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The History of Neutrality: *Dobbs* and the Social-Movement Politics of History and Tradition

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ABSTRACT. By excavating the history around the history-and-tradition test used in *Dobbs v. Jackson Women's Health Organization* and the alternative it pushes to the side, this Essay reconsiders the meaning—and plausibility—of neutrality claims turning on the *Dobbs* Court's use of history and tradition.

INTRODUCTION

To hear the Supreme Court tell it, the end of abortion rights will begin a new era of judicial neutrality. In *Dobbs v. Jackson Women's Health Organization*, the majority reasoned that by adopting an approach to unenumerated rights rooted in history and tradition, the Court could "guard against the natural human tendency to confuse what [the Fourteenth] Amendment protects with our own ardent views about the liberty that Americans should enjoy."[1]

Understanding what the Court means by neutrality—and how the majority defines its relationship to history and tradition—has high stakes for unenumerated but fundamental rights housed in substantive due process jurisprudence. In *Dobbs*, for example, Justice Thomas's concurrence suggested that a commitment to judicial neutrality requires the Court to jettison its substantive due process jurisprudence, since the doctrine itself "exalts judges at the expense of the People from whom they derive authority."[2] The dissenters in *Dobbs* likewise indicated that what the Court means by history and tradition will decide the future of

1. 142 S. Ct. 2228, 2247 (2022).

2. *Id.* at 2302 (Thomas, J., concurring).

rights to same-sex marriage, contraception, and intimacy.[3] "Either the mass of the majority's opinion is hypocrisy," the dissenters reasoned, "or additional constitutional rights are under threat."[4]

Perhaps most centrally, the Court staked its claim to the legitimacy of *Dobbs*—and other decisions that will implement its history-and-tradition method—on the neutrality such an approach ostensibly delivers.[5] The *Dobbs* majority flagged the recognition of unenumerated rights as a particularly fraught exercise, one that makes it easy to fall prey to the kind of "freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*."[6] The Court should guard against this abandonment of neutrality, the *Dobbs* majority explained, by focusing on "the history and tradition that map the essential components of our liberty."[7] Justice Kavanaugh likewise promised in concurrence that the Court can maintain judicial neutrality in the area of unenumerated rights by adhering to an approach centered on history and tradition.[8]

Legal scholars have debated the meaning of judicial neutrality, asking whether it is a myth,[9] detailing cross-cutting debates about its meaning,[10] and

3. *Id.* at 2319 (Breyer, Kagan & Sotomayor, JJ., dissenting) (suggesting that under the majority's reasoning "all rights that have no history stretching back to the mid-19th century are insecure").

4. *Id.* The meaning of the history-and-tradition test will also shape conversations within the Court about enumerated rights. Marc O. DeGirolami suggests that the Court's embrace of a history-and-tradition test signals the rise of a new, traditionalist approach to constitutional interpretation, one that privileges some voices from the constitutional past while giving "strong weight to the concurrence of many geographically and temporally disparate sources." Marc O. DeGirolami, *Traditionalism Rising*, J. CONTEMP. LEGAL ISSUES 6-7 (forthcoming), https://ssrn.com/abstract=4205351 [https://perma.cc/7WK9-HMT3]. Randy E. Barnett and Larry B. Solum instead contend that the Court's use of history and tradition in cases like *Dobbs* is nothing new—and can be broadly reconciled with a jurisprudence focused on the original public meaning of the Constitution. Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs, Bruen, *and* Kennedy: *The Role of History and Tradition*, 118 NW. U. L. REV. 26-28 (forthcoming 2023), https://ssrn.com/abstract=4338811 [https://perma.cc/B4W4-QML5]. Who is right about the history-and-tradition test will tell us a great deal about the Court's approach to the Bill of Rights in the years to come.

5. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247, 2278-80 (2022).

6. *Id.* at 2248.

7. *Id.*

8. *Id.* at 2304-05 (Kavanaugh, J., concurring).

9. *See* Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

10. *See* Frederick Schauer, *Neutrality and Judicial Review*, 22 L. & PHIL. 217 (2003).

studying its relationship to impartiality.[11] Focusing on the conflicts about reproduction and sexuality that shaped *Dobbs*, this Essay unearths an understudied debate about neutrality that unfolded outside of the academy—one closely tied to the role played by history and tradition in the recognition of unenumerated rights.

The *Dobbs* majority positions its history-and-tradition test as a natural outgrowth of its commitment to judicial neutrality in the area of substantive due process.[12] Understood in historical context, however, the *Dobbs* Court's approach to history and tradition appears radically different: as the byproduct of coalition-building on the right, and the end result of social-movement struggle over the extent to which the nation's traditions are dynamic and inclusive rather than static and inherently hierarchical.

Other scholarship has explored the appeal of originalist methods to politicians and activists looking to forge a cohesive conservative legal movement.[13] Originalism provided a common language for conservative groups with disparate goals, and the then-liberal Supreme Court offered a shared target for various activists who often disagreed with one another.[14] In its early decades, the nascent conservative legal movement—which was far more marginalized than the conservative legal movement of today—challenged the legal status quo in ways that easily could have seemed extreme or simply political. By invoking original intent, the Federalist Society and its allies argued that its movement sought to revive an objectively ascertainable constitutional past, not to spark a legal revolution. The conservative legal movement accused the judges, lawyers, and professors in positions of power in the legal community of ignoring the law in favor of their own political preferences.

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11. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

12. *Dobbs*, 142 S. Ct. at 2247-48, 2278-80.

13. Robert Post & Reva B. Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 554-55 (2006) (exploring how originalism "served as an ideology that inspires political mobilization and engagement"); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 241-42 (2006) (explaining how arguments from original intent allowed gun-rights activists to forge common cause with other conservative groups and provided conservatives "authority that could legitimate their new exercises of public authority as the Constitution"); Calvin TerBeek, *"Clocks Must Always Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 822 (2021) (exploring the political advantages of originalist arguments for segregationists resisting *Brown*); Mary Ziegler, *Originalism Talk: A Legal History*, 2014 B.Y.U. L. REV. 869, 870-93 (studying the role played by originalist arguments in the alliance between the Republican Party, the antiabortion movement, and the conservative legal movement).

14. Siegel, *supra* note 13, at 241-45; Ziegler, *supra* note 13, at 870-88.

Arguments based on a narrow version of original intent at times had a more limited appeal for conservative Christian lawyers and antiabortion litigators. Some wanted to constitutionalize Christian traditions that predated the Founding; others were simply unsure if arguments based on original intent would lead to their preferred outcomes on questions from fetal personhood to school prayer. A history-and-tradition test, therefore, seemed more malleable than a test exclusively focused on the founding: it could account for earlier, even sacred traditions, and might deliver wins that originalism would not. A unitary history-and-tradition test offered an evolving conservative coalition a unique opportunity to find common ground in the high-stakes arena of substantive due process.

This history-and-tradition test existed alongside and sometimes clashed with a more expansive, dynamic, and inclusive version for decades before the *Dobbs* decision. *Dobbs*'s test emerges from this history not as the inevitable extension of the Court's commitment to neutral judging, but as one point in a longer movement-countermovement struggle over the nature of the nation's history and traditions — and who is allowed to shape them.

In the years between 1950 and the present, in struggles over reproduction and sexuality, some justices and popular movements adopted what I call a pluralist history-and-tradition test that framed the nation's traditions as fluid, dynamic, and inclusive.[15] This understanding developed as a middle ground between originalism and living constitutionalism: movements and judges embracing it insisted that history and tradition served as a key constraint on the courts, while acknowledging that the meaning of tradition changed over time. An alternative coalition took what this Essay calls a unitary approach to history and tradition, which suggested that tradition is (and should be) unchangeable and rooted in the Judeo-Christian values that were argued to animate the nation's founding.[16]

In adopting the latter unitary definition of history and tradition, *Dobbs* proposed that its understanding is an inevitable outgrowth of precedent, specifically *Washington v. Glucksberg*.[17] That the *Dobbs* Court staked its claim to neutrality

15. *See infra* Part I. Miranda McGowan identifies four versions of the history-and-tradition test. *See* Miranda McGowan, *The Democratic Deficit of* Dobbs, LOY. U. CHI. L.J. (forthcoming 2023) (on file with the author). Reva B. Siegel, by contrast, describes this version of a history-and-tradition approach as dynamic, for it reflects the view that later generations must determine the meaning of the Constitution for themselves. Reva B. Siegel, *The History of History and Tradition: The Roots of* Dobbs*'s Method (and Originalism) in the Defense of Segregation*, 133 YALE L.J.F. 99 (2023). This dynamism, for social movements, also promised a more inclusive and pluralist approach to history and tradition, one that accounted for the views of those historically at the margins as well as those in positions of power.

16. *See infra* Part II.

17. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242-43 (2022) (citing Washington v. Glucksberg, 521 U.S. 702 (1997)).

on precedent is ironic, for as other scholars have noted, the *Dobbs* Court not only rejected a well-established precedent, but also unsettled substantive due process jurisprudence[18] and changed the rules governing stare decisis.[19] But the *Dobbs* Court's invocation of *Glucksberg* signaled more than an inconsistent approach to precedent: the vision of history and tradition embraced in *Dobbs* arose well before *Glucksberg*, as the result of party politics and social movement struggles over sodomy laws, death and dying, and abortion. Invoking precedent's claim to neutrality, the *Dobbs* Court mischaracterized *Glucksberg*, all while brushing aside decades of movement conflict about how a history-and-tradition test should work.[20]

By excavating the history around the history-and-tradition test used in *Dobbs* and the alternative pluralist approach it pushes to the side, this Essay reconsiders the meaning—and plausibility—of neutrality claims turning on the *Dobbs* Court's use of history and tradition. Recovering past battles about the history-and-tradition test allows us to appreciate better how, over the decades, the idea of judicial neutrality has in fact been deployed non-neutrally, in the service of a shifting, and at times divisive, set of social values. *Dobbs* pays lip service to neutrality without achieving it.

Second, the strategic deployment of neutrality—and claims tying it to history and tradition—helps make sense of how the history-and-tradition test adopted by the *Dobbs* Court was designed and is likely to operate, both in the context of unenumerated rights and beyond. Dialogue about equality, pluralism, and the communities that define the Constitution has long been at the heart of the debate over whether (and how) history and tradition should define unenumerated rights. The Court's current approach to history and tradition, which has roots in

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18. *See* David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 3 (2023) ("The Court . . . upended longstanding precedent."). Reva B. Siegel, Serena Mayeri, and Melissa Murray have also noted the Court's puzzling willingness to reverse decades of *Roe* while relying on a flawed account of precedent to foreclose sex equality arguments for abortion rights. *See* Reva B. Siegel, Serena Mayeri & Melissa Murray, *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside the Context of Abortion*, 43 COLUM. J. L. & GENDER 67, 69 (2022) ("Justice Alito's claim to address equal-protection precedents without discussing any of these decisions suggests an unwillingness to recognize the last half century of sex equality law.").

19. *See* Nina Varsava, *Precedent, Reliance, and* Dobbs, 136 HARV. L. REV. 1845, 1911 (2023) (explaining that *Dobbs* "appears to have overruled *Casey* not just as a precedent about abortion, but as a precedent about precedent too").

20. *See* Marc Spindelman, The Gambit and the Gap: *Glucksberg* and the Lawlessness of *Dobbs*' Originalism (unpublished manuscript) (on file with author); *but see* Linda C. McClain & James E. Fleming, *Ordered Liberty After* Dobbs, 35 J. AM. ACAD. MATRIM. L. 624, 626-28 (2023) (interpreting *Glucksberg* as "the proper approach only for justices who oppose and wish to eliminate the expansion of substantive due process rights").

constitutional coalition-building on the right, emerged from the crucible of constitutional conflict.

Furthermore, that history reinforces the importance of candor as a check on the courts. While judicial neutrality is primarily aspirational, the principle of accountability for the Court is not. As *Dobbs* exemplifies, our constitutional politics involve a complex dialogue between the Court, elected officials, social movements, and even voters. To debate whether a decision is defensible, or to seek to move beyond it, one must not only understand the principles shaping a ruling but also have a clear understanding of the alternatives rejected by the Court in endorsing one principle over another. By presenting its idea of history and tradition as uncontested and uncontestable, the *Dobbs* Court failed this minimum requirement of candor.

The rest of this Essay proceeds in four parts. Part I chronicles the rise of a pluralist understanding of history and tradition in the struggles over segregation and birth control in the 1950s and 1960s. Part II traces the emergence of a unitary approach to history and tradition as antiabortion lawyers and the broader conservative legal movement mobilized to redefine judicial neutrality in the 1980s. Part III uses this history to contextualize and critique the account of history and tradition offered as proof of neutrality in *Dobbs*.

I. THE PLURALIST HISTORY-AND-TRADITION TEST

Glucksberg's articulation of a history-and-tradition test relies, as the *Dobbs* majority implied,[21] on a line of decisions ending with *Moore v. City of East Cleveland*[22] in 1977.[23] These cases do not simply call for neutral judging in the face of "freewheeling judicial policymaking."[24] *Moore* and the cases preceding it came at a time of intense conflict about gender roles, changing sexual mores, and shifting ideas of family, some of it framed in terms of claims made on the Constitution. At times, the justices turned to what this Essay calls a pluralist history-and-tradition test to balance concern for neutrality with the changing terms of contemporary constitutional culture. A pluralist history-and-tradition test looks to the past to define unenumerated rights, but insists that the nation's traditions can change, as previously marginalized groups gain respect and as modern understandings of liberty evolve.

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21. *Dobbs*, 142 S. Ct. at 2247-48.

22. 431 U.S. 494 (1977) (plurality opinion).

23. Washington v. Glucksberg, 521 U.S. 702, 710 (1997) (pointing also to Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), and Cruzan by Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990)).

24. *Dobbs*, 142 S. Ct. at 2248.

In the 1950s, when a debate erupted about judicial neutrality and the legitimacy of the Supreme Court's decision in *Brown v. Board of Education*,[25] claims about original meaning already played a role in definitions of judicial neutrality.[26] In the litigation of *Brown*, lawyers defending de jure segregation stressed, as Reva B. Siegel shows in this Collection, that states routinely segregated schools at the time the Fourteenth Amendment was ratified; this state practice, in turn, reflected the understanding of the Amendment's ratifiers.[27] In 1956, ninety-six members of Congress denounced the *Brown* Court for ignoring the original intent of the Fourteenth Amendment and substituting its "personal political and social ideas for the established law of the land."[28] Segregationist politicians across the South attacked the Court for unfairly privileging the harms caused by segregation over the injury segregationists claimed would be produced by integrating schools and for ignoring state practice at the time the Fourteenth Amendment was ratified.[29]

Herbert Weschler's famous 1959 article, *Neutral Principles*, brought this conflict about *Brown* and equal protection into the academy.[30] Wechsler defined a neutral judicial decision as "one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved."[31] He reasoned that *Brown* failed this test because it was rooted in concern for the plight of Black Americans rather than some generalizable principle and, as such, heightened concern that "the courts are free to function as a naked power organ."[32]

That Wechsler said little about history and tradition in his definition of judicial neutrality may seem striking to a contemporary audience. But at the time Wechsler was writing, that absence might have seemed natural,[33] since the idea that history and tradition should guide the Court's analysis of equal protection

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25. 347 U.S. 483 (1954).

26. On the nature of debates about neutrality and legitimacy after *Brown*, see Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1475-1562 (2004).

27. Siegel, *supra* note 15, at 112-20.

28. 102 CONG. REC. 4460 (1956) (statement of Sen. Walter F. George).

29. Siegel, *supra* note 26, at 1478-90.

30. Wechsler, *supra* note 11.

31. *Id.* at 19.

32. *Id.*

33. *See* Gori v. United States, 367 U.S. 364, 499-501 (1961) (Harlan, J., dissenting).

was still inchoate, and originalism (even proto-originalism) was still underdeveloped in the academy and uninfluential outside of it.[34] Indeed, Southern segregationists' focus on state-counting as a way to determine the original public meaning of the Fourteenth Amendment failed in *Brown*, where the Court stressed that it could not "turn the clock back to 1868."[35]

The role played by history or tradition in defining the contours of substantive due process rights also remained unclear. At times, before the 1960s, various justices suggested that tradition should play a role in illuminating which rights counted as "necessary to our system of ordered liberty."[36] But these decisions did not say much about precisely how relevant — or how important — tradition was to the recognition of unenumerated rights. In *Lochner v. New York*, for example, when the Supreme Court recognized a substantive due process right to freedom of contract, Justice Holmes's dissent implied that tradition should serve as some kind of limit on the recognition of unenumerated rights: namely, when "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."[37] In *Snyder v. Massachusetts*, a majority likewise indicated that history and tradition should help elucidate the meaning of the Fourteenth Amendment.[38] The defendant in *Snyder* argued that the Fourteenth Amendment gave him a right to be present while the jury inspected a crime scene.[39] Rejecting his claim, the Court held that government actions violate the Due Process Clause only if they offend "some principle of justice so rooted in the *traditions* and conscience of our people as to be ranked as fundamental."[40]

Snyder suggested that judges would glean the meaning of history and tradition from practice at the time of the founding, or even before[41] (for example, the *Snyder* Court stressed that, at common law, defendants generally had no right to be present for jury visits).[42] But other ideas of due process were already present

34. TerBeek, *supra* note 13, at 830 (explaining that the legitimization of originalism came later, in the 1970s and 1980s, when academic figures like Robert H. Bork retooled political arguments about original intent). For more on the legitimization of originalism, *see* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Constitutionalism — And Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1133-34 (2023).

