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THE GOOD, THE BAD AND THE UGLY OF *DOBBS*: A CONSTITUTIONAL RECKONING

Allan C. Hutchinson*

The United States Supreme Court's decision in Dobbs v. Jackson Women's Health Organization *marked a constitutional reckoning, with pervasive and inescapable consequences for many Americans. This article discusses this constitutional reckoning in two senses. First, it was a reckoning with the Court's own precedent, as it overturned nearly fifty years of precedent on abortion rights. Second, it was a reckoning with the Court's role in American society, as it raised fundamental questions about the Court's legitimacy and its ability to protect the rights of minorities.*

This article begins by outlining a history of abortion rights in the United States, from the early days of the republic to the present day. The Court's landmark decision in Roe v. Wade *in 1973 established a constitutional right to abortion; and while it was a controversial decision, it has been challenged ever since.*

The Dobbs decision, like every other decision made by the Supreme Court, was not immune to the interpretive whims of the individuals who currently inhabit their seats of judgment and power. While the Dobbs *decision may be characterized as "flawed" by some, this article seeks to examine the notion that there are no "flawed" or "unflawed" interpretations of the United States Constitution; only ones which we like, or do not like. As such, this decision will have a devastating impact on women's rights and reproductive health for many years to come.*

This article concludes by discussing the potential future landscape of abortion rights in the United States. Although the

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Dobbs *decision was a setback for abortion rights, this is nowhere near the end of the fight, considering other available levers outside of the judiciary, including and not limited to legislative action, public education, and grassroots organizing.*

TABLE OF CONTENTS

I. A Constitutional Reckoning 311
A. Forward to the Past 311
B. The *Dobbs* Debacle 315
C. The Challenge Ahead 318
II. As Good As It Gets 323
A. A Principled Primer 323
B. The *Dobbs* Stand-Off 327
III. Breaking Bad 330
A. A Fresh Approach 330
B. Of Results and Reasoning 332
C. Truth and Consequences 336
D. A Progressive Response? 339
IV. Turning Ugly 341
A. Keeping The Faith 341
B. Speaking Power to Truth 345
V. A Closing Note 350

The constitution itself is necessary, right, and good.[1]
—Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*

In so many ways, the Supreme Court's decision in *Dobbs* has put the cat among the pigeons.[2] It has brought about a political and social fallout that has generated a torrent of heated commentary and active protest. More importantly, it has had an immediate and negative impact upon the lives of women across the country. For good and bad, therefore, it has already joined that small set of cases that count as "landmarks

1. Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 642 (1958).
2. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

placed upon the trackless wilds of [the] law."[3] As such, it has also roiled the more secluded and precious waters of jurisprudential study. *Dobbs* has brought back into sharp and open focus the debate about not only what the Supreme Court decides in constitutional cases, but also how they make those decisions—is there an objective method or way of proceeding that can be relied upon to discover or produce constitutional decisions that are considered just and that amount to more than the preferred outcomes of those making such decisions?

In this essay, I will offer some tentative answers to that question as well as some further provocations. After framing the *Dobbs* opinions in jurisprudential terms, I will highlight and examine the recognizably good i.e., that constitutional law and reasoning is a professional and principled activity, but one that does not always or only produce consistent or even just results), the presumptively bad (i.e., that constitutional reasoning and law is inescapably political and ideological even when it is done in a principled way), and the evidently ugly (i.e., that efforts at doing constitutional reasoning and law that would otherwise be legitimate can lose that estimable status if made in bad faith). In traversing this territory, I intend to offer a more sophisticated and compelling account of constitutional law and reasoning as being simultaneously a professional and political exercise. Throughout the essay, I will show that *Dobbs* is a decision to be reckoned with and also that there is a need for a jurisprudential reckoning of it. It is not an aberrational or special case. Indeed, if anything, it illuminates the deep and problematic footings of what might appear to be run-of-the-mill constitutional decisions.

I. A CONSTITUTIONAL RECKONING

A. Forward to the Past

More than most countries, the United States is fixated on its Constitution.[4] Not only is its Constitution the founding design and blueprint of the country, but constitutional doctrine

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3. SAMUEL WARREN, A POPULAR AND PRACTICAL INTRODUCTION TO LAW STUDIES 434 (1835).

4. Joshua Keating, *Are Americans too Constitution obsessed?*, FOREIGN POLICY (Sept. 24, 2010, 3:59 PM), https://foreignpolicy.com/2010/09/24/are-americans-too-constitution-obsessed/.

is treated as the normative lodestar by which today's politics are to be illuminated, guided, and criticized. For almost all Americans, the Constitution is an article of civic faith that, if understood properly and respected appropriately, will ensure the United States is and remains an enviably just and justly envied society; it will set a shining example for other polities to follow and emulate. In short, for Americans, the Constitution is considered the embodiment of all that is good and true about the nation, its values, and its people. For a document and tradition that is now over 233 years old, this is no small challenge or achievement.

As much as this basic viewpoint is broadly shared, there is no shared understanding of what the Constitution and its developed doctrines mean or how it should be given meaning. Although most citizens and commentators pretend otherwise, the Constitution is as much a site for conflicting interpretation, not a source for the fixed resolution of such conflicts.[5] The history of constitutional law is mixed at best. For every *Brown*,[6] there is a *Dred Scott*;[7] for every *Goldberg*,[8] there is a *Hobby Lobby*;[9] for every *Harper*,[10] there is a *Citizens United*;[11] and for every *Obergefell*,[12] there is a *Masterpiece Cakeshop*.[13] There is no single narrative of America's constitutional development that can showcase the Constitution as an unqualified social and progressive good.[14] In confronting this truth, the basic maneuver for many is to highlight the ups as being reflective of what the proper or true Constitution demands and to treat the downs as examples of errors or anomalies where the courts have got it wrong. Of course, there

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5. *See* Maxwell L. Stearns, *Constitutional Law's Conflicting Premises*, 96 NOTRE DAME L. REV. 447 (2020) (noting that "[d]octrinal inconsistency is constitutional law's special feature and bug.").

6. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

7. Dred Scott v. Sandford, 60 U.S. 393 (1857)) (holding that freed slaves of African descent are not "citizens" under the Constitution), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

8. Goldberg v. Kelly, 397 U.S. 254 (1970).

9. Burwell v. Hobby Lobby Stores Inc., 573 U.S. 682 (2014).

10. Harper v. Canada, [2004] 1 S.C.R. 827 (Can.).

11. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

12. Obergefell v. Hodges, 576 U.S. 644 (2015).

13. Masterpiece Cakeshop, Ltd. v. Co. C.R. Comm'n, 138 S. Ct. 1719 (2018).

14. *See* ADAM COHEN, SUPREME INEQUALITY: THE SUPREME COURT'S FIFTY-YEAR BATTLE FOR A MORE UNJUST AMERICA, at xv-xvi (2020).

is no general agreement on what the good precedents are and what the bad ones are.

Certainly *Roe v. Wade* represents one of those precedents that has reached landmark status, even if there is as much criticism of it as celebration. By way of Justice Harry Blackmun's leading opinion (in a seven-to-two split) in 1973—although it was conceded that there was no explicit textual reference to a right to privacy in the Constitution—the Court recognized such a right and found that it was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[15] However, this was a right that was not absolute, but could be balanced against a state government's appropriate interests in protecting fetal life and health; a trimester approach was adopted.[16] Moreover, because the right was considered "fundamental," any restriction had to meet the demands of strict scrutiny.[17] In an aspiration that reverberates through all the Court's jurisprudence, Justice Blackmun insisted that his and the Court's challenge was "to resolve the issue by constitutional measurement, free of emotion and of predilection."[18]

Not surprisingly, the immediate response to *Roe* was divided and passionate; there were unyielding partisans on either side of the issue.[19] As with earlier iconic decisions like *Brown*,[20] there was not only heated debate about the result, but also stark disagreement among legal academics about the strength and kind of reasoning used to establish such a right and, therefore, the legitimacy of the majority's holding.[21] Some

15. Roe v. Wade, 410 U.S. 113, 153 (1973).

16. *Id.* at 150, 163.

17. *Id.* at 155.

18. *Id.* at 116.

19. Bill Peterson et al., *After* Roe v. Wade*: 10 Years' Conflict Over Abortion*, WASH. POST (Jan. 23, 1983), https://www.washingtonpost.com/archive/politics/1983/01/23/after-roe-v-wade-10-years-conflict-over-abortion/28c74c0e-c543-4da5-88a9-84ba1a1ed997/; *see*, *e.g.*, John Hart Ely, *The Wage of Crying Wolf: A Comment on* Roe v. Wade, *82* YALE L.J. 920 (1973) (criticizing *Roe v. Wade*); Michael J. Perry, *Abortion, the Public and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976) (arguing in support of *Roe* and responding to Ely's criticism).

20. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

21. *See generally* MARY ZIEGLER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE (2015). I will use the terms 'anti-abortion' and 'pro-choice'; other labels are loaded and controversial. For example, no one is for abortion as an end in itself and no one is not pro-life in general terms.

praised the decision and took the organicist view that it was right and proper that the Constitution should evolve in line with society.[22] But others railed against the decision on the basis that it betrayed the originalist underpinnings of constitutional interpretation.[23] As framed by the dissenting Justice Byron White, the problem was that there is "nothing in the language or history of the Constitution to support . . . a new constitutional right for pregnant women," and therefore, the decision amounted to "an improvident and extravagant exercise of the power of judicial review."[24] As such, *Roe* not only wreaked political and social havoc, it also set the jurisprudential battle lines for the coming half-century—the more progressive forces of an organicist constitution were pitted against the more conservative ranks of an originalist constitution.[25]

Over the years, the opponents of *Roe* began to gain ground. Inroads were made into women's fundamental procreative rights. In *Casey*, the trimester schema was abandoned in favor of a fetal viability test and strict scrutiny was replaced by an "undue burden" standard.[26] The Court became even more deeply divided. Whereas Justice Blackmun would have kept *Roe*'s approach fully intact, Justice Scalia would have done away with *Roe* as he maintained that such a right was not a liberty protected directly by the Constitution and there was a long-established tradition of permitting state governments to

22. *See generally* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1994). The organicist approach to constitutional interpretation has been the accepted mode of constitutional interpretation in Canada for over ninety years. *See* Edwards v. Canada, [2004] 3 S.C.R. 698 (Can.).

23. *See, e.g.*, Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion* Cases, 1973 SUP. CT. REV. 159, 185 (1973).

24. Roe v. Wade, 410 U.S. 113, 221-22 (1973) White, J., dissenting). Even the supporters of the Roe outcome were troubled about the strength of its reasoning and doctrinal cogency. *See, e.g.*, Ely, Donald H. Regan, *Rewriting* Roe v. Wade, 77 MICH. L. REV. 1569 (1979); Judith Jarvis Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFFS. 47 (1971); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 805-14 (1983).

