THE UGLY RHETORIC OF *DOBBS*, OR, WHY JACK BALKIN IS HISTORY

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INTRODUCTION

Many people who make constitutional arguments literally don't know what they are doing. They think they are engaged in a kind of logical inference, drawing inescapable conclusions from indisputable premises. Actually, they are doing rhetoric, the construction of persuasive argument about matters that are uncertain and contestable.[1] As one leading rhetoric treatise explains:

> The very nature of deliberation and argumentation is opposed to necessity and self-evidence, since no one deliberates where the solution is necessary or argues against what is self-evident. The domain of argumentation is that of the credible, the plausible, the probable, to the degree that the latter eludes the certainty of calculations.[2]

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[1] This conception of rhetoric is ancient: "[W]e deliberate about things that appear to admit of alternative possibilities. For no one deliberates about things that they take to be incapable of being otherwise than they have been, will be, or are." ARISTOTLE, RHETORIC bk. I, ch. 2, at 8 [1357a] (C.D.C. Reeve trans., 2018). "For the educated person seeks exactness in a given area to the extent that the nature of the subject allows; for apparently it is just as mistaken to demand demonstrations from a rhetorician as to accept merely persuasive arguments from a mathematician." ARISTOTLE, NICOMACHEAN ETHICS bk. I, ch. 3, § 4 (Terence Irwin trans., 3d ed. 2019). "And to the extent that someone tries to establish dialectic or rhetoric not just as capacities but as sciences, to that extent he will—without noticing it—obscure their nature by the change." ARISTOTLE, RHETORIC bk. I, ch. 4, at 13 [1359b] (C.D.C. Reeve trans., 2018).

[2] CH. PERELMAN & L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION 1 (John Wilkinson & Purcell Weaver trans., 1969) (1958). Balkin has the same view: rhetoric "concerns the kinds of questions that cannot be demonstrated for certain, as in mathematics, but for which there are a range of possible answers, some more plausible and

Rhetoric is "the study of the discursive techniques allowing us *to induce or to increase the mind's adherence to the theses presented for its assent*."[3] This is not to deny that there are better and worse arguments in constitutional law, or that the aim of constitutional discourse is to find the right answer. It is to say that what makes constitutional answers right is not the soundness of their deductions, but the persuasiveness of their arguments.

Jack Balkin's *Memory and Authority: The Uses of History in Constitutional Interpretation* is really two books. Its first task is corrective: refuting the so-called originalists who purport to have found a way to do constitutional law by deduction.[4] He shows that they keep reaching for the techniques of rhetoric, even though their official story dictates that they must never do that. The book's second—and primary—task is to map the various ways in which history matters for constitutional argument, cataloguing the techniques of argumentation that persuade audiences in American constitutional law and showing how the citation of history is a useful tool in constructing those arguments.

Constitutional interpretation draws on a variety of sources: text, structure, purpose, consequences, judicial precedent, political convention, custom and lived experience, natural law or natural rights, the American ethos, tradition, and honored authority.[5] History is relevant to each in a different way.[6] For instance, the values and examples of cultural heroes like George Washington and Martin Luther King are sometimes invoked to support one's reading of the Constitution. History is also sometimes used in a negative way, by citing past injustices that the Constitution aims to transcend. Arguments about collective memory are offered to show what our law should be understood to be today.

I am persuaded. This Essay has three claims. First, I want to emphasize an underappreciated ethical virtue elicited by the practice of rhetoric: it demands that the speaker get out of his own head and focus on his audience and what they care about. History matters because it speaks to us. It tells us who we are and why we are

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more reasonable than others." Jack M. Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 CONST. COMMENT. 145, 171 (2018). Balkin cites Perelman in his earlier work, *see, e.g.*, *id.* at 172, 177, but not in his new book.

[3] PERELMAN & OLBRECHTS-TYTECA, *supra* note 2, at 4.

[4] Not all originalists fit this description. Balkin himself is a self-identified originalist. On the other hand, Balkin's denial that one can do constitutional law deductively has elicited strong negative reactions from many other originalists. For a philosophical exploration of those reactions, see generally Andrew Koppelman, *Why Jack Balkin is Disgusting*, 27 CONST. COMMENT. 177 (2010).

[5] JACK M. BALKIN, MEMORY AND AUTHORITY: THE USES OF HISTORY IN CONSTITUTIONAL INTERPRETATION 17–21 (2024) [hereinafter BALKIN, MEMORY AND AUTHORITY]. He thus augments and corrects Philip Bobbitt's celebrated list of modalities of constitutional law enumerated in *Constitutional Fate*. *See* PHILIP BOBBITT, CONSTITUTIONAL FATE (1982).

[6] Originalist arguments, based on original meaning or intention, likewise are deployed with reference to all of these sources. BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 150–51.

doing what we are doing. The rhetorical deployment of historical narrative in political discourse can help to forge a collective identity in which we all can recognize ourselves, and so make the polity more inclusive. Second, if this aspect of rhetoric is understood, we will notice when it is offered in a way that marginalizes some citizens by excluding them from its audience and implying that they do not matter and that their concerns are beneath notice. Justice Alito's opinion for the Court in *Dobbs v. Jackson Women's Health Organization*[7] is an example, the nastiness of which is best appreciated when one considers it as a rhetorical exercise. And third, the work of exposing these abuses supports one of Balkin's central methodological points, which is that liberals and progressives should not denounce originalism, but rather should master its techniques and learn to deploy its rhetorical power.

I. LAW IS RHETORIC

Law is necessarily rhetoric because it aims to elicit a response from its audience. It seeks obedience. In order to engage in legal argumentation, one must regard law from what H.L.A. Hart called the internal point of view; one must accept its authority as a guide to practical conduct.[8] The internal point of view treats the law as a "reason and justification"[9] for action, and as the "basis for claims, demands, admissions, criticism, or punishment."[10] We need a reason to grant law this authority. The mere fact that it claims authority will not do. Balkin writes in one of his early works:

> [W]hen we try to justify a particular rule of law to another person, we must find arguments that justify it, and to do this we ourselves must analyze the situation and determine the most plausible arguments for and against the position that we are taking. So the tasks of persuasion and analysis go hand in hand.[11]

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[7] 597 U.S. 215 (2022).

[8] H.L.A. HART, THE CONCEPT OF LAW 56 (2d ed. 1994); Andrew Koppelman, *Why Do (Some) Originalists Hate America?*, 63 ARIZ. L. REV. 1033, 1035–37 (2021).

[9] HART, *supra* note 8, at 11.

[10] *Id.* at 90.

[11] J.M. Balkin, *A Night in the Topics: The Reason of Legal Rhetoric and the Rhetoric of Legal Reason*, *in* LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 211, 215 (Peter Brooks & Paul Gewirtz eds., 1996). This tight connection is sometimes occluded in the otherwise similar account of adjudication offered by Stanley Fish, who argues that "the injunction to search for the best justification of your decision [should be] understood not as a method for producing that decision, but as a strategy for presenting it after it has already been made." STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 392 (1989). The demand for justification

> tells you that only half your work is done and that, as things now stand, the way to do the second half—the way to be persuasive—is to construct a certain kind of story in which your decision is more or less dictated by the inexorable laws of the judicial process.