35. Brown v. Bd. of Educ., 347 U.S. 483, 492 (1954).

36. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2247 (citing McDonald v. City of Chicago, 561 U.S. 742, 778 (2010)).

37. 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

38. 291 U.S. 97, 105 (1934).

39. *Id.* at 97-101.

40. *Id.* at 105 (emphasis added).

41. *See id.*

42. *See id.* at 104-05, 113.

in the Court's jurisprudence. For example, in *Palko v. Connecticut*, the Court addressed a double jeopardy claim brought by Frank Palka (whose name would be forever misspelled as "Palko"), a man who broke into a store, stole a phonograph, and murdered a police officer while making a getaway.[43] A Connecticut jury convicted Palka of second-degree murder, but the state appealed, invoking a Connecticut law permitting new trials when there had been an error "to the prejudice of the state."[44] The Court held that double-jeopardy protections did not qualify as a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[45] But in reaching the conclusion, the Court said almost nothing about the constitutional past.[46] "Reflection and analysis" were all that was required—i.e., whether the Court could imagine an equitable justice system without such a right.[47] Similarly, in *Wolf v. Colorado*, a 1949 case on the Fourth Amendment exclusionary rule, Justice Frankfurter stressed in dicta that it is "the very nature of a free society to advance in its standards of what is deemed reasonable and right."[48]

Two years after the publication of Weschler's *Neutral Principles*, Justice Harlan II developed more fully a kind of pluralist history-and-tradition test in dissent in *Poe v. Ullman*.[49] *Poe* addressed the constitutionality of a Connecticut law barring even married couples from using contraception.[50] When the case reached the Court in 1961, the family-planning movement had achieved significant success in mainstreaming contraception.[51] The birth-control pill had been on the market for a year[52] and the federal government—with support from both political parties—was considering legislation to support family planning in the name of reducing both domestic and international population growth.[53] The

43. Brief for Appellant at 3-4, Palko v. Connecticut, 302 U.S. 319 (1937) (No. 135).

44. *Palko*, 302 U.S. at 321.

45. *Id.* at 325 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

46. *Id.* at 320-28.

47. *Id.* at 325.

48. 338 U.S. 25, 27 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

49. 367 U.S. 497, 522-55 (1961) (Harlan, J., dissenting).

50. *See id.* at 499-500.

51. On the struggle for family planning in the mid-twentieth century, see LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 260-375 (2002).

52. On the approval and effect of the birth control pill in the 1960s, see ELAINE TYLER MAY, AMERICA AND THE PILL: A HISTORY OF PROMISE, PERIL, AND LIBERATION 35-94 (2011).

53. On the rise and impact of the population control movement on federal policy, see DONALD T. CRITCHLOW, INTENDED CONSEQUENCES: BIRTH CONTROL, ABORTION, AND THE FEDERAL GOVERNMENT IN MODERN AMERICA 50-112 (1999); and Rickie Solinger, *Bleeding Across Time: First*

family-planning movement sought to undo remaining restrictions on birth control, and feminists within the movement insisted that the Constitution protected a right to contraception.[54] Representing three married women whose health and relationships were threatened by the law, attorney Fowler Harper argued in *Poe* that Connecticut's law lacked a rational basis.[55]

The Supreme Court ultimately concluded in *Poe* that the plaintiffs had not suffered a redressable injury because they faced neither a prosecution under the Connecticut law nor a realistic threat of one (the majority emphasized that birth control was "commonly and notoriously sold in Connecticut drug stores").[56] Justice Harlan dissented.[57] He reasoned that if married couples had a constitutional right to use birth control, it was not enough to say that "the only thing which stands between them and being forced to render criminal account of their marital privacy is the whim of the prosecutor."[58] Harlan then addressed how the Court should identify unenumerated rights, referencing the balance that the nation had "struck between that liberty and the demands of organized society."[59] To achieve this balance, the Court should consult "what history teaches are the traditions from which it developed as well as the traditions from which it broke."[60] But the meaning of neither history nor tradition was fixed. "That tradition," Harlan wrote, "is a living thing."[61]

Harlan had adopted what this Essay calls a pluralist view of history and tradition. This understanding still privileges an imagined constitutional past, rather than a more abstract set of constitutional values, but suggests that tradition is contested. As different (even marginalized) communities advance their own ideas about the nation's defining values, their understandings may gain acceptance. Constitutional conflict ensures that some traditions lose respect even as others remain ascendant.

This idea of history and tradition was not living constitutionalism *tout court*. The idea of living constitutionalism, too, was inchoate in the early 1960s, but reflected the basic premises of the argument made by Charles A. Beard in 1936:

Principles of US Population Policy, *in* REPRODUCTIVE STATES: GLOBAL PERSPECTIVES ON THE INVENTION AND IMPLEMENTATION OF POPULATION POLICY 63-98 (Rickie Solinger & Mie Nakashi eds., 2016).

54. On the role of birth-control arguments in second-wave feminism, see GORDON, *supra* note 51, at 310-39.

55. *See* Brief for Appellants at 11-19, Poe v. Ullman, 367 U.S. 497 (1961) (Nos. 60, 61).

56. *Poe*, 367 U.S. at 502.

57. *See id.* at 536-55 (Harlan, J., dissenting).

58. *Id.* at 536.

59. *Id.* at 542.

60. *Id.*

61. *Id.*

"Since most of the words and phrases dealing with the powers and the limits of government are vague and must in practice be interpreted by human beings, it follows that the Constitution as practice is a living thing."[62] Underscoring that the meaning of the Constitution had to change to meet the needs of a new generation, Charles A. Reich elaborated on this point in 1963.[63] "A constitutional provision can maintain its integrity only by moving in the same direction and at the same rate as the rest of society," Reich explained. "In constitutions, constancy requires change."[64] Harlan's idea of history and tradition, by contrast, still assigned "communities of the past" a central role in determining constitutional meaning.[65] At the same time, under Harlan's test, the nation's lawmaking communities could shift and even expand, and the nation's traditions could accommodate the views of those who were historically disempowered as well as those who had conventionally played a role in government.

This idea of history and tradition defined the Court's decision in *Moore v. City of East Cleveland*.[66] East Cleveland was zoned for single-family occupancy, and the city's definition of "family" excluded Inez Moore, who was living with and raising her two grandsons.[67] Zoning laws like the one in *Moore* got dragged into conflict with the changing meaning of family as rates of nonmarital cohabitation began to rise,[68] civil rights leaders and feminists challenged the treatment of nonmarital children,[69] and civil libertarians questioned the sexual policing of the unmarried.[70] In its amicus brief in *Moore*, the American Civil Liberties Union

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62. Charles A. Beard, *The Living Constitution*, 185 ANNALS AM. ACAD. POL. & SOC. SCI. 29, 31 (1936).

63. *See* Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 735-36 (1963).

64. *Id.* at 736. Justice William J. Brennan offered what is arguably the best-known articulation of living constitutionalism. *See* William J. Brennan, *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 437 (1986) ("To remain faithful to the content of the Constitution, therefore, an approach to interpreting the text must account for the existence of these substantive value choices and must accept the ambiguity inherent in the effort to apply them to modern circumstances.").

65. Siegel, *supra* note 34, at 1133-34. As Siegel explains, reasoning about the past is a way of seeking legitimacy for what are otherwise contestable propositions. *See id.* at 1134 (explaining, for example, that "originalism . . . locates democratic authority in *imagined communities of the past*").

66. 431 U.S. 494 (1977).

67. *See id.* at 497-98.

68. *See* Serena Mayeri, *The State of Illegitimacy After the Rights Revolution*, *in* INTIMATE STATES: GENDER, SEXUALITY, AND GOVERNANCE IN MODERN US HISTORY 235-37 (Margot Canaday, Nancy F. Cott & Robert O. Self eds., 2021).

69. *See* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 5 U. PA. L. REV. 1277, 1279-1292 (2015).

70. LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 153-79 (2013).

(ACLU) gestured to these social changes.[71] The fact that Moore did not have "an average nuclear family with a mother, father and children," the ACLU wrote, "does not mean that the Constitutional protection afforded her is any the less."[72]

Writing for a plurality of four, Powell agreed, but he reached this conclusion by applying a version of Harlan's history-and-tradition test.[73] Quoting Harlan's *Poe* dissent at length, Powell wrote for the majority that the Court recognized only unenumerated rights that were "deeply rooted in this Nation's history and tradition."[74] But again, this idea of history and tradition was a living, or at least flexible, thing.[75] *Moore* certainly paid attention to claims about the distant constitutional past: what Justice Powell described as "the accumulated wisdom of civilization, gained over the centuries and honored throughout our history."[76] But the *Moore* majority made clear that while "the basic values that underlie our society" were rooted in history, they could change as once-marginalized communities gained respect, and as changing circumstances revealed new understandings of liberty or equality.[77] Thus, the constitutional significance of extended family reflected both the teachings of the past and the way those teachings had been revised to reflect the contemporaneous importance of "the broader family," "[e]specially in times of adversity."[78] "[T]he Constitution," Powell wrote, "prevents East Cleveland from standardizing its children — and its adults — by forcing all to live in certain narrowly defined family patterns."[79]

This vision of history and tradition promised to constrain judges, Powell argued, limiting unenumerated rights to those based on "solid recognition of the basic values that underlie our society,"[80] or rooted "in intrinsic human rights."[81] Justices who feared that living constitutionalism could result in "arbitrary line drawing" could still treat the "teachings of history" as a limiting principle while

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71. *See* Brief of the American Civil Liberties Union and the ACLU of Greater Cleveland, Amici Curiae at 14-19, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (No. 75-6289), 1976 WL 178724 at *14-*19.

72. *Id.* at 7-8.

73. *Moore*, 431 U.S. at 502-06.

74. *Id.* at 503.

75. *See id.* at 504 (explaining that "[o]urs is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family," since "[t]he tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition").

76. *Id.* at 505.

77. *Id.* at 503 (citing Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring)).

78. *Id.* at 505.

79. *Id.* at 506.

80. *Id.* at 503 (citing *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)).

81. Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 845 (1978).

using "caution and restraint" in determining when a constitutional tradition had changed. *Moore*'s history-and-tradition test insisted on a role for the constitutional past while presupposing that the meaning of tradition was changeable and could, over time, come to reflect the views of those who had not had a say in old-status hierarchies.

II. THE UNITARY HISTORY-AND-TRADITION TEST

An alternative to the pluralist history-and-tradition test emerged from the complex coalitional politics of the political right, as antiabortion lawyers worked to smooth over their differences with an emerging conservative legal movement.[82] The rhetoric of judicial neutrality was not a natural fit for those opposed to abortion: indeed, antiabortion lawyers sided with Wechsler's critics in early struggles over judicial neutrality and sought to capitalize on *Brown* by framing fetuses as an equally subjugated population. In the 1980s, by contrast, the emergent Federalist Society elected to follow Wechsler and house their politics in the purportedly neutral "original intent" inquiry. Aligning with the conservative legal movement struck abortion opponents as a crucial source of legitimacy and resources. Republican political operatives saw the divide between social conservatives and the conservative legal movement as a politically costly fracture in a potentially potent coalition of donors, voters, and political patrons. Drawing from the conservative Christian movement, conservative anxieties about crime, and contemporary debates about death and dying, conservative lawyers developed a unitary history-and-tradition test: one that suggested that the meaning of tradition could not change and reflected only attitudes at the time of the Founding, or an even more distant point in the past. This test supported the movement's antiabortion preferences while appealing to the Federalist Society's notion of judicial neutrality.

A. Claims on Neutral Principles

In the 1960s, when scholars were debating the meaning of judicial neutrality in response to Wechsler's *Neutral Principles*, antiabortion lawyers rallied to defeat so-called reform bills. These bills were modeled on a proposal of the American

82. On the complexity of the early relationship between the conservative legal movement and the antiabortion movement, see MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT 78-110 (2022).

Law Institute (ALI) allowing abortion in cases of rape, incest, fetal abnormalities, and certain threats to health.[83] As states considered the ALI model, abortion opponents first argued that access to abortion was never necessary — because the fetus's natural-law right to life outweighed concerns about abortion's effect on the mother,[84] for example.

When these arguments failed to sway legislators, antiabortion advocates instead contended that permissive abortion reform was itself unconstitutional.[85] Members of an emerging antiabortion movement argued that the word "person" in the Fourteenth Amendment applied before as well as after birth and that unborn children qualified as a suspect class for the purposes of equal protection analysis.[86] Notably, this generation of antiabortion attorneys did not rely on Wechsler's critique of *Brown* or enlist arguments about judicial neutrality.[87] That was partly because antiabortion lawyers relied on *Brown*'s progeny — and the idea of suspect classifications — to detail their own vision of constitutional change. They also saw other constitutional values, such as solicitude for the politically powerless, as more important to their cause than Wechslerian calls for neutrality.[88]

Instead of stressing what were at the time marginal arguments for original intent mostly identified with Southern segregationists, leading antiabortion lawyers insisted that unborn children resembled racial minorities — and that liberal abortion laws, like racial classifications, should thus be constitutionally suspect under the Equal Protection Clause. Robert Byrn, a leading antiabortion movement theorist and attorney, argued that unborn children closely resembled people of color: both, he claimed, were unfairly judged based on physical appearance

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83. *See* MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: *ROE V. WADE* TO THE PRESENT 14-15 (2020).

84. *See* DANIEL K. WILLIAMS, DEFENDERS OF THE UNBORN: THE PRO-LIFE MOVEMENT BEFORE *ROE V. WADE* 47-48 (2016).

85. *See* Ziegler, *supra* note 13, at 899-923.

86. *See id.* at 884, 888-90.

87. *See id.* at 869 (explaining that early antiabortion constitutionalism centered "on the Declaration of Independence, human rights law, substantive due process precedents, biological evidence, and common-law opinions on fetal personhood").

88. For examples of these arguments, see Charles Rice, *Equal Protection for Child in the Womb*, 2 N.D. LEG. 2, 2-5 (1971); Robert Byrn, *Abortion in Perspective*, 5 DUQUESNE L. REV. 125, 134-36 (1966); and A. James Quinn & James A. Griffin, *The Rights of the Unborn*, 31 JURIST 577, 607-10 (1971). Among the cases that were central to antiabortion reasoning was *McLaughlin v. Florida*, 379 U.S. 184 (1964), which established that classifications based on race were "constitutionally suspect." *Id.* at 192 (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)). Antiabortion lawyers looked to *McLaughlin* in developing an analogy between abortion and race discrimination, and between the fetus and people of color.

rather than an ability to contribute to the nation's wellbeing, and both were especially powerless to protect themselves against discrimination.[89] Of course, Byrn elided crucial differences between people of color and the fetus: for instance, people of color are not dependent on anyone else, much less for survival, in the same way as fetuses or embryos. Furthermore, fetuses might remain only "potential" life, for some pregnancies end in miscarriage or stillbirth. But antiabortion lawyers responded that dependence and vulnerability, not anticlassification nor antisubordination principles, should be at the heart of equal protection analysis.[90] "The more dependent and helpless a person is," reasoned Byrn, "the more solicitous the law is of his welfare."[91]

By the 1980s, however, an emerging conservative legal movement was popularizing its own ideas of neutrality, often tied to both history and tradition. Founded in 1982 by a small group of law students at Yale and the University of Chicago, the Federalist Society launched an attack on what it saw as bias in the legal academy and on the bench.[92] At the time, conservatives were a minority in the academy and the bar, and had a limited influence on the federal judiciary, even when Republicans like Richard Nixon were in office.[93] For this reason, conservative lawyers appeared to their critics to be pursuing an inherently political and even radical project, questioning rights, equality guarantees, and interpretive methods that enjoyed broad support in the legal community.[94] Leaders of the Federalist Society responded that the legal status quo itself was deeply political, indifferent to the voices of conservatives, and increasingly beholden to the Critical Legal Studies movement, developed by liberal academics, which the Federalist Society claimed had created a "growing crisis in [the] American legal system."[95]

Members of the conservative legal movement suggested that they had adopted more neutral — and therefore more legitimate — approaches to the law.[96] President Reagan praised the Federalist Society for "returning the values and

89. *See* Byrn, *supra* note 88, at 132-35.

90. *See id.*

91. *Id.* at 133.

92. On the founding and trajectory of the Federalist Society, see AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 1, 8-15, 23-45 (2015); and STEVEN TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW 137-42 (2008).

93. TELES, *supra* note 92, at 280-83; HOLLIS-BRUSKY, *supra* note 92, at 1, 8-15.

94. TELES, *supra* note 92, at 283 (arguing that "the Federalist Society was founded by conservative students in elite law schools to force the legal establishment to seriously consider ideas that were typically dismissed as strange or reactionary").

95. *Debate Could Lead to New Methods of Teaching Law*, BOS. GLOBE, May 15, 1984, at 1, 7.