25. These are general tendencies; it is possible, of course, to be an organicist and still be anti-choice and an originalist to be pro-choice. For a defense of the idea that originalism does not inexorably lead to conservative decisions, *see also* JACK M. BALKIN, LIVING ORIGINALISM (2014).

26. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 837 (1992).

regulate and even proscribe it.[27] As the protesting social voices against *Roe* were unrelenting and the Republican-appointed membership of the Court began to change, the push to overrule *Roe* became stronger and bolder.[28]

B. The Dobbs Debacle

In June 2022 (after an earlier leaked draft of Justice Alito's majority opinion[29]), the Supreme Court published its decision in *Dobbs*. As anticipated, the Court's majority of five Justices overruled *Roe* and did away with any constitutional right that women might have to terminate their pregnancies;[30] it was left to individual states to determine when, if at all, and how abortions might be permissible.[31] Again, as with *Roe*, the response was swift, divided, and antagonistic. This time, of course, the tables were turned. As the pro-choice forces lambasted the work of the Court in gutting pregnant women's rights, the anti-choice lobby was gleeful in their success.[32] Predictably, the legal academe was also divided, but their response was more restrained and jurisprudential. For some, the Court was viewed as simply correcting a constitutional misstep that was based on weak and unconvincing reasoning. For others, it was chastised for riding roughshod over an established, if shaky, precedent of the Court. Either way, as in the world at large, a legal landmark has been revealed to be

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27. *See id.* at 923 (Blackmun, J., concurring in part, and dissenting in part); *id.* at 980-81 (Scalia, J., concurring in the judgment and dissenting in part).

28. *See* Jess Bravin, *The Conservative Legal Push to Overturn Roe v. Wade Was 50 Years in the Making*, WALL ST. J. (June 24, 2022, 6:54 PM), https://www.wsj.com/articles/roe-v-wade-overturned-supreme-court-11656110804.

29. Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022, 2:14 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

30. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

31. *Id.* at 2243. *See id.* at 2310 (Roberts, C.J., concurring). *See id.* at 2304 (Kavanaugh, J., concurring).

32. *Compare, e.g.*, Lauren McEwan, *Feminist Women's Health Center Speaks Out Against Anti-Abortion Arguments in Dobbs v Jackson*, FEMINIST WOMEN'S HEALTH CTR., https://feministcenter.org/blog/feminist-womens-health-center-speaks-out-against-anti-abortion-arguments-in-dobbs-v-jackson/ (last visited Feb. 20, 2023) *with* Tom Shakely, *A New Day at Last: U.S. Supreme Court Reverses Roe v. Wade*, AMS. UNITED FOR LIFE (June 24, 2022), https://aul.org/2022/06/24/a-new-day-at-last-u-s-supreme-court-reverses-roe-v-wade/.

less enduring than many realized or expected; it was torn down and might or might not be replaced by a *Dobbs*-like other.[33]

Justice Alito's leading opinion was scathing in its treatment of *Roe* and Justice Blackmun's reasoning. Alito condemned *Roe* as being "egregiously wrong," "plainly incorrect," "remarkably loose," "deeply damaging," and "exceedingly weak."[34] The main thrust of the opinion was twofold—that the right asserted was supported neither by the text's wording nor by the nation's traditions and that *stare decisis* was not an insuperable barrier when it came to correcting constitutional errors.[35] As such, Justice Alito was not prepared to treat abortion as a constitutionally protected right, but handed the issue back to state governments to regulate as they saw fit: the Court must "heed the Constitution"[36] and "not fall prey to [*Roe*'s] unprincipled approach."[37] By way of concurrence, Justice Kavanaugh insisted that "because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral."[38] Although Chief Justice Roberts joined the majority in the immediate resolution of the case, he took a much more restrained and narrow approach: "[T]here is a clear path to deciding this case correctly without overruling *Roe* all the way down to the studs: recognize that the viability line must be discarded, as the majority rightly does, and leave for another day whether to reject any right to an abortion at all."[39]

Of course, the three dissenting Justices were not at all persuaded that *Roe* was wrongly decided and should be overruled. Expressing both disagreement and dismay, Justice Breyer emphasized the need to respect established precedents and, thereby, the legitimacy of the Court.[40] He rejected the majority's originalist approach and contended that "[t]he Constitution does not freeze for all time the original view of

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33. For an account of 'great cases,' *see generally* ALLAN C. HUTCHINSON, IS EATING PEOPLE WRONG?: GREAT LEGAL CASES AND HOW THEY SHAPED THE WORLD (2011). Ironically, the conservative majority made a 'woke' move by tearing down what they saw as an institutional symbol of past injustice.

34. *Dobbs*, 142 S. Ct. at 2240, 2243, 2245, 2265, 2270.

35. *Id.* at 2235-36, 39.

36. *Id.* at 2243, 2248.

37. *Id.* at 2243, 2248.

38. *Id.* at 2305 (Kavanaugh, J., concurring); *see infra* pp. 59-61.

39. *Id.* at 2314 (Roberts, C.J., concurring).

40. *Dobbs*, 142 S. Ct. at 2319-20 (Breyer, J., dissenting).

what those rights guarantee, or how they apply."[41] For him, it was vital that the Constitution was understood within a more organicist frame of interpretive reference.[42] The challenge was to ensure that such an approach did not give Justices' *carte blanche* to do whatever they wish, but that "applications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents."[43] As an almost half-century-old precedent that had been approved and followed by more than twenty cases, Breyer cautioned that *Roe*'s overruling would "call[] into question this Court's commitment to legal principle"[44] and that both women and the Court would pay "a terrible price" for such recklessness.[45]

As this brief introduction to the *Dobbs* opinions readily suggests, the differences in approach and viewpoint were stark and unrelenting. That said, I do not want to take apart both sets of opinions analytically bit-by-bit. Nor do I want to suggest that one opinion is somehow better than the other either as a matter of law or politics. What I do want to do is expose and criticize the jurisprudential underpinnings of the opinions in terms of their argumentative structure and judicial philosophy. My focus will largely be on the fact that the majority and the minority each accuse the other of acting in an unprincipled and, therefore, indefensible and illegitimate manner. While the majority alleges that the minority flouts the settled modes of constitutional interpretation (i.e., constitutional text and established national traditions), the minority asserts that the majority has ignored a settled precedent of constitutional law (i.e., *Roe* and related substantive due process holdings).[46] However, these assertions of unprincipled behavior speak to a much deeper and more telling divide between the Court's Justices.

41. *Id.* at 2326.
42. *See id.* at 2325-26.
43. *Id.* at 2326.
44. *Id.* at 2348.
45. *Id.* at 2350.
46. *Dobbs*, 142 S. Ct. at 2259-61; *id.* at 2330-35 (Breyer, J., dissenting).

C. The Challenge Ahead

The aftermath of *Dobbs* is far from novel in either intensity or sweep. There has been a continuing and troubling history of bitter reactions to Supreme Court decisions. The reaction to the school desegregation decision of *Brown* in 1954 and the following years ran deep and volatile.[47] In particular, the Southern States refused to abide by it and engaged in outright resistance for many years and even decades.[48] Also, there was opposition to the decision and its reasoning within both academic and judicial circles; it was considered to be an improper exercise of judicial power that flouted established traditions of what counts as valid constitutional law and as appropriate judicial decision-making.[49] The other obvious decision that received a powerful backlash was *Roe* itself. On this occasion (and in contrast to *Dobbs*), it was the political right that orchestrated and engaged in a violent and prolonged protest for almost half a century.[50] In both situations, whether made by the political left or right, the charge that the Supreme Court has acted politically became a partisan rallying-cry. The liberal defenders of *Roe* celebrated it as good and valid constitutional law but condemned *Dobbs* as bad and invalid constitutional law.[51] Of course, the conservative opponents of

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47. *See The Case That Changed America:* Brown v. Board of Education*: The Southern Manifesto and "Massive Resistance" to* Brown, LEGAL DEF. FUND, https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/ (last visited Feb. 24, 2023); *see also* Leslie T. Fenwick, *The Ugly Backlash to* Brown v. Board of Ed *That No One Talks About*, POLITICO (May 17, 2022, 2:13 PM), https://www.politico.com/news/magazine/2022/05/17/brown-board-education-downside-00032799.

48. *See id.*; *see generally* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976); *see generally* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004).

49. *See, e.g.*, THE CONFERENCE OF CHIEF JUSTICES: REPORT OF THE COMMITTEE ON FEDERAL-STATE RELATIONSHIPS AS AFFECTED BY JUDICIAL DECISIONS (1958), 104 CONG. REC. A7782 (1958); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

50. *See* ZIEGLER, *supra* note 21.

51. *See* Erwin Chemerinsky, *The Enormous Consequences of Overruling* Roe v. Wade, TIME (May 3, 2022, 9:50 AM), https://time.com/6172956/consequences-overruling-roe-wade/; *see also* Brook Thomas, *What Alito Gets Wrong by Comparing His Opinion in* Dobbs *to* Brown v. Board of Education, SLATE (July 5, 2022, 12:51 PM), https://slate.com/news-and-politics/2022/07/alito-roe-v-wade-abortion-ban-school-segregation-brown-v-board-of-education.html.

Roe condemned it as bad and invalid constitutional law and defended *Dobbs* as good and valid constitutional law.[52]

In the past, although political disagreements ran strong and divided, there seemed to be some loose agreement that resorting to the Supreme Court would and should effectively resolve disputed matters. It was assumed that after any Supreme Court decision was handed down, both sides of the political aisles would accede, albeit reluctantly and critically, to the dictates of constitutional law.[53] So, while there was understood to be underlying and sharp ideological differences in play, there was a deeper and more unifying commitment to the idea that the Constitution can stand, if not apart from prosaic politics, at least to the side of them. Properly interpreted by the Supreme Court, constitutional law was accepted to be a principled and reasoned refuge from the opportunistic hustle and bustle and arch-partisanship of the political arena; the courts could fulfil their constitutional role by bringing a measured, rational, and nonideological level-headedness to political contestation. While presidents, politicians, and social activists played politics and got their hands dirty, the Chief Justice of the Supreme Court and his puisne associates were expected to take a more elevated stance and keep their hands unsoiled by that same political dirt.[54] As such, the Supreme Court was viewed as a "forum of principle," not another divisive arena of political haggling, by both the warring politicians and judges.[55]

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52. Dan O'Donnell, *The Brilliance of the* Dobbs *Decision*, MACIVER INST. (May 4, 2022), https://www.maciverinstitute.com/2022/05/the-brilliance-of-the-dobbs-decision/#:~:text=It%E2%80%99s%20no%20surprise%20that%20this%20draft%20opinion%20was,implicit%20in%20any%20other%20rights%20that%20it%20confers.

