that made it into the Constitution were meant to restrain Congress, the President, and federal judges from interfering with local politics.

We tend to think of the Bill of Rights, for example, as the foundation of a culture of judicially enforceable rights against the government. But the more carefully we examine each amendment, the more—like a constitutional stereogram—judges fade from the picture and juries, legislatures, and other local institutions come into view. The First Amendment’s free speech clause was originally understood to address so-called “prior restraints”—licensing schemes that would enable the executive to sanction speakers without fear of jury trials. The Second Amendment aimed to prevent the executive from disbanding state militias, which were a check on federal power. The Third Amendment, which bars the peacetime quartering of troops without consent, ensured the primacy of the local militia and guarded a different kind of local authority—that of a man over his home and family.

The focus on juries, a powerful instrument of local political control, is particularly evident in the various provisions addressing criminal and civil justice at the heart of the Bill of Rights. The Fourth Amendment erects an especially high bar—“probable cause”—to searches and seizures authorized in advance through a judicial warrant. The Fifth, Sixth, and Seventh Amendments guarantee grand and petit juries directly—in indictments, criminal trials, and civil cases alike—and safeguard the integrity of the jury’s verdict by banning double jeopardy. The Eighth Amendment prevents judges from imposing punishments not authorized by the legislature or the jury verdict.

That none of the Bill of Rights originally applied to state and local governments wasn’t some quirky historical footnote. It reflected a considered view that responsive, accountable, democratic governments
grant and preserve rights; they don’t threaten them. Individuals and minority groups using the power of the courts to upset community judgments wasn’t what the Bill of Rights protected—it was what it protected against.

Understanding rights as fundamentally consistent with and indeed specially protective of state and local lawmaker remained the dominant view until the Civil War. Race was its undoing. As Chapter 2 discusses, efforts to integrate former slaves into an unwelcoming political community of white men exposed the fatal limits of relying on local legislatures and juries to protect rights. The Framers had been accustomed to the ways in which a factional minority—King George, the English parliament, and their local enablers—could thwart the will of the People. They saw a remedy not in special substantive entitlements or exemptions, but rather in political membership: no taxation without representation. Their essential blind spot was that they drew the lines of citizenship too narrowly.

The Civil War brought a formal end to chattel slavery, but the War’s violent wake called for a different understanding of rights than what the Framers intended. After slavery was abolished, the former Confederate states immediately instituted so-called Black Codes that prevented former slaves from owning property, making or enforcing contracts, or testifying in court. The Fourteenth Amendment took direct aim at these practices, guaranteeing that the basic rights of citizens would be enjoyed equally by all, even against an otherwise valid state law.

In practice, however, the empowering language of rights did little for black Americans. It was instead repurposed by businesses seeking to avoid health, safety, and labor regulation. The chapter zeroes in on the 1905 New York bakery case, *Lochner v. New York*, in which the Supreme Court struck down a law limiting the number of hours bakers could work. *Lochner* is a well-known case, but the chapter offers new insight into its modern significance. The two dissenting opinions in the case offer two competing visions of rights. The more famous dissent of Oliver Wendell Holmes models the modern approach: either the bakery owners had a right to work, in which case they should probably win, or (more likely) they did not, in which case they should probably lose.
The Holmes dissent has overshadowed the more careful dissenting opinion of John Marshall Harlan. Harlan was willing to concede that bakery owners had rights to enter into contracts of their choosing, but he would subject that right to what he saw as a reasonable health regulation. He saw the bakery case as an invitation to take seriously both the freedom of individuals to set the terms of their labor—a sensible legacy of the Civil War—as well as the right of a people, acting through its legislature, to govern itself. On the Holmes view, ordinary social and economic legislation would be largely impervious to constitutional challenge. On the Harlan view, everything would depend on the facts.

The *Lochner* case has become anticanonical, almost universally panned by mainstream judges, lawyers, and legal scholars and held up to this day as an example of exactly how not to do constitutional law. But as Chapter 3 shows, in following the Holmes dissent, we’ve learned the wrong lesson from the bakery case. The received wisdom is that the bakery owners simply had no right to negotiate longer hours with bakers. That was certainly Holmes’s view. But in fact the problem wasn’t that the bakery owners had no rights of contract but rather that the bakers also had rights, protected through legislation, that the Supreme Court couldn’t see.

The triumph of the Holmes dissent was equal parts personality and politics. Harlan was dead within six years of *Lochner*, but Holmes was just warming up. Over the next two decades, Holmes would become the most famous judge in America, brilliant, acerbic, and unsparing, both a social Darwinist and a society man, chummy with younger public intellectuals like Harold Laski and Felix Frankfurter who could carry on his legacy. Frankfurter, the Harvard intellectual, D.C. operator, and later Supreme Court Justice, was by one account “the most influential single individual in Washington” in the 1930s, and he placed Holmes’s *Lochner* dissent on a singular pedestal. As Roosevelt’s New Deal consigliere, Frankfurter channeled Holmes in championing a highly deferential posture towards what the Supreme Court would call “ordinary” social and economic regulation: minimum wage and maximum hour laws, food safety and consumer protection measures, child labor laws, unemployment insurance, occupational licensing, and so forth.\textsuperscript{8}
Rights fetishism grew out of the tension between that post-New Deal deference to regulators and the civil rights movement’s deep and well-founded suspicion of those same legislators and administrators. A free hand for legislatures to pursue “ordinary” regulation of the economy helped bring about the spectacular rise of the American middle class, but what about the victims of laws that were anything but ordinary? Black life in the Jim Crow South recalled the evils the Fourteenth Amendment had been designed to eradicate, a fact that was not lost on the Justices.

And so the Court found itself identifying two very different kinds of rights claims: on one hand, challenges to the regulatory and welfare state, and on the other, core civil rights violations such as racial discrimination and freedom of speech and religion. Where the Court would outright refuse to entertain the former, it would come to view the latter as unassailable, nearly absolute.

Rights fetishism emerges from the shadow of this artificial two-track regime. We still treat the presence of rights as implying a pathological government on the order of the Jim Crow South and the absence of rights as implying a free hand for the government. The turbulent rights explosion of the 1960s showed that this makes no sense in the modern world. A woman’s right to have an abortion, a struggling family’s right not to be kicked off the welfare rolls arbitrarily, a criminal defendant’s right to a government lawyer, or a white college applicant’s right not to have race used in admissions do not fit neatly into either track. In each case, the government’s behavior in denying the right is not per se illegitimate, as it was during the Jim Crow era, but that doesn’t mean it should escape any serious scrutiny. This, not Jim Crow laws, is what a typical rights conflict looks like in a modern constitutional democracy. Rights are not the emergency brakes we place on a government run amuck; they are the predictable byproduct of ordinary statecraft. Rights are not special. They are all around us.

Part II reveals the tragic consequences of our failure to recognize the rights epidemic. Chapter 4 exposes the gulf between rights and justice that emerges when we fetishize rights. It takes us to Texas in the 1960s, where families in San Antonio’s Edgewood neighborhood sent their kids to
dilapidated schools because they couldn’t raise enough property tax revenue to fund their schools on par with wealthier neighborhoods. The parents claimed a right not to have public school funding turn on the families’ wealth. The Supreme Court rejected their claim. Writing for the majority, Justice Powell seemed to recognize, faintly, that there was injustice in this funding scheme, but he still refused to recognize the parents’ claims. If judges recognized a constitutional right to equal educational funding, he wrote, they would need to recognize a right to food, or housing, or a right for every municipality to have equal funding of police, fire, or public hospitals. Courts have no place, and no capacity, to force states to make the kinds of budgetary tradeoffs needed in a world in which citizens have a right to social goods such as public education.

Powell’s position misunderstands what it means for a court to recognize a right. Take the case of India. India has more children and more poor people than any country in the world, and yet the Indian Supreme Court has declared a constitutional right to education. The Indian government is manifestly unable to provide a sound education to each of the country’s more than 500 million school-aged children. But declaring a right to education has enabled the Court to force incremental change toward enrollment of students and improvements in school infrastructure — what some courts and international treaties call “progressive realization” of a right. The existence of a right to education has also enabled the Indian Supreme Court to address other, related rights such as the right to food. Providing a basic midday meal is integral to school attendance in India. Every U.S. state provides a right to education in its state constitution. As in India, enforcement of those rights has not been absolute but has been incremental, in just the way we should expect when legislatures have competing demands on their fisc.

U.S. courts likewise tolerate a yawning gap between rights and justice in cases confronting the effects of structural inequality. McCleskey lost his case in part because, unlike courts around the world, the U.S. Supreme Court outright refuses to see government acts that exacerbate race or sex disparities as cause for constitutional concern unless the government specifically intends that result. This produces the perverse outcome that
race-conscious remedies for structural inequality draw the Court’s ire, whereas the underlying inequality itself does not.

**Chapter 5** addresses a second problem with rights fetishism: its inability to make sense of conflicts of rights. Nowhere is this more obvious or with a less happy ending than in the abortion area. The chapter weaves together the U.S. experience with abortion regulation with the parallel universe of abortion regulation in Germany. The Supreme Court’s two most interesting pronouncements about abortion came in 1973, in *Roe v. Wade*, and 1992, when the Court reaffirmed *Roe*’s central holding. Germany’s constitutional court heard that country’s own momentous abortion cases at nearly the same time, but coming from a startlingly different perspective. Abortion was illegal in all circumstances until the Social Democrats tried to decriminalize it in 1974. The question for the German court was not whether restrictions on abortion infringed the rights of women but rather whether liberalizing abortion interfered with the rights of fetuses. The Court struck down the law for this reason. But rather than structure an abortion jurisprudence around the rights of either women or fetuses alone, the Court has consistently structured the law around both rights.

What this has meant in practice is a model in which the government is required to take seriously both its constitutional interest in women’s autonomy and its commitment to fetal life. Thus, abortions must be permitted in some instances, including when medically indicated, and the state must provide prenatal care, child care, and employment guarantees that encourage women to choose life rather than termination. Abortion has become, in Germany, a subject of political negotiation among parties proceeding from radically different but nonetheless constitutionally reasonable policy views. Remarkably, abortion politics in Germany are less controversial today than they were in the 1970s, and far less controversial there than here. At the same time, even as the constitutional court started from a premise of fetal rights, it is easier (and often much cheaper) for women to obtain abortions in Germany than in much of the United States. There’s no telling whether the German model could work in the United States, but it does suggest that violent, apocalyptic conflict over abortion
rights isn’t inevitable and can be influenced by the legal regime courts put in place.

Abortion is not, of course, the only area of American law that seems paralyzed by rights conflicts. In recent years, for example, as marriage rights have been extended to same-sex couples, some artisans such as photographers, florists, and bakers have refused to serve same-sex weddings, claiming religious objections. Some religious employers have likewise chafed at Obamacare rules that require them to ensure that their female employees have insurance coverage for birth control. As Chapter 6 illuminates, the framing of these conflicts foregrounds what may be the most tragic consequence of American rights fetishism: how reliably it tears us apart. In the best known of the wedding cases, a Colorado baker, citing his devout Christianity, refused to bake a custom cake for a same-sex wedding. To hear the parties, the pundits, and the amici who submitted briefs to the Supreme Court tell it, the baker was just like Jim Crow-era segregationists who put “Whites Only” signs in their windows and the couple was just like tinpot dictators who force believers to submit to false gods. On this framing, the wedding cake case was a naked clash of rights, a battle for the soul of the country.

Except that it wasn’t. The baker and the couple actually agreed on a surprising amount. They agreed that it would be illegal for the baker to refuse service to a gay couple, whether for religious reasons or not, based on their sexual orientation. They also agreed that a professional baker need not sell his wares to all comers, indeed that he may refuse to sell to customers whose beliefs he disagrees with. The reason you likely didn’t know any of that is because rights fetishism encourages not just the parties but the rest of us as well to tie our opponents’ claims to the most extreme possible position. The more a court ignores the particular facts, motives, and evidence that are actually before it, the more it pays for lawyers to paint the rights their opponents claim as leading to absurd consequences. Chapter 6 uses two same-sex marriage-related cases out of the United Kingdom to show how a different approach can leave room for courts to take a more respectful posture toward the parties, and for the parties to more clearly see the dignity in each other’s claims.
While Part II is diagnostic, Part III turns prescriptive. What might it look like to address the most controversial conflicts of our time without fetishizing rights? Each chapter tracks one of the problems Part II identifies with the American approach to rights and offers a solution. Chapter 7 takes on disability rights. Unlike with race or sex, U.S. courts do not treat disability discrimination with any special scrutiny or care. States, municipalities, and the Feds are constitutionally entitled to discriminate against people with disabilities so long as the government’s behavior is minimally rational. Courts’ refusal to recognize the category is grounded explicitly in the fact that disability discrimination claims are potentially capacious. The logic of treating disability as special seems to apply not just to physical handicaps but also, for example, to mental illness, addiction, and old age.

This stance simply erases disabled people from the Constitution. A typical discrimination claim by a disabled person is not a complaint of invidious, irrational treatment like Jim Crow segregation. It is, rather, a claim for accommodation, a demand to have one’s differences accounted for in providing access to services or opportunities. Accommodation costs money, and so a refusal to accommodate will just about always have a rational justification. What that means is that even the most cold-hearted indifference to disabled employees’ or constituents’ inability to live their lives bucks no constitutional prohibition, while we hold sacred James Maloney’s right to his nunchucks.

This is no one’s idea of justice. It needn’t be the Constitution’s either. Indeed, we have, in the Americans with Disabilities Act, a ready-made, workable (if limited) framework for addressing the needs of disabled Americans. The ADA requires service providers and employers to make accommodations for the disabled unless doing so would be unreasonable. Instead of putting to disabled people the impossible burden of showing that non-accommodation is irrational, the ADA asks the rest of society to show that accommodation is unduly costly or inconvenient. The Supreme Court’s narrow view of rights not only fails to give constitutional weight to the accommodations that justice requires but it in fact jeopardizes the ADA itself by placing Congress’s power to pass that landmark statute on shaky
footing. The Court should constitutionalize a framework similar to the ADA’s.

Chapter 8 reveals how one of the most controversial issues in constitutional law—race-based affirmative action—is just the kind of conflict of rights that courts in the grips of rights fetishism get egregiously wrong. The Supreme Court views all of affirmative action as “racial discrimination” that therefore warrants the same intense suspicion as a segregated train car or a ban on interracial marriage. The Court has allowed some affirmative action but only in quite narrow circumstances that conceal schools’ actual motives. In fact, the biggest sin of a typical affirmative action plan is not its use of race. Both historical and present structural inequality not only tolerates race-conscious admissions but makes it urgent. Rather, the sin is lack of transparency. A court in a constitutional democracy should not tolerate opacity by public officials about their reasons for action, especially in the sensitive area of race, and yet U.S. courts outright encourage schools to obfuscate when it comes to affirmative action.