Persuasion requires that the speaker attend to what the audience cares about. Perelman and Olbrechts-Tyteca's treatise notes that "knowledge of those one wishes to win over is a condition preliminary to all effective argumentation."[12] They observe:

> To agree to discussion means readiness to see things from the viewpoint of the interlocutor, to restrict oneself to what he admits, and to give effect to one's own beliefs only to the extent that the person one is trying to persuade is willing to give his assent to them.[13]

The rhetorician imagines an audience capable of persuasion and, if he is successful, calls it into being. He tells his listeners who they are. Balkin writes that arguments from ethos and tradition, for example, "assume that both the speaker and the audience identify with a common tradition, that the identities of both speaker and audience are partly constituted by that tradition, and therefore that both speaker and audience wish to continue to be true to it."[14] Appeals to the handiwork of the Framers of the Constitution persuade because we in some way identify with them, and feel that their accomplishments are ours.[15] This identification "is always premised on an interpretation of and selective identification with the past,"[16] as well as a distinctive imagination of "a continuing political project that extends into the future."[17]

So, rhetoric is a morally fraught business. It constructs a collective self.

This enterprise is necessarily historical because any coherent self persists in time. "Collective memory is a set of stories, icons, symbols, and events that help constitute members of a social group as a group and that help constitute the group's identity and its sense of shared values."[18] Put another way, "[t]he past is constitutive

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Id. This formulation separates the inseparable. At the point of decision, a judge must ask whether she can give a persuasive account of what she is inclined to do. Rhetoric is thus the real, legitimate constraint on judicial discretion. Justice John Paul Stevens, who routinely wrote his own first drafts before handing opinions to his clerks, noted that "you will find sometimes that it won't write, and then you have to start over." Adam Liptak, *The End of an Era, for Court and Nation*, N.Y. TIMES (Apr. 9, 2010), https://www.nytimes.com/2010/04/10/us/politics/10judge.html [https://perma.cc/5ZC6-M7KX]. Put another way: "[T]he Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 866 (1992) (plurality opinion).

[12] PERELMAN & OLBRECHTS-TYTECA, *supra* note 2, at 20.

[13] *Id.* at 55.

[14] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 36.

[15] JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 51–52 (2011) [hereinafter BALKIN, CONSTITUTIONAL REDEMPTION].

[16] *Id.* at 54.

[17] *Id.*

[18] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 179.

of our world and what our world means to us."[19] Any constitutional narrative will describe a national ethos that is embodied in a tradition. It will also be exclusionary: "arguments from ethos and tradition pick history's winners and losers, regardless of how these people understood themselves or were understood by others in their own day."[20]

Historical writing always reflects the concerns of the present generation.[21] It is in historical inquiry in general, not just law, that "people's normative judgments affect how they characterize the meaning of the past, what they select from the past, and what they find relevant in the past."[22] Put another way, our "theoretical and practical commitments shape which facts are relevant and important, and how and why they are relevant and important."[23]

Law often involves circumstances not considered when the original text was laid down. "Legal argument always takes some parts of the past—texts, precedents, political ideas, and legal concepts—out of their original historical situation and attempts to apply them in the present."[24] The fundamental difference between historical scholarship and law is that the latter is prescriptive:

> [Lawyers] seek to infer, from an incomplete historical record reflecting a different historical context, how the past would bear on present-day problems. They complete arguments that may never have been completed; they draw inferences and apply insights that may never have been drawn or applied by people living in the past. This act of extension in pursuit of authority is always creative.[25]

That is what is denied by an originalism that purports to derive rules of law deductively from ancient sources, in a way that is unresponsive to contemporary concerns—"to leverage merely persuasive authority into mandatory authority, and appeals to the past into commands from the past."[26] Originalist arguments gain their rhetorical power from "appeals to national ethos, tradition, and honored authority."[27] For each of the sources of law—text, purpose, etc.—"there is a corresponding kind of originalist argument, which asserts that the founders, framers, or adopters have *special*

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[19] *Id.* at 11.

[20] *Id.* at 47.

[21] *See generally* EDWARD HALLETT CARR, WHAT IS HISTORY? THE GEORGE MACAULAY TREVELYAN LECTURES DELIVERED IN THE UNIVERSITY OF CAMBRIDGE JANUARY–MARCH 1961 (1962).

[22] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 108.

[23] *Id.* at 121.

[24] *Id.* at 139.

[25] *Id.* at 234.

[26] *Id.* at 115.

[27] *Id.* at 12.

insight or that the events leading up to or contemporaneous with adoption have a *special status*."[28] This strategy will work only if "we can plausibly accept the values of the framers and adopters as our own or can somehow recharacterize those values (for example, at a high level of generality) so that we can plausibly accept those values as our own."[29]

In order for law to be ours, its meaning cannot be too inflexible. A reading of our Constitution, which is "among the most difficult to amend in the world," that forecloses too many political choices "will exacerbate the democratic deficit of a long-lived constitution and will undermine democratic legitimacy as time goes on."[30]

Balkin's own variety of originalism, developed in his earlier work, argues that our Constitution happens to be a flexible one: it offers a framework whose details are left to be worked out by subsequent generations, and so is designedly adaptable to present concerns.[31] Elsewhere, Balkin has written that he rejects "the idolatry of mathematical precision in legal reasoning."[32] American judges and lawyers (including self-identified originalists) reject it too, though they don't always admit it. Originalism matters, but it is only one of many sources of constitutional law. "If originalist analyses generated binding legal obligations rather than resources for constitutional construction, lawyers would always cite them as their most powerful legal arguments, and judges would never ignore them."[33] In practice, however, "American judges employ originalism selectively and opportunistically."[34]

One can persuade without lying. Rhetoric at its best is the enterprise of showing *this* audience what is true and good. But if one takes one's task to be to demonstrate that the original meaning of the Constitution unambiguously dictates one's present political program, as a matter of logic rather than persuasion, the temptation to distort the historical record will be powerful.[35] Originalism can easily degenerate into "historical ventriloquism."[36]

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[28] *Id.* at 149. The various types of originalist argument are catalogued at *id.* at 149–54.

[29] *Id.* at 12.

[30] *Id.* at 134. I add that the deficit is exacerbated by the dependence of originalism upon ongoing research, so that its prescriptions will be subject to unpredictable revision depending on what the scholars have lately turned up. *See* Koppelman, *supra* note 8, at 1034, 1060–61.

[31] JACK M. BALKIN, LIVING ORIGINALISM 3–4 (2011) [hereinafter BALKIN, LIVING ORIGINALISM]. The Constitution's character as a broad framework also helps explain its attractiveness to people with widely varying moral views and political hopes. *See* Andrew Koppelman, *Respect and Contempt in Constitutional Law, or, Is Jack Balkin Heartbreaking?*, 71 MD. L. REV. 1126, 1128–29 (2012).

[32] Jack M. Balkin, *Idolatry and Faith: The Jurisprudence of Sanford Levinson*, 38 TULSA L. REV. 553, 562 (2003).

[33] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 161.

[34] *Id.* at 160.

