Judicial Value Judgments and the Common Good

*by Gerard V. Bradley**

Introduction

"Common good constitutionalism" is chiefly a criticism of what might be helpfully described as "mainstream" legal conservatism—the prescription for constitutional adjudication exemplified in the opinions of Antonin Scalia and those (in and out of the judiciary) who follow his lead. The "common-good" constitutionalists' critique centers on the stated commitment of contemporary judicial conservatism to *originalism*; that is, to interpreting the Constitution according to its original public understanding as nearly as possible given the limitations of historical sources and the development of the law since the founding.[1] I think that this defining commitment is correct, for it satisfies two fundamental requirements of any sound theory of constitutional interpretation. The first is that the constitutional *text* and only that text is authoritative. The second is that interpretation is the right method for deriving the meaning conveyed by those who wrote and ratified that text. Constitutional interpretation, at least in America, is, when done right, still anchored by the historical project of reconstructing the sequence of normative thinking which culminated (if you will) in the ratified constitutional document.

But beginning in the mid-1980s and especially since the millennium, "mainstream" legal conservatives have wed these sound originalist instincts to a methodological doctrine of judicial restraint—a normative approach to how to decide constitutional cases that is allergic to critical moral reasoning. These conservatives say that they scrupulously avoid relying upon "value judgments" in justifying their decisions.[2] They say that, in our constitutional order, legislators get paid to make judgments about moral value and that judges do not.

In the event, value-neutralist methodology has eclipsed interpretation. Avoiding judicial "moralizing"—or what Justice Scalia described as his brethren's "predilections"[3]—has become for many conservatives the overriding *desideratum* of constitutional adjudication. So, Supreme Court nominees are regularly heard to insist that (in my paraphrase): "I would never dream of imposing my morality on the law."[4]

Note that, while originalism is an interpretive theory, this hypothesized "value" neutrality is not. It is rather a self-imposed limitation upon the quest for original meaning, which implicitly (and sometimes explicitly) trades upon doubts regarding the objectivity of moral norms. This commitment to avoid "values" has no tendency whatsoever to yield the original understanding of any part of the Constitution if only because there is no historical basis for assuming that the Founding Fathers doubted the abilities of judges the way modern judges doubt themselves.[5]

---

* Professor of Law, University of Notre Dame; Co-Director, Natural Law Institute (University of Notre Dame); Visiting Fellow, Hoover Institution (Stanford University); Senior Fellow, Witherspoon Institute.

1 *See, e.g.*, Hon. William H. Pryor, *Against Living Common Goodism*, 23 Federalist Soc'y 24, 26 (2022) (arguing that, while they germinate from different substantive moral beliefs, living constitutionalism and common good constitutionalism are methodologically identical).

2 *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 863 (1989). *But see* Josh Hammer, *Common Good Originalism After* Dobbs, Am. Mind (Sept. 21, 2022), https://americanmind.org/features/florida-versus-davos/common-good-originalism-after-dobbs/ ("there is *no such thing* as 'values-neutrality.' [The] preference of Thayerian deference to legislative majorities [is] *itself* a 'pro-democracy' value judgment.").

3 Scalia, *supra* note 2, at 863.

4 *See, e.g., infra* Part I (Judges and Umpires).

5 *See* Adrian Vermeule, *Beyond Originalism*, The Atlantic (Mar. 31, 2020), https://www.theatlantic.com/ideas/archive/2020/03/common-good-constitutionalism/609037/ ("Originalism . . . can now give way to a new confidence in authoritative rule for the common good."); *see also* Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 Geo. L.J. 1, 21 (2018) (offering "compelling" indications that the founders regarded the judiciary subject to fiduciary norms such as Hamilton's contention that judges are obliged to prefer the "intention of the people to the intention of their agents" when legislative intent conflicts (quoting The Federalist No. 78 (Alexander Hamilton)).