A court sensitive to all citizens’ right to fair treatment in admissions to public schools would tolerate some attention to race in order to mitigate the effects of structural racial inequality. But it would at the same time require that schools that use race do so openly, that they be prepared to justify their policies with evidence and reasoned argument. Schools that do so with care should receive significant deference in addressing the complex social problem of minority access to higher education. The University of Michigan, whose undergraduate admissions program is the only university affirmative action plan the Supreme Court has invalidated in more than four decades, is in fact a model for the transparent use of race in college admissions at a large public university. It should have received a fairer shake in the courts.

The final chapter, Chapter 9, stays on campus but turns to the issue of student speech. Ideological clashes among college students, particularly around speaker invitations, are among the most visible emblems of the polarized state of American society. Conservatives student groups court professional racists and provocateurs to make a point about freedom of speech, and their opponents deploy increasingly aggressive tactics to deny
a platform to certain speakers. The crude language of rights adds unneeded fuel to these conflicts. Students have argued that public university codes of conduct that interfere with their freedom of speech are worthy of high dudgeon, and courts have believed them. They shouldn’t. The idea that the Constitution’s protection for speech exempts public school students from speech codes is one legacy of the free speech movement that galvanized Berkeley in the 1960s, but it gets academic freedom quite wrong. The freedom the Constitution most strongly protects is that of the university to determine how to educate its students, including just how to curate the information students engage with.

Courts confronted with speech codes at public colleges are too easily seduced by the fact that schools are regulating the content of student speech and even the viewpoints embedded within it. The U.S. approach to rights can’t easily distinguish these practices from *Nineteen Eighty-Four*-style Thought Police, which leads courts to elevate drunken racial slurs to the tracts of political prisoners. A more sensible jurisprudence would pay less attention to facile questions of whether schools are discriminating among content and viewpoint—which is, after all, what educators do—and more attention to contextual, factual questions of the schools’ motives, methods, sanctions, exemptions, and track record in applying them to actual cases. Creating a civil campus environment is a high calling for a university, no less so than its commitment to academic freedom. The modern information environment calls for institutions that can play the role of curator; schools should be at the front of the line, and they need discretion to do their jobs.

More broadly, treating regulation of “speech” as a talismanic trigger for the most aggressive of rights claims can swallow all of governance. It has gone far—too far—toward doing exactly that. Whether it is in denying a state the power to protect prescription records from professional data miners or treating campaign finance measures as if they were sedition laws or equating paying union dues with coerced speech, figuring out how to characterize regulation as an infringement on “speech” has become a high-stakes game for lobbyists and their lawyers. It’s not that these activities don’t implicate any expressive interests—they do!—but rather that the
presence of expressive interests cannot be a regulatory trump in a modern pluralistic democracy.

The story of speech rights is a familiar one, and it doesn’t end well. Over and again, in areas as diverse as race and education, privacy and free speech, LGBTQ rights and criminal justice, the U.S. Supreme Court has treated rights conflicts as zero-sum games in which awarding rights to one side means denying rights to others. This attitude towards rights distorts our law and debases our politics. While it might be too late to climb out of the hole we’re in, this book tells us how courts can stop digging.

* * *

The proliferation of rights is an ancient problem. You may recall from grade school the core conflict of Sophocles’ *Antigone* between the title character, who wishes to bury her fallen brother Polynices, and her uncle Creon, the ruler of Thebes who refuses an honorable burial to a man who took up arms against the kingdom. *Antigone* was the German philosopher G.W.F. Hegel’s main text when he described a conflict between two diametrically opposed sides, each with a strong justification, as “the essence of tragedy.” Antigone is too wed to “the bonds of kinship” to allow for exceptional cases or the validity of a royal command. Creon is too stubborn about his exercise of public power to respect “the sacred tie of blood.” Antigone ends up hanging herself in prison and Creon loses his wife and his son to suicide.9

We, too, are hurtling toward tragedy. The Framers sought an answer in political institutions that could seek justice through mediation: legislatures and juries, churches and families. But those institutions excluded and marginalized women and people of color. The opposite extreme is one in which unelected judges choose the rights we have and enforce them full-throttle against bad-faith bigots and good-faith legislatures alike, while allowing the government free rein over whatever rights judges happen to leave behind. This, too, courts tragedy.

A Constitution for the modern world asks judges neither to ignore nor to supplant politics, but rather to structure it, to push it, and to police it. For the Constitution isn’t just built for lawyers. It is built for citizens and
aliens, for lovers and haters, for workers and bosses and partiers. It is built for Karen Finley and her chocolate smears, for Jack Phillips and his wedding cakes, for the couples he refuses to serve. It is built for veterans and hippies, for atheists and priests, for George Tiller and even, for all his sins, for Scott Roeder. It is, to paraphrase Madison, for everyone but the angels.
CHAPTER 3: THE RIGHTS OUTBREAK

“[Holmes’s] conception of the Constitution must become part of the political habits of the country, if our constitutional system is to endure; and if we care for our literary treasures, the expression of his views must become part of our national culture.”

—Felix Frankfurter

It can sometimes be tempting to attribute the development of the law over time to ascendant partisan politics, economic conditions, or the sheer power behind an idea. But in law, as in so much of human experience, relationships matter.

John Marshall Harlan succumbed to pneumonia six years after the bakery case was decided. He was more famous than Holmes at the time, and his dissent had received more coverage in the papers than Holmes’s. But Holmes stayed on the Court for another two decades after Harlan’s death. The period extending from that moment in 1911 to Holmes’s own death in 1935 bookends the ascension of the Progressive legal movement. Holmes was not himself a Progressive, but the young intellectuals of that movement who would largely determine the path of American law in the twentieth century viewed Holmes as their patron saint.

No one was more responsible for the ascendancy of Holmes’s thinking than Felix Frankfurter. New Deal consigliere, Supreme Court Justice, operator par excellence, Frankfurter is second to none (save perhaps Holmes) in his influence on twentieth-century American constitutional thinking. That claim may surprise some who know Frankfurter primarily through his somewhat disappointing tenure as a Justice. But the long arm of Frankfurter’s constitutional thought reached far beyond the opinions he authored. In particular, Frankfurter’s adoration of Holmes—and of Holmes’s *Lochner* dissent above all else—would frame the Court’s response as it struggled to contain a wave of new, unfamiliar rights claims in the 1960s and 1970s.
Frankfurter lived the American dream. Born in Vienna, he sailed to the U.S. in the steerage deck of a migrant boat in August of 1894, at the age of 11. The Frankfurters settled on New York’s Lower East Side, where his father, Leopold, sold linens. Felix soon became a star student in City College’s joint high school-college program. He attended Harvard Law School, where he graduated first in his class, then carried the briefcase of Henry Stimson, who was the U.S. Attorney for the Manhattan district. When Stimson became William Taft’s Secretary of War in 1911, he took the 28-year-old Frankfurter with him to D.C. to serve as a legal adviser in the Bureau of Insular Affairs, which was the administrator for the country’s overseas territories in Puerto Rico and the Philippines.

Frankfurter was that guy. An inveterate sycophant and social climber, Frankfurter craved proximity to power. As the child of working-class Jewish immigrants, he also craved acceptance, and he was prepared to work his tail off to get it. Holmes, the Boston Brahmin, became an early target. Frankfurter lived in a Dupont Circle boarding house with a dozen or so other young bachelors then working in the Taft Administration. The roommates hosted dinners, cocktail parties, and salons, mixing drinks with verve and chatting up the D.C. intelligentsia, among whom Holmes was the ne plus ultra. Holmes was “the gay soldier who can talk of Falstaff and eternity in one breath, and tease the universe with a quip,” recalled the journalist Walter Lippmann, a boarder with Frankfurter at what came to be known as the House of Truth. “A sage with the bearing of a cavalier; . . . [h]e wears wisdom like a gorgeous plume, and likes to tickle the sanctities between the ribs.”

Frankfurter excelled in this environment. Standing just 5’5” tall but gifted with a quick wit and preternatural self-confidence, he could charm and dominate in equal measure. He would grab firm hold of his listener’s arm, squeezing tightly as he spoke to—or at—him. (Kiss up and kick down,
as they say.) Eventually, Frankfurter became a frequent caller at Holmes’s Northwest D.C. home, and the two became close. Frankfurter wrote a great many letters to Holmes over the years, always fawning, almost nauseatingly obsequious. Holmes was, for Frankfurter, “the King” before whom all others were “creeping worms,” as he said to Holmes in one missive. Though never waning in adulation, Frankfurter’s letters to Holmes grew more intimate in tone with the passage of time. “To know you is to have life authenticated not through you but in my own rich increase of life,” he wrote in March 1921. “The abundant measure of life being at once proof of its worth, I count it as one of my ultimately precious benedictions to have you be—for so I feel—be part of me.” He continued what can only be described as a florid love letter to the old jurist: “When I saw you from the very first I knew it was there—the answer to life that needeth no ‘answer,’ that accepts without fatalism, that questions without humorous arrogance,” Frankfurter wrote. “Above all there is the beauty and the gay valor of you, for me forever. You give me the exhilaration, the life-intoxicated ferment that no other man does—and with you I feel the overtones and undertones which need no speech and have none.”

Holmes was (almost by necessity) more measured in his replies, but he did not object to Frankfurter’s flattery. “It will be many years before you have occasion to know the happiness and encouragement that comes to an old man from the sympathy of the young,” Holmes told his young suitor in 1912, early in Frankfurter’s courtship. “That, perhaps more than anything else, makes one feel as if one had not lived in vain, and counteracts the eternal gravitation toward melancholy and doubt.” Holmes seems to have regarded Frankfurter as the son he never had, fit to protect and enlarge his legacy. He wasn’t wrong.

Felix’s Happy Hot Dogs

In 1914, Frankfurter became, at 31, the first Jewish professor at Harvard Law School. Once there, he set about imprinting Holmes’s
constitutional views (or at least his own interpretation of them) on the hearts and minds of the legions of students who would seek his favor over the years. He told Holmes as much. “Much of our labor these days is bringing bricks to the building of the structures for which you long ago sketched the blue prints,” he wrote to Holmes early in his tenure at Harvard. Within two years of arriving in Cambridge, Frankfurter published a glowing study of Holmes’s constitutional opinions in the *Harvard Law Review* in which he claimed that Holmes’s dissent in the New York bakery case had decisively turned away a “tide” of natural law thinking at the Supreme Court. This is a bizarre assertion to make of a dissent, particularly one that had never been cited in a federal court opinion. It was also wrong. Holmes’s dissent wouldn’t be vindicated for another two decades.¹⁵

Frankfurter was undeterred. In a 1928 treatise on federal jurisdiction, Frankfurter argued that, in *Lochner*’s wake, “[t]he philosophy behind the constitutional outlook of Mr. Justice Holmes . . . appeared to be vindicated by demonstration in detail.” But the so-called *Lochner* Era, in which federal courts routinely invalidated state and federal laws for interfering with property and contract rights, remained in full bloom in 1928. Just five years earlier, the Supreme Court had struck down a D.C. law setting a minimum wage for women and children. The opinion, which quoted *Lochner* at some length, was written by Justice George Sutherland in his first Term on the Court, over Holmes’s dissent. Still, there was Frankfurter, five years later, celebrating the 87-year-old Holmes’s consistently losing views as if they were the law. Ten years later, Frankfurter gave a lecture on Holmes in Cambridge that he would later turn into a hagiographic monograph. “Mr. Justice Holmes’ classic dissent,” he wrote of the *Lochner* opinion, “will never lose its relevance.” Not if Frankfurter had a say in it, anyway.¹⁶

Well, he did have a say. Frankfurter returned to Washington in 1917 to serve as a special assistant to the Secretary of War, Newton Baker, and later as chairman of the War Labor Policies Board, which was designed to prevent labor unrest that could disrupt wartime production. The Board also included the Assistant Secretary of the Navy, a fellow named Franklin
Delano Roosevelt, and the two ambitious men became close professional acquaintances in D.C. Frankfurter rekindled the relationship when Roosevelt became governor of New York in 1929, offering frequent advice via letters, phone calls, and personal calls to “Frank’s” Hyde Park estate. When Roosevelt became President in 1933, Frankfurter became one of his most trusted advisors.\(^\text{17}\)

It is difficult to gauge Frankfurter’s precise influence within the Roosevelt Administration, but it was undoubtedly substantial. He tended to be circumspect about his role, but by reputation, Frankfurter became an operator of nearly supernatural powers. Some newspapers offered unflattering comparisons (tinged with anti-Semitism) to Shakespeare’s Iago or to Rasputin, the Russian mystic and tsar-whisperer. Raymond Moley, the Roosevelt braintruster who coined the term “New Deal,” called Frankfurter a “patriarchal sorcerer” to his “apprentice[s]” within the Brain Trust such as Ben Cohen and Tommy Corcoran. Hugh Johnson, the former head of the National Recovery Administration, called Frankfurter “the most influential single individual in the United States” in the 1930s.\(^\text{18}\)

Frankfurter earned these lofty appellations not just by doling out his own advice to the president, though he did plenty of that, but by staffing the growing federal bureaucracy with students and friends whom he had mentored and who owed him loyalty. Thus it was that Agricultural Adjustment Administration head George Peek complained of the “plague” of young Washington lawyers who “all claimed to be friends of somebody or other and mostly of Felix Frankfurter.” These disciples, whom Frankfurter called his “boys” and whom others called his “happy hot dogs,” numbered in the hundreds. They would check in regularly with Frankfurter to receive their marching orders on pain of excommunication from his network.\(^\text{19}\)

If Holmes was the patron saint of the progressive legal movement, Frankfurter was its high priest. His fingerprints were everywhere in the federal government during the New Deal era. Corcoran, a former student
whom Frankfurter had placed in a clerkship with Holmes, was a de facto chief of staff to Roosevelt and an important drafter of several key pieces of New Deal legislation, including the Securities Act of 1933 and the Fair Labor Standards Act of 1938. A long career in public service followed, including as a key advisor to President Lyndon Johnson. Cohen, whom Frankfurter had secured a clerkship with the highly respected judge Learned Hand, was Corcoran’s partner in crime atop the federal bureaucracy. Frankfurter’s co-author on that 1928 treatise celebrating Holmes’s *Lochner* dissent was his former student James Landis, whom Frankfurter had awarded a coveted clerkship with Louis Brandeis. Five years later, Frankfurter brought Landis to Washington to help draft the 1933 Securities Act. Landis then served as an inaugural commissioner and later chair of the SEC. He became dean of Harvard Law School after he left Washington in 1937. Other former students of Frankfurter’s in high administration positions included Charles Wyzanski (Labor Solicitor), David Lilienthal (Tennessee Valley Authority), Nathan Margold (Interior Solicitor), and Nathan Witt and Lee Pressman (Agriculture Department). Before Alger Hiss became notorious for being an alleged Soviet spy, he was a student of Frankfurter’s, a clerk for Holmes (at Frankfurter’s behest), and a lawyer placed by Frankfurter in the Agricultural Adjustment Administration. The future Secretary of State Dean Acheson, who helped create NATO and draft the Marshall Plan, was a Frankfurter protégé who had been placed in a Brandeis clerkship and in Roosevelt’s Treasury Department.