53. *See* Adam Liptak, *Angering Conservatives and Liberals, Chief Justice John Roberts Defends Steady Restraint*, N.Y. TIMES (June 26, 2015), https://www.nytimes.com/2015/06/27/us/chief-justice-john-roberts-defends-steady-restraint.html?hp&action=click&pgtype=Homepage&module=b-lede-package-region®ion=top-news&WT.nav=top-news; Hannah Hartig, *Before Ginsburg's Death, a Majority of Americans Viewed the Supreme Court as 'Middle of the Road*,*'* PEW RES. CTR. (Sept. 25, 2020), https://www.pewresearch.org/fact-tank/2020/09/25/before-ginsburgs-death-a-majority-of-americans-viewed-the-supreme-court-as-middle-of-the-road/.

54. Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. 35, 36-37 (2012) (discussing the Framers' intention that the Supreme Court be insulated from both political pressures and public opinion).

55. This phrase is, of course, Ronald Dworkin's. *See* Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981). I am not suggesting that the

In recent years, even that shallow and far universal assumption has been eroded. Notwithstanding what many judicial apologists still maintain, the Supreme Court appears to be facing a full-on crisis of institutional legitimacy.[56] Many citizens no longer concede that the Supreme Court is not a political institution.[57] Indeed, it seems to be a reasonably common perception that it is or has become a political institution, which may explain the public's rapidly declining confidence in the Supreme Court.[58] As such, political activists have begun to direct their efforts to ensuring that judges are appointed who reflect and embrace their politics and to developing a litigation strategy that leverages that realization.[59] However, there can be little doubt that political conservatives have been much more effective and successful at doing this.[60] In contrast, political liberals seem to have difficulty letting go of the idea that—whatever its present failings—the Supreme Court can actually live up to the

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judges of the Supreme Court adopt Dworkin's more general naturalist methodology for resolving constitutional disputes.

56. *See* Spencer Bokat-Lindell, *Is the Supreme Court Facing a Legitimacy Crisis?*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/opinion/supreme-court-legitimacy-crisis.html.

57. *See* Susan Milligan, *Supreme Court Standing Slips as Politics Creeps Onto the Bench*, U.S. NEWS (July 1, 2022, 6:00 AM), https://www.usnews.com/news/the-report/articles/2022-07-01/supreme-court-standing-slips-as-politics-creeps-onto-the-bench; Zack Beauchamp, *What happens when the public loses faith in the Supreme Court?*, VOX (June 26, 2022, 11:01 AM), https://www.vox.com/23055620/supreme-court-legitimacy-crisis-abortion-roe.

58. Most adults in the United States are skeptic that Justices are not influenced by politics according to recent polls. *See Public's Views of Supreme Court Turned More Negative Before News of Breyer's Retirement*, PEW RES. CTR. (Feb. 2, 2022), https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/; Jeffrey M. Jones, *Confidence in U.S. Supreme Court Sinks to Historic Low*, GALLUP (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx (noting a sharp drop in the American public's confidence in the Supreme Court).

59. For example, Justice Kagan has called out Texas for "strategically filing" immigration cases before courts aligned with their politics. *See* Uriel J. García, *U.S. Supreme Court Wrestles over Biden's Immigration Enforcement Policy*, TEX. TRIB. (Nov. 29, 2022, 2:00 PM), https://www.texastribune.org/2022/11/29/supreme-court-texas-biden-immigration-policy/.

60. *See* Jeffery Toobin, *The Conservative Pipeline to the Supreme Court*, NEW YORKER (Apr. 10, 2017), https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court?utm_source=onsite-share&utm_medium=email&utm_campaign=onsite-share&utm_brand=the-new-yorker.

traditional aspiration that constitutional law can be done in a way that grapples with politics, but in a way that does not collapse into partisan politics.[61] They seem willing to declare that "constitutional interpretation is necessarily a normative enterprise, not a mechanical one,"[62] but they maintain that it is possible to be normative without also being ideological.

In an important sense, political liberals and progressives have not been able to abandon the heady days of the 1970s when the Warren Court "gave progressives a reason to see the judiciary as a friend rather than a foe."[63] This is a dangerous and self-defeating belief; it is more wishful thinking than anything else. The Constitution's past, except for the Warren Court, has been largely conservative with small pockets of liberal alignment.[64] Also, the whole constitutional enterprise has been played according to conservative rules and on their home turf.[65] *Brown* and then *Roe* are both the talismans and the *bêtes noire* of liberal and progressive constitutionalism.[66]

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61. *See generally* MARTHA MINOW, IN *BROWN'S* WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK (David Kairys ed., 2010).

62. Jonathan S. Gould, Book Note, *Puzzles of Progressive Constitutionalism*, 135 HARV. L. REV. 2054, 2084 (2022) (reviewing MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM (2022) and JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTIONAL: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022)).

63. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 964 (2004).

64. *See* COHEN, *supra* note 14, at xvi-xxi.

65. Peter Berkowitz, *A Way Forward for a Troubled Political Coalition*, *in* CONSTITUTIONAL CONSERVATISM: LIBERTY, SELF-GOVERNMENT, AND POLITICAL MODERATION 113, 114-15 ("The nation was founded on [constitutional conservatism]."). This chapter outlines the principle of constitutional conservatism and tracks how the concepts underlying constitutional conservatism mirror those upon which the nation was founded (i.e. ideas of Burke, Adam Smith, Tocqueville, etc.).

66. For support that Brown as a *bêtes noire* and talisman of liberal constitutionalism, *see* Calvin Terbeek, *"Clocks Always Must Be Turned Back":* Brown v. Board of Education *and the Racial Origins of Constitutional Originalism*, 115 AM. POL. SCI. REV. 821, 832 (2021) ("[T]he modern GOP's constitutional 'originalism' grew directly out of resistance to Brown."); Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763, 1773 (1993) (describing Brown as "the fountainhead of the civil rights movement and as a milestone of Equal Protection jurisprudence."). For support that Roe as a *bêtes noire* and talisman of liberal constitutionalism, *see* William N. Eskridge, Jr., *Pluralism and Distrust: How Courts Can Support Democracy by Lowering the Stakes of Politics*, 114 YALE L.J. 1279, 1326 (2005) ("Not only did *Roe* energize the pro-life movement and accelerate the infusion of sectarian religion into American politics, but it also radicalized many traditionalists."); Robin West, *Progressive*

While they are high watermarks of liberal achievement, they were bought at the enormous cost of portraying the Supreme Court as the exclusive or only place to seek liberal justice and hold back the conservative tide.[67] Further, this meant that being for the Constitution entailed being for the Supreme Court as its primary expositor and guardian of its values. However, in defending the Supreme Court as a neutral institution, liberals, like Ronald Dworkin,[68] were making a gamble that liberals would prevail more than or as much as conservatives in constitutional battles. However, the fact is that, in such contests, liberalism, let alone progressivism, has come out second best in the long and medium-term.[69]

In so many ways, *Dobbs* will likely come to be seen as the occasion when the liberal chickens have come home to roost. Emboldened by their savvier grasp of judicial politics, the conservative judges and activists have taken advantage of liberalism's naivete.[70] They have exploited the idea that the Supreme Court should be understood as a politically neutral institution and weaponized the Constitution as a force for advancing their own political agenda.[71] In dealing with this challenge, liberals and progressives will need to not only change their strategy to constitutional law and litigation, but also to adopt an entirely different approach to thinking about and implementing what is involved in having a constitutional

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and Conservative Constitutionalism, 88 MICH. L. REV. 641, 646 (1990) ("Progressive[] [constitutionalists] . . . tend to support the outcome in *Roe*" because "progressives tend to support an 'affirmative' understanding of the liberty protected by the due process clause of the fourteenth amendment—in which case, reproductive and sexual freedom is at least arguably included within the sphere of due process protection . . . .").

67. *See* Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFFALO L. REV. 1267 (discussing and critiquing *Brown* and *Roe* as two examples of judicial lawmaking and describing Judge Friendly's stance that "judicial lawmaking based on policy should not even be controversial . . . .").

68. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1997).

69. Erwin Chemerinsky, *Progressive and Conservative Constitutionalism as the United States Enters the 21st Century*, 67 CONSERVATIVE AND PROGRESSIVE LEGAL ORDERS 53, 53 (2004) ("Thirty-two years ago, when William Rehnquist joined the Supreme Court, he was perceived as the far right on the Court. Now, virtually every view that he expressed has come to be the majority position.").

70. Toobin, *supra* note 60.

71. *See generally* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM (2022).

agenda. This is no easy task. But, if liberals and progressives are to reverse or even offset the conservative successes in constitutional law, they must be prepared to make bold and radical moves. By pursuing the same tried-and-untrue tactics, they will only be throwing good money after bad. If they do not take this stance, they will be handing over the future of constitutional law to an increasingly conservative politics for generations to come.

As the *Dobbs* decision shows, what makes a judicial decision good or bad is not based on an internal technical assessment (i.e., does it best conform with existing legal doctrine in small and/or large ways?), but is validated by an external normative evaluation (i.e., does it reach and defend a stance that is politically desirable and defensible in terms of prevailing social and political contexts?). As such, the appropriate and pressing questions are not about whether judges act judicially, but whether what it means to act judicially can be understood in more openly political terms. In saying this, I am not suggesting that there is no difference between judges and politicians. However, I am suggesting that the difference is not as large or as significant as most scholars and popular commentators contend. Moreover, no matter how desirable maintaining the traditional distinction between judges and politicians would be, it is simply not achievable or realizable—judges cannot fulfil their roles in deciding constitutional issues without resorting to or relying on controversial and disputed political values. The Supreme Court is inevitably and unavoidably political. In other words, acting judicially is one more way of acting politically.

II. AS GOOD AS IT GETS

A. A Principled Primer

Although it has a much longer lineage, the modern idea that judicial decision-making should be principled in character and application is attributable to Herbert Wechsler. In his Holmes Lecture in 1959, he urged that, in order to justify its legitimate exercise of constitutional authority, a court of law must not act as a "naked power organ."[72] In particular, it must

72. Wechsler, *supra* note 49, at 12.

be able to distinguish its work from "the ad hoc in politics."[73] To do this, Wechsler contended that courts "are obliged to be entirely principled" and, as such, their decisions must rest "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."[74] In the immediate post-*Brown* era when the Warren Court was beginning to flex its activist and liberal muscles, Wechsler's challenge was treated as a powerful reminder and corrective for constitutional judges and jurists tempted to act too boldly or too recklessly.[75]

This idea is a demanding, but vague standard that has stood the test of time. Although the appeal to "neutral standards" has been interpreted in different and occasionally conflicting ways, it still remains a rallying cry for mainstream jurists who seek to explain and criticize the constitutional work of the Supreme Court.[76] The most well-known and perhaps successful effort to build on Wechsler's work is that of his former student, Ronald Dworkin. In a vast body of writings, he was insistent that the Supreme Court was neither another arena for political haggling and policy analysis nor an occasion to resurrect the pseudo-original views of the founding era.[77] Instead, he proposed that there existed a more "noble vision" of "a constitution of principle that lays down general, comprehensive moral standards that government must respect but that leaves it to . . . judges to decide what those standards mean in concrete circumstances."[78] Dworkin's was a more openly political jurisprudence that put principled reasoning in the service of a progressively liberal politics.