[35] Justice Alito, for example, has found himself attributing to the Framers judicial rules that were first devised in the 1960s. *See* Andrew Koppelman, *Justice Alito, Originalism, and the Aztecs*, 54 LOY. U. CHI. L.J. 455, 464–66 (2022).

[36] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 12.

The ethical character of rhetoric and its flexibility over time form a single package. Law must appeal to us here and now. Constitutional law does not exist in order to administer painful lessons on the limits of human foresight. The Framers never met us and could not know us, and so our inheritance, if it is to have any hold on us, must be capable of being construed in a way that is responsive to our concerns. That is why, as Balkin has observed, mobilized social movements, invoking their own interpretations of the Constitution, have played an important role in determining which specification will ultimately prevail.[37]

That responsiveness can and often does bespeak a kind of interpersonal respect among the citizens: the enterprise of persuading one's fellow citizens implies that persons regard one another as free and rational, that addressees can freely and rationally accept the reasons that are given (and any authority relations in which they are grounded), that legitimate demands are distinct from mere coercion, and that addresser and addressee share a common authority to make claims on one another. "The practice of making claims therefore also presupposes autonomy of the will and the common basic dignity of persons."[38] Perelman and Olbrechts-Tyteca: "To engage in argument, a person must attach some importance to gaining the adherence of his interlocutor, to securing his assent, his mental cooperation. It is, accordingly, sometimes a valued honor to be a person with whom another will enter into discussion."[39]

On the other hand, rhetoric directed only at a privileged subset of the citizenry, that regards the others as unworthy of address because their views simply don't matter, has moral implications of its own.

II. THE DEEP ROOTS OF "DEEPLY ROOTED"

Citation of history was ubiquitous in Justice Alito's opinion for the Court in *Dobbs v. Jackson Women's Health Organization*,[40] which overturned *Roe v. Wade*[41] and permitted states to ban abortion. He declared that substantive due process protects only rights that are "deeply rooted in [our] history and tradition."[42] That

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[37] *Id.* at 131–34; BALKIN, LIVING ORIGINALISM, *supra* note 31, at 10–11, 70–71, 81–99; BALKIN, CONSTITUTIONAL REDEMPTION, *supra* note 15, at 63–72.

[38] Andrew Koppelman, *Darwall, Habermas, and the Fluidity of Respect*, 26 RATIO JURIS 523, 524 (2013). This argument about interpersonal accountability has been elaborately developed by Stephen Darwall and, in a different way, by Jurgen Habermas. *Id.* at 523–28.

[39] PERELMAN & OLBRECHTS-TYTECA, *supra* note 2, at 16. Elsewhere Perelman writes:

> Argumentation is intended to act upon an audience, to modify an audience's convictions or dispositions through discourse, and it tries to gain a meeting of minds instead of imposing its will through constraint or conditioning. Hence it is not something negligible to be a person to whose opinion we attach some value.

CH. PERELMAN, THE REALM OF RHETORIC 11 (William Kluback trans. 1982).

[40] 597 U.S. 215 (2022).

[41] 410 U.S. 113 (1973).

[42] *Dobbs*, 597 U.S. at 237–38 (citing Timbs v. Indiana, 586 U.S. 146, 148–49 (2019);

tradition, he reasoned, cannot be construed to protect a right to abortion. "No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware."[43] On the contrary, there was "an unbroken tradition of prohibiting abortion on pain of criminal punishment persist[ing] from the earliest days of the common law until 1973."[44]

Balkin observes that Alito has read tradition in a misleading way. The common law tradition to which Alito points, which did not outlaw early abortion, "might suggest that there actually was a common-law tradition of not interfering with women's decision to have an abortion before quickening."[45] Balkin is too gentle. The phrase "might suggest" is a gross understatement. Here is the first sentence of the principal history of American abortion regulation: "In 1800 no jurisdiction in the United States had enacted any statutes whatsoever on the subject of abortion; most forms of abortion were not illegal and those American women who wanted to practice abortion did so."[46] The "unbroken tradition" Alito cites is pure fabrication.[47]

McDonald v. City of Chicago, 561 U.S. 742, 767 (2010); Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The test also requires that the asserted right be "implicit in the concept of ordered liberty," *id.* at 231 (quoting *Glucksberg*, 521 U.S. at 721), but that requirement has not been given any independent weight in the Court's analyses, and evidently did no work in *Dobbs*. *See* Joseph Blass, *The Rule for Rights, Rewritten*, BALKINIZATION (June 25, 2022, 10:30 AM), https://balkin.blogspot.com/2022/06/the-rule-for-rights-rewritten.html [https://perma.cc/UZR7-6HJY].

[43] *Dobbs*, 597 U.S. at 241.

[44] *Id.* at 250. As others have noted, the *Dobbs* opinion is not originalist. *See, e.g.*, Randy E. Barnett & Lawrence B. Solum, *Originalism after* Dobbs*,* Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 455–62 (2023). An originalist inquiry might produce a different result. *See* Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1935–37 (2012).

[45] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 203. Quickening, the point at which fetal motion was detectable, might occur as late as the twenty-fifth week of pregnancy. Brief for American Historical Association and Organization of American Historians as Amici Curiae Supporting Respondents at 2, *Dobbs*, 597 U.S. 215 (No. 19-1392).

[46] JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, at vii (1978). The account of history in *Roe*, which Alito witheringly criticizes, thus turns out to have been accurate: "At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the nineteenth century." 410 U.S. at 140–41.

[47] *Dobbs*, 597 U.S. at 250. This might lead one to conclude that Alito is a phony originalist, and other evidence supports that conclusion. Reva Siegel has argued, however, that originalism was always a rhetorical device the purpose of which was to legitimate the overruling of *Roe*. Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 TEX. L. REV. 1127, 1129 (2023). If this is right, then to the extent that evidence undermines the originalist case against *Roe*, so much the worse for evidence. For purposes of this Essay, I set aside this possibility, since Balkin's concern is how history can be deployed honestly and accurately in the service of constitutional argument.

Regulations of abortion, in the period Alito looks to, "were part of more general features of law and social practices that kept women subservient, denied them equal opportunities, and regulated their sexuality and autonomy."[48] Those practices are a poor candidate for honored authority. In short, "the same tradition that denied women control over their reproductive lives was part of a larger tradition of male dominance."[49]

Balkin thinks that this undermines the history-and-tradition test. "A doctrinal test that asks whether a right is deeply rooted in our nation's traditions invites this kind of erasure, because it treats tradition as presumptively legitimate and not reflecting a history of subordination or mistreatment of any relevant group."[50]

But, in keeping with the flexibility associated with the modalities, I would like to point out that tradition is more flexible than this objection presumes. "Because traditions contain multiple and conflicting elements," Balkin acknowledges, "there is often more than one way to characterize them and draw normative lessons from them."[51] The silences are revealing. "Alito's failure to reckon with the deep connections between the history of abortion regulation and the subordination of women generally is an example of how judges engage in historical erasure when they construct a constitutional tradition."[52]

Alito "rejects the possibility that the law on the books did not match Americans' actual practices or beliefs with respect to abortion and contraception."[53] Notably, Alito never explains *why* he rejects that possibility. Balkin points out elsewhere that tradition does not come in prepackaged units.[54] "Alito's approach identifies American values and traditions with the positive law of the past, rather than actual practices of liberty or general principles and commitments."[55]

A. Why Tradition?

Consider the reasons for relying on history and tradition. The Court stated as early as 1934 that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[56] Justice Harlan argued that certain norms were "so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that

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[48] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 205.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 163. Balkin proposes to expand our constitutional memory to include the dissenting groups who succeeded in changing American constitutional law. *Id.* at 210–27.