Frankfurter himself never took a formal administrative position, declining Roosevelt’s offer to serve as his first solicitor general. This enabled him to run a Sunday salon out of his house on Brattle Street, where, Joseph Lash writes, “for men concerned with the intellectual aspects of law and politics, a pilgrimage . . . was obligatory.” From Cambridge, Frankfurter could continue to cultivate apprentices without having to hold a day job arguing cases before the Supreme Court. As the career paths of his happy hot dogs attest, Frankfurter’s good grace could mean a law clerkship with
Holmes, Brandeis, or Hand, perhaps the three most renowned American judges of the twentieth century.

And it wasn’t just the men who would come to dominate the administrative state who were in Frankfurter’s fold. At least as important to the spread of Frankfurter’s thinking were the former students of his who would become the century’s leading academics. Paul Freund, one of the leading constitutional law scholars of his generation, owed his Brandeis clerkship, his government service, and his teaching career to Frankfurter. Henry Hart, godfather of the famed “legal process” school of jurisprudence and co-author of the most influential casebook in all of American law—*The Federal Courts and the Federal System*, which birthed the field of “federal jurisdiction”—was a Frankfurter disciple who had been given a Brandeis clerkship. The legendary Harvard Law School dean Erwin Griswold, after whom the building housing the dean’s suite today is named, owed his job in the solicitor general’s office in the 1930s to his old professor, Frankfurter. Charles Fairman, who would teach at Harvard and Stanford and who would become perhaps the best-known Fourteenth Amendment scholar of the twentieth century, was firmly in the fold of his former advisor, Frankfurter. The Justice recruited Fairman to write an article tearing down Justice Hugo Black’s theory (and supporting Frankfurter’s) of how to apply the Fourteenth Amendment to the acts of states. The piece became one of the most cited law review articles ever written. Fairman’s 1948 undergraduate casebook, *American Constitutional Decisions*, devotes substantial attention to *Lochner*, which was not nearly as famous then as it is now. Astoundingly, eight of Fairman’s ten paragraphs on the case pay tribute to Holmes’s dissenting opinion. “An entire philosophy is compressed into three paragraphs,” Fairman writes, parroting his mentor with uncanny precision. “His point of view has now become a part of the accepted doctrine of the court.”

Roosevelt’s appointment of Frankfurter to the Court didn’t end his tutelage. Frankfurter made it a point to get to know clerks in other Justices’ chambers, grabbing them by the arm and squeezing as he pressed his point.
His own clerks weren’t slouches, of course. Some would go on to become legendary professors at the Nation’s top law schools: Albert Sacks at Harvard, Alexander Bickel at Yale, Louis Henkin at Columbia, and David Currie and Philip Kurland at Chicago. These men, who became the leading law professors of the 1960s and 1970s, would help make Frankfurter feel, to paraphrase Holmes, as if he had not lived in vain.22

Footnote 4

I noted in Chapter 2 that Holmes’s *Lochner* dissent, taken with the other anticanonical cases, suggests the possibility of two “tracks” for U.S. rights claims. *Lochner* was officially discredited in the late 1930s, during the Great Depression. Existential economic catastrophe made clear the need for some significant political constraints on consumer and labor markets. Judicial scrutiny of redistributive politics also threatened the new, popular social safety net programs the happy hot dogs were shepherding into law, such as unemployment insurance and Social Security. Under the pressure of Roosevelt’s landslide victory over Alf Landon in the 1936 presidential election, the Court in 1937 shifted away from the all-things-considered balancing of rights that *Lochner* represented and towards a more deferential posture towards progressive legislation.23

The case setting out the basic rule, *United States v. Carolene Products*, was a challenge to the Filled Milk Act, a federal law that prevented the interstate shipment of certain milk substitutes. In upholding the Act, the Court said that “regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless, in the light of the facts made known or generally assumed, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators.” In other words, most legislation—which typically affects “ordinary commercial transactions”—will be upheld so long as there is any conceivable rational reason to pass it. Congress did not have to hold hearings or prove to a court that milk
substitutes were unhealthy; it was enough that legislators might have rationally believed they were. Likewise, the New York legislature should not have had to produce evidence that bakery work was especially strenuous or dangerous; it was enough that, as Holmes said in his dissent, “[a] reasonable man might think it a proper measure on the score of health.” The “rational basis” standard is the first “track.”

The second “track” is laid out in a footnote to the language I just quoted from the milk case. That footnote (“Footnote 4”) describes three categories in which the rational basis standard might not apply: (1) when the law interferes with a specific constitutional prohibition, (2) when the law restricts the political process itself, or (3) when the law discriminates against particular religious or racial minorities. In other words, the Court committed itself to highly deferential review of laws regulating commercial markets, while reserving a place for stricter review of laws that fell within specific constitutional language, laws that made it more difficult to engage in politics, or laws that discriminated against what the opinion called “discrete and insular minorities.” In Professor John Hart Ely’s later, influential description of this standard, the Court would resort to heightened review when it found that the political process was undeserving of trust, whether because it was trying to limit the channels of political change (think voter suppression laws) or was not inclusive of certain minorities (think Jim Crow).

*Carolene Products* largely vindicated Holmes’s *Lochner* dissent. Courts should generally let the political process play out unless the Constitution specifically instructs them not to. The further caveats in Footnote 4 describe situations in which the “outcome of a dominant opinion” that Holmes celebrated was actually *unnatural* because of inappropriate interference with the political process. Footnote 4 marries a Progressive approach to political economy, one that authorizes political control over economic markets, to a burgeoning understanding of the need to protect African Americans from Jim Crow and to protect Catholics, Jews, and Jehovah’s Witnesses from the kind of religious bigotry that was visceral
in 1938, the year of Kristallnacht. Judicial review was usually to have a light
touch but, when authorized, should protect minorities and other political
outsiders.

How, exactly, to apply this second track would become the key
constitutional question for the Supreme Court that Frankfurter joined in
1939. The Court that decided Carolene Products included just two FDR
appointees, Hugo Black and Stanley Reed, each of whom was in his first
Term. Roosevelt would put another six Justices on the Court in the next six
years: Frankfurter, William O. Douglas, Frank Murphy, James Byrnes,
Robert Jackson, and Wiley Rutledge. Six of the eight Roosevelt justices—all
save Rutledge and Black—had served as executive branch lawyers under
Roosevelt, and all eight had been vocal supporters of the New Deal and of
FDR’s broader legislative agenda. All were unwaveringly in the bag for a
repudiation of the case-by-case balancing of the right to contract that
Lochner represented. Footnote 4 offered a vision for what to do with other
cases, but how far did it go?

Hugo Black represented one school. The former country lawyer and
Alabama Senator was Roosevelt’s first appointee to the Court. The Senate’s
most ardent populist, Black had no appetite for handing victories to big
business in its fights against regulation. But Black had a race problem. He
had joined the Ku Klux Klan in the 1920s in order to win the Democratic
nomination for the Senate, then resigned after he won. It’s easy enough to
describe Black’s decision as a matter of sheer political calculation, but the
Klan wasn’t some rotary club, even in 1920s Birmingham. You don’t join
the KKK if you aren’t more than a little bit racist. Black’s Klan ties dogged
him the rest of his life and nearly derailed his Supreme Court appointment.
Perhaps it was to overcome this handicap that Black eventually developed
a jurisprudence that enabled him to remain true to his populism while
becoming one of the most progressive justices of his time on race issues.
Today we would call that jurisprudence “originalism.” On Black’s view, it
was the task of the Court to apply the text of the Constitution just as it was
written. Where rights applied, they applied absolutely. Where they did not apply, the law should be upheld.26

Frankfurter represented the other school. On a strong view of Holmes’ bakery dissent, the case was less about which rights were or were not listed in the Constitution’s text, as Black would have it, and more about the role of courts in a democracy. The “legal process” school that Frankfurter inspired and that Hart, Sacks, and Freund paid forward from their perches at Harvard Law School emphasized that legal institutions should stick to their core competence: legislatures should follow the democratic will, administrative agencies should gather data and exercise technical expertise, and courts should adhere to the common law and extend precedents using neutral legal principles, consistently applied. On a legal process view, the problem with Lochner is that courts can’t uphold and apply a “right to contract” without making political judgments that are properly the province of legislatures. “The 14th Amendment,” as Holmes wrote, “does not enact Mr. Herbert Spencer’s Social Statics.”27

Note that on Frankfurter’s “legal process” view, courts should be cautious in interfering with the democratic will even when rights are fairly well specified in the Constitution. The presence of rights in the text doesn’t make it any easier for judges to figure out how to exercise the restraint that—according to legal process types—their role calls for; indeed, it makes it harder. Frankfurter’s first major opinion for the Court provides a ready example. Two Minersville, Pa. siblings, Lillian and William Gobitis, had refused to salute the flag during the Pledge of Allegiance at their local elementary school. The children were Jehovah’s Witnesses, and they had heard a radio address by the Watch Tower Society head, Judge Joseph Rutherford, denouncing salutes of any secular object, be it Hitler or the U.S. flag. Unimpressed, the school expelled the Gobitis children. The family sued.28

The First Amendment by its terms protects the free exercise of religion, but that doesn’t tell a judge what to do with the Gobitis case. For
one thing, the Bill of Rights had long been interpreted to apply only to federal acts and not to the acts of state or local government officials. At the time the Gobitis case reached the Supreme Court, it was assumed but had never been squarely held that the Free Exercise Clause binds the states. (The Court would so hold a month later in a separate decision that also involved the Witnesses.) Apart from this technical hurdle, the text of the First Amendment doesn’t tell a judge what to do when religious freedom is burdened unintentionally. Presumably, a right to free exercise of religion prohibits the state from targeting religious minorities for persecution. But what if a neutral, generally applicable law, like Minersville’s flag salute mandate, happened to interfere with an unpopular religion? Do religious observers get an exemption from general laws? Wouldn’t such a rule run up against the First Amendment’s other religion provision, its ban on government establishment of religion?

The Supreme Court ruled against the Gobitis family, 8-1, and Frankfurter implored Chief Justice Charles Evans Hughes to let him handle the majority opinion. This was partly personal. During World War I, part of Frankfurter’s portfolio in the War Department had included designing a policy to handle conscientious objectors. Frankfurter was also a Jewish immigrant, a Zionist, and a Roosevelt friend and loyalist who was eager to enlist the Court in the coming war effort. Finally, as a former national committee member of the ACLU, the Gobitis case presented Frankfurter with the chance to show that he was consistent in his belief in judicial restraint. The ACLU had filed an amicus brief in support of the Gobitis children. With his opinion ruling against them, Frankfurter could claim (with good reason) that his constitutional theory wasn’t anti-business; it was anti-activism.

Legally, the question for Frankfurter was simply whether the school board had acted reasonably in denying an exemption to the Gobitis children, whether or not he or anyone else disagreed with its policy. That kind of policy disagreement was better suited for a legislature—or, in this case, a democratically accountable school board—than courts: “To fight out
the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena,” Frankfurter wrote, “serves to vindicate the self-confidence of a free people.”³¹

Frankfurter’s opinion in *Minersville School District v. Gobitis* arguably betrays Footnote 4 of *Carolene Products*. The Witnesses were a paradigmatic example of a religious minority facing discrimination that hampered its ability to participate in the political process. Under footnote 4, it seems, this status should subject laws that burden them to a higher degree of scrutiny than the light-touch review Frankfurter conducted for the majority. It’s for that reason that Footnote 4’s author, then-Justice Harlan Fiske Stone (he would later become Chief Justice), was the lone *Gobitis* dissenter. Calling the Witnesses a “small and helpless minority,” Stone cited his own language in *Carolene Products* and argued that “careful scrutiny of legislative efforts to secure conformity of belief and opinion by a compulsory affirmation of the desired belief, is especially needful if civil rights are to receive any protection.”³²

Stone had his own personal experiences to draw upon. He had served on the War Department’s Board of Inquiry reviewing claims of conscientious objectors, within an administrative structure that Frankfurter had been instrumental in devising. His Progressive bona fides were no less secure than Frankfurter’s. He was a consistent dissenter from the Supreme Court’s efforts to invalidate major portions of the New Deal. Like Frankfurter, he was a close friend and admirer of Holmes, with whom he served for seven years and with whom he usually agreed. In a celebratory lecture he prepared in 1938 but never gave, Stone praised Holmes’s steady maintenance of the “difference between determining whether the legislative cure of a social ill is wise, and in determining whether legislatures, believing it to be wise, are so unreasonable as to place their action beyond the constitutional power.” This was Holmes’s view in *Lochner* and it was no less Stone’s view than it was Frankfurter’s. The two
men differed less on the theory of Footnote 4 than on its application to the facts.33

Within three years, Stone’s *Gobitis* dissent would become a majority opinion, and Frankfurter’s majority a dissent. In a case out of West Virginia, the Court held that school boards couldn’t force Witnesses to salute the flag. Robert Jackson wrote for a new 6-3 majority that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.” Frankfurter dissented in deeply personal terms. He began: “One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution.” His opinion went on to emphasize the distinction between his personal views and his role as a judge, which does not adjust to “the nature of the challenge to the legislation.” The difference-makers from Gobitis to the West Virginia decision, a case called *Barnette*, were the Roosevelt Justices. The only member of the Court to switch his vote was Black. The rest of the majority were Stone and the recent appointees Jackson, Douglas, Murphy, and Routledge.34

Frankfurter had lost, as he often would during his tenure, but the ground he was staking out would be essential in the battles to come. For the disagreement within the Supreme Court wasn’t over the kinds of industry regulation that *Lochner* had jeopardized. Frankfurter had been effective in laying *Lochner* to rest. In case after case in the midcentury years and since, the Court has shown nearly total deference to states and the federal government in cases involving “ordinary social and economic legislation.” In one well-known case, for example, an Oklahoma optician challenged a state law that permitted only optometrists or ophthalmologist to fit lenses to faces, arguing that it was just protectionism for eye doctors. The Court held that it was obligated to uphold the law so long as it could think of any
rational reason for passing the law, *even if it wasn’t the state’s actual reason.* This approach to social and economic legislation simply abdicates the Court’s reviewing function, just as Holmes would have wanted.\(^\text{35}\)

The main disagreement also wasn’t over *Brown v. Board of Education* and Jim Crow. Although some Justices groused behind the scenes, the Supreme Court was unanimous in virtually every case in the 1940s, 1950s, and 1960s that challenged segregation in schools or other public facilities, including *Brown* itself. It’s true that Frankfurter had been instrumental in urging caution in the implementation of *Brown.* Famously, he encouraged the Court to require that states desegregate with “all deliberate speed,” a term he had gotten from Holmes. Holmes first used the term in a 1911 opinion, claiming origins in English equity courts. This was wrong. The best evidence was that he actually took the phrase from an 1893 poem, *The Hound of Heaven,* by Francis Thompson, whom Holmes might well have known personally. Frankfurter, ever the toady, used the term in five of his own opinions prior to the *Brown* decision. In any event, despite this curious remedial phrase, the Court remained unanimous in ordering increasingly aggressive desegregation measures all the way until 1973. Jim Crow was, after all, the heart of Footnote 4.\(^\text{36}\)

Frankfurter’s opinions in *Gobitis* and *Barnette* weren’t about the heart of that footnote but the extremities. That’s where he saw the warning signs. By the middle of the 1960s, the rest of the Court saw them too.