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73. Wechsler, *supra* note 49, at 15.

74. Wechsler, *supra* note 49, at 12, 19. Wechsler later relaxed his general requirement by recommending that the judge must test the principle against "applications that are now foreseeable." Herbert Wechsler, *The Nature of Judicial Reasoning*, *in* L. AND PHILOSOPHY 290, 298 (1964). For an extended account of the jurisprudential milieu at the end of the 1950s and beginning of the 1960s, *see* ALLAN C. HUTCHINSON, HART, FULLER AND EVERYTHING AFTER: THE POLITICS OF LEGAL THEORY (2023).

75. *See generally* Louis H. Pollack, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

76. *See* Wechsler, *supra* note 49, at 7 (arguing that courts should decide cases on "grounds of adequate neutrality.").

77. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

78. DWORKIN, *supra* note 22, at 119.

Whether persuaded or not by Dworkin's particular brand of liberal legal theory, many legal scholars still hold firmly to the Wechslerian notion that judges can resist the false allure of ad hoc politics and fulfill their constitutional duties in a more honorable and redemptive fashion by respecting the dictates of principled reasoning.[79] For example, in 2001, there was an ad in the *New York Times* of a letter sent by 673 law professors from 173 American law schools about the *Bush v. Gore* debacle; they condemned the Court for using "its power to act as political partisans, not as judges of a court of law."[80] However, as with much jurisprudential theorizing, the proof of this theoretical pudding is in its practical eating. It is difficult to imagine any judges who do not think that they are engaged in a principled exercise of their judicial function; disagreement between judges over who has the corner of what counts as principled is very much par for the course.

There seems to be, at least, three particular issues with a generally principled approach to constitutional adjudication. First, what is a principle as contrasted to other norms? Second, how are constitutional principles distinguishable from more general moral or political ones? Third, where and how can these principles be located and applied? The opinions in *Dobbs* provide ample raw material to explore these questions and evaluate any answers offered.

First, although there is little clarity on exactly what a principle is, it would seem that most consider it to be a broad proposition that is more general than a rule and that provides a normative and animating basis for guiding reasoning or actions.[81] Most importantly, it is used to denote a kind of normative stance or commitment that can be easily distinguished from a more calculated and narrow disposition

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79. Wechsler, *supra* note 49, at 6-7 (describing the "*ad hoc* in politics" as "the deepest problem of our constitutionalism").

80. Jonathan Schell, *Letter From Ground Zero*, THE NATION (July 15, 2004), https://www.thenation.com/article/archive/letter-ground-zero-20/. For an unapologetic effort to pick up the Wechsler challenge, *see* RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 24 (2018) ("The Justices' core mission involves the provision of reasoned justice under law.").

81. For example, DWORKIN, *supra* note 77, at 23 (citing Riggs v. Palmer, 115 N.Y. 506 (1889)). The rule provided by the statute of wills could be interpreted to allow a murderer from inheriting from his victims, but Judge Earl ruled the statute should be interpreted equitably in light of common law principles. An abstract principle guided the interpretation and construction of a rule.

to advance particular interests at the expense of others. Of course, it is assumed that such principles embody or result in values that are ethically good rather than bad. In particular, a principle is something that entails a willingness to act honestly in line with it, even if this leads to uncomfortable or inconvenient places; it cannot be "reduced to a manipulative tool."[82] As such, the identity and identification of principles is far from definitive or decisive; this is both their enticing beauty and their deceptive allure. For example, in relation to *Dobbs*, a commitment to liberty or equality in constitutional adjudication is principled, but it is hardly the stuff of shared values in itself; it is more a site for contestation, not a formula for its resolution.

Secondly, it is not simply any principle that can count for adjudicative purposes, but only those that are legally and constitutionally based in their derivation and source: "[T]he kind of principled appraisal, in respect of values that can reasonably be asserted to have constitutional dimension, that alone is in the province of the courts."[83] So judges cannot rely on any old principle, but must anchor a preferred principle in the available constitutional doctrines and legal traditions; there is an obligation to defend any principle relied upon as being part and parcel of extant legal doctrine. Of course, in *Dobbs*, both sets of judges make it plain that they thought that the other had rode roughshod over the embedded demands of constitutional law and that their own principled position is much more, if not exclusively, in tune with the underlying structure and substance of constitutional law.[84] Neither the majority nor minority suggests that they are breaking new constitutional ground or heading off in new doctrinal directions. As such, the resort to principles places a low threshold on what can count as a constitutional principle—the

82. Wechsler, *supra* note 49, at 15. Indeed, some have refused to acknowledge that evil "may have as much coherence and inner logic as good ones." Wechsler's is a controversial piece in terms of its substantive and doctrinal content. A charitable reading recommends that Wechsler seemed to oppose segregation as a political fact, but could not find a suitable neutral principle in law to ground the Supreme Court's decision in Brown to render segregation unconstitutional.

83. Wechsler, *supra* note 49, at 16.

84. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2259-61 (2022); *id.* at 2319-20, 2323-25 (Breyer, J., dissenting).

consequence being that there are too many principles on constitutional display.

Thirdly and perhaps most critically, the resort to constitutional principles for adjudication does not resolve political disputes, but simply shifts them to a different level of abstraction. Despite the assertions of constitutional theorists and judges, it is difficult to understand how a controlling principle can achieve the required quality of generality or "disinterested[ness]"[85] that would allow it to apply effectively to contested or ideological issues (like abortion) and avoid having a built-in propensity to favor one set of interests over others. There seems to be none or very few principles that could strike either a theoretical or operational balance that could be acceptable to all political or moral sides of a dispute. Moreover, such an aspiration smacks of a certain otherworldliness. The assumption seems to be that there is some obvious and intuitive worth to those principles that transcend or go beyond familiar and contested stances on controversial issues, like racial equality or same-sex marriage. Indeed, as the opinions in *Dobbs* reveal, the belief that there could be some neutral principle that would reconcile or placate the competing values in play seems far-fetched.[86] When understood from such a perspective, neither Justice Alito nor Justice Breyer (and the different political constituencies that they come from and speak to) can claim to be reasoning or speaking from such a standpoint. While not unprincipled, the justifications espoused are clearly partial and have very different real-world consequences.

B. The Dobbs Stand-Off

As obvious and uncontroversial as this principled requirement seems, it places very little restraint on the judges' argumentative efforts. Indeed, this is where the jurisprudential rubber hits the road. The resources of constitutional law are so ample, so capacious, and so

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85. *See* Wechsler, *supra* note 49, at 20. Significantly, in hewing to a principled approach, Dworkin made little effort to suggest that his chosen principles were neutral, although he did assert that law "is deeply and thoroughly political …. But law is not a matter of personal or partisan politics …." RONALD DWORKIN, A MATTER OF PRINCIPLE 146 (1985).

86. *Dobbs*, 142 S. Ct. at 2310 (Kavanaugh, J., concurring); *id.* at 2317 (Breyer, J., dissenting).

multidimensional that principles are prolific and abundant; it is possible to generate any number of principles at any number of levels to support a range of positions and outcomes.[87] The jurisprudential problem is, therefore, that there are too many principles, not too few, with no available meta-principle to resolve any tension or contradiction. Because of this profligacy, both the majority's and minority's doctrinal stances are entirely defensible in strictly legal terms. Most significantly, they both can easily claim to be above the threshold of doctrinal integrity that is reasonably demanded of judges in constructing legal judgments; the judgments are sufficiently polished and professional instances of the judicial craft. At face value,[88] therefore, each of the opinions given in *Dobbs* can claim to be principled and, therefore legitimate. However, they are each far from decisive in being able to persuade those with different principles and normative commitments.

Whereas the majority draw upon the principled idea of a fixed and originalist Constitution, the minority rest their case on the principled appeal to an evolving and organicist Constitution.[89] While there is nothing that necessarily follows from those initial commitments, they tend to lead in a doctrinal direction that plays out predictably—the majority rejects a right to abortion (as it was not recognized in the constitutional text or traditions) and the minority defends it (as it was recognized as being an evolving development in established

87. Tushnet, *supra* note 24, at 813 ("Even when we take account of the language of the opinion, each decision can be traced to many different possible principles . . . ."). The conclusion and inferences that I draw from this observation is different from that of Tushnet. *See generally* ALLAN HUTCHINSON, *Towards "Democratic Courts": A Salvage Operation*, *in* DEMOCRACY AND CONSTITUTIONS: PUTTING CITIZENS FIRST 125 (2021).

88. It is important to note that I am not concluding that there is nothing to choose between the two sets of opinions in terms of either their constitutional merit or democratic legitimacy. For instance, although the *Dobbs* majority treated the absence of the word 'abortion' as highly significant, there is also no mention of the words 'fetus' or 'prenatal life' that the majority considered, as a constitutional matter, an interest that could and should be weighed by the states. *See Dobbs*, 142 S. Ct. at 2242 (noting that "*Roe* and *Casey* must be overruled" because "[t]he Constitution makes no reference to abortion . . . .").

89. *Dobbs*, 142 S. Ct. at 2242-43 (majority opinion); *id.* at 2318-20 (Breyer, J., dissenting).

precedent).[90] Both majority and minority, in claiming the particular principled ground that they did, strongly assert that the other is acting in an unprincipled, abusive and opportunistic manner.[91] Indeed, they each condemn the other as engaging in a crude power grab: "[T]he Court must not fall prey to such an unprincipled approach"[92] and "[the] majority's pinched view of how to read our Constitution[93] B is hypocrisy."[94] In short, the assertion of being unprincipled is simply a way to castigate those who disagree with the particular principles being relied upon in reasoning or result. The problem of course, is that if opposing approaches to constitutional argument can qualify as principled, then the idea of principled reasoning is doing little work at all.

As such, the majority's judgment does not prevail because it is somehow a better or more cogent example of constitutional reasoning. Although it might be considered so in some juristic and judicial quarters, Justice Alito's opinion prevails because it garnered the support of more judicial colleagues than the minority did. As evidenced by *Dobbs*, the Rule of Law is often little more than the Rule of Five (even if those judges claim to be offering better or more valid legal arguments).[95] It is a numbers game as much as anything else. Indeed, Justice Breyer's warning can be directed at him and his dissenting colleagues as much as it can be at the majority— "to reverse prior law 'upon a ground no firmer than a change in [the Court's] membership' would invite the view that 'this institution is little different from the two political branches of the Government."[96] On another day (perhaps on January 22,

90. *Id.* at 2242-43, 2245 (majority opinion); *id.* at 2319-20 (Breyer, J., dissenting).

91. *Id.* at 2248 (majority opinion); *id.* at 2318, 2323 (Breyer, J., dissenting).

92. *Id.* at 2248 (majority opinion).

93. *Id.* at 2325 (Breyer, J., dissenting).