[52] *Id.* at 205.

[53] *Id.* at 43.

[54] J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1616–19 (1990).

[55] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 43.

[56] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

basis."[57] Justice Antonin Scalia defended "the theory of interpretation . . . that makes the traditions of our people paramount."[58] He thought that the purpose of the Due Process Clause "is to prevent future generations from lightly casting aside important traditional values—not to enable this Court to invent new ones."[59] The protection of a tradition "need not take the form of an explicit constitutional provision or statutory guarantee."[60] Moreover, even "traditional restrictions" might merely "go to show the scope of the right, not its lack of fundamental character."[61]

In a similar spirit, Marc DeGirolami has recently defended the use of tradition as a source of law. Law should honor "practices that have given people's lives structure, meaning, and worth,"[62] recognizing "the experience of what people desire with respect to enduring practices."[63] Constitutional language should be interpreted "with an eye to the sustenance, custody, and conservation of these old and enduring ways of doing and being,"[64] because such ways are "civic expressions of an enduring, healthy, moral and political ecology against the onslaught of those in the grips of a destructive vision of freedom."[65] Judicial application of abstract principles "often serves to displace the more diffuse and distant (though hardly less thoughtful) practices of people outside the nerve centers of power, and to replace them with elite cultural preferences."[66] Although traditionalism is often propounded by conservatives, it "might also appeal to political progressives concerned about the displacement of traditional communities, customs, and ways of life."[67]

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[57] Poe v. Ullman, 367 U.S. 497, 546 (1961) (Harlan, J., dissenting).

[58] McDonald v. City of Chicago, 561 U.S. 742, 792 (2015) (Scalia, J., concurring).

[59] Michael H. v. Gerald D., 491 U.S. 110, 122 n.2 (1989) (plurality opinion).

[60] *Id.*

[61] *McDonald*, 561 U.S. at 802 (Scalia, J., concurring).

[62] Marc O. DeGirolami, *Traditionalism Rising*, 24 J. CONTEMP. LEGAL ISSUES 9, 54 (2023).

[63] *Id.* at 40.

[64] *Id.* at 55.

[65] *Id.*

[66] *Id.* at 34. DeGirolami may be thinking of *Moore* when he writes:

> When the Court now speaks of traditions being "deeply rooted in the Nation's history," it is adopting a constitutional approach more suited to the non-elites of American society—those whose longstanding practices, and the cultural, communal, and political commitments they instantiate—may not conform to the principle-driven re-imagination of the Constitution to reflect and impose elite opinion as a national mandate. The wisdom of a people, and the sagacity of its diffuse practices and ways of life across time and geographic space, has its own merits and claims. These are not intrinsically less rational than the claims of elites, though they may have fewer professional rationalizers. Indeed, one might even adopt a liquidationist locution in arguing that these types of traditions, when they exist, are the most convincing and thoroughgoing public "sanction" or conscious, reasoned avowal of constitutional meaning.

Id. (footnotes omitted).

[67] *Id.* at 54. For critique of other aspects of DeGirolami's argument, see Andrew Koppelman, *The Use and Abuse of Tradition: A Comment on DeGirolami's* Traditionalism Rising, 24 J.

This vision has powerful attractions. Roger Scruton argues that the core teaching of conservatism is "that we have collectively inherited good things that we must strive to keep."[68] It "starts from a sentiment that all mature people can readily share: the sentiment that good things are easily destroyed, but not easily created."[69] These goods are not all recognized by public officials. They encompass all the practices and customs that matter to ordinary people. Officials may be oblivious or even hostile toward those practices. When that happens, a court that protects tradition may have a useful role to play.

B. The Birth of the "Deeply Rooted" Standard

That perspective guided the Court in *Moore v. City of East Cleveland*,[70] which first articulated the "deeply rooted" standard. The Court considered whether a housing ordinance narrowly defining the term "family" to include only a few categories of related individuals, thus prohibiting a woman from living with her two grandsons, violated the Due Process Clause of the Fourteenth Amendment.[71]

Justice Powell, writing for the Court, observed that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[72] The Constitution, he declared, "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."[73]

How did he know that? By looking at actual practice. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."[74] Changes in social conditions, which have

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CONTEMP. LEGAL ISSUES 187 (2023). Sherif Girgis has observed that the Court's traditionalism can lead it to arbitrarily freeze certain practices in place because of the historical accident of when a legal issue arises. Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1484–85 (2023). This is less of a concern with *Moore*-type rights. If citizens lose interest in the underlying practices, they will wither away without any change in the law being necessary. Even in a regime with abortion rights, women can decide not to exercise those rights.

[68] ROGER SCRUTON, HOW TO BE A CONSERVATIVE, at viii (2014).

[69] *Id.*

[70] 431 U.S. 494 (1977).

[71] *Id.* at 496.

[72] *Id.* at 499.

[73] *Id.* at 503. Powell meant this to be constraining: "an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from *Palko v. Connecticut*, 302 U.S. 319 (1937), and apparently suggested as an alternative." *Moore*, 431 U.S. at 503–04 n.12. But if all he cared about was constraint, he needn't have adopted substantive due process at all. Justice White complained: "What the deeply rooted traditions of the country are is arguable, which of them deserve the protection of the Due Process Clause is even more debatable." *Id.* at 549 (White, J., dissenting).

[74] *Moore*, 431 U.S. at 504 (plurality opinion).

diminished the number of extended family households, "have not erased the accumulated wisdom of civilization, gained over the centuries and honored throughout our history, that supports a larger conception of the family."[75]

Powell did not rely on a tradition of positive law. He did not even bother to investigate what the statute books, over the course of American history, had said about extended families. He looked at what Americans *did*. "Out of choice, necessity, or a sense of family responsibility, it has been common for close relatives to draw together and participate in the duties and the satisfactions of a common home."[76] The most recent census, which showed that extended families were still common, reinforced the point.[77]

Justice Brennan, concurring, likewise observed that the extended family was a "tradition of the American home that has been a feature of our society since our beginning as a Nation."[78] Moreover, "the prominence of other than nuclear families among ethnic and racial minority groups, including our black citizens, surely demonstrates that the 'extended family' pattern remains a vital tenet of our society."[79]

Moore, in short, gave no weight to what the elites in legislatures have deigned to recognize.[80] The traditions in question were the traditions that were manifested over generations by the personal choices of millions of people.

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[75] *Id.* at 505.

[76] *Id.*

[77] *Id.* at 504–05 n.14.

[78] *Id.* at 507 (Brennan, J., concurring).

[79] *Id.* at 510.