*The Rights Epidemic*

Felix Frankfurter suffered a stroke that forced him to retire at the end of the 1961 Term of the Court. His last significant majority opinion came in a case called *Poe v. Ullman.* The State of Connecticut had banned the use of contraceptives ever since 1879, when it joined a wave of states passing decency laws pushed by the anti-vice advocate Anthony Comstock. Connecticut’s own “Comstock law” was written in part by the circus entrepreneur P.T. Barnum, then a state representative from Bridgeport. The law—enforced but once in the next 86 years—might have been Barnum’s
greatest con. The plaintiffs in *Poe* were two married couples. In each of their cases, their doctors reported that a pregnancy would likely result in either fatal genetic abnormalities for the fetus or the death of the woman. Though no one had sought or threatened to prosecute them, they argued that the state’s prohibition on contraceptive use violated their right to liberty without due process of law.\(^{37}\)

A birth control ban is an unusually invasive law. Its enforcement wedges the state in between consenting sexual partners, including married couples such as the carefully selected plaintiffs in *Poe*. In some cases, as in *Poe*, that interference could have devastating physical and psychological consequences. More broadly, the right to make family-planning decisions is deeply personal, and the curtailment of that right seems not to implicate any especially important government interest. Yet the Constitution does not specifically provide a right to use contraception. And Footnote 4, crafted as a guiding light for judges when the constitutional text runs out, isn’t very helpful here. A birth control ban doesn’t curtail the operation of the political process, at least not directly. Those affected by a birth control ban—which in practical terms means women (especially poor ones), more than their male partners—are not “discrete and insular” minorities. Indeed, women are not minorities at all. Holding for the plaintiffs in *Poe* seemed to require either stretching the old categories or creating a new one.

Faced with this dilemma, Frankfurter decided to punt. His opinion in *Poe* denied the couples’ claims on the ground that they did not have “standing” to challenge the Connecticut law because it was never going to be enforced against them. Birth control devices were openly sold in Connecticut drug stores despite the Comstock law. In fact, the only time a prosecution had been initiated, in 1939, the state’s attorney moved to dismiss the case after winning at the Connecticut Supreme Court. The *Poe* disposition was vintage Frankfurter. The power of federal courts to consider the constitutionality of a statute, he emphasized, was activated only when there is a true “case or controversy” between the parties. Here, with no recorded prosecutions or prospects for any in the future, one had to question whether the Comstock law was even the law at all. Quoting his own words in an opinion written during his first full Term on the Court, he
wrote: “‘Deeply embedded traditional ways of carrying out state policy . . .’ — or not carrying it out— ‘are often tougher and truer law than the dead words of the written text.’” It’s hard not to see in Frankfurter’s last major opinion for the Court a parting shot at Black’s historical adventurism.\(^{38}\)

Planned Parenthood of Connecticut, which had been behind the \(\text{Poe}\) lawsuit, had to regroup. What its executive director Estelle Griswold did next would alter the course of American history. Frankfurter’s opinion in \(\text{Poe}\) had said that Connecticut doesn’t arrest people for violating its birth control laws, but Griswold would see about that. Soon after the \(\text{Poe}\) decision came down, Griswold announced that Planned Parenthood would be opening a birth control clinic in New Haven that fall. The clinic opened on November 1, 1962 and held a press conference the following day. When news of the clinic’s opening splashed across the papers, a local grumpalump named James Morris called as many police officers as he could find until finally two New Haven detectives agreed to pay a visit to the clinic’s second-floor offices on Trumbull Street. Griswold, thrilled to see them, offered the officers the clinic’s literature and told them that the doctors in the office were busy fitting illegal diaphragms and giving out contraceptive jelly. She even asked the officers to dip their fingers into some Emko Vaginal Foam that she had on hand. She volunteered to provide the detectives with patients who could provide witness statements to assist in her own prosecution. They fell for it. An arrest warrant was issued a few days later, and Griswold had herself the court case she was craving.\(^{39}\)

Frankfurter died on February 22, 1965, seven weeks before the Supreme Court heard oral argument in \(\text{Griswold v. Connecticut}\). A new era was upon the country, and the Court. The four years between the Court’s punt in \(\text{Poe}\) and its June 1965 decision in \(\text{Griswold}\) were among the most consequential and tumultuous in the Nation’s history. \(\text{Griswold}\) was argued two weeks after Bloody Sunday, when Selma police officers and Alabama state troopers brutally assaulted peaceful civil rights marchers on the Edmund Pettus Bridge, whose namesake headed the Alabama KKK after Reconstruction. Ten days after Bloody Sunday, the Voting Rights Act (VRA) was introduced into Congress. The VRA, which passed in August 1965, would immediately subject the voting rules in six Southern states and
in numerous counties throughout the country to supervision by the Department of Justice and by federal courts. The year before, the Supreme Court had announced the rule of “one man one vote” that would commit federal courts for the first time to overseeing the apportionment of voters into congressional and state legislative districts. Frankfurter’s last opinion for the Court was a dissent from the Court’s declaration that such cases were fit to be resolved by judges.40

At the time Poe was decided, Jim Crow segregation remained the norm in the Deep South. As is well known, southerners fiercely resisted Brown’s desegregation mandate. In 1964, on the eve of the Civil Rights Act and a decade after Brown, 99 percent of black students in the eleven Deep South states attended schools that had no white students. Many southern school boards enacted “freedom of choice” school plans that did not formally discriminate but that inevitably resulted in the same segregation patterns that predated Brown. Although some public facilities were slowly desegregating, privately owned hotels and restaurants still could and often did ban black customers altogether. Moreover, private actions, whether in denying a hotel room or a spot at a lunch counter, didn’t violate the Fourteenth Amendment at all. The sit-in movement that began with North Carolina lunch counters in the 1960s and quickly expanded to theaters, hotels, parks, swimming pools, beaches, and other public sites needed creative courts to gin up reasons to void trespass prosecutions. The Civil Rights Act of 1964, which President Kennedy originally proposed after Birmingham Police Chief Bull Connor used attack dogs and fire hoses on peaceful protesters in the spring of 1963, catalyzed both southern school integration and the demise of Jim Crow in public accommodations such as hotels and restaurants. The Act needed the Court’s blessing to survive.41

Among the most enduring provisions of the Civil Rights Act is its ban on employment discrimination on the basis of not just race but sex as well. The language banning sex discrimination was added to the bill at the eleventh hour by Virginia Representative Howard W. Smith, a dogged opponent of the civil rights bill, possibly to make its passage less likely. But once the Act passed, its sex discrimination provision quickly became one of its most litigated provisions. Betty Friedan’s The Feminine Mystique, which
questioned the culturally dominant assumption that a woman’s well-lived life was as a housewife, had been the bestselling nonfiction book of 1964. The government’s shoddy enforcement of Title VII’s sex discrimination language is what led Friedan and other women to found the National Organization for Women in 1966. At the time of the Civil Rights Act, Hawaii and Wisconsin were the only states that banned sex discrimination in employment. Within a decade, nearly every state had such a ban.42

Up until the 1970s, women consistently lost rights cases brought to the Supreme Court. In 1873, the Court held that the state of Illinois could refuse to admit women lawyers to its state bar. In 1948, Frankfurter wrote a majority opinion holding that Michigan could ban women from working as bartenders. As late as 1961, a unanimous Supreme Court upheld a Florida rule requiring men but not women to serve on juries, on the ground that “woman is still regarded as the center of home and family life.” A creative reading of Footnote 4 could meet the challenge of sex discrimination. Birth control bans, employment discrimination, and—more directly—exclusion from jury service could certainly curtail the ordinary operation of the political process. Women whose lives are artificially constrained by discrimination cannot fully participate in civil society.43

Still, women were then and are now a majority, not a minority. Sex discrimination was so deeply engrained that even the President’s Commission on the Status of Women, headed by Eleanor Roosevelt, issued a report in 1963 that maintained as a “fact of life” that is “not debatable” that that “the care of the home and the children remain [women’s] unique responsibility.” The Equal Employment Opportunity Commission, which was responsible for implementing the Civil Rights Act’s ban on sex discrimination in employment, issued guidance saying that the Act didn’t prohibit employers from advertising jobs for just men or just women. A judge conditioned to avoid “activism” could easily be thrown by the prospect that he should henceforth treat sex discrimination with the same care as race discrimination.44

The first half of the 1960s was also a momentous time for criminal justice rights. Until 1961, the state could use illegally seized evidence against criminal defendants at trial. Until 1963, a felony defendant too poor
to afford a lawyer would simply be tried without one. Until 1964, state and local police officers could refuse a criminal suspect’s request to have a lawyer present for his interrogation. *Miranda* and its famous “right to remain silent” would come two years later. Some of the revolution in constitutional criminal procedure was parasitic on the civil rights movement, as a disproportionate number of criminal suspects were African-American, and black defendants were more likely to see their rights disregarded. Part of it, too, was that mass use of automobiles had forever changed policing. As traffic stops came to be the most common point of contact with law enforcement, and one experienced by whiter, wealthier Americans as well as others, standards for criminal suspicion were recalibrated in revolutionary ways.\(^\text{45}\)

The civil rights movement also helped deepen the Court’s appreciation for freedom of speech. In March 1960, a group headed by A. Philip Randolph was raising money for Dr. Martin Luther King Jr.’s legal defense against trumped up Alabama perjury charges. The group placed a full-page ad on page 25 of the *New York Times* called “Heed Their Rising Voices.” The ad contained a number of minor factual errors. For example, it referred to Alabama State College students singing “My Country, ‘Tis of Thee” on the steps of the State Capitol in Montgomery, when in fact the students sang “The Star-Spangled Banner.” The ad said that school officials padlocked the dining hall in order to encourage students to end their registration boycott; in fact, there was no padlock, though unregistered students were barred from the cafeteria. The ad claimed that King had been arrested seven times when in fact it was four. That sort of thing.\(^\text{46}\)

Claiming they had been defamed, Montgomery’s public health and public safety commissioner L.B. Sullivan and five other Alabama public officials sued the *Times* and a number of prominent black ministers who were listed on the ad as supporters. Each of the six plaintiffs sought $500,000 in damages. The plaintiffs won their jury trial and the Alabama Supreme Court affirmed the judgment. The *Times* successfully sought U.S. Supreme Court review, arguing that the judgment violated the freedom of the press. The problem with this defense is that, as was well-established at the time, the First Amendment doesn’t protect libelous publications. And
whether the Times ad counted as libel was for a fact question for the jury, not a legal question for the Justices. More broadly, the First Amendment was generally understood to apply to laws passed by legislatures or the actions of executive officials such as licensors or police officers. If successful, the Times argument might invite federal judges to supervise state civil jury verdicts and state court rulings in the legions of ordinary tort or breach of contract cases that implicate someone’s speech interests.

That said, a defamation suit can be a potent tool of harassment. Civil damages actions against unpopular defendants raise the specter of the jury being used as a tool of oppression, upsetting the Framers’ expectations. As a case in point, the minister defendants were prominent within the civil rights movement in Montgomery, but immediately after the verdict, Sullivan was able to ask the sheriff to seize their automobiles and property. Between the time of Sullivan’s initial lawsuit and the Supreme Court’s 1964 decision in New York Times v. Sullivan, newspapers—many of which were from out of state—were on the hook for almost $300 million in libel damages before southern courts. The Supreme Court recognized this subtext when it ruled for the Times, holding that libel or defamation suits brought by public officials had to be premised on “actual malice” by the publisher. This means the paper had to know the defamatory material was false or had to have been recklessly uninterested in finding out.47

The Sullivan Court likened the Alabama jury verdict to the 1798 Sedition Act, but the analogy fails. No one doubts that seditious speech is protected by the First Amendment, whereas defamation has for time immemorial been a tort in every state. What the Court was instead recognizing in Sullivan were the demands of the civil rights movement to have the court pierce the veil of ordinary civil actions and recognize them as forms of resistance to racial progress.

The Supreme Court was doing much the same work when it overturned disorderly conduct charges against the comedian and activist Dick Gregory after he was arrested at an August 1965 march against school segregation in Chicago. Gregory v. City of Chicago is one of several cases that have come to stand for the idea that a speaker can’t be punished just because his speaking inspires others—whether hostile critics or fellow
travelers—to act unlawfully. Freedom of speech in the 1950s was primarily about sedition prosecutions and red-baiting. Within a decade, it would be about far more complex conflicts between expressive interests on the one hand and public order, community standards of decency, and local autonomy on the other.  

The biggest challenge for rights recognition and enforcement in the last fifty years has been accounting for the role the government plays in our lives. The government pays us in the form of Social Security, unemployment compensation, and various federal, state, and local welfare programs. It funds our health care in the form of Medicare and Medicaid. It provides professional and occupational licenses that we need to pursue a livelihood and the driver’s licenses we need to get to and from work, the supermarket, the home of a relative, or to places of worship. It doles out taxi medallions and broadcast licenses, it subsidizes our corn, sorts our mail, charters our businesses, protects us from criminals, educates our children, and employs tens of millions of us directly.

In 1964, the legal scholar Charles Reich wrote a groundbreaking article, *The New Property*, in which he sought to wake Americans up to what the state’s growing presence in our lives means for how we think about rights. Reich’s core observation was this: Our dependence on government isn’t going away, indeed “is the inevitable outgrowth of an interdependent world.” That reality upsets a number of the law’s default assumptions about rights. For example, courts once tried valiantly to distinguish “rights” and “privileges,” the latter of which did not entitle the bearer to due process of law upon deprivation by the state. Holmes himself famously said, in upholding a dismissal of a police officer for soliciting money for a political campaign, that the officer “may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” That’s cute, but for Reich this would not do in a modern society. The fact that the state is not required to provide some good, service, or benefit doesn’t mean it can’t be understood as a “right” or that, once offered, it may be retracted on a whim.