94. *Id.* at 2319; *id.* at 2319, 2325. Although the majority suggest that an originalist approach is the only legitimate way to proceed, they are hard pressed to justify some landmark decisions, particularly *Brown*, by reference to it. *See id.* at 2341-42. Although Justice Kavanaugh stresses that the rolling back of *Roe* is a one-off, *id.* at 2310 (Kavanaugh, J., concurring), Justice Thomas hints that the overruling of *Roe* might presage other corrective interventions on 'substantive due process'. *Id.* at 2301-02 (Thomas, J., concurring).

95. *See, e.g.*, H. Jefferson Powell, *The Rule of Five*, *in* CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16 (2008).

96. *Dobbs*, 142 S. Ct. at 2350 (Breyer, J., dissenting) (quoting Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 864 (1992)).

1973, when *Roe* was decided?), the three justice minority might be able to acquire two or more votes and be susceptible to the same charge.[97]

So, if the measure of principled reasoning does not explain the relative and opposite justifications of the majority's and minority's opinions, what does? Is there some persuasive account of constitutional reasoning that can salvage the judicial enterprise and confer legitimacy on their work? Or is it all simply a matter of political maneuvering dressed up as legal reasoning?[98] I will offer some initial answers to those questions. Of course, the jurisprudential challenge is to produce an account that allows for some disagreement between Justices in approach and outcome but does not validate all approaches and outcomes. If that were the case, then the account offered would not be doing the kind of heavy lifting that is expected or required. However, the fact that all judges are obliged to deal with a constitutional text and doctrine that can be traced back over more than centuries does not auger well for any approach that seeks to be more progressive and modern in its outlook.

III. BREAKING BAD

A. A Fresh Approach

On its face, Wechsler's demand that courts should act in a principled manner is no bad thing. This is particularly so when

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97. The *Roe* court divided seven-to-two. Interestingly, while the two dissenters (Justices White and Rehnquist) were a Democratic and Republican appointment respectively, the seven members of the majority (Justices Blackmun, Marshall, Brennan, Douglas, Stewart, Powell, and Chief Justice Burger) comprised three Republican and four Democratic appointments. As such, it hard to make any real or deep connection between political orientation and the result in *Roe*. This cannot be said of *Dobbs*. *See infra* at pp. 98-99.

98. There are many efforts to answer these questions. However, the main gambit is to line up a preferred mode of reasoning with preferable outcomes. Dworkin is particularly susceptible to this charge in collapsing constitutional rightness and egalitarian liberalism into one and the same thing. *See* Dworkin, *supra* note 22. There are some who do attempt to accept that, although there are some decisions that are plain wrong, most decisions of the Supreme Court are reasonable and defensible. *See generally* CASS R. SUNSTEIN, CONSTITUTIONAL PERSONAE: HEROES, SOLDIERS, MINIMALISTS, AND MUTES (2015). David A. Strauss, *Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015); LAWRENCE LESSIG, FIDELITY & CONSTRAINT: HOW THE SUPREME COURT HAS READ THE AMERICAN CONSTITUTION (2019).

it is presented as the alternative to courts acting as a "naked power organ" or as mimicking "the ad hoc in politics."[99] However, although now considered as ground zero by constitutionalist theorists, this jurisprudential contrast has done more harm than good in both law and politics. If judges are not as principled as constitutional jurists insist, nor need legislators be understood as being as crudely ideological as this dichotomy suggests. Judges and politicians are neither principled nor ideological simply by virtue of their status as politicians or judges. While the realm of politics might well (and, in present circumstances, can often more correctly) be characterized in such crude terms, there is no reason why this has to be the case. It is reasonable to think about the possibility that the world outside the courts can also be understood as a principled undertaking; reasonable opinions and reasoned argument could be as much expected in the political world as the accepted practices of raw ideological horse trading, bare-knuckle confrontations and crass power grabs.[100] So Wechsler's black-and-white depiction of modern government does justice to neither the performance of courts nor the work of governmental institutions.

Within such a frame of reference, it is not surprising that, when judges are criticized as failing to perform in a thoroughly professional and principled way, they are condemned as also being nothing more than ideologues in disguise.[101] This criticism is therefore seen to place them in an indefensible and incorrigible role that is self-evidently unacceptable. Because each is seen as a negation of the other, there is little room to recommend that judges (and politicians) might be acting in a way that is both principled and political. This dichotomized approach is an unfortunate and unnecessary understanding of both law and politics. Moreover, by accepting Wechsler's limited schema, critics of judicial decision-making have allowed themselves to be trapped within the same limited and limiting straitjacket. In short, they face an unnecessary Hobson's choice: judges can be principled, even if they

99. Wechsler, *supra* note 49, at 12, 15.

100. For a biting critique along these lines, *see* YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY: WHY OUR FREEDOM IS IN DANGER & HOW TO SAVE IT 54-57, 80-98 (2018).

101. *See, e.g.*, MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988).

occasionally fall short of the exacting standard, or they can be "manipulative," in that they make no attempt to be principled.[102]

Instead of this, I want to propose a way of thinking about judicial reasoning in constitutional law that will provide a more sophisticated framework for both appreciating and criticizing its performance. This involves cultivating a jurisprudential understanding that allows constitutional reasoning to be seen to straddle both the principled and the ideological as well as the professional and the partisan. The Supreme Court's opinions in *Dobbs* offer a timely and telling opportunity to do that. If the majority and minority opinions are viewed through the traditional lens of a Wechslerian approach, there is nowhere to go once it is established that they both can claim a certain legitimacy in terms of "principled appraisal"[103] or that they both fail to meet that standard and are labelled as political. The critical jurist can only conclude that they are both exercises of raw political power and manipulation. In contrast, I want to demonstrate that they can both be better understood as professional and as political performances.

B. Of Results and Reasoning

There is nothing about the reasoning employed by the majority and minority in *Dobbs* that would permit them to claim conclusively that their decision was more valid or legitimate simply by virtue of the style and force of their reasoning. Of course, each chastises the other and contends that their opponents are either "unprincipled" or guilty of "hypocrisy."[104] As such, the debate over whether the majority or minority is more compelling and decisive in terms of their principled reasoning is a sleeveless errand; each can claim to have met and exceeded any threshold requirement for competent and professional reasoning. Moreover, numerous issues with each approach make it impossible to draw a clear, authoritative connection between reasoning and decision. So,

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102. Wechsler, *supra* note 49, at 15. Of course, there will be occasions when the allegation of bad faith and manipulativeness might be warranted.

103. *Id.* at 16.

104. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2248 (2022); *id.* at 2319 (Breyer, J., dissenting).

while both are entirely acceptable examples of professional competence, both are also unable to convince that their reasoning is authoritatively superior to the other.

The majority opinion's reliance on an originalist approach drawing exclusively on "the constitutional text, history, or precedent" flatters to deceive in its claim to be both grounded and insulated from political contamination.[105] Indeed, the shakiness of this approach is not difficult to reveal—its use of history is too selective and too self-serving; it is unsupported by the Court's own jurisprudence as being the only and exclusive mode of constitutional reasoning; it is unable to account for some important decisions, especially *Brown*; and it offers no convincing evidence that the Founders would have expected their own substantive views to be given enduring priority. As the minority states, "the Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply" and "one result of today's decision is certain: the curtailment of women's rights, and of their status as free and equal citizens."[106] In short, the majority's decision needs to be buttressed by something other than the innate strength of its legal reasoning if it is to assert unassailable authority or appeal.

Reaching a similar conclusion, we find that the minority opinion's energizing force depends on the extent to which its evolutionary and organicist rendition of constitutional reasoning can be defended. Again, the fragility of this approach is not difficult to reveal—it places enormous power and trust in each generation's judges; it imposes no fixed or reliable constraints on what the judges can or should do; it is unsupported by the Court's own jurisprudence as being the only and exclusive mode of constitutional reasoning; and its reliance on precedential authority is not easily squared with

105. *Id.* at 2266 (majority opinion). The originalist approach is itself a relatively recent innovation and its rise can be attributed to Justice Scalia. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (1998). Ironically, there is historical evidence to conclude that the Founders did not intend their specific views to influence future interpretations of the Constitution. *See* GORDON S. WOOD, THE IDEA OF AMERICA: REFLECTIONS ON THE BIRTH OF THE UNITED STATES (2011).

106. *Dobbs*, 142 S. Ct. at 2318, 2326 (Breyer, J., dissenting). For a balanced assessment of originalism and organicism, *see generally* ROBERT W. BENNETT & LAWRENCE B. SOLUM, CONSTITUTIONAL ORIGINALISM: A DEBATE (2011).

its emphasis on growth and responsiveness.[107] As the majority states, "the Constitution does not grant the nine unelected Members of this Court the unilateral authority to rewrite the Constitution to create new rights and liberties"[108] and "the Court must not fall prey to such an unprincipled approach."[109] In short, the minority's decision does not make itself authoritative and superior by dint of its legal arguments alone.

Consequently, the only credible way to explain what went on is that the majority and minority each made a decision to rely on a legal technique that would produce what in their eyes was a more desirable outcome. What gets these opinions over the decisional line, leaving aside the numbers matter,[110] is their commitment to a particular political and/or moral stance. Of course, each side might seek to argue that it was their commitment to a certain style of argumentation—originalist or organicist—that tipped the scales one way or the other in reaching the conclusion that they did. But this position is very hard to maintain. It would seem that it is only jurists (as opposed to the general public) who hold to this naïve and romanticized view of judges as political innocents who eschew the temptations to act politically.[111] It is certainly not the case that most politicians, including appointing presidents, pay no attention to a judge's political leanings. While judges might not be appointed only for their politics or their identity, it is a rare appointee whose general political views run against the politics of the appointing president.[112]

A much more plausible account is that the mode of reasoning chosen, organicist or originalist, is compatible generally with reaching the kind of result that such proponents would approve of in terms of its political or moral salience. It

107. *See Dobbs*, at 2317-54 (Breyer, Sotomayor, Kagan, JJ., dissenting); *id.* at 2325-26.

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

109. *Id.* at 2306 (Kavanaugh, J., concurring).

110. *See Dobbs*, 142 S. Ct. at 2283, 2290.

111. The leading exemplar of this view is Ronald Dworkin. *See* Dworkin, *supra* note 55; DWORKIN, *supra* note 68.

112. This is not to say that judges always follow the wishes of their appointing president e.g., Earl Warren) or that they do not change their political allegiances over time (*e.g.*, Harry Blackmun). *See* ALLAN C. HUTCHINSON, *Crossing Over: The Anti-Formalist Critique*, *in* TOWARD AN INFORMAL ACCOUNT OF LEGAL INTERPRETATION 104-22 (2016). However, in recent years, some presidents have been more openly ideological in their choices.

is not that every decision would result in such compatibility, but that it will most often be the case, especially in areas of overt moral and political controversy. To put it bluntly, in *Dobbs*, the majority was set on overruling *Roe* and coming up with the best set of reasons to do that, whereas the minority was equally determined to stand by *Roe* and opt for a reasoning strategy that leaned strongly in that direction.[113] So, insofar as the anti-abortion position is more easily achieved by an originalist and thereby conservative style of reasoning, the majority took such a line. Insofar as the pro-choice stance is more straightforwardly attained by an organicist and thereby more progressive mode of reasoning,[114] the minority adopted this approach. While this phenomenon is more readily apparent in *Dobbs* (and *Roe*), it is a staple feature across the case law of constitutional law.[115]

To ignore or fail to give sufficient weight to the political dimension in grasping the dynamics of judicial reasoning is unconvincing. Indeed, it is like staging Shakespeare's *Hamlet* without the Prince: it elides a main explanatory factor for the play, its performance, and its meaning. The same is true for constitutional decision-making—the political and moral preferences of the judges are at work to a greater and lesser extent. In saying this, I am not suggesting, as some apologists claim that critics do, that "the justices simply vote political preferences . . . without regard to law."[116] The rejection of the

113. *See Dobbs*, 142 S. Ct. at 2244, 2253, 2260; *id.* at 2283, 2290, 2294 (Breyer, J., dissenting).