The effect of this stipulated, methodological constraint may be usefully compared, I think, to the possibilities for sound New Testament exegesis executed on the *a priori* supposition that either miracles simply do not occur (think Bultmann) or that intelligible public revelation does not happen (think Jefferson). Bultmann's liberal Christianity and Jefferson's sanitized Bible are interesting constructs. Neither is the Gospel of Jesus Christ.

Judges and Umpires

This cultivated "value" neutrality was articulated most memorably by John Roberts at his 2005 chief justice confirmation hearings: being a justice is like being an umpire calling balls and strikes.[6] Roberts was not referring just to the impartiality of umpires as a model stance; that indeed is a desirable quality in judges (as in umpires). Roberts also compared very favorably the act of judging balls and strikes to the act of judging strictly technical means, such as the use of facial recognition software at airports as violating the constitutional norm against "unreasonable search and seizure."[7]

The comparison is ridiculous. There is no useful similarity or analogy between accurately seeing the relationship between two objects—home plate and a pitched baseball—and deciding whether to reverse *Roe v. Wade* or whether the Fourteenth Amendment bars Donald Trump from running for president.[8] New Deal-era Justice Owen Roberts's view—that in constitutional cases a judge puts the statute beside the Constitution and asks whether the "latter squares with the former"—is, by comparison to the umpire picture, quite sophisticated.[9] Yet it too is hopelessly naïve. Interpretation of a text is much harder work than taking a good look. In any event, Chief Justice Roberts's umpire analogy is outdated. Professional baseball is experimenting with automated umpires now.[10] Besides, do we really want constitutional law that could be done by Siri sitting behind a big wooden bench? Turbo-con-law?[11]

Chief Justice Roberts revisited sports analogies in his December 2023 end-of-the-year Report on the Federal Judiciary.[12] Taking up the question of whether AI could ever replace human judges, Roberts this time looked to tennis, not baseball.

> Many professional tennis tournaments, including the US Open, have replaced line judges with optical technology to determine whether 130 mile per hour serves are in or out. These decisions involve precision to the millimeter. And there is no discretion; the ball either did or did not hit the line. By contrast, legal determinations often involve gray areas

6 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) [hereinafter *Roberts Hearing*].

7 Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 Minn. L. Rev. 1105, 1132 (2021) (using Chief Justice Roberts's "digitally aware" Fourth Amendment jurisprudence as a complete basis for an analytical framework in the likelihood of future facial recognition court cases).

8 *See Roberts Hearing*, *supra* note 6, at 185 (statement of Sen. Joseph Biden) (continuing the metaphor, then-Senator Biden asked where "unreasonable search and seizure" fell in terms of the strike zone, which in baseball, is clearly defined as between the shoulders and the knees, and how, as an "umpire," a judge could determine "reasonable" without defining the strike zone himself).

9 *United States v. Butler*, 291 U.S. 1, 62 (1936) (using this term to describe the judicial branch's "only one duty"). "The only power it has, if such it may be called, is the power of judgment." *Id.* at 63; *see also* D. Grier Stephenson, Jr., *The Judicial Bookshelf*, in 2 Journal of Supreme Court History 168-88 (1996).

10 Relatedly, robots use the "formalist" two-dimensional strike zone as defined by official "Constitution" of baseball. Umpires have been "functionally" using a three-dimensional strike zone. Ronald Blum, *What is a Strike in Baseball? Robots, Rule Book, and Umpires View it Differently*, AP Sports (July 10, 2023 12:46 AM), https://apnews.com/article/mlb-robot-umpires-strike-zone-40ec7285ae4d1ccaf2621adcb8d72b02.

11 *But see id.* ("I enjoy[] [automated umpires] because [they are] consistent. You want to know what the zone is at all times, even if it's a little funkier, a little different.").

12 Chief Justice John G. Roberts, Jr., Year-End Report on the Federal Judiciary 6 (2023).

13 *Id.*

> that still require application of human judgment.[13]

What sort of "human judgment" did the chief justice of the United States believe to be irreplaceable by digital brains?