[80] *Id.* at 499 (plurality opinion). The Court in the *Glucksberg* case, which *Dobbs* deemed controlling authority, listed similar cases in this line:

> See *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) ("[T]he Constitution protects the sanctity of the family *precisely because* the institution of the family is deeply rooted in this Nation's history and tradition" (emphasis added)); *Griswold v. Connecticut*, 381 U.S. 479, 485–486 (1965) (intrusions into the "sacred precincts of marital bedrooms" offend rights "older than the Bill of Rights"); *id.*, at 495–496 (Goldberg, J., concurring) (the law in question "disrupt[ed] the traditional relation of the family—a relation as old and as fundamental as our entire civilization"); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness"); *Turner v. Safley*, 482 U.S. 78, 95 (1987) ("[T]he decision to marry is a fundamental right"); *Roe v. Wade*, 410 U.S. 113, 140 (1973) (stating that at the founding and throughout the 19th century, "a woman enjoyed a substantially broader right to terminate a pregnancy"); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental"); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (liberty includes "those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men").

Washington v. Glucksberg, 521 U.S. 702, 727 n.19 (1997). Note *Roe*'s appearance on the list.

C. Abortion Is a Deeply Rooted Tradition

What would happen if we applied the test of *Moore* to abortion—if we investigated, looking at the actual practices of Americans, whether a right to abortion is "deeply rooted in this Nation's history and tradition"?[81]

Helen Lefkowitz Horowitz's history of nineteenth-century controversies over sexuality observes that many Americans have long shared a cultural understanding of sex and abortion:

> Passed down through the generations and sideways among peers, this framework sustained an earthy acceptance of sex and desire as vital parts of life for men and women. It is best labeled "vernacular" because it was a largely oral tradition outside the literate discourses of religion, science, and law and typically despised by those in power.[82]

Elite discourse was oblivious or hostile to this aspect of America's history and tradition. "Although plenty of prescriptive statements from the pulpit and the printed page attempted to shape what Americans thought and felt, they did not fully supplant what seemed to many to be common wisdom."[83] Leslie Reagan points to this vernacular culture when she describes

> an unarticulated, alternative, popular morality, which supported women who had abortions. This popular ethic contradicted the law, the official attitude of the medical profession, and the teachings of some religions. Private discussions among family and friends, conversations between women and doctors, and the behavior of women (and the people who aided them) suggest that traditional ideas that accepted early abortions endured into the twentieth century. Furthermore, through the 1920s at least, working-class women did not make a distinction between contraceptives and abortion. What I call a popular morality that

[81] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022). I am here addressing the question that the *Dobbs* Court poses for itself. My own view is that the right to abortion does not need to rely on substantive due process, since it is firmly rooted in the text of the Thirteenth Amendment. *See* Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

[82] HELEN LEFKOWITZ HOROWITZ, REREADING SEX: BATTLES OVER SEXUAL KNOWLEDGE AND SUPPRESSION IN NINETEENTH-CENTURY AMERICA 5 (2002).

[83] *Id.* The enslaved population had a somewhat different vernacular culture, which I have explored elsewhere. *See generally* Koppelman, *supra* note 44.

> accepted abortion was almost never publicly expressed but was rooted in people's daily lives. Americans have a long history of accepting abortion in certain situations as a necessity and as a decision that, implicitly, belongs to women to make. This popular attitude made itself felt in the courts and in doctors' offices: prosecutors found it difficult to convict abortionists because juries regularly nullified the law by acquitting abortionists, and few physicians escaped the pressure from women for abortions. Throughout the period of illegal abortion, women asserted their need for abortion and, in doing so, implicitly asserted their sense of having a right to control their own reproduction.[84]

This vernacular culture has persisted throughout American history, sometimes in the face of severe repression. It underwent a shock when young women migrated into cities, away from their mothers and aunts. Horowitz writes that commercial abortionists, first seen in the early nineteenth century, "may have emerged to provide commercial services that the women's community had once offered its members."[85] The cultural impact was dramatic. "Abortion went from a secret, private practice to one performed commercially and advertised in the newspapers."[86] Demand for abortion persisted, but it took new forms. This publicized female sexual agency in a way that many men found alarming. It made them aware of a long-standing subculture of which they had previously been ignorant. They didn't like it.

The mid-nineteenth century saw a wave of laws prohibiting abortion—laws that expressly aimed at forcing women into their traditionally subordinated role. These reflected not a broad societal consensus, but the action of those in power upon a subject population, like the decision of the colonial government in early twentieth-century Nigeria to give legal recognition only to Christian marriages.[87] The writings of the prohibitionists constantly complained that American women saw nothing wrong with abortion.[88] These laws soon became a dead letter in much of the United States. Their enforcement was uneven. In major cities, despite nominal illegality,

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[84] LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 6 (1997); *see also* HOROWITZ, *supra* note 82, at 194 (noting that "the secret knowledge of women's vernacular sexual culture" included "the various means of preventing and terminating pregnancy").

[85] HOROWITZ, *supra* note 82, at 198.

[86] *Id.* at 209. For other evidence to the same effect, see Brief for American Historical Association and Organization of American Historians as Amici Curiae Supporting Respondents, *supra* note 45, at 24, 28–30.

[87] Eniolá Ànúolúwapó Sóyemí, *Participation and Law's Authority*, 36 CANADIAN J.L. & JURIS. 491, 499–500 (2023).

[88] Siegel, *supra* note 47, at 1187–88, 1192–93.

professional abortionists "had offices, kept regular hours, and had a steady stream of patients coming in."[89]

The most vigorous enforcement occurred after World War II. "The new repression of abortion was a reaction against the apparent changes in gender and growing female independence."[90] It should be understood as one part of the broader wave of authoritarianism that targeted leftists and gay people.[91]

The absence of consensus is made clear by the enormous number of women who had abortions despite the law, with dire medical consequences. The industry, driven underground, became far more dangerous:

> Thousands of women with abortion-related complications poured into the nation's hospitals for emergency care every year. Hospitals had entire wards devoted to caring for these patients. In Chicago, the results of the restriction of abortion could easily be seen in Cook County Hospital's wards. In 1939, Cook County Hospital treated over one thousand women for abortion-related complications; twenty years later that number had more than tripled. By 1962, the county hospital reported caring annually for nearly five thousand women with abortion related complications.[92]

This was "a public-health disaster—especially for low-income and minority women."[93] But what matters for purposes of the *Moore* analysis is that the vernacular culture persisted in the face of fearsome legal coercion and peril. It seems to have been at least as deeply rooted as the tradition of extended families.

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[89] REAGAN, *supra* note 84, at 162.

[90] *Id.*

[91] *See generally* Andrew Koppelman, *Why Gay Legal History Matters*, 113 HARV. L. REV. 2035, 2038–41 (2000) (reviewing WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999)).

[92] REAGAN, *supra* note 84, at 209.

[93] *Id.* at 214. The end of abortion restrictions had similarly dramatic public health consequences.

> Making abortion legal improved public health: overall maternal mortality dropped dramatically. In New York City, maternal mortality fell 45 percent the year after the state legalized abortion. "In 1971," city health officials reported, "New York City experienced its lowest maternal mortality rate on record." California and North Carolina reported similar improvement. Septic abortion wards closed. As a public-health measure, the legalization of abortion represented an improvement in maternal mortality that ranks with the invention of antisepsis and antibiotics.