In the decade following Estelle Griswold’s day in front of the Supreme Court, the Court would decide cases in which plaintiffs argued
for a public school teacher’s right to publicly criticize the board of education, for a poor family’s right to tie welfare benefits to family size, for a right to equal funding for public schools regardless of a neighborhood’s property tax base, for a right not to be fired from a public university or kicked off the welfare rolls or to have a driver’s license suspended without a hearing. These were and remain the workaday questions of modern rights adjudication, but bromides about rights and privileges don’t begin to provide answers. Reich foresaw that we’re not in Topeka, Kansas anymore, and he was right.50

By the time the Court heard Griswold v. Connecticut, then, Footnote 4 was starting to feel rather quaint. That Footnote lived in a world of categories. In that universe, the vast majority of laws don’t implicate anyone’s constitutional rights. This was Frankfurter’s work in cementing Holmes’s legacy. Those laws that did implicate rights were tied to specific, readily identifiable, categorical problems: jailing one’s political enemies, segregating public facilities by race, or the like. The Court that entered the 1960s reserved rights enforcement essentially for corrupt public officials who couldn’t be trusted with state power.

But the events of the 1960s would drag the Court into the very different world we live in today. At the time of Carolene Products, less than 10 percent of the Supreme Court’s docket comprised civil rights claims. That number jumped by about 20 percent over the next two decades, then jumped another 20 percent just in the six years before Griswold. This is a world in which claims for racial equality will call not just for an end to intentional discrimination but for structural changes in employment practices, school assignment, time-honored voting and districting procedures, and virtually every aspect of the criminal justice system. Indeed, in this world, charges of intentional racial discrimination will often reach courts as claims of white students or contractors chafing at race-based remedial measures. This is a world in which equality isn’t just about renouncing slavery and Jim Crow but is also about upending traditional family roles and enabling well-lived lives by securing sexual autonomy and reproductive freedom, up to and including the freedom to abort a fetus. Challenges to discrimination aren’t just about genes anymore but are about
a protected set of commitments, values, and preferences. The rights of criminal defendants will extend beyond the bare formalism of a criminal trial and will saddle the state with affirmative duties to provide competent defense lawyers, to share exculpatory evidence, and to inform suspects of their rights. Free speech norms will spread to unfamiliar institutional spaces such as common law courts and public universities, commercial airwaves and strip clubs. Courts will have to entertain not just claims of the right against government abuse but a right to government support in securing the conditions of citizenship.51

We are faced, for a half century and counting, with a rights epidemic. Rights in this world are diverse and unruly, sometimes majoritarian and populist, other times protective of minorities or those on the margins of civil society; often supported by sophisticated lawyers or even government officials, other times living outside the legal mainstream. Rights since the 1960s have been, perhaps above all, competitive. They cannot readily be quarantined, hived off from other rights and interests with which they come into constant, at times adversarial contact. The question for modern courts is not about when government officials can’t be trusted. It’s about how to reconcile a diverse, unpredictable array of competing, important, and deeply felt individual and group interests with the government’s existential interest in governing.

Griswold v. Connecticut

The Griswold Court struck down the Connecticut birth control law, but the Justices held very different views about how and why. With surprising clarity, the range of views expressed in the six opinions written in the case—four to overturn the law and two to retain it—reveal the choices available to courts seeking to contain the rights epidemic.

The nominal majority opinion belonged to William O. Douglas. Douglas was cantankerous and brilliant, too much of both for his own good. He circulated his first draft in 10 days, scribbled on a yellow notepad, amounting to six typed, double-spaced pages. For Douglas, the Connecticut law violated the constitutional freedom of association. Although the First
Amendment does not mention this freedom expressly, the Court had recently recognized it in a case in which Alabama had tried to obtain a list of the NAACP’s members, so as better to harass them. What Douglas called “[t]he association between husband and wife”—others call this “sex,” among other things—seems not to fit in quite the same constitutional category as NAACP membership, but it was good enough for Douglas. Describing the right in First Amendment terms was awkward, but at least that got it into the text of the Constitution. Doing so allayed any need to probe the limits of Footnote Four.52

Douglas circulated the draft privately to Justice William Brennan, who was unconvinced. Brennan had his law clerk Richard Posner draft a memo to Douglas in which Posner suggested that the opinion rest instead on the right to “privacy,” which Douglas had only hinted at. Just as the First Amendment contains a right to association on its periphery, Posner suggested, other Bill of Rights provisions, taken as a whole, “indicate a fundamental concern with the sanctity of the home and the right of the individual to be let alone.” Douglas agreed, and within three days he had sent a revised draft that would become the lead opinion in Griswold.53

According to the Douglas opinion, the right to privacy lives in the shadows of the Bill of Rights. “[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.” Thus, the First Amendment contains within its “penumbra” a right of private association. The Third Amendment, prohibiting the quartering of troops without consent, also implicates privacy interests, as does the Fourth Amendment’s ban on unreasonable searches and seizures. Less obviously, the Fifth Amendment’s protection of the right against self-incrimination allows a suspect to keep his inner thoughts private even if they implicate him in a crime. The right to privacy is in the Constitution, Douglas was suggesting, if not in so many words.54

The Douglas opinion reflects a more creative iteration of Hugo Black’s basic approach to rights adjudication. In the face of a rights epidemic, the Court could simply let the constitutional text be its guide. Black himself adhered to this position in Griswold, and he accordingly dissented. “I like my privacy as well as the next one,” he wrote, “but I am
nevertheless compelled to admit that the government has a right to invade it unless prohibited by some specific constitutional prohibition.” Justice Potter Stewart’s separate dissent said much the same thing, calling the Connecticut statute “an uncommonly silly law” but one that didn’t offend the Constitution. Douglas saw more there than Black and Stewart did, and his opinion has widely been ridiculed for it. Penumbras and emanations are meet for Halloween, but they don’t void democratically enacted laws.55

The essential failure of Douglas’s Griswold opinion reflects a deeper problem with a textualist-originalist response to the rights epidemic. To reach most modern rights claims, the constitutional text must be read expansively or bent out of shape, thus undermining the very discipline that textualist originalism is supposed to promote. The alternative is Black’s more skeptical version, but there’s no appetite either among the Justices or among the American people for allowing states to ban birth control, to jail people for engaging in oral sex, to sterilize criminals or the mentally retarded, or indeed to browse the membership lists of unpopular organizations, to name just a few of the many topics on which the constitutional text is silent. Americans have the shortest and oldest national constitution in the world. Which rights are important to us today bears little relationship to the Constitution’s vague, sparse language. It touches modern rights only by happenstance. Pretending otherwise turns rights enforcement into a lawyer’s game of textual manipulation and comma parsing rather than the sensitive process of moral or political deliberation that rights claims call for.56

Justice Brennan and Arthur Goldberg, who had taken Frankfurter’s seat, joined the Douglas opinion in Griswold, but they also joined a separate opinion, written by Goldberg, that emphasized a very different theory of what was wrong with the Connecticut law. (Chief Justice Earl Warren obliquely signaled his discomfort with the Douglas opinion by only joining the Goldberg opinion, which says it joins the Douglas opinion.) For Goldberg, the rights protected by the Fourteenth Amendment are “not confined to the specific terms of the Bill of Rights.” Noting that the Ninth Amendment says the Bill of Rights should not be construed to exclude unenumerated rights, Goldberg said that judges could extend the
protections of the Constitution to “fundamental” rights, defined as those rooted in “the traditions and (collective) conscience of our people.” Goldberg was satisfied that the right to privacy, especially in relation to the marital bedroom, was so rooted.57

This was Footnote 4 with a twist. The footnote had suggested that there were two categories of rights claims that could be recognized even if they did not implicate the specific text of the Constitution: rights to participation in the political process and rights claims by certain discrete and insular minorities facing prejudice. The Douglas opinion didn’t have to reach these categories because he found the right to privacy in the Constitution’s text. The Goldberg opinion simply leapfrogged the other categories by adding another: privacy. Still more categories of rights might be added if a majority of the Court deemed them “fundamental.” This formulation of so-called “substantive due process” rights is the one law students learn to this day. The sequence of questions they should ask themselves in identifying a right are: (1) is the right in the specific constitutional text; (2) if not, is it “fundamental” in the sense that it is rooted in our traditions and collective conscience. If the answer to either question is “yes,” then the right is a “fundamental” one that is not to be infringed unless the government satisfies the highest level of scrutiny. If the answer to both questions is “no,” then the right is not fundamental and is subject to the lowest level of scrutiny.

Americans continue to debate constitutional rights in the terms drawn by these Griswold opinions. On one side of the field are the textualist-originalists. Most recently these have typically been conservatives such as Antonin Scalia, Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh. They claim to view strict adherence to the Constitution’s text and history as necessary to judicial restraint. In practice, many of these Justices have, like Justice Douglas, applied idiosyncratic glosses to the text and history in order to achieve desired outcomes, as for example in cases involving affirmative action, campaign finance, and gun regulation. Across the pitch are the Goldberg and Brennan acolytes who see it as the Court’s job in rights cases to determine which unenumerated rights—whether to abortion or assisted suicide or same-sex marriage—should be deemed fundamental
and therefore entirely outside the government’s grasp. The Justices who view substantive due process as a living tradition incapable of precise definition are accused of a kind of lawlessness, conforming the Constitution’s meaning to the Justices’ own takes on what rights, interests, and commitments lie within the collective conscience of the American people. Brennan himself famously would tell new law clerks that the most important thing they need to know to start working at the Supreme Court was how to count to five. That’s how many votes it took to change the Constitution.⁵⁸

Partisans on either side of this modern jurisprudential battle tend to miss their common ground. Hugo Black and Bill Brennan, Antonin Scalia and Ruth Bader Ginsburg all agree that the main question they are called upon to answer in rights cases is whether important rights are implicated or not. It’s a threshold question “originalists” and “living constitutionalists” are constantly fighting about, but it’s the wrong question. The startling diversity of rights claims in the modern world ensures that, unless courts change their focus, the fight will never end. But what Griswold takes away with one hand it gives with the other. Just as we see in the Griswold opinions the seeds of this seemingly existential conflict in judicial method, we also see there, if faintly, a way out.

*The Second Justice Harlan*

Arthur Goldberg was Frankfurter’s immediate successor, but he was not his heir. Goldberg’s Griswold opinion, the most expansive of the lot, shows how very different philosophically the two men were. The man who took Frankfurter’s seat in spirit was none other than John Marshall Harlan, grandson of the great dissenter. Harlan came to the Court in 1955, elevated by Dwight Eisenhower after a long career at the white-shoe firm of Root, Clark, Buckner, & Howland and a brief stint on the Court of Appeals. He and Frankfurter knew each other well, having first met through Emory Buckner, a friend of Frankfurter’s and partner at Harlan’s firm who took Harlan along when he served as U.S. attorney in New York in the 1920s. When Harlan joined the Court, Frankfurter sensed an ally in his
temperamentally conservative, Republican younger colleague. He immediately began an influence campaign that included seeking to spread his negative opinions of Black and Douglas, both of whom Frankfurter intensely disliked. (Harlan didn’t bite.\textsuperscript{59}

Harlan’s reputation indeed lives in the same family as Frankfurter’s. He is viewed as a conservative speedbump in the path of the Warren Court’s activism, the role Frankfurter would have played had he lived through the 1960s. Nearly half of Harlan’s 613 opinions were dissents, including a mind-boggling average of more than 62 dissents per Term during the Warren Court’s heyday of 1963 to 1967. But there was a crucial difference between Frankfurter and Harlan. Frankfurter had built his jurisprudential legacy around Holmes, and especially Holmes’s pithy dissent in the bakery case. Absent extraordinary reasons later memorialized in Footnote 4, judges should defer to legislatures whenever they act with minimum rationality. By contrast, Harlan’s view of due process wasn’t Holmes’s. It was Harlan’s.\textsuperscript{60}

Two sets of cases illustrate the difference. The first are the birth control cases, \textit{Poe} and \textit{Griswold}. Harlan dissented from Frankfurter’s opinion dismissing the \textit{Poe} case for lack of standing, and chose to reach the merits. In \textit{Griswold}, Harlan refused to join either the Douglas or the Goldberg opinions, instead writing his own concurrence incorporating by reference his \textit{Poe} dissent. To a remarkable degree, Harlan’s take on the Connecticut birth control statute echoed his grandfather’s approach to the New York bakeshop law. He rejected the argument that the Fourteenth Amendment should be equated with guaranteeing fair government procedures or, contra Black, should apply only to government deprivations specified in the Bill of Rights. “Due process,” Harlan wrote, “has not been reduced to any formula; its content cannot be determined by reference to any code.” Rather, he said, “it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”\textsuperscript{61}

Just as the older Harlan accepted a right to contract that had to be balanced, with care, against the need for reasonable regulation, his
grandson recognized a right to privacy that likewise called for temperate balance against government interests. Indeed, far from demonizing *Lochner* as Douglas and Black had, Harlan cited favorably to the case (predating the bakers’ case) in which the Court first recognized a right to contract. For Harlan, that right was one point on a continuum of liberty interests that must be adjudicated with sensitivity to their particular context and the government’s reasons for limiting them. “No formula,” Harlan wrote, “could serve as a substitute, in this area, for judgment and restraint.”

In the specific context of the Connecticut birth control law, Justice Harlan assumed that there was a constitutional right to privacy, but also that the government could regulate private spaces if it had a good enough reason. Here, it didn’t. The space—the marital bedroom—was as private as any in our tradition. Moreover, the fact that the state didn’t enforce the law showed that its police and prosecutors evidently didn’t believe it was especially needed. The law’s novelty also counted against it. Connecticut was the only state that banned the use of contraceptives. So for Harlan, it was unconstitutional. For him, the case did not rise or fall on whether there was a specific right to privacy in the Constitution or on whether the law targeted minorities. What mattered was the law’s justification and its operation on the ground. What mattered were the facts.

In between *Poe* and *Griswold*, the Supreme Court decided a less famous case that shows just how far a departure Harlan is from modern thinking about rights. A Kansas law had said that only attorneys could engage in debt adjustment, whereby a debtor pays an adjuster to negotiate a plan with creditors. Agreeing with the plaintiff that this was unreasonably restrictive, a lower court enjoined the law under the Fourteenth Amendment. The Supreme Court reversed. Then, as now, this was an easy case. Under the post-New Deal consensus embodied in *Carolene Products*, an ordinary economic licensing scheme that didn’t touch upon any protected classes gives nearly unlimited berth to the state to make distinctions it sees fit. Justice Black’s majority opinion accordingly gave the lower court a lengthy lecture on the rule that courts are not “to draw on their own views as to the morality, legitimacy, and usefulness of a
particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process.” Black cited *Lochner* and referenced Holmes’s dissent to support this by-then blackletter view: “Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours.” The retired Frankfurter probably smiled when he read the opinion.64

Harlan didn’t. He agreed with the outcome but he thought Black’s opinion was overstated. The U.S. Reports indicates a one-sentence hint at Harlan’s reasons: “Mr. Justice HARLAN concurs in the judgment on the ground that this state measure bears a rational relation to a constitutionally permissible objective.” Behind the scenes, one of Harlan’s law clerks had lamented that Black’s opinion “almost does away entirely with the Due Process Clause” and “appears to do away even with the rational basis test.” Harlan appeared to be concerned that the opinion devoted almost no discussion to whether the legislature’s reasons were good ones, which seems to imply that those reasons don’t matter at all. Although Justice Black likely believed just that—the Constitution doesn’t go out of its way to protect debt adjusters—Harlan couldn’t go along. Harlan was a longtime Wall Street lawyer and so his openness to some scrutiny of economic regulation of businesses makes biographical sense. But it also reflected a philosophical position on constitutional rights review. He was a business lawyer, yes, but more importantly, he was a Harlan.65

Harlan’s views have not prevailed. Black’s categorically uncharitable view of so-called economic due process is still taught in law schools. The Court of course invalidated the Connecticut birth control law, but it did so by declaring that there was a “fundamental” right to privacy embedded in the Constitution. The “private” status of the relationship the government was targeting is what shielded it from regulating. Privacy was a new category, a new box, into which Americans could try to fit their conduct to exempt that conduct from the state’s reach. If a law intruded on privacy, it should usually be struck down. If it failed to get into the privacy box, or some other, it would be reviewed with great deference to the government. Holmes had won. His categorical view of constitutional rights
persists to this day, bending awkwardly beneath the weight of facts it cannot accommodate. The limitations of the privacy category became apparent almost immediately, when the Court decided *Roe*. Abortion opponents didn’t see terminating a pregnancy as a private decision. Wasn’t the fetus a person? What then? Unwilling to confront that question, the Court held that the fetus had no rights. And the war came.