96. *See infra* note 98.

concepts of law as our founders understood them to scholarly dialogue, and through that dialogue, to our legal institutions."[97] Early material circulated by the Federalist Society echoed Wechsler's arguments, suggesting that much of the Court's jurisprudence (and certainly some of its substantive due process rulings) privileged political preferences over any neutral principle.[98] As the Federalist Society explained in a 1988 funding proposal: "Once law is approached as a system to be manipulated to achieve particular politically desired results, it loses its ability to provide people with a predictable set of rules, and ultimately, its claim to legitimacy."[99]

Over time, lawyers in the Federalist Society, together with Reagan administration officials, suggested that not just any neutral principle would do: in interpreting the Constitution, judges should be bound by its original intent.[100] This argument held tremendous appeal for Reagan administration officials seeking both to reassure socially conservative voters and to avoid public accusations that the president had an ideological litmus test for judicial nominees.[101] At the same time, an alliance with the Federalist Society seemed increasingly important to social conservatives because of the proximity to power and the potential career advancement it offered: Ronald Reagan reportedly relied on the Federalist Society to staff vacant positions in his administration and nominate judges for the federal bench.[102] For the antiabortion movement to have influence on the legal vision of the American right, working closely with the Federalist Society seemed to be a necessity.

B. Tensions in the Conservative Legal Coalition

The original-intent approach detailed by the early Federalist Society was not a natural fit for some members of the antiabortion movement.[103] In the 1960s

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97. *Reagan Denounced Liberalism in Justice*, OLATHE DAILY NEWS, Sept. 10, 1988, at 9.

98. For more on this argument, see Al Kamen, *Federalist Society Quickly Comes of Age*, WASH. POST, Feb. 1, 1987, at A3, which argues that the Federalist Society's mission was "to limit 'judicial activism' and to bring about the overturning of Supreme Court landmarks from the New Deal era on—with special focus on the rulings of the 1960s and 1970s—including the 1966 Miranda decision and the 1973 decision legalizing abortion."

99. Federalist Society for Law and Policy Studies Funding Proposal (Aug. 1988) (on file with the People for the American Way Papers, Carton 39, Bancroft Library, University of California).

100. *See* Siegel, *supra* note 34, at 1148-67.

101. *See id.* at 1156-61.

102. On the appeal of the Federalist Society to those seeking proximity to power in the 1980s, see Kamen, *supra* note 98, at A3.

103. *See* Ziegler, *supra* note 13, at 888-97.

and 1970s, antiabortion constitutionalism centered on demands for fetal personhood under both the Equal Protection and Due Process Clauses.[104] In advancing these claims, antiabortion lawyers had relied on approaches with little appeal to conservative originalists: arguing that there was an unenumerated right to life that logically extended from the Constitution's penumbras, as outlined in *Griswold*, or that the Court should not only police existing suspect classifications, such as those involving race or illegitimacy.[105] These cases had attracted the ire of the Reagan Administration[106] and the criticism of early originalist thinkers like Robert H. Bork.[107] At the same time, members of the early Federalist Society were divided about the abortion issue itself, with some libertarian members ambivalent about government regulation of reproduction.[108]

To join and reshape this new conservative legal movement, with the Federalist Society at its center, abortion opponents began denouncing *Roe* as an activist and undemocratic decision—a political act that defied the neutral approach to judging that the Federalist Society claimed to embrace.[109] But this vision of neutrality concealed fault lines within a conservative legal movement that, as Eugene Meyer of the Federalist Society explained in 1986, sought "a reordering of priorities within our legal system so as to place a premium on individual liberty, traditional values, and the rule of law."[110] Railing against the activism of the *Roe* Court was politically expedient for antiabortion lawyers,[111] but the movement was still looking for a more comprehensive hook for its constitutional vision. For a time, antiabortion activists had shaped the conservative legal movement by reinforcing the attack on *Roe* as an unprincipled and non-neutral decision. What the movement wanted, however, was to be on offense: to constitutionalize the

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104. *See id.*

105. *See id.*

106. *See* Siegel, *supra* note 34, at 1148-51.

107. *See* Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J.F. 316, 320 (2015); ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA 74-75 (2007) (1989) (detailing Bork's hostility to right-of-privacy jurisprudence).

108. *See Justice Scalia's Cheerleaders*, N.Y. TIMES, July 23, 1986, at B6 (Federalist Society co-founder Steven Calabresi explaining that the organization's members would "probably be split in half on the constitutionality of abortion laws").

109. MARY ZIEGLER, *ROE*: THE HISTORY OF A NATIONAL OBSESSION 49-54 (2023).

110. Letter from Eugene Meyer, Exec. Dir., Federalist Soc'y, to Gabrielle Cassell (Sept. 4, 1986) (on file with the People for the American Way Papers, Carton 39, Bancroft Library, University of California).

111. On the spread of antiabortion arguments about judicial activism, see Mary Ziegler, *Grassroots Originalism: Rethinking the Politics of Judicial Philosophy*, 51 LOUISVILLE L. REV. 201, 235-40 (2012).

movement's deeply held beliefs in a way that would still appeal to allies in the Federalist Society.

It was not clear that arguments based on original intent or original public meaning would deliver the results that conservative Christian or antiabortion litigators desired. After all, at the time the Fourteenth Amendment was ratified, state lawmakers passing criminal abortion bans said nothing about the Fourteenth Amendment, and the framers of the Fourteenth Amendment said nothing about abortion.[112] The unitary history-and-tradition test, which could draw on both religious and secular ideas of tradition that predated or were only tangentially related to the moment of the founding, emerged as an alternative for conservative movements. Thus, by identifying judicial neutrality with one understanding of history and tradition, antiabortion lawyers could equate their own vision of the Constitution with judicial neutrality.

C. Christianity as Neutrality

A new antiabortion constitutionalism synthesizing Christian values with original intent took inspiration from an emerging conservative alternative to *Moore*'s pluralist history-and-tradition test. By the 1980s, conservative Christian authors and scholars had been debating the role of Christianity in the nation's founding for several decades.[113] The theologian R.J. Rushdoony famously argued not only that the Founders of the United States grounded their ideas in Christianity, but also described certain forms of race-based slavery as benevolent and called for the reinstatement of Mosaic law, including the imposition of the death penalty for public blasphemy.[114] In his widely circulated film, Francis Schaeffer, a prominent evangelical theologian, popularized the argument that

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112. On the problems with the Fourteenth Amendment argument for personhood, *see* Aaron Tang, *After* Dobbs: *History, Tradition, and the Uncertain Future of a Nationwide Abortion Ban*, 75 STAN. L. REV. 1091, 1110-45 (2023); Ed Whelan, *Doubts About Constitutional Personhood*, FIRST THINGS (Apr. 8, 2021), https://www.firstthings.com/web-exclusives/2021/04/doubts-about-constitutional-personhood [https://perma.cc/XWW7-6YPW]; Ed Whelan, *My* First Things *Response to John Finnis on Constitutional Personhood*, NAT'L REV. (Apr. 8, 2021, 8:56 AM), https://www.nationalreview.com/bench-memos/my-first-things-response-to-john-finnis-on-constitutional-personhood [https://perma.cc/8QG6-X3MQ].

113. *See* KENNETH KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL LIBERALISM IN THE HEYDAY OF AMERICAN LIBERALISM 162-225, 274-89 (2019); AMANDA HOLLIS-BRUSKY & JOSHUA WILSON, SEPARATE BUT FAITHFUL: THE CHRISTIAN RIGHT'S RADICAL STRUGGLE TO TRANSFORM LAW AND CULTURE 250-95 (2020).

114. For R.J. Rushdoony's view on the role of Mosaic law, see R. J. RUSHDOONY, THIS INDEPENDENT REPUBLIC: STUDIES IN THE NATURE AND MEANING OF AMERICAN HISTORY 71, 79-80 (1964). For more on the evolution of Christian Reconstructionism and its positions on race and slavery, see JULIE INGERSOLL, BUILDING GOD'S KINGDOM: INSIDE THE WORLD OF CHRISTIAN RECONSTRUCTIONISM 4-34 (2015).

the nation's Founders intended Christian values to inform constitutional interpretation.[115]

The Rutherford Institute, the first Christian litigation shop, adopted similar arguments.[116] Though not fully embracing Rushdoony's Christian Reconstructionism, Rutherford founder John W. Whitehead released a series of books arguing that the "Constitution was acknowledging that a system of absolutes," accessible only through Biblical revelation, governed the function of law and government.[117]

As the Supreme Court considered a challenge to Georgia's sodomy ban in *Bowers v. Hardwick*, Rutherford attorneys seized on and transformed the history-and-tradition test in *Moore* through the incorporation of Christian values.[118] At the time Rutherford was forging its argument, antiabortion attorneys were circulating similar claims in arguing that there was no constitutional right to die, stressing that the Court should rely on a history-and-tradition test and thus determine the existence of a substantive due process right by performing "a comprehensive survey of attitudes toward suicide in the history of western civilization."[119] Rutherford brought these arguments to the Supreme Court. Rather than a living tradition, open to contestation and changes in meaning, Rutherford's brief echoed Whitehead's ideas about a Constitution rooted in unchangeable Christian teachings that had critically shaped history and tradition.[120] The right to "homosexual sodomy" failed this history-and-tradition test, Rutherford insisted, because "traditionally and historically western society has considered the practice of sodomy . . . as within the proper scope of government regulation."[121] Rutherford made clear that the meaning of tradition had been fixed by "Judeo-Christian Scriptures, Roman law, the teachings of the Christian Church, and early English common and statutory law."[122] The organization's amicus brief

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115. *See* FRANCIS A. SCHAEFFER, A CHRISTIAN MANIFESTO 17-22, 33, 46-52 (1981). On Schaeffer's film and its influence, see DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 138-45 (2010); and KERSCH, *supra* note 113, at 152-63.