Id. at 246.

D. The Rhetoric of Dobbs

Now let us return to the historical claims of *Dobbs*. It is one thing to make parts of the past invisible. Everybody does that: accounts of the past are necessarily selective.[94] But it is another thing to make huge numbers of your fellow citizens invisible.

Guido Calabresi criticized *Roe* for insensitivity to the concerns of those whose claims it rejected:

> The Court, when it said that fetuses are not persons for purposes of due process, said to a large and politically active group: "*Your* metaphysics are not part of *our* constitution." . . . Such a statement is about as bad as can be made by the Supreme Court of the United States in the area of conflicting beliefs.[95]

Abortion should rather be recognized as presenting "a tragic conflict of ideals."[96] In such cases, when "we deny that anything of value is being sacrificed and say that the losing belief is one to which our polity gives no weight, we are adding significantly to the loss of the losers."[97]

When *Dobbs* ignores the history just described, it undertakes the kind of marginalization Calabresi complains about. It needs to do that in order to construct the univocal tradition it imagines. Balkin observes: "If the memory of the past tells us that current arrangements are the result of previous injustices that people contested and resisted, erasure of the past makes the present appear legitimate and the result of consent and free choice."[98]

Much has been written about the *Dobbs* Court's treatment of reliance and women's equality. Here, I want to focus on its rhetoric when it addressed those claims.

1. Reliance

Courts, when deciding whether to overrule a precedent, consider reliance interests for the same kind of reasons that the Court considered tradition in *Moore*: law should not shatter expectations and plans. Justice Amy Coney Barrett has observed

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[94] On the other hand, the history just recounted had been presented to the Court in amicus briefs, but Alito does not acknowledge or attempt to address it. Leslie J. Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022, 4:30 AM), https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174 [https://perma.cc/7B6G-8E2L].

[95] GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 95 (1985).

[96] *Id.* at 97.

[97] *Id.* at 98.

[98] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 185.

that, among the reasons why courts follow their own precedents, "the protection of reliance interests is paramount."[99]

Dobbs invokes laws from half a century earlier in order to nullify the rights of persons here and now. That creates a huge reliance problem. The dissenters explained:

> [P]eople today rely on their ability to control and time pregnancies when making countless life decisions: where to live, whether and how to invest in education or careers, how to allocate financial resources, and how to approach intimate and family relationships. Women may count on abortion access for when contraception fails. They may count on abortion access for when contraception cannot be used, for example, if they were raped. They may count on abortion for when something changes in the midst of a pregnancy, whether it involves family or financial circumstances, unanticipated medical complications, or heartbreaking fetal diagnoses. Taking away the right to abortion, as the majority does today, destroys all those individual plans and expectations.[100]

How did the Court respond?

Its answer was to ignore the dissent and instead focus on an earlier treatment of reliance by Justices O'Connor, Kennedy, and Souter. When *Roe* was reaffirmed in *Planned Parenthood v. Casey*,[101] that plurality wrote: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives," and "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[102]

Chief Justice William Rehnquist dissented:

> Surely it is dubious to suggest that women have reached their "places in society" in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of

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[99] Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1730 (2013).

[100] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 405–06 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting).

[101] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[102] *Id.* at 856 (plurality opinion).

> their ability to fill positions that were previously thought to be reserved only for men.[103]

This sentence is nearly unintelligible. Is he saying that women's determination to advance is never frustrated by an unwanted pregnancy? That no college or professional school student's ambitions will be stymied if she has an unwanted baby?

Dobbs quotes the *Casey* plurality and responds that "this Court is ill-equipped to assess 'generalized assertions about the national psyche.'"[104] Alito claims that it "is hard for anyone—and in particular, for a court—to assess" the "effect of the abortion right on society and in particular on the lives of women."[105] How, he innocently wonders, can a court possibly know whether women's lives will be disrupted by unintended, inescapable pregnancy?

But of course, the claim that such pregnancies can hijack women's lives is not a "generalized assertion." It is a massively obvious fact. Alito is not the only Justice who is in denial. At oral argument, Justice Barrett asked a rhetorical question: to the extent that "the consequences of parenting and the obligations of motherhood that flow from pregnancy" burden women, "Why don't the safe haven laws take care of that problem?"[106] It is a brutally silly question. Set aside the fact that pregnancy is physically grueling, more so as it progresses, often leaving permanent damage. Adoption is hard. Many women find it difficult to give up for adoption an infant born of their bodies, and when they do, the experience is often traumatizing. One study, cited by the dissent and ignored by the majority, found that nine out of ten women who were denied abortions ended up keeping the baby.[107] (There would be more pressure to do that if abortion really were effectively outlawed: the foster care system would be overwhelmed by more than 800,000 infants each year.[108] It is already the case that babies are far less likely to be adopted if they are not white.[109])

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[103] *Id.* at 956–57 (Rehnquist, C.J., concurring in judgment in part and dissenting in part).

[104] *Dobbs*, 597 U.S. at 288 (quoting *Casey*, 505 U.S. at 957 (Rehnquist, C.J., concurring in judgment in part and dissenting in part)).

[105] *Id.*

[106] Transcript of Oral Argument at 56, *Dobbs*, 597 U.S. 215 (No. 19-1392). Alito cites the same claim in *Dobbs*, 597 U.S. at 258–59.

[107] Gretchen Sisson et al., *Adoption Decision Making Among Women Seeking Abortion*, 27 WOMEN'S HEALTH ISSUES 136, 139 (2017), cited in *Dobbs*, 597 U.S. at 397 n.17 (Breyer, Sotomayor & Kagan, JJ., dissenting).

[108] *Number of Abortions in the United States Likely to Be Higher in 2023 Than in 2020*, GUTTMACHER INST. (Jan. 17, 2024), https://www.guttmacher.org/news-release/2024/number-abortions-united-states-likely-be-higher-2023-2020 [https://perma.cc/6Y5D-YBKL]. Alito blithely declares that "a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home." *Dobbs*, 597 U.S. at 259. That is true, at least for white babies, in a world in which abortion is available, but that state of affairs would evaporate if all unintended pregnancies were brought to term.

[109] *See* Anna North, *Why Adoption Isn't a Replacement for Abortion Rights*, VOX (Dec. 8, 2021, 7:00 AM), https://www.vox.com/2021/12/8/22822854/abortion-roe-wade-adoption

Alito claims that reliance interests are "not implicated."[110] He quotes the *Casey* plurality: abortion is generally "unplanned activity" and "reproductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."[111] Precedent, he writes, concerns "very concrete reliance interests, like those that develop in 'cases involving property and contract rights.'"[112] But, once more, the specter of pregnancy can jeopardize financial plans. Think of women who are students and have in some cases borrowed tens of thousands of dollars for the first year of school, who will never finish if they get pregnant.

Women's assumption that they get to control their own bodies, and their decisions to build their lives around that assumption, is, Justice Alito writes, a "novel and intangible form of reliance."[113] There is nothing novel about it. That does not decide the *Roe* question, of course. But it is a consideration that weighs against overruling. He ought to explain what outweighs it.