These kinds of complexities are present in the mine run of constitutional rights cases that reach the Court, but the Justices continue to treat them as exceptions. They are still trying to put rights into categories, still searching for the right box, the right formula. But both Justice Harlan's were right all along. There is no formula. There is only judgment.
CHAPTER 5. WHEN RIGHTS COLLIDE

“[T]he word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”

—Justice Harry Blackmun, Roe v. Wade, 1973

“The fundamental right [to life] guaranteed by . . . the Basic Law, as the most fundamental and most original human right, protects, in comprehensive fashion, unborn life as well.”

—Federal Constitutional Court of Germany, 1975

Over a 19-day stretch in the late fall of 1975, John Paul Stevens was nominated to the Supreme Court, received a three-day hearing before the Senate Judiciary Committee, and was unanimously confirmed. Stevens had been selected by a Republican President, Gerald Ford, but Democrats controlled 61 seats in the Senate. Presidential primary season was in full swing. Barely a week before Stevens was picked, Ronald Reagan had announced that he would be challenging Ford for the Republican nomination. A month after Stevens was confirmed, a little-known Georgia peanut farmer named Jimmy Carter would improbably win the Iowa Democratic Caucus. Had the Democrats held out against the badly weakened Ford, Carter might have gotten a chance to make what would have been his only Supreme Court appointment. And yet Stevens was confirmed that December, 98-0, after all of five minutes of debate. It was a different time.

What makes the ease and swiftness of Stevens’s confirmation all the more startling is that he was the first person to be nominated to the Supreme Court after its 1973 decision in Roe v. Wade. And yet, at his confirmation hearing and in individual meetings with Senators, Stevens was not asked a single question, from any Senator, Democrat or Republican, about Roe or about abortion. It wasn’t that Senators didn’t ask about sensitive or political issues—Senators asked freely about busing plans and the First Amendment and government surveillance and the death penalty. It’s just that abortion wasn’t nearly as sensitive or political then as it is now. Roe had been a 7-2
decision. The majority included five Republican appointees, including three by Richard Nixon, as well as the only Catholic Justice on the Court, William Brennan. Roe was assailed by many Roman Catholic leaders, but the decision preceded (and eventually helped to motivate) the deliberate fusion of Republican politics with the most conservative elements of the Protestant evangelical movement. Indeed, most Protestants in the early 1970s favored liberalized access to abortion. The Southern Baptist Convention in 1974 reaffirmed its position that it was necessary to seek “a middle ground between the extreme of abortion on demand and the opposite extreme of all abortion as murder.” Roe didn’t even lead the news cycle the day it came down; Lyndon Johnson had died of a heart attack soon after the decision was announced.69

The very year Justice Stevens was being confirmed to the Supreme Court without fanfare, the former West Germany found itself embroiled in its own abortion controversy, but turned inside-out. Abortion had been banned in most cases in West Germany since the German Republic’s founding in 1871. But in 1974, the left-leaning Social Democrats had teamed up with the Free Democrats to squeeze an abortion liberalization bill through the Bundestag, West Germany’s lower house. The vote, 247-233, was so tight that individual votes had to be counted for the first time in the history of the Bundestag. Under the new law, a woman could obtain an abortion in the first 12 weeks of pregnancy following consultation with a physician and a social counselor. After 12 weeks, only medically necessary abortions were allowed. Had this law been passed in the United States, it would have been unconstitutional under Roe because it didn’t sufficiently protect a woman’s right to end a second-trimester pregnancy. The German Constitutional Court’s perspective was just the opposite: Did a law permitting a first-trimester abortion sufficiently protect the fetus’s right to life? The German Court said no. Call it bizarre Roe.70

Roe’s author, Harry Blackmun, had entertained but quickly rejected the possibility that a fetus might hold constitutional rights. Blackmun’s aim was to describe the abortion controversy in purely medical terms. The hope was that a medically oriented opinion could help depoliticize the issue. The medical framing suited Blackmun to boot. He had once aspired to be a
doctor, and he kept a copy of Dorland’s Medical Dictionary on a shelf behind his desk in chambers. In the 1950s he had cut his teeth as general counsel for the Mayo Clinic, a job he was so fond of that he requested that his ashes be scattered on the Clinic’s grounds after his death. In the summer of 1972, just before *Roe* was argued, Blackmun spent 10 days conducting research on abortion at the Clinic library in Rochester, Minnesota.\(^{71}\)

Blackmun’s eventual opinion in *Roe* is nothing if not clinical. He described the decision whether to have an abortion as a medical judgment made by a doctor in consultation with his patient. The woman had a “privacy” interest in family planning. And the state had an interest in ensuring the pregnant woman’s health, which meant that it could, for example, require that abortions be performed by doctors. But as far as the Constitution was concerned, the fetus was not a person and was therefore irrelevant. If a fetus is a constitutional person, he wrote, then “[the woman’s] case, of course, collapses.”\(^{72}\)

Blackmun was quite wrong about this, and the rest of this chapter shows why. It also shows how a different understanding of the nature of fetal rights can help facilitate a very different politics around abortion. I have already explained the ways in which rights fetishism divorces conceptions of law from conceptions of justice. The American judiciary’s view of the abortion issue models a second problem with rights fetishism: it can’t deal with conflicts of rights. Two competing rights cannot both be absolute. My absolute right to kill is incompatible with your absolute right not to be killed. My absolute right to speak cannot accommodate your absolute right to silence me. My absolute right to have race-based disadvantage considered in college admissions cannot sit quietly beside your absolute right to a colorblind admissions process. When rights are absolute, we must be extremely cautious in finding rights to exist.

*Roe* is the single most emancipatory decision in the Supreme Court’s history. Its holding that a woman has a nearly absolute right to terminate a pregnancy prior to the third trimester instantly made abortion on request legal in 46 states, 30 of which had previously prohibited abortion in all circumstances. The decision has prevented many millions of women from
being subjected to the emotional, social, and financial toll of motherhood against their will.

Many opponents of abortion rights believe that every one of those millions of liberated women is complicit in the murder of her child. On the face of things, there can be no common ground, no reconciliation between these positions. Abortion presents a conflict of rights in its purest form. The woman’s right to end her pregnancy sits in deep tension with the fetus’s right to live. The German Court’s approach to abortion shows what it might mean for such competing rights, though deeply felt, to coexist. It also shows one promising example of how a deeply divided people might respond.

The German Abortion Decisions

Let’s return, then, to February 25, 1975, the day the West German abortion decision came down. A basic prohibition on abortion was part of the inaugural German penal code of 1871 and resisted numerous reform efforts over the subsequent century. Indeed, penalties for abortion had been enhanced during the Third Reich, a concession to the eugenicist urge to repel perceived “attacks on race and heredity.” But abortion liberalization faced its own dark ties to the country’s Nazi past. As the 6-2 majority wrote, the right to life was put into the German Constitution (the Basic Law) “as a reaction to the ‘destruction of life unworthy of life,’ to the ‘final solution’ and ‘liquidations,’ which were carried out by the National Socialistic Regime as measures of state.” Barely a generation removed from the end of World War II, the idea that certain lives were beneath the protection of the law was an uncomfortable one for West Germany’s highest court to endorse. Because abortion involved the killing of a fetus, West German law had a duty to condemn it.73

But the fact that fetuses were protected under the West German Constitution didn’t mean that women were not. In addition to safeguarding the right to life, the Basic Law also protects the “right to free development of [one’s] personality,” the ability of individuals to pursue their life goals without undue interference from the state. This right has since been used controversially, for example, in a 1994 Constitutional Court decision
advising the legislature to decriminalize the possession and use of small amounts of marijuana, and in a 1989 case recognizing the right to ride horses in wooded areas. But it has also been used to protect what Americans understand as “privacy” rights, as when, for example, the Court struck down a census provision requiring residents to reveal where they had taken vacations. For pregnant women, what was in effect a right to self-determination meant that an abortion performed for legitimate reasons, though illegal, did not need to be criminally punished. Legitimate reasons did not mean any reason, as it does under Roe. Rather, the Court specified that abortion could be decriminalized in the first trimester for reasons relating to significant threats to the woman’s health or life, serious genetic irregularities of the fetus, severe emotional distress or unusual hardships associated with pregnancy or childbirth, or in cases of pregnancies resulting from rape or incest.74

For all its attempts at Solomonic wisdom, the German Constitutional Court’s abortion decision managed to make no one happy. Not at first, anyway. To opponents of abortion rights, the decision meant that too many first-trimester abortions would be permitted. Under the new law implemented in 1976 after the Court’s decision, there was no prohibition on abortions in the 14 days before implantation. Moreover, a woman could terminate her pregnancy in the first trimester if she could find two doctors willing to certify that carrying the fetus to term would cause severe emotional or financial distress and if she went through social counseling. This exception is what German law calls a “social” indication, and, following the ruling, it was the main way for a woman to obtain an abortion in West Germany. In 1977, a year after the new abortion law went into effect, 37 percent of legal abortions were medically indicated (based on threats to the woman’s health or life), while 57 percent were socially indicated. Within five years, those numbers were 19 percent and 77 percent respectively. By 1990, just before reunification, 85 percent of legal abortions were socially indicated. In part because of the relative ease of obtaining a social indication, the West German legal regime didn’t seem to reduce the overall number of abortions. The number was more or less the same as in East Germany, where first-trimester abortions were not only permitted after 1972 but were free. For the Catholic Church and for conservative
Germans, the Constitutional Court had done little to protect the life of the unborn.  

But proponents of abortion rights had much to complain about as well. German feminists in the 1960s and 1970s had sought the total repeal of the abortion prohibition in the penal code. What they got instead was an arbitrary patchwork that still declared women who obtained abortions to be criminals. Like the United States, Germany is a federal republic, and — again, like the United States today — how easily a woman could obtain an abortion in West Germany depended on which Land, or state, she lived in. Although (unlike in the United States) abortion is primarily legislated at the national level, the counseling agencies whose approval was required to obtain a first-trimester abortion had to be authorized by the various Länder. More Catholic, more conservative Länder such as Bavaria and Baden-Württemberg could put women through their paces by, for example, segregating social counselors into different offices from medical counselors or requiring that women be counseled in a directive or confessional rather than a neutral way. As in the United States, moreover, some of West Germany’s more conservative states simply lacked an adequate number of medical facilities licensed to perform abortions. The disparities among Länder made it common for women seeking abortions to have to travel from the more conservative German south to northern Länder or to the Netherlands. A practice even emerged of forcing gynecological exams on women crossing the Dutch-German border in order to smoke out abortion tourism.

And so in the same year John Paul Stevens was breezing through a Senate controlled by the opposition party without being asked a single question about abortion, Germany was in turmoil. The Constitutional Court’s decision leaked a month in advance. By the time of its official release, 1,000 protestors had gathered in the center of Karlsruhe, where the Constitutional Court sits, and mass demonstrations had been planned in all of the major West German cities. Judges were burned in effigy and protestors hurled stones at the court, which the police barricaded before eventually resorting to tear gas and billy clubs. In Berlin, Frankfurt, and
Munich, protestors demonstrated at Catholic churches, whose influence was (not unreasonably) blamed for the decision.\textsuperscript{77}

But the political and social climate changed, and quickly. The framing of abortion rights in the court decisions in the United States and Germany seems to have made a difference in how newspapers covered abortion and how advocates on both sides talked about it. Prior to the decision, German abortion rights supporters freely emphasized themes of choice and autonomy, with feminists deploying popular slogans such as “Mein Bauch gehört mir” (“my body, myself”) and “Was in der Vagina versteckt, wird von uns jetzt selbst entdeckt” (“every woman her own gynecologist”). The sociologist Myra Marx Ferree has shown that in the 1970s, American women were in fact more likely than their German counterparts to emphasize the need for the state, via legalized abortion, to protect women from the psychological and social burdens of unwanted pregnancy and from the health and safety risks posed by illegal abortions. But \textit{Roe} and subsequent U.S. cases emphasized the autonomy of women in making abortion decisions and the accompanying lack of a state duty to support that decision in any way other than through legalization. By contrast, the German indications model expressly tied the decriminalization of abortion to women’s social and emotional needs. And so by 1977, German women were using protectionist (as opposed to choice) arguments for abortion rights much \emph{more} than American women. These kinds of arguments rose sharply among both men and women in Germany after the Constitutional Court decision.\textsuperscript{78}

German abortion discourse was tested quickly. The International Year of the Child was proclaimed in 1979, providing an opportunity for the Catholic Church to push its opposition to the social and eugenic indications in the revised abortion law. Abortions had risen by some 30 percent since the new law was passed, prompting Joseph Cardinal Höffner, head of the Roman Catholic Church in West Germany, to call for the law to be revised in light of this “scandalous” result.\textsuperscript{79} Interestingly, although Social Democrats (SDP) had sponsored the original 1974 revision, they did not by and large respond to Höffner’s provocations in the language of “choice” that has become common in the United States. Instead, German
progressives echoed the Constitutional Court’s framing. Johannes Rau, chair of the SDP in North Rhine-Westphalia, answered Cardinal Höffner thus:

I would like to assure you that the Social Democratic Party does not and will not support this ethically and legally untenable and false formulation. There is no “right to abortion.” According to the law, an induced termination of pregnancy is fundamentally illegal. That is not the case only if certain legal conditions are given, specifically the existence of an indication. That is the position of the law, from which the Social Democrats will not deviate . . . The SPD holds strictly to the law, however—a law that also recognizes the social indication.

The Court’s requirement of an indications model had influenced the SDP’s political strategy. Rau ended his letter by suggesting not that the Cardinal was insensitive to women’s freedom to choose to end their pregnancies but instead by arguing that Höffner was improperly politicizing pregnant women experiencing social and emotional distress: “surely the individual needs of pregnant women are not an appropriate topic for controversy or polemical debates in the public sphere.”