116. *See infra* text accompanying notes 117-123.

117. *See* KERSCH, *supra* note 113, at 289; R. JOHNATHAN MOORE, SUING FOR AMERICA'S SOUL: JOHN WHITEHEAD, THE RUTHERFORD INSTITUTE, AND CONSERVATIVE CHRISTIANS IN THE COURTS 22-43 (2007).

118. *See* Brief of the Rutherford Institute et al. as Amici Curiae Supporting Petitioner at 5-8, 13-28, Bowers v. Hardwick, 478 U.S. 176 (1986) (No. 85-140).

119. Tom Marzen et al., *A Constitutional Right to Suicide?*, 24 DUQUESNE L. REV. 1, 17 (1985).

120. Brief of the Rutherford Institute et al, *supra* note 118, at 13.

121. *Id.* (capitalization normalized).

122. *Id.*

also drew on originalist reasoning, stressing "[t]he existence of sodomy laws at the time of the adoption of the Fourteenth Amendment."[123]

The Court's decision in *Bowers* seemed to suggest that tradition had a single meaning, noting that "proscriptions against [sodomy] have ancient roots" and that sodomy bans were accepted at the time of ratification of both the Bill of Rights and the Fourteenth Amendment.[124] The majority in *Bowers* did not adopt the Rutherford test wholesale: the Court also stressed what it described as contemporary understandings of sodomy, noting—recalling the state-counting methodology employed in *Dobbs*—that "24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults."[125] Though the Court did not cite the Rutherford brief directly, the ruling in some ways offered parallel reasoning, emphasizing both common law and practice at the time of Reconstruction.[126] Chief Justice Burger's concurring opinion echoed the Rutherford brief even more directly, pointing to "Judeo-Christian moral and ethical standards."[127]

Although *Bowers* did not squarely adopt a unitary history-and-tradition test, the echoes of Rutherford's brief in Burger's concurrence and the majority opinion suggested that the test could succeed in the Supreme Court—and that such a test could form part of a constitutional strategy consistent with the Federalist Society's ideas about both originalism and neutrality. By insisting that the meaning of tradition was frozen at or even before the time of ratification of the Fourteenth Amendment (or the Founding), antiabortion attorneys could call into question the constitutional foundation of the *Roe* decision in seemingly neutral terms ("original intent" or "history and tradition") that were nonetheless shaped by the substantive principles they favored (conservative Christianity).[128] History and tradition served as the perfect vehicle to accomplish particular policy outcomes while claiming the mantle of neutrality.

D. Crime, Death, and Abortion

As the antiabortion movement aligned more closely with the Republican Party in the 1980s, a unitary history-and-tradition test promised to constitutionalize the antiabortion movement's emerging preferences about crime and punishment. In Reagan's second term, the Comprehensive Crime Control Act of

123. *Id.* at 16.

124. Bowers v. Hardwick, 478 U.S. 186, 192-93 (1986).

125. *Id.* at 193-94.

126. *Id.* at 192-94.

127. *Id.* at 196-97 (Burger, C.J., concurring).

128. For more examples of these arguments, see *infra* text accompanying notes 131-134.

1984 reinstated the federal death penalty, gutted the federal parole program, created mandatory minimums for certain violent felonies committed with firearms, allowed law enforcement to recover up to ninety percent of the cash and property seized from accused drug users, and established a national clearinghouse to help states construct new prisons.[129] Reagan suggested that the best way to enforce victims' rights was to punish "criminal predators in our midst."[130]

Antiabortion groups sought to tap into conservative anxieties about crime with new initiatives painting the fetus as a victim. Some organizations, such as Americans United for Life (AUL), fought to modify fetal homicide laws or pass new ones, punishing anyone who killed an unborn child at any point in pregnancy.[131] Antiabortion groups also encouraged prosecutors to pursue charges against pregnant drug users for chemical endangerment, neglect, or abuse.[132] Laurie Anne Ramsey of AUL praised these proposals for "sensitiz[ing] the public to the fact that the unborn child—at any stage of his or her development—deserves protection and does have rights."[133] At the same time, the antiabortion movement itself was changing, with new supporters pouring in from across the South and Midwest convinced, as the clinic blockade group Operation Rescue argued, that abortion was murder, and that those who performed it (and perhaps those who chose it) deserved criminal punishment.[134] By pointing to a unitary history-and-tradition test, antiabortion lawyers could argue that tradition supported the criminalization of abortion as murder and claim fidelity to judicial neutrality.

In the discourse around *Washington v. Glucksberg*, antiabortion lawyers expanded on this approach. Conflicts about death and dying had been intensifying

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129. *See* Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976. For more on the crime control legislation passed in Reagan's second term, see ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA 310-21 (2016).

130. David Hoffman, *Reagan Stumps with Tough Line on Crime, Drunk Driving*, WASH. POST, June 21, 1984, at A7.

131. *Fetal Homicide Legislation: Protecting the Unborn in a Non-Abortion Setting*, AUL FORUM, Jan. 1995, 1 (on file with the People for the American Way Papers, Carton 9, Bancroft Library, University of California, Berkeley); *see* Marney Rich, *A Question of Rights*, CHI. TRIB. (Sept. 18, 1988), https://www.chicagotribune.com/news/ct-xpm-1988-09-18-8802010917-story.html [https://perma.cc/W28F-6SN7].

132. *See* MARY ZIEGLER, AFTER *ROE*: THE LOST HISTORY OF THE ABORTION DEBATE 113-14 (2015).

133. William E. Schmidt, *Murder Trial Adds Facet to the Abortion Debate*, N.Y. TIMES (June 15, 1990), https://www.nytimes.com/1990/06/15/us/law-murder-trial-adds-facet-to-the-abortion-debate.html [https://perma.cc/PP74-9KG9].

134. On Operation Rescue and its punitive approach, see GEOFFREY R. STONE, SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY 408 (2017).

in the years leading up to *Glucksberg*: starting in the 1960s, as life expectancy climbed and more Americans experienced intense medical interventions as they aged, small organizations endorsing euthanasia or even eugenics gave way to larger groups calling for a right to die.[135] By the 1980s, conflicts about living will laws had sparked a complex struggle between right-to-die groups, antiabortion organizations, and even groups representing people with disabilities.[136] Following the Supreme Court's 1990 decision in *Cruzan v. Director, Montana Department of Health*,[137] more right-to-die activists turned to the issue of physician-assisted suicide.[138]

In *Glucksberg* and its companion case, *Vacco v. Quill*,[139] leading antiabortion groups turned to a unitary tradition-and-history test—based on *Dobbs*-esque state-counting—to advance their agenda. A win in *Glucksberg* might discredit a right to die—something that antiabortion organizers had worked to do since the 1980s[140]—and elevate a history-and-tradition test that would undermine a right to choose abortion. "It is clear that a right to assisted suicide is neither implicit in the concept of ordered liberty nor deeply rooted in American history and tradition," argued the National Right to Life Committee, "for at the time the fourteenth amendment was ratified twenty-one of the thirty-seven states criminalized assisted suicide."[141] "[T]here has never been a period in English or American history," AUL agreed, "when suicide (or suicide assistance) was regarded as a 'fundamental right,' a 'protected liberty interest' or even a socially tolerated practice."[142] Antiabortion amici insisted that the nation's history and tradition allowed or even required the criminalization of such practices.

This idea of an unchanging tradition coexisted uneasily alongside a more fluid, egalitarian understanding of tradition in the *Glucksberg* decision itself. *Glucksberg* spent a great deal of time detailing what "Anglo-American common-law tradition" had to say about suicide, with analysis of medieval treatises, Black-

135. *See* IAN DOWBIGGIN, A MERCIFUL END: THE EUTHANASIA MOVEMENT IN MODERN AMERICA 99-120 (2003); MARY ZIEGLER, BEYOND ABORTION: *ROE V. WADE* AND THE BATTLE FOR PRIVACY 163-70, 198-201 (2018).

136. *See* DOWBIGGIN, *supra* note 135, at 99-104; ZIEGLER, *supra* note 135, at 163-69.

137. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

138. *See* ZIEGLER, *supra* note 135, at 188-201.

139. 521 U.S. 793 (1997).

140. *See* Marzen, *supra* note 119, at 1-14; ZIEGLER, *supra* note 135, at 163-69.

141. Brief of the National Right to Life Committee, Inc. as Amicus Curiae in Support of Petitioners at 23, Washington v. Glucksberg, 521 U.S. 702 (1997) (No. 96-110).