2. Equality

Another consideration supporting *Roe* was the sex equality argument. Equal protection aims not to preserve ancient traditions, but to remedy ancient injustices. This makes history relevant in a different way. As Balkin observes, it offers a narrative of redemption.[114] All-male legislatures in the nineteenth century did not mind forcing women to have babies. When the Fourteenth Amendment was enacted and for many years thereafter, segregated schools were also common. Nineteenth-century practice cannot settle the meaning of the Civil War amendments.

If "[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination,"[115] this discrimination has consisted primarily of compelling women to be mothers. The *Dobbs* Court however casually dismissed the sex equality claim for abortion rights.[116] It cited *Geduldig v. Aiello*,[117] which had held that pregnancy-based classifications were not sex discrimination. According to *Geduldig*, no disadvantage imposed exclusively on pregnant women ever raises any sex equality issue, even though the burdens of pregnancy and childrearing are the historical core of the subordination of women.[118] After Congress rejected that view

-supreme-court-barrett [https://perma.cc/A7BA-37ZF]; Peggy Cooper Davis, *A Response to Justice Amy Coney Barrett*, HARV. L. REV. BLOG (June 14, 2022), https://harvardlawreview.org/blog/2022/06/a-response-to-justice-amy-coney-barrett/ [https://perma.cc/JL5V-66CF].

[110] *Dobbs*, 597 U.S. at 288.

[111] *Id.*

[112] *Id.* (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

[113] *Id.*

[114] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 175–76.

[115] Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (plurality opinion).

[116] *Dobbs*, 597 U.S. at 236–37. Reva Siegel observes that this discussion was improper dictum because no equal protection claim had been made. Siegel, *supra* note 47, at 1135 n.30.

[117] 417 U.S. 484 (1974).

[118] They were also a major element of slavery. *See* Koppelman, *supra* note 44, at 1938.

in the Pregnancy Discrimination Act,[119] the Court largely repudiated its reasoning[120] and never again cited *Geduldig* until *Dobbs*.[121] This kind of formalism has nothing to do with any reason why anyone might have wanted to challenge historical inequalities.[122] Its sole attraction is that it preserves some of those inequalities by insulating them from scrutiny.[123] Again, the Court might have explained how it struck the balance, but its opinion indicates that only the most deferential level of scrutiny is warranted.

E. The Rhetorical Challenge

Alito could have written an opinion acknowledging the costs, personal and collective, of reversing *Roe*. His criticisms of that decision are logically separate from the questions of reliance and equality. He might have argued that the decision was so poorly reasoned and destructive to democracy that these costs were justified.

But he would then have to concede that those costs existed. That is sometimes a wise rhetorical strategy. Perelman and Olbrechts-Tyteca observe: "Concession is above all the antidote to lack of moderation . . . . By restricting his claims, by giving up certain theses or arguments, a speaker can strengthen his position and make it easier to defend, while at the same time he exhibits his sense of fair play and his objectivity."[124] This observation has an inverse: if the speaker refuses to budge, if he stands on indefensible ground, he betrays his lack of those virtues.

A story of vigorous abortion restriction is not a happy one from the perspective of either liberty or equality. The right to life movement has never figured out how to address those issues. An honest response might look something like this:

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[119] Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k).

[120] *See* Nev. Dep't Hum. Res. v. Hibbs, 538 U.S. 721, 731–35 (2003).

[121] Cary Franklin & Reva B. Siegel, *Equality Emerges as a Ground for Abortion Rights In and After* Dobbs, *in* ROE V. DOBBS: THE PAST, PRESENT, AND FUTURE OF A CONSTITUTIONAL RIGHT TO ABORTION 22, 28–30 (Lee C. Bollinger & Geoffrey R. Stone eds., 2024).

[122] One can find a similar formalism in the Court's earlier inclination to uphold prohibitions against interracial marriage, or some judges' reluctance to recognize that discrimination on the basis of sexual orientation is sex discrimination. *See* Andrew Koppelman, Bostock *and Textualism: A Response to Berman and Krishnamurthi*, 98 NOTRE DAME L. REV. REFLECTION 89, 101–02 (2022); Andrew Koppelman, Bostock*, LGBT Discrimination, and the Subtractive Moves*, 105 MINN. L. REV. HEADNOTES 1, 1–4 (2020).

[123] Alito claims in *Dobbs* that the nineteenth-century abortion prohibitions did not have the purpose of forcing women into their traditional subordinated role. This misrepresents the historical record. *See* Franklin & Siegel, *supra* note 121, at 35–43. Laws that do not classify on the basis of sex are nonetheless subject to a presumption of unconstitutionality if they were enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," such as "because it would accomplish the collateral goal of keeping women in a stereotypic and predefined place." Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). This is true of those abortion prohibitions.

[124] PERELMAN & OLBRECHTS-TYTECA, *supra* note 2, at 488.

> *Abortion is murder. No one has a right to murder. That means that women who unintentionally become pregnant—including preteen girls and women who are raped*[125]*—are out of luck: there is no morally licit way for them to avoid the burdens of pregnancy and childbirth. This fact will entail regrettable systemic effects. In vitro fertilization will disappear. Because a regime of abortion prohibition rests on distrust of women's choices, it tends to include regulation and surveillance of pregnant women. Miscarriages will sometimes trigger criminal investigations. Because unintentionally pregnant women often do want to end their pregnancies, this surveillance is necessary and appropriate. More broadly, women who do not control their fertility will have fewer opportunities than men. They will, in many cases, lose the capacity to direct their lives. The motherhood that is forced upon them will in turn drive them into economic dependence on men, dependence that entails relationships of power. Some of the men will take advantage of the opportunities to engage in violence or sexual coercion, of the women and their children. All this is sad, but better than a regime that permits (what states are constitutionally permitted to deem) the murder of babies. It is in fact the best of all possible worlds. If women's liberty and equality can be achieved only if they are permitted to kill their children, then these desiderata come at too high a price.*

This narrative is obviously hard to sell,[126] which is why the prevalent strategy, in *Dobbs* and elsewhere, is to try to keep the audience thinking about something else.[127]

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[125] The political reality is that many abortion bans will nominally have rape exceptions, but the moral reality is that they will be meaningless and impossible to invoke. Andrew Koppelman, *The Phony Rape Exception to Abortion Bans*, THE HILL (Feb. 3, 2023, 9:30 AM), https://thehill.com/opinion/healthcare/3842067-the-phony-rape-exception-to-abortion-bans/ [https://perma.cc/5BLM-KQ8Q].

[126] Perelman and Olbrechts-Tyteca note that "being ridiculous" is a danger faced by "anyone who sets forth principles whose unforeseen consequences put him in opposition to ideas which are accepted in a given society, and which he himself would not dare to contravene." PERELMAN & OLBRECHTS-TYTECA, *supra* note 2, at 206. The difficulties of maintaining a position in which, for example, a raped ten-year-old girl must be compelled to bear the child, or in vitro fertilization is impermissible, is why "the general tendency of *Dobbs*, at least at the outset, will be to pressure and shrink the Republican coalition." Jack M. Balkin, *Abortion, Partisan Entrenchment, and the Republican Party*, *in* ROE V. DOBBS, *supra* note 121, at 81, 100.