It wasn’t just abortion rights proponents who seemed to soften their legal position. Heading into the 1980 elections, Christian Democrats were showing signs of fissures in their alliance with the Church on abortion issues. In July 1979, Cardinal Höffner appeared to approve of a Christian Social Union official’s likening of abortion rights proponents to Nazis, a charge that traverses the brightest red line of German politics. Höffner’s comments alienated liberal, younger, and female Catholics who might otherwise have been sympathetic to the Church position. A 1980 survey indicated that 70 percent of German Catholics rejected the Church’s negative stance on the 1976 abortion law, and that a majority of those who parted ways from the Church believed that the law should be made even more liberal. Likewise, the Evangelical Church (EKD), a federation of the major German Protestant denominations, emerged as a supporter of the social and medical indications model by the 1980s after having opposed abortion in all circumstances prior to the Constitutional Court decision.
When the Christian Democrats returned to power in 1982, the party’s leadership tried and failed to pass laws that would abolish federal funding and require dissuasive rather than neutral counseling for socially indicated abortions. Surprisingly, much of the opposition to the CDU’s anti-abortion agenda came from women within the party. The Women’s Union of the CDU (FU) played essentially no role in the 1970s debates over abortion law reform, but by the 1980s it was a major player in preventing conservative reforms. The FU emphasized the need to support women by making the law more family-friendly. Again, this was consistent with the Constitutional Court’s emphasis on the social needs of pregnant women contemplating abortion. The German Catholic Women’s Association (KFD) also converted from its prior opposition to the 1976 law to support for decriminalization in the 1980s. These efforts paved the way for broader cooperation between the KFD and the leftist Green Party on a 1990 law banning embryological research, egg donation, and surrogacy. The 1975 Abortion Decision had forced political compromise over abortion, which in turn enabled cooperation on adjacent issues.82

The Court thus shifted the Overton window around abortion in West Germany. By recognizing fetal life as constitutionally protected, it made impossible a Roe-style approach that implied an absolute right to a first-trimester abortion. By characterizing abortion rights as nonetheless encompassed within the Basic Law — and by emphasizing the rights dimension of the “social indication” — the Court forced those seeking to reduce the number of abortions to do so by making women’s reproductive choices more meaningful. Thus, abortion rights proponents argued less that women had absolute freedom of choice over their bodies and more that any anti-abortion law had to provide women with real alternatives in light of the social and emotional burdens of pregnancy, birth, and motherhood to which the Court gave constitutional notice. And abortion rights opponents argued less that abortion is murder and therefore must be criminalized and more that the alternatives to abortion were in fact sufficient to reduce the justification for social indications. As Green Party politician Margarethe Nimsch wrote in the early 1990s, “Unlike twenty years ago, all relevant groups in society today concentrate on the protection of unborn life.”83
So when the abortion debate roared back into the spotlight in the early 1990s, its frame within West German politics was relatively narrow. Abortion very nearly derailed German unification. In East Germany, abortion had been liberally available and paid for by the national health service since 1972. Because that regime was inconsistent with the Constitutional Court’s interpretation of the Basic Law, negotiators sought to craft a single law that would both be politically acceptable and survive the inevitable court challenge. As I have noted, mainstream German feminists had framed abortion in terms of women’s autonomy in the 1970s. But in the months leading up to the new law, feminist arguments adopted the language of fetal life. The idea was that women in trying circumstances would have abortions even if it was illegal to do so. The only way to protect fetal life was therefore to alter those circumstances.

The various political parties held a range of positions on what the law should look like, ranging from the Green Party’s call for abortion on request to the most conservative of the Christian Democrats’ support for an indications model that excluded social indications. Still, very few Germans supported complete repeal of abortion restrictions, and there was likewise a general consensus that counseling and financial assistance to pregnant women and families protected fetal life far better than a prohibition on abortion. And so the Liberals and the Christian Democrats agreed to a suite of services that had to be made available to women and families as part of any law regulating abortion: financial assistance to stay-at-home parents; a guaranteed return to a parent’s prior job if he or she took off up to three years to care for a child; extended daycare and extensive tax credits for daycare costs; increased rates for child support payments; extended paid leave to care for sick children; reemployment guarantees for empty nesters; sex education services; and a host of other measures relating to adoption, housing, and taxation.84

Those service improvements for parents were negotiated politically between parties who held very different views on core questions of abortion rights but who were forced by the Court to see points of common ground. The eventual law, which resulted from many months of hard-fought negotiation, was dubbed the Gruppenantrag or “group bill,” a reference to
the fact that it resulted from a diverse cross-party coalition. The basic political compromise that emerged was that an abortion obtained in the first 12 weeks and after dissuasive counseling and a three-day waiting period was declared not to be illegal. After that period, however, abortion was permitted only when necessary to avoid a serious threat to the woman’s life or her physical or mental health. Abortions could be funded through the national health service, and there would be the already mentioned financial support and other guarantees for people who chose to have and care for children.85

As expected, the new law was immediately challenged by Christian Democrats and eventually, after nearly a year of deliberation, the Constitutional Court struck parts of the law down. The Court objected to the notion that a non-indicated abortion could be declared legal, but it allowed that the State could choose not to punish such an abortion. Rather, the government could choose to protect life by offering more supportive counseling and social benefits to women contemplating abortion. Although job security and financial benefits for caregivers were already part of the 1992 law, the Court suggested that such benefits might need to be strengthened in light of the constitutional mandate to protect life. At the same time, the Court held that neither public nor private insurance could cover non-indicated abortions except for women receiving welfare. The Bundestag responded with a revision in 1994 that defined abortion as a crime but permitted a woman to choose an abortion in the first trimester without fear of prosecution even if she did not let her counselor in on her reasons. The law followed the Court decision in permitting public funding of abortions for women receiving welfare but allowing funding for other women only if their abortions were the result of health issues, genetic issues, or rape or incest. The law also strengthened childcare support and job security guarantees for parents who took time off to care for children.86

Unlike in the 1970s, abortion is a far less politically polarizing issue in Germany than in the United States. To take one measure, the March for Life protest organized by Germany’s largest pro-life group, Bundesverband Lebensrecht (BVL), typically draws fewer than 10,000 marchers. By contrast, the annual March for Life in Washington, D.C. regularly draws
crowds in the hundreds of thousands, including an estimated 650,000 in 2013. The two leading German political parties — the Christian Democrats and the Social Democrats — were once bitter rivals in abortion politics but now take moderate stances that more or less hew to the 1994 compromise bill. The parties whose rhetoric best approximates the U.S. pro-choice/pro-life dichotomy are the leftist woman’s party Die Linke and the right-wing populist Alternative Fuer Deutschland, both fringe groups that remain at the margins of political power.87

The point here isn’t that Germany has a perfect regime of abortion regulation. Partisans on both sides will find much to criticize. The Court insists that abortion is and must remain a criminal act that often can’t be paid for even by private insurance, and there are significant legal constraints on abortions after the first trimester. A controversial ban on doctors’ advertising of abortions remains in place. The language of “choice” that many American women find empowering and affirming is frowned upon, forcing many feminists to the margins of mainstream abortion politics. At the same time, abortion on request is available in the first trimester. It is easier and cheaper for many German women to obtain an abortion than for many American women, and there is universal recognition in Germany that limits on abortion are inseparable from serious financial, childcare, and professional support for parents. The anti-abortion group Americans United for Life lists U.S. states in order of how protective of “life” they are. Of the top 10 anti-abortion states, only one requires that businesses offer pregnancy leave to enable women who become pregnant to keep their jobs. In Germany, by contrast, expectant mothers are required to receive paid leave. When courts prevent each side of a conflict from digging in and retreating to their corners, when recognizing the rights on one side does not mean denying it on the other, it opens space for political dialogue and enables us better to see each other and find shared ground. Partisan criticism of the law is therefore a feature, not a bug of the German experience.88

The Politics Abortion Law Makes
A “group bill” on abortion of the sort that followed German reunification is simply inconceivable in the United States today. Abortion is a subject of political power, but it is not a subject of political negotiation. It isn’t just that abortion legislation tends to fall along party lines, though it does. As of this writing, just two of the 250 Republicans in Congress identify as pro-choice; seven of the 282 members of Congress who caucus with the Democrats are pro-life. It’s that abortion legislation is almost never the result of compromise between legislators who hold fundamentally different views on the issue and must weaken their demands in order to win votes. Abortion politics countenances no “grand bargain,” no “comprehensive reform,” no bipartisan “gang” of legislators.

At the state level, the politics of abortion in the United States primarily involves red-state attempts to push the constitutional envelope with laws banning abortion when a fetal heartbeat can be detected or requiring women to view ultrasounds or requiring abortion doctors to obtain onerous hospital admitting privileges or banning abortion when the fetus is alleged to be able to feel pain. These efforts are provocations meant to prompt a test case before a Supreme Court thought to be hostile to Roe. At the federal level, the politics of abortion is simply the politics of judicial appointments. When the Court makes political compromise impossible, the losing side sees changing the Court as its only legal option. The Republican Party has used that message to structure its political appeal even to voters who reject much of the rest of the Party’s platform.89

How did we get here? I began this chapter by describing the state of play in December 1975, nearly three years after Roe had been decided, with an overwhelmingly Democratic Senate asking a Republican Supreme Court nominee no questions about the decision. By the time of Sandra Day O’Connor’s 1981 hearing, matters were quite different. Abortion was the central issue at her hearing before a Republican Senate. In 1970, while serving as a state senator in Arizona, O’Connor had cast a committee vote in favor of a law that would have decriminalized abortion. Senator Strom Thurmond, who was chairing the Judiciary Committee, pressed her on that vote in his first set of questions at the hearing. “[M]y own knowledge and
awareness of the issues and concerns that many people have about the question of abortion has increased since those days,” she responded. “It was not the subject of a great deal of public attention or concern at the time.” Senators Thurmond, Kennedy, Hatch, Dole, DeConcini, East, and Denton all asked O’Connor about her abortion views during her hearing. Denton of Alabama, the only Senator not to vote to confirm O’Connor, withheld his yea out of concern over her abortion views even though she said on the record that she was opposed to abortion and that it was repugnant and personally offensive to her.90

The watershed moment in abortion’s migration into the fulcrum of U.S. politics in that crucial period from 1975 to 1981 might have been Gerald Ford’s loss to Carter in the 1976 general election. With Ford becoming the first incumbent since Herbert Hoover to fail in his reelection bid, a political crisis for the Republican Party became an opportunity for its activist fringe. Ford had announced his support for a right-to-life constitutional amendment, but he was viewed as soft on the issue. His wife, Betty, was an outspoken abortion rights advocate, and his Vice President, Nelson Rockefeller, had vetoed restrictions on abortion access when he was governor of New York. The overt political strategy to help Republicans regain power heading into the 1980s was to use abortion and the right-to-life amendment to create a permanent home in the Republican Party for evangelical protestants, Catholics, and bigoted voters who associated black civil rights with moral degradation. The so-called New Right already had its national figurehead in the charismatic persona of Ronald Reagan. Reagan had narrowly lost in the 1976 primary running to Ford’s right on cultural issues, which positioned him well after Carter rode a Southern wave to squeak past Ford into the White House. On the ground, Richard Viguerie, the George Wallace acolyte and founder of Conservative Digest, was using his unparalleled direct mail skills to raise money for arch conservatives. Heritage Institute co-founder Paul Weyrich conducted trainings for conservative activists and, with Howard Phillips, pushed Jerry Falwell to cofound the Moral Majority in 1979. Falwell’s group became a
fundraising, lobbying, and messaging juggernaut leading up to the 1980 presidential election.\textsuperscript{91}

There is reason to think some version of this history would have happened no matter how \textit{Roe} was written. Certainly, many abortion rights opponents in the 1970s were already active before the decision. The political strategy that followed depended on the confluence of a number of important social currents. Most prominently, the Equal Rights Amendment had passed Congress in 1972 and was being vigorously debated in the states, with thirty-five states passing it over the next five years. Phyllis Schlafly led the charge against the ERA by arguing that it would destroy traditional family roles. Unsurprisingly, many feminist supporters of the ERA also supported abortion rights, and ERA opponents actively touted liberalized abortion access as emblematic of what the Amendment portended.\textsuperscript{92}

Even so, one of the important social currents in the politicization of the anti-abortion movement was the unbending nature of the decision itself. Some prominent anti-abortion advocates such as Catholics United for Life founders Elasah Drogin and Theo Stearns specifically cited \textit{Roe} as having motivated their activism. And the \textit{Roe} Court’s outright dismissal of the state’s interest in curtailing first- and second-trimester abortions supplied ready language for political mobilization. Most concretely, that language provided an opening for a proposed constitutional amendment recognizing fetal life. Several members of Congress proposed such “human life” amendments in the months following the decision. Some tracked and specifically rejected Justice Blackmun’s language denying fetal personhood under the Fourteenth Amendment. For example, New York Senator James Buckley’s proposal would have added to the Constitution that “[w]ith respect to the right to life, the word ‘person’ . . . applies to all human beings, including their unborn offspring at every stage of their biological development.” Human life amendments received hearings before the Senate Judiciary Committee in 1974 and 1975, and much of the testimony
sought to provide a scientific basis for the “fact” that life begins at conception.\textsuperscript{93}

ERA backers tended not to support these amendments, making it child’s play for Schlafly and the Moral Majority to tie the ERA movement to disregard for the life of the unborn. \textit{Roe} gave abortion rights supporters no language to rebut those accusations. Quite the opposite. It not only explicitly denied that fetal life had any constitutional status, but its language of autonomy and privacy tied into other movement demands that were less popular than abortion rights. Choice arguments drawn specifically from \textit{Roe} animated the growing advocacy for the rights of gays and lesbians, including both the right to sexual freedom and the right to marry. After the former beauty queen Anita Bryant and her anti-gay group, Save Our Children, mobilized to repeal a gay rights ordinance in Miami, some movement members blamed the privacy and choice language that had been borrowed from \textit{Roe}. The New Right exploited these connections to tie abortion rights to loose morals and a more controversial agenda of radical social change. Choice was “the code word for abortion”, Schlafly said, “much as ‘different lifestyles’ [is] the code word for homosexuality.”\textsuperscript{94}