142. Brief Amicus Curiae on Behalf of Members of the New York & Washington State Legislatures in Support of Petitioners at 6, Vacco v. Quill, 521 U.S. 793 (1997) (Nos. 95-1858, 96-110).

stone and Bracton, and practice in the colonial period and the nineteenth century.[143] *Glucksberg* also rejected a living constitutionalist approach that "deduced [rights] from abstract concepts of personal autonomy."[144]

But, unlike the *Bowers* Court, the *Glucksberg* Court still staked out a middle-ground view of history and tradition, one that justified a right to choose abortion. *Glucksberg* justified the holding of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which had reaffirmed the "essential" holding of *Roe v. Wade* in 1992.[145] "*Casey*," the Court reasoned in *Glucksberg*, described "those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment."[146] The *Glucksberg* Court gestured to history and tradition as a way of facilitating judicial neutrality while suggesting that the present as well as the past should inform the meaning of tradition.

In the years between *Glucksberg* and *Dobbs*, competing ideas of history and tradition circulated in the Court. In *Lawrence v. Texas*, the Court struck down sodomy bans and overturned *Bowers* without repudiating a history-and-tradition test.[147] Writing for the majority, Justice Kennedy embraced something resembling a pluralist history-and-tradition test, detailing past debate and uncertainty about the social and political meaning of same-sex intimacy and reasoning that international laws, state policy, and medical attitudes had reshaped tradition in the years since *Bowers* came down.[148] Justice Scalia's dissent, invoking a unitary history-and-tradition test, suggested that "the only relevant point" in *Bowers* or *Lawrence* was that sodomy "*was* criminalized—which suffices to establish that homosexual sodomy is not a right 'deeply rooted in our Nation's history and tradition.'"[149]

A parallel discussion unfolded in the Court's analysis of same-sex marriage in *Obergefell v. Hodges*.[150] While the majority reasoned that the meaning of tra-

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143. Washington v. Glucksberg, 521 U.S. 702, 710-16 (1997); *see also id.* at 710 (listing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), first among the cases exemplifying "our Nation's history, legal traditions, and practices").

144. *Id.* at 725.

145. *See id.* at 726-27.

146. *Id.* at 727.

147. Lawrence v. Texas, 539 U.S. 558, 568-78 (2003).

148. *See id.*; *id.* at 572 (stressing an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives").

149. *Id.* at 596 (Scalia, J., dissenting).

150. 576 U.S. 644, 671-72 (2015).

dition depended not just on "ancient sources alone" but also on "a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era,"[151] the dissenting justices insisted that tradition was unchanging, and recognized a "singular understanding of marriage" that prevailed "throughout our history."[152] The meaning of the history-and-tradition test itself has been contested in ways that the *Dobbs* Court erases.

III. HISTORY, TRADITION, AND NEUTRALITY IN *DOBBS*

The history-and-tradition test adopted in *Dobbs* reflects the decades-long work of conservative movements linking neutrality to a history-and-tradition test — and suggesting that the Court had damaged its legitimacy by straying from this path. Antiabortion groups had long prioritized the recognition of fetal personhood (and by extension, a federal ban on abortion). But in the lead-up to *Dobbs*, antiabortion litigators primarily stressed claims about history, tradition, democracy, and neutrality. Abortion foes framed *Roe* as an inherently political and therefore illegitimate decision. Reversing *Roe*, the movement argued, would return the issue to the democratic process — and restore the Court's reputation as a neutral arbiter. In practice, of course, movement leaders had no intention of arguing in the long term that the Constitution offered no protection to the fetus — or of allowing states (or voters) to decide the abortion question themselves. History and tradition arguments instead served as a vehicle for legitimizing what would inevitably be a politically unpopular and doctrinally revolutionary decision to undo *Roe*.

For the Supreme Court, the politics of the history-and-tradition test also seemed complex. Neutrality, for the *Dobbs* majority, serves as the central justification for its adoption of a history-and-tradition test. This appeal to neutrality obscures the roots of the test in social-movement conflict and repackages the divisiveness of the decision and its reasoning as necessary and apolitical.

A. The Lead-Up to Dobbs

Antiabortion lawyers sharpened claims circulating before *Casey*, when groups like the National Right to Life Committee argued that "[b]ecause of its weak foundation, *Roe* exacerbated the abortion controversy."[153] The year that the

151. *Id.* at 671.

152. *Id.* at 690-91 (Roberts, C.J., dissenting).

153. *See* Brief for National Right to Life, Inc. as Amici Curiae Supporting Respondents/Cross-Petitioners at 7, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (Nos. 91-744, 91-902).

Court decided *Lawrence,* Robert H. Bork, the co-chairman of the Federalist Society Board of Visitors, developed a similar idea. In the 1980s and 1990s, Federalist Society leaders had fended off accusations that their movement was reactionary by pointing to what they described as the politicization of the courts by progressives—and to the purported neutrality of their own interpretive methods. In this way, the Federalist Society reframed a relatively popular legal consensus as politically biased, while presenting their own legal insurgency as a defense of longstanding legal understandings. In a keynote before the Federalist Society, Bork likewise presented the attack on *Roe* and *Casey* not as an act of conservative politics but as an effort to once again make the Court a politically neutral actor.[154] As Bork framed it, both decisions had abandoned history, tradition, and original meaning to recognize "fictitious rights," proving that "a majority of the Court is willing to make decisions for which it can give no intelligible argument."[155] Bork further suggested that *Roe* and *Casey* had contributed to the politicization of the Court.[156] "Once [the Court] is recognized as a political body," Bork reasoned, "it becomes a political weapon and a political prize, and you can expect senators to fight over its composition because they know it's not neutral . . . ."[157]

In 2014, AUL attorneys implied that the weakness of the *Roe* Court's analysis of history and tradition—and its failure to articulate a principled basis for its decision—ensured that *Roe* and *Casey* remained divisive. "*Roe*/*Casey*," wrote Clarke Forsythe of AUL, "is unsettled because it was so poorly put together, without an evidentiary record, based on hunches, assumptions, and prejudices."[158]

When the Court agreed to hear *Dobbs*, the meaning of the history-and-tradition test remained a subject of struggle, with historians and scholars developing different ideas about what the test demanded and whether a right to abortion passed that test.[159] Progressive constitutional scholars cited both *Poe* and *Ober-*

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154. Transcript, Robert H. Bork, *2003 Barbara K. Olson Memorial Lecture* (Nov. 14, 2003), https://fedsoc.org/commentary/publications/2003-barbara-k-olson-memorial-lecture-transcript [https://perma.cc/X43M-ZJR9].

155. *Id.*

156. *Id.*

157. *Id.*

158. Clarke Forsythe, *Why* Roe*/*Casey *Is Still Unsettled*, HUM. LIFE REV. (Sept. 2014), https://humanlifereview.com/roecasey-still-unsettled [https://perma.cc/B87X-79RM].

159. *Compare* Reply Brief for Petitioners at 9-10, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392); Brief for Professors Mary Ann Glendon and O. Carter Snead as Amici Curiae in Support of Petitioners at 15-27, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392),

gefell to insist on a history-and-tradition test that was "duly mindful of reconciling the needs both of continuity and of change in a progressive society."[160] The pro-abortion respondents' merits brief likewise stressed that "history and tradition provide ample support for the conclusion that 'liberty' encompasses an individual's right to end a pre-viability pregnancy," stressing the importance of bodily integrity at common law and the changing meaning of that tradition over time.[161] Meanwhile, conservative lawyers presented a unitary history-and-tradition test as a necessary constraint on judicial policymaking. AUL's amicus brief stressed that the Court had "never demonstrated that *Roe*'s abortion right is 'deeply rooted in this Nation's history and tradition'" (contrary to that exact demonstration in *Glucksberg* re *Casey*[162]) and had thus abandoned a commitment to neutrality in favor of a role as "the nation's *'ex officio* medical board.'"[163] The Thomas More Society, another antiabortion group, likewise argued that an abortion right failed a unitary history-and-tradition test.[164] "[A] decision without principled justification would be no judicial act at all," argued the group's amicus brief, quoting *Casey*.[165] "That precisely describes *Roe v. Wade*."[166]

In *Dobbs*, the majority adopted a unitary history-and-tradition test, equating it with judicial neutrality and ignoring the very possibility of an alternative. Only when the Court's approach was "guided by the history and tradition that map the essential components of our Nation's concept of ordered liberty," Justice Alito reasoned, could the Court avoid an "unprincipled approach."[167] And the Court measured that "history and tradition" by pointing to the number of states that had criminalized abortion at the time of the Fourteenth Amendment's ratification.[168] For Alito, "[t]he inescapable conclusion" based on this methodology "is

with Brief of Constitutional Law Scholars Lee C. Bollinger et al. as Amici Curiae Supporting Respondents at 11-18, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392), *and* Brief for Amici Curiae American Historical Association and Organization of American Historians in Support of Respondents at 20-28, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (presenting different arguments and historical evidence about the legal and social treatment of abortion in United States history).