> Machines cannot fully replace key actors in court. Judges . . . measure the sincerity of a defendant's allocution at sentencing. Nuance matters: Much can turn on a shaking hand, a quivering voice, a change of inflection, a bead of sweat, a moment's hesitation, a fleeting break in eye contact. And most people still trust humans more than machines to perceive and draw the right inferences from these clues.[14]

Leave aside the question whether AI could deliver over the broad run of cases more accurate "inferences" about witnesses' or defendants' credibility.[15] Never mind for the moment that "inferences" about credibility are most often drawn by lay jurors in the course of deliberations about guilt and not by judges and that jurors do not need any specific legal training in order to make them. Jurors and judges rarely, if ever, rely, moreover, upon gross anatomical and behavioral factors such as beady eyes or sweaty palms in making them.

It has been decades since I prosecuted jury cases myself, but I tried many of them when I did. Never did I—nor any lawyer in my presence nor any judge—ever indicate that they relied upon such gross indicia of a test for truth-telling. Nor should they have. Any trial lawyer will tell you that honest witnesses are often fidgety and that many liars exhibit an actor's aplomb. I taught trial advocacy in law schools for decades thereafter and never once suggested to students that they make credibility arguments based upon quivers or the shakes.

Drawing inferences about credibility has nothing to do with making law or with moral evaluative judgments. Identifying a truth-teller involves evaluative judgments of a sort. But it does not require reliance upon any critical moral norm. Drawing such inferences has to do with settling upon the factual basis for a verdict and, perhaps, for making some law of the case.

In his end-of-the-year report, Chief Justice Roberts remarks that "[a]ppellate judges, too, perform quintessentially human functions. Many appellate decisions turn on whether a lower court has abused its discretion, a standard that by its nature involves fact-specific gray areas."[16] Other appellate decisions "focus on open questions about how the law should develop in new areas."[17] Indeed, they do. And it is right here, when facing the challenge of making and not just finding law in a new area, that "common-good" critics (among other detractors) of judicial moral reticence expect judges to resort to sound norms of natural law (rational morality): that is, norms of justice that are not overtly found in constitutional text but rather have earned status within law by dint of being *true* and, consequently, inescapably inherent within countless rules and doctrines of our (positive) law. Perhaps the best compact expression of this criticism is that the positive law, especially including our Constitution, is normatively much thicker than constitutional "textualists" typically suppose.

What, then, do human judges bring to that task that AI cannot or at least presently does not? Chief Justice Roberts's answer: "AI is based largely on existing information, which can inform but not make such decisions."[18]

The only sure takeaway from that murky claim is that humans are, somehow, able to gather a particular sort of "information," evidently that which goes beyond "existing" stocks, that is characteristically beyond the capacity of AI. And there is an end to it: "I predict that human judges will be around for a while."[19] The chief

14 *Id.*

15 *See id.*

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

justice ended without acknowledging one thing that human judges can do that AI could never do: make critical moral judgments and choices about what is most conducive to that which is genuinely good for humans and for their lives together in a political community.[20]

Invited to opine on the umpire analogy during a 2009 appearance at Pepperdine Law School, Justice Alito said that umpiring "is not as mechanical as a lot of people think" and that umpires themselves "really exercise a lot of discretion."[21] In fact, he added, umpires exercise "more discretion in some areas than judges should exercise."[22] He did concede that the chief justice's analogy nonetheless contained a "very valid point, which is that umpires have rules to apply, and judges have rules to apply. It is our job, just as it is the job of the umpire, to apply those rules, not to make up new rules."[23]

"Common-good" critics rightly object to this understanding of what appellate judges do as naïve and productive of mischief. But their target is too narrow. The Court's liberals say that they share Chief Justice Roberts's rejection of recourse to sound norms of natural law and justice. They say that they too believe that legal source materials—text, relevant history, precedent—massaged by technical legal reasoning are invariably (or almost always) *determinate* enough to resolve constitutional cases.