114. I say this as a pragmatic summary about general tendencies. I am not suggesting that each approach necessarily leads to such results. For example, in the Supreme Court's Second Amendment decision in *District of Columbia v. Heller*, the majority and the principal dissent drew upon the supposed interpretive authority of originalism. In reaching diametrically different views of the original public meaning of "the right of the people to keep and bear arms," Justices Scalia and Stevens each offered a rigorous examination of the constitutional text and its public context. *See* District of Columbia v. Heller, 554 U.S. 570, 580 n.6 (2008) (examining text of Constitution and "other founding-era documents" to determine scope of Second Amendment right); *id.* at 651-62 (Stevens, J., dissenting) (reviewing text and constitutional drafting history of Second Amendment). Another view is that originalists "are relatively more hierarchical, morally traditionalist, and libertarian in their thinking." Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356, 375 (2011).

115. *See, e.g.*, LOUIS FISHER & KATY HARRIGER, AMERICAN CONSTITUTIONAL LAW (10th ed. 2013).

116. FALLON, *supra* note 80, at 2.

idea that there are objective legal standards that vouchsafe correct forms of reasoning and results does not, therefore, lead into a cynical or opportunistic perspective. On the contrary, it recognizes that, although judicial decision-making is ideological, it can still be thought about in terms of being law-contained, principled, reasoned in good faith, and not done in an ad hoc way. A badly reasoned opinion is unlikely to garner the support and approval of the legal community as a respected precedent whatever its political leaning. But legal craft alone cannot carry the day.

Any account of judging that wants to be taken seriously, especially by the legal community at large, needs to accept that the craft skills of legal argument and judicial reasoning are not just self-serving exercises in convenient ideological window dressing. Even if legal techniques fail to explain all that judges do, it is equally fallacious to assume that they have no influence at all. The better argument is as a piece of legal reasoning, the more it will convince others about the decision reached. Judges are never fully restrained nor are they ever fully free; freedom and constraint are mutually dependent and can only be made sense of in light of the other. In *Dobbs*, the majority and minority opinions were both good and bad depending on your political allegiance. However, it must also be remembered that the claim that the Constitution and its doctrines can be applied in a principled, correct, and politically neutral way is itself a thoroughly ideological claim.[117] Both originalism and organicism are themselves as much political ideologies as interpretive theories; they do not work as a hedge against ideology, but as a professional conduit for its achievement.

C. Truth and Consequences

When understood properly, therefore, a critical approach conceives of legal interpretation as an applied exercise in law-and-ideology. Rather than treat legal reasoning and ideological argument as antithetical practices, constitutional adjudication is treated as being both a thoroughly professional craft as well as a thoroughly ideological exercise; law is a result of the combination of legal technique and political vision,

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117. *See Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring) (describing the Constitution as "neutral" and as "neither pro-life nor pro-choice.").

particularly at the level of the Supreme Court. Political or ideological argument is no more arbitrary than any other kind of argument. Of course, ideological argument can be arbitrary, but it can also be as logical as any other mode of argument, including legal reasoning. In more philosophical terms, the epistemological dimension (i.e., what is the correct methodology to access the true meaning of law or the Constitution?) can be viewed as being inextricably intertwined with the ideological dimension (i.e., what political interests and values are promoted or prioritized by a particular interpretive or constitutional methodology?).[118]

This means that judges must abandon the notion that they are tasked with finding constitutional truths and principles that are considered theoretically correct.[119] The *Dobbs* majority's approach to originalism is framed as an objective, clinical method that keeps the judges detached from political influences. They believe there is an objective interpretation of the Constitution[120] and that only originalists have access to its truths. This sense of entitlement leads to disregarding other judges' interpretations and can come across as condescending.

Unfortunately, the organicism that is wielded by the *Dobbs* minority does not put enough distance between itself and the philosophical underpinnings of originalism. While the minority rejects originalism,[121] it unnecessarily hobbles itself by seeking to remain in the business of espousing constitutional truths, albeit of a less fundamentalist and ahistorical character.[122] This seems a strategic and

118. *See generally* ALLAN C. HUTCHINSON, THE PROVINCE OF JURISPRUDENCE DEMOCRATIZED 173-95 (2009).

119. This stance is very much part of the traditional jurisprudential canon. For example, Dworkin enlisted the support and assistance of his super-human judge and alter-ego, Hercules, to underwrite the fact that "particular propositions of law should be taken to be sound or true." RONALD DWORKIN, LAW'S EMPIRE 110 (1986). Also, Joseph Raz's work is very much part of such an analytical tradition. *See* JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON (2009).

120. *See Dobbs*, 142 S. Ct. at 2243, 2247.

121. *Id.* at 2326 (Breyer, Sotomayor, Kagan, JJ., dissenting) (noting that ("[t]he Constitution does not freeze for all time the original view of what those rights guarantee, or how they apply.").

122. *Id.* (Breyer, Sotomayor, Kagan, JJ., dissenting) (observing that the meaning of "the constitutional 'tradition' of this country … gains content from the long sweep of our history and from successive judicial precedents—each looking to the last and each seeking to apply the Constitution's most fundamental

philosophical error on its part. In seeking to overturn a long-established decision, like *Roe*, and its entrenchment of a fundamental constitutional right, the majority has a much steeper jurisprudential hill to climb. Whereas the majority must justify a major shift and reversal in constitutional doctrine that takes away a recognized right, the minority only has to offer a justification for why such a radical break is inadvisable and should not be made. This is not to suggest that the minority's stance is not a political one, but that the nature of that politics and its attendant rationalization in principled terms is much easier to defend and promote in *Dobbs* than the majority's far-reaching and almost militant upheaval of constitutional law. The minority took the stand that it did not only because of its free-standing commitment to precedent, but also because it would lead to a more politically preferable result. Like the majority, they would not have permitted precedent to prevent the recognition of what they considered to be important constitutional rights.[123]

If politics are considered to be as much a part of judicial decision-making as legal reasoning (as they are), then traditional scholars will no doubt raise the criticism that such a law-and-ideology approach will undermine the constitutional authority of the courts and fatally compromise their institutional legitimacy—how can judges, as unelected officials, retain popular support and deference if they are seen to be acting as politicians countermanding the decisions of elected legislators? If *Dobbs* is anything to go by, pretending that courts act only in a principled and not political way does not promote the cause of democracy. Indeed, Supreme Court opinions that hide behind such a pretense cause irreparable harm to the legitimacy of judicial review. Apart from their strengths and weaknesses as judicial opinions, the bitter back-and-forth between the majority and the minority only adds fuel to an already fierce fire. If encouraging or restoring public support is the aim, then *Dobbs* has failed on its own terms. The fact that both popular support and opposition to the decision is based on its political outcome and consequences offers further

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commitments to new conditions" but questioning the authenticity of the majority's reliance on 13th century case law). *Id*. at 2323.

123. *See, e.g.*, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954); Obergefell v. Hodges, 576 U.S. 644 (2015); Roe v. Wade, 410 U.S. 113 (1973).

evidence of why constitutional decision-making cannot be defended as being an entirely principled and professional exercise; it must also be characterized as a political and partisan performance to some extent.

D. A Progressive Response?

If it is recognized that judicial reasoning and decision-making are both professional and ideological in equal measure, the jurisprudential debate should also change its traditional focus and balance. It should shift from an increasingly sterile exchange about what courts can and should do to meet the standards of "principled appraisal."[124] A positive result might be ending the false debate over whether law should be considered separate from politics.[125] Once this result is achieved, attention can be directed towards the much more important task of evaluating whether the substantive decisions of the Supreme Court Justices contribute to a more just society. This entails worrying less about the argumentative form of decisions being made and being more concerned with the substantive kind of decisions that are made. By getting beyond the reasoned principles/raw power dichotomy, jurisprudence can stop trying to salvage the judicial process and show that it is professional, not ideological in its reasoning and result. At a minimum, judges would be obliged to take personal responsibility for the decisions they make; they will have to defend their substantive merit directly rather than hide behind the constitutional truths that their judicial methodologies supposedly disclose.

A progressive approach to constitutional law can operate on two different fronts.[126] First, it must disabuse itself and

124. Wechsler, *supra* note 49, at 16.

125. By politics, I do not mean either a person's capricious or arbitrary choices or, at the other extreme, a fully elaborated and finely calibrated series of integrated principles for action. I am hinting at the idea that judges will have political leanings and tendencies that will vary in their refinement and systemization.

126. What counts as "progressive" is, of course, a matter of stern debate. However, for present purposes, it can be understood as representing a political orientation that favors support for a public welfare state, substantive equality, workers, environmentalism and gun control. In constitutional law, such a progressive approach is offered by, for example, Erwin Chemerinsky. *See* ERWIN CHEMERINSKY, WE THE PEOPLE: A PROGRESSIVE READING OF THE CONSTITUTION FOR THE TWENTY-FIRST CENTURY (2018); Mark Tushnet, *Progressive*

others from the idea that the Supreme Court is the only governmental venue that can resolve constitutional disputes in any decisive way. Aided and abetted by both liberals and progressives themselves, it has become received wisdom that only the Supreme Court can deduce constitutional truth.[127] Being for the Constitution means being for the Supreme Court as its primary expositor and guardian of its values. In a democracy, this is a dangerous and unnecessary insight.[128] Constitutionalism is neither a neutral account of politics nor should the Supreme Court be the only place to develop any different kind of constitutionalism. The vision of the Constitution as being distinct from politics is unproductive as it de-levels the playing field to a marked extent; it cuts the Constitution loose from any kind of political community that might animate and sustain it. Rather than think of the Constitution being a source of political community, it is viewed as a limitation on what a political community can be; it disciplines and polices, but it does not inform and embody a substantive account of responsible government. This advances the kind of community politics that conservatives embrace.