\textit{Roe} is sometimes blamed for improperly nationalizing the abortion question. The problem, though, wasn’t that abortion became a national issue — most Americans support reading a basic right of reproductive freedom into the federal Constitution, thereby necessarily making it a national issue. And abortion rights opponents at the time of the decision did not typically respond by attacking the “activism” of the Court. Indeed, a major plank of anti-abortion legal advocacy in the early 1970s resonated with the German model: courts had to protect fetal life from the vagaries of state politics. The problem, rather, was that \textit{Roe} drew the stakes so starkly, and so thinly — women’s medical decisions versus fetal life — that its critics were easily able to translate a legal argument about the “due process clause” into the special vernacular of movement politics.\textsuperscript{95}
For example, the *Roe* decision encouraged an absolutist rhetoric around privacy rights and medical autonomy that made it easier to mobilize against public funding for abortions. Illinois Congressman Henry Hyde, co-sponsor of the 1976 law preventing Medicaid coverage for abortions, explained in writing his reason for the Amendment using a quote from Robert Bork when he was Solicitor General: “The privacy right vindicated in *Roe v. Wade* . . . is not the right affirmatively to obtain an abortion, but rather the lesser right to be free to seek abortion services without government obstruction or interference,” Bork said. “The government has no constitutional obligation financially to facilitate the exercise of privacy rights.” The grand bargain that lowered the temperature of German abortion discourse was a constitutional recognition of the value of fetal life in exchange for a holistic approach to protecting that life. This holistic approach meant that women needed support from the state in order to make meaningful reproductive choices. Because indicated abortions were understood as urgent and not “just” a choice — and under the 1976 law, this included socially indicated abortions — they should be paid for out of public insurance like any other medical necessity. *Roe* did not distinguish “chosen” from “indicated” abortions except in the third trimester, and so it was easy to mobilize against public money. Indeed, the Hyde Amendment had an exception for abortions needed to save the pregnant woman’s life.96

Of course, Germany is a social welfare state, and so public assistance for abortions and for parents caring for young children was always going to be an easier sell there than in the United States. Reagan’s ascendant neoliberal agenda made the language of “choice” an especially appealing rallying cry for the abortion rights movement and made a grand bargain centered around financial security for families and regulation of childcare seem all the more remote. Still, it is worth noting that the terms of the German abortion détente were not part of the conversation in West Germany until the Court forced both sides to give something up. The abortion rights movement in the United States has continued to emphasize
the language of “choice” not only because of the resonance the idea has with many supporters but because movement leaders have not perceived a viable alternative frame. Emphasis on the need for public funding that supports the “choice” of poor women is simply not politically saleable.97

Abortion rights opponents have leapt into the void. The ascendant trope of “post-abortion syndrome,” for example, emphasizes those women who have developed regrets about having had abortions. As Ferree notes, organizations such as American Victims of Abortion, Birthright, and Feminists for Life argue that degradation of fetal life leads women to abort too easily and without the support needed to make good decisions. In a 2007 Supreme Court case about the federal ban on so-called partial birth abortions, Justice Kennedy wrote in his majority opinion: “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.” Kennedy cited to a brief that had been submitted in the case by Sandra Cano, the “Doe” in Roe’s companion case Doe v. Bolton, who has since become an anti-abortion activist. The Cano brief was on behalf of herself and “180 women hurt by abortion.” It described depression, suicidal thoughts, substance abuse, promiscuity, and other ills resulting from, in the brief’s words, “the ‘choice’ [of these women] to abort their baby.” The women “have regretted their ‘choices,’” the brief added, putting the word “choice” in quotes for emphasis.

Much of the reaction on the left to Justice Kennedy’s reliance on the Cano brief and argument was to criticize him for echoing anti-abortion tropes rather than to acknowledge the presence of abortion regret as a powerful argument for social welfare and — in its absence — the availability of abortion. The urge has been to destigmatize abortion — to call for women to “shout” their abortions — thereby alienating women who want but cannot have children (including some who had abortions solely because of financial distress). Because the pro-choice movement has strategically abandoned the discourse of support, with its implication that some women may in fact regret having made the termination decision, it
has opened a space for the anti-abortion community to build ties to such women.

To be fair, the Court’s approach to abortion has changed in important ways since Roe. Like their German counterparts, the U.S. Justices had an opportunity to reconsider their abortion law in the early 1990s. The occasion was not a political compromise, as in Germany. Rather, it was the dawn of a new Court. With Clarence Thomas’s replacement of Thurgood Marshall, the last five Justices to join the Court were assumed abortion opponents, and each of the Justices they replaced had been members of the Roe majority. With Roe dissenters William Rehnquist and Byron White still on the Court, the overruling of Roe seemed less a question of if than when. So in October 1991, when a court of appeals judge by the name of Samuel Alito wrote an opinion upholding a Pennsylvania law that, among other things, imposed a 24-hour waiting period and required women to notify their spouses before obtaining an abortion, the stage was set for Roe’s final act. The ACLU and Planned Parenthood’s southeast Pennsylvania affiliate took the unusual step of petitioning to the Supreme Court just three weeks after the decision. If the Court was going to overturn Roe, as many expected, advocates were eager for the case to be decided in time to make the 1992 presidential election into a referendum on the issue. The petition to the Supreme Court urged the Justices to answer a single question: “Has the Supreme Court overruled Roe v. Wade, holding that a woman’s right to choose abortion is a fundamental right protected by the United States Constitution?” The fashioning of abortion rights as a zero-sum battle between the rights of women and the lives of their fetuses had positioned the Supreme Court Justices as the ultimate referees of that battle. For abortion rights opponents, the Court’s membership took on an existential cast.

When the ultimate decision in Planned Parenthood v. Casey came down in June 1992, the Court did not overrule Roe but instead modified it. A surprise opinion by the Court’s most centrist Justices — O’Connor, Kennedy, and Souter — recognized and sought to correct two problems
with Roe. In doing so, it neglected and in some ways exacerbated a third problem. First, the Justices emphasized that the state had interests in potential fetal life prior to viability. This meant that the state could pass informed consent, parental consent, and waiting period laws in order to encourage the woman’s choice to be more deliberate. This was meant as a corrective to the Roe Court’s thin understanding of the state’s interest. Second, the Casey trio described the women’s interest not in terms of the medical judgment of her (likely male) doctor, as the Roe Court had, but instead as among “the most intimate and personal choices a person may make in a lifetime.” In the words of the three Justices, “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” In reconciling the state’s interest with women’s rights, the Court held that the state may not impose an “undue burden” on a woman’s right to have an abortion prior to viability.100

Casey proceeded from noble instincts. Certainly it seems more sensitive to say that a state has some interest in potential fetal life rather than to deny that possibility entirely. And certainly it seems more respectful to assign the right to terminate a pregnancy to the woman and not to her doctor. The Casey Court’s progress along both these dimensions is commendable. But the Casey Court believed that its job was to depoliticize abortion rights, when in fact its job was just the opposite. Indeed, the three Justices said that Americans’ “belief in themselves as [a people who aspire to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.”101 This is quite wrong. The job of the Court is not to speak before all others for our constitutional ideals, but to speak with all others. It is not to eliminate political conversation around difficult issues but to facilitate it.

The state had already spoken for a constitutional ideal, on its understanding, namely by passing a law designed to protect fetal life. To describe the state’s commitment to fetal life in terms of its “interests”—no
different, say, than its interest in tax revenue—makes less visible the
correlative duties rights give rise to. A right to fetal life might not only
justify abortion restrictions but might require that pregnant women be
given a certain degree of prenatal care, paid work leave, and meaningful
options to choose childbirth. A Court attentive to fetal rights would have
been better able to interrogate the rationality of the state’s position. Leaning
into the language of women’s autonomy was laudable in rejecting the
paternalism of Justice Blackmun’s purely medical frame, but it doubled
down on the notion that abortion is a decision women make alone. Support
for women struggling with their choice or in need of better options, though
not inconsistent with abortion rights and choice, tends to drop out of the
political conversation. What has taken its place are measures like Alabama’s
virtual total ban on abortion, the text of which explicitly (and unfavorably)
compares legal abortion to the Holocaust, Soviet gulags, Cambodian killing
fields, and the Rwandan genocide. The ascension of a Supreme Court
Justice, Brett Kavanaugh, believed to be favorable to the state’s position
encouraged it to press its advantage to the maximum possible extent.¹⁰²

The point here is not to laud the German abortion law, which many
will object to, but to laud the way in which it came about. Abortion is a
subject of German politics not because Germans agree about abortion any
more than Americans do but, in significant part, because Germany’s highest
court sought to put abortion into politics instead of take it out. That is just
what courts should be doing in a divided society. And the way for courts
to do that is to recognize more rights, and thereby give more people voice
and leverage within high-stakes politics. Scott Roeder thought he had no
leverage, and so he took politics into his own hands. We shouldn’t make
constitutional law to appease murderers, but the prevalence of people
holding Roeder’s views should give us serious pause. Like Americans,
Germans disagree vehemently about abortion. But unlike Americans,
Germans do not resolve conflicts over abortion by passing laws like
Alabama’s, much less by killing and maiming each other. Rights on both
sides of this intense moral conflict are governed by and enforced through
ordinary law and politics, not by the trolling of women seeking abortions and certainly not by people like Roeder.

The Problem of Sex Selection

I end the discussion of abortion with a challenge. The fetal right to life and the woman’s right to reproductive autonomy or to social equality are not the only rights conflicts that can complicate the abortion debate. A number of countries, and nine states, have enacted bans on obtaining an abortion for the purpose of rejecting a disfavored sex, typically girls. It is anathema within the U.S. “choice” paradigm to restrict the reasons for which a woman may obtain an abortion at any stage prior to viability. Under Roe, the only justification for a state regulating abortion before the third trimester was to protect the woman’s health. Under the modern Casey regime, the state may additionally pass laws prior to viability that are “aimed at ensuring that a woman’s choice contemplates the consequences for the fetus,” but the state may not ultimately interfere with that choice. The Supreme Court has never upheld a state’s effort to confine abortion to certain reasons along the lines of the German indications model.103

Many abortion rights proponents in the United States defend the legality of sex-selective abortion as encompassed within a woman’s nearly unqualified right to control her own reproduction. In fact, when Kentucky passed a law banning sex selective abortion (among other things) in March 2019, the ACLU sued immediately. A ban on sex selection opens the door to doctors or police probing a woman’s reasons for abortion in ways that can be patronizing. The probe itself is an interference with her autonomy. Permitting sex-selective abortion might also in some circumstances help to prevent female infanticide. But to view sex selection as simply one among many other reasons a woman might choose an abortion seems insensitive to the equality dimensions of this practice. Selective abortion of female fetuses is widespread in parts of East and South Asia and Eastern Europe in which abortion is not itself highly stigmatized and cultural norms favor male children. There is little evidence of widespread sex-selective abortion
in the United States except among some parents of certain nationalities, but
the practice is difficult to defend on its own terms.104

The U.S. model of abortion rights denies us the resources to think
this problem through. The slightest concession that society is permitted to
deeM some abortion choices to be poor ones endangers the rest of the choice
defense. And so to preserve the absolute supremacy of choice requires one
to deny any rights dimension to sex selection, just as it requires a denial of
any fetal rights at all. With more than three out of four Americans in favor
of a sex-selection ban, abortion rights proponents are forced simply to cede
ground to opponents who can accuse them, rightly, of having no answer to
a genuine human rights problem. It is not surprising that a law such as
Kentucky’s does not distinguish first- and second-trimester abortions and
does not, for example, contain an exception for inherited sex-linked
diseases such as hemophilia or Duchenne muscular dystrophy. The kind of
political negotiation that could temper the reach of the law is rare in U.S.
abortion politics. Courts could do much to change that.105

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The Supreme Court’s willful blindness to conflicts of rights is not just
a problem for abortion rights. The Court almost never acknowledges the
presence of constitutional rights on both sides of a case it hears. The next
chapter explores one consequence of this posture: its exacerbation of
political polarization. For now, consider two puzzles of constitutional law
that making rights conflict visible helps us to solve. Chapter 3 introduced
us to the Griswold case, which struck down a Connecticut law prohibiting
even married couples from using birth control. Constitutional scholars have
long debated how to distinguish Griswold from two cases that are subject to
intense criticism that Griswold somehow escapes: Lochner and Roe. The
language of rights conflict gives us an enticing tool for solving the puzzles.

Recall that the Lochner Court invalidated a New York law limiting
the working hours of bakers. The critique of the case that continues to
dominate U.S. constitutional law is that the Court invented a right to
contract, and that economic rights of this sort are no part of our
Constitution. Griswold is not a case about economic rights — so far, so good
— but the right to use birth control is no more specific in the Constitution than the right to contract. Indeed, it is less so. Article I, section 10 of the Constitution prohibits states from “impairing the obligations of contracts,” and the right to make and enforce contracts was clearly one of the “privileges or immunities” that the Fourteenth Amendment was designed to protect against state abridgement. And so the standard critique of *Lochner* seems to suggest that *Griswold* is also wrong. The existing strategies for getting around this problem are not very satisfying. They focus on ways of thinking about the right to privacy or the right to reproductive freedom as somehow more worthy of protection than the right to contract, even though those rights are not to be found in the Constitution’s text and are foreign to its history.

But understanding that rights can coexist on both sides of a constitutional dispute reveals an important difference between *Lochner* and *Griswold*. The New York Bakeshop Act was an effort to protect the rights of workers from exploitation. The Court could not see that, and so it placed undue weight on the right to contract on the other side of the dispute. The problem in *Lochner* wasn’t, then, that there is no right to contract — there is! — but that the right to contract must compete with other rights that are protected through law. In fact, we know that such rights exist because the Constitution tells us they do. The Ninth Amendment reads: “The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” This language is sometimes thought to authorize judges to recognize constitutional rights that are not specified in the text. Whatever one thinks of that interpretation, the more obvious reading of the Ninth Amendment from the perspective of the Founding is that it requires judges to recognize and preserve constitutional rights protected through local democratic institutions such as legislatures. The New York legislature should have received more deference in striking a balance between rights, or at least some acknowledgement of its important role in doing so.106

By contrast, the Connecticut birth control ban was not meant to protect anyone’s rights. Estelle Griswold was prosecuted under the state’s 1879 Comstock law targeting “Offenses Against Decency, Morality and
Humanity.” The Connecticut law did not deserve anything more than the usual deference owed a democratically enacted law. In fact, given that the state had basically never tried to prosecute anyone under the law, it was owed much less deference. Criminal laws that remain on the books for generations without any prosecutions implicitly transfer the power to make law from legislatures to police and prosecutors, who can use the law’s presence as a pretext for improper targeting of disfavored individuals. This is the chief problem with morals legislation of other sorts, such as sodomy, adultery, and fornication laws. From a rights perspective, the law struck down in Griswold had it coming from multiple directions.¹⁰⁷

Roe is grounded in the same right of privacy discovered in Griswold, but it was far more controversial. Standard critiques of Roe as having invented a constitutional right out of whole cloth are, again, irreconcilable with the widespread support Griswold enjoys. The problem with Roe is not that women don’t have constitutional rights to reproductive autonomy. Rather, the problem is that the state was acting to protect a competing right to life that the Court should have met on its own terms. Doing so would not have required the Court to reject women’s rights. It would, however, have forced the Justices to offer an account of abortion conflict that makes visible the constitutional claims on all sides.

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17 Feldman 11; Hirsch 100; Parrish 200.
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31 *Gobitis*, 310 U.S. at 600.
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