On the other hand, I have described a rhetorical difficulty rather than a refutation of the claim that a fertilized egg is a person with rights. For refutation, see DAVID BOONIN, A DEFENSE OF ABORTION 115–29 (2003); Lynne Rudder Baker, *When Does a Person Begin?*, 22 SOC. PHIL. & POL'Y 25 (2005).

[127] Or to trivialize the burdens on women. One classic move is to dismiss their desire to

Alito's approach, however, has a cost of its own. Its response to objections from reliance and equality exemplifies the rhetorical strategy summarized by Ring Lardner: "Shut up he explained."[128] Unlike the speaker in Lardner's story, who simply does not want to answer his son's question, Alito's silencing has substantial cognitive content. It tells the women whom the decision will harm that they simply do not matter, that they are owed no explanation, that they are beneath the Court's notice. Perelman and Olbrechts-Tyteca observe that when "argumentation addressed to the universal audience and calculated to convince does not convince everybody, one can always resort to *disqualifying the recalcitrant* by classifying him as stupid or abnormal."[129] This strategy has its limitations. "There can only be adherence to this idea of excluding individuals from the human community if the number and intellectual value of those banned are not so high as to make such a procedure ridiculous."[130]

As long as we are talking about precedent, we should consider a notable precedent for Alito's tactic.

During an 1874 Congressional debate on civil rights legislation, Representative John T. Harris offered his own account of what was deeply rooted in America's history and tradition: "I say there is not one gentleman upon this floor who can honestly say he really believes that the colored man is created his equal." Alonzo J. Ransier, a Black congressman from South Carolina, called out, "I can." Harris replied: "Of course you can; but I am speaking to the white men of the House; and, Mr. Speaker, I do not wish to be interrupted again by him."[131]

Later, Harris asked "every gentleman on the other side of the House" to admit they were bound to respect the prejudice "that the colored man was inferior to the white." Ransier again responded, "I deny that." Harris retorted, "I do not allow you to interrupt me. Sit down; I am talking to white men; I am talking to gentlemen."[132]

Alito is Harris's rhetorical heir. The women who have relied on *Roe*, and who are unenthusiastic about being forced into motherhood, are not part of his imagined audience. He doesn't need to even try to justify himself to them. He, too, is talking to gentlemen.

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control the course of their lives as arising from "convenience, whim, or caprice." Doe v. Bolton, 410 U.S. 179, 221 (1973) (White, J., dissenting).

[128] RING LARDNER, *The Young Immigrunts*, *in* THE PORTABLE RING LARDNER 685, 704 (Gilbert Seldes ed., 1946).

[129] PERELMAN & OLBRECHTS-TYTECA, *supra* note 2, at 33.

[130] *Id.* Balkin observes that originalists who aspire to extract a univocal consensus from the past will inevitably do so "by reading the evidence selectively and opportunistically, by ignoring many members of the public, or by declaring that their views were not in fact reasonable." BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 137.

[131] 43 CONG. REC. 376 (1874). Thanks to Christopher Green for helping me track down the reference.

[132] *Id.* at 377.

III. THE ORIGINALIST OPPORTUNITY

Conservative originalists' denial about what they are doing creates opportunities for liberals and progressives. In the picture that Balkin draws, originalists are living in a kind of dream world, constantly making moves that, according to their own official story, are impermissible or irrelevant. For example, there has been a cottage industry of originalist theorizing aiming to show that *Brown v. Board of Education*[133] is derivable from originalist premises, even though the Fourteenth Amendment probably would not have been enacted if it had generally been understood to mandate that result.[134] More generally, "conservative originalists have to continually retrofit their theories of original meaning to make sure that they can accommodate canonical precedents, practices, and results."[135] Their arguments also just happen to coincide, in nearly every detail, with the agenda of today's Republican Party.[136] Balkin is right: "Originalism is the living constitutionalism of movement conservatives."[137]

A competent lawyer knows how to use all the tools that are at her disposal. That is why it is such a mistake for the left to abjure originalist arguments. "Quite apart from the demands of litigation, scholars, advocates, and political actors should regularly make originalist arguments because these arguments draw on the normative power of the nation's cultural memory."[138] Conservative originalism has persuaded many precisely because it "has given people a way to connect their vision of the world to the authority of the Constitution, and to articulate their political objections in terms of fidelity to the Constitution."[139] Liberals and progressives should not let conservatives appropriate this kind of argument without challenge. Other narratives, based on different accounts of the past, are possible. As we just saw, conservative originalism sometimes misrepresents and distorts the record, and this needs to be called out.[140] The fact that your opponents are lying about history

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[133] 347 U.S. 483 (1954).

[134] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 145.

[135] *Id.* at 113.

[136] This is particularly striking in the newly emerging, purportedly constitutional constraints on the administrative state, which have nothing to do with original meaning and derive primarily from the ubiquitous deployment of libertarian rhetoric to void long-standing government protections. *See* ANDREW KOPPELMAN, BURNING DOWN THE HOUSE: HOW LIBERTARIAN PHILOSOPHY WAS CORRUPTED BY DELUSION AND GREED (2022); ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM (2013); Andrew Koppelman, *The Supreme Court, Vaccination and Government by Fox News*, THE HILL (Jan. 14, 2022, 2:00 PM), https://thehill.com/opinion/judiciary/589763-the-supreme-court-vaccination-and-government-by-fox-news/ [https://perma.cc/6Z7M-57TZ].

[137] BALKIN, MEMORY AND AUTHORITY, *supra* note 5, at 93.

[138] *Id.* at 173.

[139] *Id.* at 174.

[140] The task of exposing such misrepresentation, Balkin thinks, is one in which historians have a comparative advantage over lawyers. *Id.* at 239.

is evidence that history can be your friend. "Refusing to claim the past for oneself means accepting other people's versions. Those who will not deign to speak in the name of tradition and cultural memory will have tradition and cultural memory deployed against them."[141]

The biggest attraction of Balkin's vision is that in it, the past is enabling rather than constraining. It enables us to construct a world we can live in. Rhetoric creates a sphere of freedom: as Perelman and Olbrechts-Tyteca observe, it justifies "the possibility of a human community in the sphere of action when this justification cannot be based on a reality or objective truth."[142] There is no freedom in arithmetic or in chaos. "Only the existence of an argumentation that is neither compelling nor arbitrary can give meaning to human freedom, a state in which a reasonable choice can be exercised."[143] One shouldn't lie about history, but that constraint leaves a lot open. History is constraining in the same way that an artist is constrained by the properties of paint and canvas. It is because those substances are manipulable that we can reasonably hope to create a portrait in which we can recognize ourselves.

[141] *Id.* at 176.

[142] PERELMAN & OLBRECHTS-TYTECA, *supra* note 2, at 514.

[143] *Id.* Put another way: "All intellectual activity which is placed between the necessary and the arbitrary is reasonable only to the degree that it is maintained by arguments and eventually clarified by controversies which normally do not lead to unanimity." PERELMAN, *supra* note 39, at 159.