Achieving this objective is far from easy. As well as undermining the ideological underpinnings of the courts as the only legitimate venue for constitutional politics, it will be necessary to recommend practical initiatives to multiply the sites for interpreting the Constitution and acting in line with it. Although there are serious obstacles to doing this, there is nothing within the Constitution itself that prohibits such a pluralistic undertaking. If constitutional law is inherently political, then the political and democratic branches of government can take up the institutional slack of constitutional decision-making.[129] By so acting, the Constitution might reanimate citizens' authority and primacy

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Constitutionalism: What Is "It"?, 72 OHIO STATE L.J. 1073 (2011); ROBIN WEST, PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT (1994).

127. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM COURTS (1999).

128. *See, e.g.*, RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004); *see also* MARTIN LOUGHLIN, AGAINST CONSTITUTIONALISM (2022).

129. *See, e.g.*, MARK TUSHNET & BOJAN BUGARIČ, POWER TO THE PEOPLE: CONSTITUTIONALISM IN THE AGE OF POPULISM (2021); *see also* Hutchinson, *supra* note 33.

in democratic politics. Indeed, more progress might be made if all parties were to recognize that the main action and central bone of contention is not about abstract jurisprudential theory, but about constitutional politics—what are the political values and ideological commitments that drive judicial decision-making? And what are the most democratic locations at which to engage in debate about those values and commitments?

Secondly, on the basis that it is more prudent to replace something with something than with nothing, progressives must develop a fuller vision of substantive politics than has presently been offered. While conservatives have an account of what kind of political community the Constitution instantiates (i.e., individualistic, property based, freedom loving, minimalist government, and traditional values), progressives do not; they are too content to be viewed as simply not being conservative. Instead, they must promote a progressive politics of constitutionalism that can challenge the conservative account in its substantive content.[130] This is an urgent task that cannot be delayed. As the *Dobbs* saga shows, it will not be enough to bemoan the flawed interpretive methods of the conservative majority. As unconvincing as originalism is, it will not be displaced by one more defense of the superior appeal of organicism. Fighting political fire with fire, progressive lawyers must offer a substantive vision of political community that can flesh out, not merely hint at, what a progressive society can be. Working within the confines of a *Roe* or not-*Roe* matrix will not cut it. While decriminalizing abortion is important, it is also insufficient to ground a woman's right to choose. There must be a more positive account of society and its informing institutional structures in which women's reproductive freedom and equality can be fully appreciated and substantively realized.

IV. TURNING UGLY

A. Keeping The Faith

In his concurrence, Justice Kavanaugh offered comments about his own and all other justices' approach to the

130. For a wonderful example of this, *see* JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022).

constitutionality of abortion rights. He noted that "amidst extraordinary controversy and challenges, all of [the more than twenty Justices of this Court since 1973] have addressed the abortion issue in good faith after careful deliberation."[131] This is an important and revealing assertion that, if true, is extremely important in evaluating the work of the Supreme Court—disagreement and dissent is to be respected as long as judges are acting in good faith. However, there are several reasons to question this sweeping claim, especially in regard to the majority opinion that Justice Kavanaugh was very much part of. Of course, challenging the idea of whether judges are acting in good faith is a very serious matter, but it is one that deserves to be aired and explored in light of some of the surrounding features and context of the *Dobbs* decision. There are, at least, three particular issues that warrant attention: (1) the institutional and democratic assumptions that inform the opinion; (2) the disregard of any appreciation of how the members of the majority might appreciate the influence of their own identities and values; and (3) the public statements made by the Justices at the time of their appointment to the Supreme Court.

What amounts to good or bad faith is itself a matter of considerable debate and disagreement. However, in general terms, it seems reasonable to suggest that one of the core ideas is the notion that people at bottom are expected to be as honest and authentic as they can when accounting for the things that they do. Bad faith might include hiding the real reasons for their actions, offering justifications for what they are doing that are insincere and misleading, or relying on irrelevant details and motivations.[132] At its most extreme, this involves fraud and deceit, but it also encompasses the lesser failings of hypocrisy, trickery, and disingenuity. As regards judicial decision-making, this premise would recommend that relying on reasons that were not disclosed, that claimed a false lack of knowledge, or that set aside earlier commitments without good

131. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2310 (2022) (Kavanaugh, J., concurring).

132. This is to be distinguished from the use of 'bad faith' in existential philosophy that is more about self-deception than anything else. *See* JEAN-PAUL SARTRE, BEING AND NOTHINGNESS (1943). However, this explanation of 'denial' might have some relevance to the work of judges. *See* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 191-205 (1997).

reason would all count as sufficient to undermine the integrity and uprightness of opinions given. In *Dobbs*, this would seem to be a genuine possibility when the majority's opinion is placed in a wider context. Indeed, Justice Kavanaugh's insistence that he and his colleagues were acting in good faith might well be a statement not made in good faith.[133]

First, the majority plead a certain naivete or ignorance at the likely effect of the *Dobbs* decision on American society: "[W]e do not pretend to know how our political system or society will respond to today's decision overruling *Roe* and *Casey*."[134] This is not a convincing claim that is easy to accept at face value. It does not require any prescience or insight to grasp that, especially after a draft opinion was leaked seven weeks before the release of the actual decision, there would be social and political turmoil. Many states were pushing to ban abortion services entirely or with only minimal exceptions; state legislation was primed to be activated if a favorable decision was forthcoming.[135] Although the precise situation was fluid, it was known to everyone that it would be much more difficult for women to obtain abortions if the *Dobbs* decision was made in the way that it was; this is precisely what the minority noted with concern.[136] As such, it seems disingenuous for the majority to pretend that the consequences of the opinion were not known or knowable.

Secondly and as a corollary of this, the majority's claim that abortion is an issue best left to the states' democratic procedures also seems less than candid or consistent. The

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133. *Dobbs*, 142 S. Ct. at 2310 (Kavanaugh, J., concurring).

134. *Id.* at 2279 (majority opinion).

135. Nadine El-Bawab, *Texas Abortion 'Trigger' Law Allowing Criminal, Civil Penalties Set to go Into Effect in August*, ABC NEWS (July 27, 2022, 1:20 PM), https://abcnews.go.com/US/texas-abortion-trigger-law-allowing-criminal-civil-penalties/story?id=87485720; Shefali Luthra, *How GOP Lawmakers Are Prepping to Ban Abortion as Soon as Legally Possible*, GUARDIAN (May 9, 2022 5:10 PM), https://www.theguardian.com/world/2022/may/09/republican-lawmakers-abortion-ban-roe-v-wade-trigger-laws.

136. *Dobbs*, 142 S. Ct. at 2318-19 (Breyer, J., dissenting). All states, except for New Mexico, North Carolina, and Alaska, have regulated abortion in some way. There are nine states with what are generally considered to be outright abortion bans. The strictest states are Texas, Arkansas, South Dakota, and Oklahoma, where abortion is completely outlawed except for when the life of the mother would end if she carried the fetus to term. *See Abortion in the United States Dashboard*, KAISER FAMILY FOUNDATION, https://www.kff.org/womens-health-policy/dashboard/abortion-in-the-u-s-dashboard/ (last visited Feb. 24, 2023).

thrust of the argument is that, because "the Constitution is neutral on the issue of abortion,[137] . . . the people and their elected representatives [can] address the issue through the democratic process."[138] Moreover, the decision is promoted by the majority as allowing women to use their "electoral or political power" in lobbying for legislation.[139] Leaving aside the fact that *Dobbs* undercuts women's power over themselves, let alone the electoral process, this defense appears somewhat hypocritical. The traditional stance is usually that constitutional rights are so important and fundamental that they need to be insulated from the vagaries of the political and democratic process.[140] However, in this case, a right that was recognized as a constitutional right for nearly fifty years is now seen to almost benefit from being put back into the political arena. For those not persuaded that the Constitution is or should be "neutral on the issue of abortion,"[141] this is cold comfort. As importantly, it is, at best, selective and inconsistent for the majority to take this stance.

Thirdly, the majority remain adamant that their opinion must be based exclusively on legal arguments. In particular, they protest that it would be illegitimate for them to "allow our decisions to be affected by any extraneous influences such as concern about the public's reaction to our work,"[142] "social and political pressures,"[143] or "based on our own moral or policy views."[144] But this grand assertion of principle seems to be almost willfully unaware or sensitive to what might be their own views and any pressures working on them. Indeed, it cannot be ignored that all five of the majority were practicing Catholics or had direct Catholic backgrounds.[145] While this

137. *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring).

138. *Id.* at 2305-06 (Kavanaugh, J., concurring).

139. *Id.* at 2277 (majority opinion).

140. A good example of this is the rhetoric deployed by the same majority over gun rights and the expressed need to secure them outside the regulation of democratic politics. *See* New York State Rifle & Pistol Association Inc. v. Bruen, 142 S. Ct. 2111, 2131 (2022).

141. *Dobbs*, 142 S. Ct. at 2305 (Kavanaugh, J., concurring).

142. *Id.* at 2278 (majority opinion).

143. *Id.*

144. *Id.* at 2306 (Kavanaugh, J., concurring).

145. While it is possible to be a Catholic and have a pro-choice stance, it is also a fundamental tenet of Roman Catholicism that abortion is sinful and should be prohibited. Chief Justice Roberts is Catholic. Also, President Biden might be one of those Catholics who supports a pro-choice position politically. Either way, some

cannot be decisive in accounting for their "moral or policy views"[146] (and it has to be recognized that one of the dissenting minority judges was Catholic), it is surely improbable and unrealistic to think that this played no part at all. Similarly, four of the five Justices who joined the majority were men and, therefore, had no direct personal experience of women's reproductive experiences. On both counts, it is hardly going too far to expect that some recognition or, at least, explanation of how these factors played no part in their decision would be offered; it cannot simply be assumed and asserted. Again, the failure to speak to or even mention these telling facts raises reasonable doubts about the integrity and trustworthiness of the majority's opinion.

B. Speaking Power to Truth

The fourth and perhaps most telling issue is the circumstances under which each individual Justice of the *Dobbs* majority became a member of the Supreme Court and their relevance to any questions of good faith performance. That the appointment process has a marked political dimension is uncontestable. Presidents appoint judges whose political leanings, if not always fully in synch with their own, do not run counter to them.[147] Some might want to go as far as the fictional Irish bartender, Martin Dooley—"th' [s]upreme [c]ourt follows th' iliction [*sic*] returns."[148] However, this is not entirely accurate: it is more often the case that the Court does not reflect the substantive voting preferences of the winning President, but that the appointment of judges tends to follow the election returns.[149] As history shows, while almost all judges tend to remain reasonably consistent in their political orientation, there are a handful that buck that trend; *Roe*'s

explanation seems necessary. *See* Frank Newport, *The Religion of the Supreme Court Justices*, GALLUP (Apr. 8, 2022), https://news.gallup.com/opinion/polling-matters/391649/religion-supreme-court-justices.aspx.

146. *How Judges and Justices are Chosen*, USHISTORY.ORG, https://www.ushistory.org/gov/9d.asp (last visited Mar. 15, 2023).

147. *Id.*

148. FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1906).

149. *How Judges and Justices are Chosen*, USHISTORY.ORG, https://www.ushistory.org/gov/9d.asp (last visited Mar. 15, 2023).