160. Brief for Constitutional Law Scholars, *supra* note 159.

161. Brief for Respondents at 20-21, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

162. *See supra* text accompanying notes 145-146.

163. Brief for Americans United for Life as Amicus Curiae in Support of Petitioners at 20, 23, *Dobbs*, 142 S. Ct. 2228 (2022) (No. 19-1392) (citation omitted).

164. Brief of the Thomas More Society as Amicus Curiae in Support of Petitioners at 4-25, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392).

165. *Id.* at 28 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992)).

166. *Id.*

167. *Dobbs*, 142 S. Ct. at 2248.

168. *Id.* at 2252-53.

that a right to abortion is not deeply rooted in the Nation's history and traditions[;]" rather, "an unbroken tradition of prohibiting abortion on pain of criminal punishment persisted from the earliest days of the common law until 1973."[169]

In separate concurring opinions, Justices Kavanaugh and Thomas amplified the connection between judicial neutrality and a unitary history-and-tradition test. Justice Thomas invoked the importance of neutrality in suggesting that the Court dismantle the entirety of substantive due process, which, he wrote, "unquestionably involves policymaking rather than neutral legal analysis."[170] Thomas framed abortion as the ultimate "exaltation of judicial policymaking," but he suggested that fidelity to a unitary history-and-tradition test, and a commitment to judicial neutrality, requires the overruling of many other precedents.[171] "Substantive due process," Thomas explained, "is the core inspiration for many of the Court's constitutionally unmoored policy judgments."[172] Justice Kavanaugh likewise equated a unitary history-and-tradition test with judicial neutrality, while insisting that this test will not require the overruling of other substantive due process precedents.[173] The two opinions sketch alternative futures for the unitary history-and-tradition test: one in which the test is used selectively, to arbitrarily eliminate divisive liberties deemed at odds with the constitutional past, and a second, in which the test destroys the entirety of substantive due process in short order.

Justice Thomas's understanding of the history-and-tradition test certainly seems more internally consistent. If the meaning of the Fourteenth Amendment was fixed in 1868 (or even before), it is hard to imagine how a right to contraception or same-sex marriage can survive. Either the history-and-tradition test has political or prudential limits—and is not the objective test the majority presents—or Justice Thomas's reading of the majority seems to be the right one. But predicting where the history-and-tradition test will go next, or whether Justice Kavanaugh or Thomas will have the better of the argument, is difficult because the history-and-tradition test is not determinate, as Aaron Tang shows in this Collection, and because it has always reflected broader movement-countermovement conflict.[174]

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169. *Id.* at 2253-54.

170. *Id.* at 2302 (Thomas, J., concurring) (citing United States v. Carlton, 512 U.S. 26, 41-42 (1997) (Scalia, J., concurring)).

171. *Id.*

172. *Id.*

173. *Id.* at 2305-09 (Kavanaugh, J., concurring).

174. Aaron Tang, *Lessons from* Lawrence*: How "History" Gave Us* Dobbs*—And How History Can Help Overrule It*, 133 YALE L.J.F 65 (2023).

B. The Wake of Dobbs

In practice, true neutrality is inherently aspirational. Empirical research supports the conclusion that, especially in ideologically divisive cases, judges' views can be predicted largely by looking at the partisan affiliation of the president who appointed them.[175] Recent work has confirmed that as Donald Trump's nominees began shaping the Court's jurisprudence, the Court has taken a far more ideologically conservative position relative to the general public.[176] None of this is surprising. But invoking neutrality at the expense of candor simply disguises the principles on which the Court relies and discourages reasoned engagement with the Court's decisions. Especially in areas of intense movement contestation, the Court's decisions are at times responsive to "the ways that citizens and officials interact over questions of constitutional meaning."[177] Claiming neutrality as a way to disguise constitutional conflicts, and delegitimize interpretations rejected by the Court, undermines the kind of accountability that the *Dobbs* Court purports to embrace.

As the *Dobbs* Court reminded us, federal judges are unelected, and voters have no easy way of constraining them. But simply invoking the value of neutrality, or yoking it to history and tradition, does nothing to limit judges either. After all, the Court can cherry-pick which history matters, disregard consensus positions among historians, or choose between several history-and-tradition tests. As Aaron Tang explains, "[t]he very idea of identifying a definitive, singular historical tradition that existed in America so long ago is a task that will often be riddled with uncertainty, historical ambiguity, and conflict."[178] Neutrality as a norm is problematic too because its very meaning is contested, as *Dobbs* exemplifies: what the majority defined as neutral, the dissenting justices saw as a "betray[al of] guiding principles."[179]

Constitutional decisions like *Dobbs* instead remind us that, at least in certain high-salience cases, judicial decision-making takes place in dialogue with other stakeholders, from state courts and lawmakers to voters, social movements, and

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175. *See* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2007); *see also* Allison P. Morris & Maya Sen, *Bias and Judging*, 22 ANN. REV. POL. SCI. 241, 241-59 (2019).

176. Stephen Jessee, Neil Mahotra & Maya Sen, *A Decade-Long Longitudinal Survey Shows that the Supreme Court Is Now Much More Conservative than the General Public*, 119 PROCS. NAT'L ACAD. SCIS. U.S. AM. 1 (2022).

177. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change*, 94 CALIF. L. REV. 1323, 1340-41 (2006).

178. Tang, *supra* note 174, at 92.

179. *Dobbs*, 142 S. Ct. at 2350 (Breyer, Kagan, & Sotomayor, JJ., dissenting).

political parties.[180] For the Court to facilitate rather than short-circuit this dialogue, some minimum degree of candor is necessary.[181] Only if we can understand the grounds for the Court's decision can we assent to it or effectively seek to change its reasoning or result.[182] As Micah Schwartzman explains: "Those subject to judicial power are owed reasons that they can, in principle, understand and accept."[183]

The *Dobbs* Court clearly offered justifications for its position: a historical narrative, an understanding of how the history-and-tradition test ought to work, and even an implicit account of what defines judicial neutrality and how it can be accomplished. But the Court was less transparent about the choices behind those justifications: the historical consensus set aside, the alternative idea of history and tradition disregarded, and the other values—beyond supposed neutrality—deserving of potential consideration. In this way, *Dobbs* presented its holding as a sort of final resolution of the constitutional politics of abortion. That such a permanent resolution is impossible seems almost beside the point. As one participant in a broader constitutional dialogue (albeit an important one), the Court has an obligation to disclose the values animating its reasoning and the alternative approaches that it has set aside.

CONCLUSION

Social movements have long contested the legitimacy of relying on history and tradition in identifying substantive due process rights. So, too, have grassroots mobilizations struggled over what defines the nation's traditions, and whether those traditions are dynamic or static.

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180. *See* Reva B. Siegel & Robert Post, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 379 (2007) (explaining that "adjudication is embedded in a constitutional order that regularly invites exchange between officials and citizens over questions of constitutional meaning").

181. *See* Ronald Krotosyznski, Jr., *On the Importance of Being Earnest: Contrasting the Dangers of Makeweights with the Virtues of Judicial Candor in Constitutional Adjudication*, 74 ALA. L. REV. 243, 246 (2022) ("People are far more likely to accept judgments with which they disagree when judges have the courage to offer the *actual reasons* that animate those judgments . . . ."); Richard H. Fallon, Jr., *A Theory of Judicial Candor*, 117 COLUM. L. REV. 2265, 2297 (2017) (developing a theory of judicial candor centered on the premise that judges must not "deliberately mislead nor make assertions that they know are likely to mislead"); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633-35 (1995).

182. *See* Krotosyznski, *supra* note 181, at 299; Eric J. Segall, *Justice O'Connor and the Rule of Law*, 17 U. FLA. J.L. & PUB. POL'Y 107, 112 (2006).

183. Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1009 (2008).

It is unsurprising that an account of this history makes no appearance in the *Dobbs* opinion. Rather than naming and navigating this history, the *Dobbs* majority frames a history-and-tradition test as a strategy to guarantee judicial neutrality — not as the contingent, value-laden product of grassroots conflict that it is.

Appeals to apolitical neutrality serve a non-neutral political purpose of their own. As in the case of *Dobbs*, justifying a method as neutral may legitimize deeply unpopular or revolutionary results, and framing a method as neutral may disguise the political origins or resonance of an opinion.

A history-and-tradition test need not be incompatible with recognizing reproductive rights — or indeed, with acknowledging that constitutional meaning changes. Instead of cloaking ideology in the rhetoric of neutrality, a better decision would explicitly disclose the choices made in crafting an opinion like *Dobbs*. Whatever else one might think of constitutional struggles over abortion, it seems clear that the *Dobbs* Court owed the people at least that much.

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