Justice Harry Blackmun is often considered exhibit one in this regard.[150]

Nevertheless, as the membership of the *Dobbs* court reveals, it is reasonable to assume that much can be learned about judges and their political leaning by reference to their appointing president; the majority and Chief Justice were Republican appointees, and the minority were each Democratic ones.[151] In recent years, under the presidency of Donald Trump and with the support of a Republican-dominated Senate, the alignment of judges with their appointing president has become more doctrinaire; he made no bones about the fact that he was working to ensure that federal judicial vacancies were filled by card-carrying conservatives who were usually originalist in their judicial philosophies and opposed *Roe*.[152] And, of course, President Biden took a similar tack in filling a vacancy on the Supreme Court by replacing a retiring judge with a Democratic appointee.[153] Presumably, the belief was that this would bear partisan fruit for many years and even decades to come.[154]

None of this is surprising, although many constitutional jurists seem intent on playing down the significance of judges'

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150. Along with Justices Hugo Black and David Souter, Justice Blackmun is one of the exceptions that prove the general rule—among the great bulk of the Supreme Court, there is some ideological shift, but that shift is of contestable or limited significance; only three judges have crossed over the ideological divide between right and left. *See* Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1485-86 (2007).

151. *See About the Court: Current Members*, THE SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/biographies.aspx.

152. Michelle Boorstein & Julie Zauzmer, *Thrilling Christian Conservative Audience, Trump Vows to Lift Ban on Politicking, Appoint Anti-Abortion Judges*, WASH. POST (June 22, 2016, 2:25 PM), https://www.washingtonpost.com/news/acts-of-faith/wp/2016/06/20/how-can-trump-win-the-many-undecided-evangelicals-we-asked-them/; Tessa Berenson, *Inside Trump's Plan to Dramatically Reshape U.S. Courts*, TIME (Feb. 8, 2018, 6:14 AM), https://time.com/5139118/inside-trumps-plan-to-dramatically-reshape-us-courts/.

153. Katie Rogers, *Biden Introduces Ketanji Brown Jackson, His Supreme Court Pick*, N.Y. TIMES (Mar. 22, 2022), https://www.nytimes.com/live/2022/02/25/us/supreme-court-nominee-biden.

154. Although I presume that Justice Ketanji Brown Jackson will locate herself with the liberal minority in *Dobbs*, much will depend on what kind of Democrat she will show herself to be. There is a considerable range along the Democrat political spectrum—Justices Breyer and Ginsburg were both Democrats, but not of exactly the same kind.

political affiliations when it comes to explaining or criticizing their judicial performance and output in terms of principled reasoning.[155] However, while all judges are vulnerable to the same observations when examining the link between their political leanings and their judicial decisions, there are some telling and disturbing differences when it comes to the appointments of the *Dobbs* majority. While all five Justices were appointed by Republican presidents, certain statements were made by them during their Senate confirmation hearings that raise disturbing doubts about their good faith in handling the divisive issue of abortion and the continuing validity of the *Roe* precedent. Indeed, at a minimum, these declarations offer some credible evidence that they were not entirely proceeding with integrity and honesty when *Dobbs* and related matters came before them.

As expected, a particular focus of the Senate confirmation hearings was the candidate's attitude towards the controversial decision of *Roe*. While each of them was typically circumspect in addressing this and related issues, there was a general sense in which they intimated that it was a settled constitutional precedent and, therefore, deserving of constitutional weight. Appointed to the Court in 1991 by President George Bush, Justice Thomas was deliberately evasive on *Roe* as he maintained he could not "comment on that specific case" and "maintain [his] impartiality."[156] He also added that "I think it is inappropriate for any judge who is worth his or her salt to predjudge any issue or to sit on a case . . . that he or she cannot be impartial."[157] Appointed to the Court in 2006 by President George W. Bush, Justice Alito did not hide his conservative views, but maintained that *Roe* was entitled to "considerable respect"[158] and that he would separate his "personal views"[159] from what he did as a judge and keep

155. *See* FALLON, *supra* note 80; LESSIG, *supra* note 98.

156. The Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Before the S. Comm. on the Judiciary, 102d Cong. 262 (1991), https://www.govinfo.gov/content/pkg/GPO-CHRG-THOMAS/pdf/GPO-CHRG-THOMAS-1.pdf.

157. *Id.* at 293.

158. Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Before the S. Comm. on the Judiciary, 109th Cong. 455 (2006), https://www.govinfo.gov/content/pkg/CHRG-109shrg25429/pdf/CHRG-109shrg25429.pdf.

159. *Id.* at 531.

"an open mind."[160] So, although far from categoric in their support for *Roe*, both Justices Thomas and Alito did not suggest that they would overrule it if a suitable occasion arose. Until 2021, that occasion (and the needed numbers) did not arise.

The appointments of the three remaining members of the majority were very recent. They took place during the presidency of Donald Trump who was publicly open about his intention to appoint Justices who were opposed to the *Roe* ruling.[161] However, at their confirmation hearings, all three judges were not only cautious and guarded in their comments, but also gave reassurances that overruling *Roe* was not at all part of their immediate judicial philosophy. Denying that he had been asked by the President about his views, Justice Gorsuch remarked about *Roe* that "a good judge will consider it as precedent of the U.S. Supreme Court worthy as treatment of precedent like any other."[162] He also insisted that his "personal views [had nothing] to do with the judge's job."[163] Justice Kavanaugh was also cagey in answering questions, but did confirm that *Roe* was a "settled as precedent."[164] Finally, Justice Barrett was also difficult to pin down, but she did go so far as to say that,

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160. *Id.* at 454.

161. Dan Mangan, *Trump: I'll Appoint Supreme Court Justices to Overturn Roe v. Wade Abortion Case*, CNBC NEWS (Oct. 19, 2016, 10:00 PM), https://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html.

162. *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be An Associate Justice of the Supreme Court of the United States: Before the S. Comm. on the Judiciary*, 115th Cong. 77 (2017), https://www.govinfo.gov/content/pkg/CHRG-115shrg28638/pdf/CHRG-115shrg28638.pdf.

163. *Id.* at 195. It is also worth noting that, while a doctoral student at Oxford, he wrote a thesis on abortion and its (im)moral foundations.

164. *Confirmation Hearing on the Nomination of Hon. Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States: Before the S. Comm. on the Judiciary*, 115th Cong. 297 (2018), https://www.govinfo.gov/content/pkg/CHRG-115shrg32765/pdf/CHRG-115shrg32765.pdf. Prior to his hearing, though, Justice Kavanaugh told Republican Senator Susan Collins in a closed meeting that he was "no threat" to *Roe* and that his 'don't-rock-the-boat' juridical style should demonstrate to her that confirming his nomination was a safe bet for women's fair access to abortion services. *See* Carle Hulse, *Kavanaugh Gave Private Assurances. Collins Says He 'Misled' Her.*, N.Y. TIMES (June 24, 2022), www.nytimes.com/2022/06/24/us/roe-kavanaugh-collins-notes.html.

[T]he substantive due process clause says that there are some liberties, some rights that people possess that the state can't take away or can't take away without a really good reason so the right to use birth control, the right to an abortion are examples of rights protected by substantive due process.[165]

Read generously, the overall import of the three recent appointees' senate hearings would not, if taken at face value, give rise to the expectation that they would become part of a majority that would overrule *Roe* at the earliest opportunity. But that is exactly what they did. Of course, as all lawyers know, it is not wise to take statements at face value. Although one might be forgiven for thinking that judges who are under oath might be relied upon to speak truthfully, the fact is that recent events have undermined the mild reassurances that those three judges offered. It might be said that they knew that they were under the ideological microscope and that they were simply engaging in a practiced political strategy that treated anything other than outright lies as being close enough to truth. But, while Justices Thomas and Alito might somehow claim that their views had shifted over time (although there is no evidence of that), the three recent recruits have no such excuse. At a minimum, it can reasonably be concluded that they were playing fast and loose with the truth; they were open and ready to overrule *Roe* if the occasion and numbers presented themselves. And that opportunity occurred very quickly. In the case of Justice Barrett, it was within eighteen months of her appointment.

For those committed to the Court's legitimacy, these facts are not in any way reassuring or comforting. Indeed, they can be appreciated to have created a very uncomfortable state of affairs. Reasonably viewed and taken together, they cannot be brushed aside as being little more than the predictable carping of cynical critics. As judges and lawyers like to remind people, it is not only that justice should be done, but that it should be seen to be done.[166] These facts need to be responded to, if not by the majority Justices themselves, at least by mainstream

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165. *Amy Coney Barrett Senate Confirmation Hearing Day 2 Transcript*, REV (Oct. 13, 2020), www.rev.com/blog/transcripts/amy-coney-barrett-senate-confirmation-hearing-day-2-transcript. It is worth noting at their confirmation hearings, each of the minority judges signaled that they considered *Roe* to be settled precedent. This, of course, was not a stretch for them to do.

166. R. v. Sussex Justices *ex parte* McCarty [1924] 1 KB 256 at 259 (Eng.).

defenders of the Court. At a minimum, these nagging misgivings about the *bona fides* of the majority not only speak to the legitimacy and, therefore, the validity of the *Dobbs* decision itself, but also to the overall reputation and standing of the Supreme Court. After all, as Justice Kavanaugh suggests, there is much riding on the fact that the majority "have addressed the abortion issue in good faith after careful deliberation."[167] If they did not, it is important that jurists and commentators call them to account.

V. A CLOSING NOTE

When it comes to constitutional law and doctrine, it is surely the case that there is no final word. Like most laws, it is a work in progress that is always moving, but never arriving anywhere in particular. However, why its temporary destinations are set and how it intends to get to them is of the most crucial significance. In criticizing the *Dobbs* decision, I have recommended that there are three standards that any Supreme Court must be judged by if it is to engender the kind of public and professional respect that it seeks and requires—the soundness of the legal reasons that have been offered; the political principles that guide their decision-making; and the integrity and good faith with which they operate. Although both the majority and the minority have little to divide them in terms of the first two (even though many will be more or less partial to the opposing political ideologies that animate the legal arguments), there is considerable uncertainty about whether the majority can live up to the demands of the third standard.

Although judges have no place to stand that allows them to be politically innocent in their reasoning and opinions, it does not mean that, in being political, they must be unprincipled or crudely ideological. It is a cruel caricature to suggest that judges directly and deliberately, if secretly, indulge their political preferences; this is a crude and unconvincing explanation that casts all judges as acting in bad faith. While the Supreme Court and its Justices cannot be ignored, they can be treated within much less reverential and

167. Dobbs v. Jackson Women's Health Org., 142, S. Ct. 2228, 2310 (2022) (Kavanaugh, J., concurring).

untouchable terms than is presently the case. The *Dobbs* decision invites that a constitutional and jurisprudential reckoning be done. It might be that Fuller's widely shared view that "the constitution itself is necessary, right, and good"[168] will itself need to be to rethought or even cast away.

168. Fuller, *supra* note 1.