One recent Supreme Court nominee, for instance, resisted the umpire analogy because, she asserted, it suggested that judging is "akin to a robotic enterprise."[24] Elena Kagan nonetheless left no room in her preferred model of judging for critical moral reasoning or, evidently, for making law at all. Even though judges have some discretion,

> [t]hat does not mean that they are doing anything other than applying law. I said yesterday . . . it is law all the way down. You know, you are looking at the text, you are looking at structure, you are looking at history, you are looking at precedent. You are looking at law and only at law, not your political preferences, not your personal preferences.[25]

A different Supreme Court nominee, and the biggest baseball fan of them all,[26] also pushed back against the chief justice's "umpiring."

> I prefer to describe what judges do, like umpires, is to be impartial and bring an open mind to every case before them. And by an open mind, I mean a judge who looks at the facts of each case, listens and understands the arguments of the parties, and applies the law as the law commands. It's a refrain I keep repeating because that is my philosophy of judging, applying the law to the facts at hand. And that's my description of judging.[27]

---

20 *See generally* Joe McKendrick & Andy Thurai, *AI Isn't Ready to Make Unsupervised Decisions*, Harv. Bus. Rev. (Sept. 15, 2022), https://hbr.org/2022/09/ai-isnt-ready-to-make-unsupervised-decisions (illustrating through several examples of what happens when AI is confronted with the quintessential "trolly problem" in an effort to explain that AI fails to capture intangible human factors such as moral and ethical considerations).

21 Samuel A. Alito, Jr. et al., *The Second Conversation with Justice Samuel A. Alito, Jr.: Lawyering and the Craft of Judicial Opinion Writing*, 37 Pepp. L. Rev. 33, 35 (2009).

22 *Id.*

23 *Id.*

24 *Hearing on the Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 203 (2010) (statement of Elena Kagan, Nominee to be an Associate Justice of the Supreme Court of the United States).

25 *Id.*

26 "Few judges could claim they love baseball more than I do, for obvious reasons." *Hearing on the Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 111th Cong. 79 (2009) (statement of Sonia Sotomayor, Nominee to be an Associate Justice of the Supreme Court of the United States) [hereinafter *Sotomayor Hearing*]; *see also* Barack Obama, U.S. President, Speech Nominating Hon. Sonia Sotomayor to the United States Supreme Court (May 26, 2009) (adding that an injunction she ordered was widely known for saving baseball).

27 *Sotomayor Hearing*, *supra* note 26. That is not how most lawyers would describe her judging.

Conservatives who complain about the value-neutrality of the Court's conservatives fail to see the broader reach and depth of the value-aversion problem. They do not see that their nemesis, a pronounced judicial moral-reticence, is caught up in an enveloping claim about the infrequency and very limited extent of judicial *lawmaking*—a claim not limited to those on the right side of the judicial aisle.

One might imagine that the relationship between value-neutrality and the determinacy of legal materials embraced by Justices Roberts, Alito, Kagan, and Sotomayor (among others) presents a classic chicken-egg quandary. Is it that they rarely or never *make* law, and therefore have no need to rely upon true moral norms in doing so? Or is that, having derived a striking moral reticence from considerations of democratic theory and judicial competency, the justices recognize that they should refrain from the value-laden task of making law? The relationship is rather, I think, not one of prioritizing first and then second. It is dialectical; there is a mutually reinforcing to-and-fro between the twin commitments to steer clear of both lawmaking and value-laden decisions for the sake of the Court's legitimacy within our democratic system of government.

Judicial Value Judgments

Notwithstanding the justices' protests that they stick strictly to legal craft, it is abundantly clear that the Supreme Court commonly makes law and that, when it does, it unmistakably relies upon critically justified norms of natural law and natural justice.[28]

The roster of constitutional issues that have required judicial value judgments for their resolution is a very long one. It might be most helpful to proceed vertically, from the top down. At the heights, we discover the interpretive challenge: What is the original public meaning of a contested constitutional provision? A select list of provisions that bears overt moral evaluative content includes laws that "impair[] the obligation of contract,"[29] or that impose "excessive" bail and fines or "cruel and unusual punishment,"[30] or that deny "equal protection" or "due process" of law,[31] or that violate persons' rights to be free of "unreasonable search and seizure."[32]

The roster also includes the guarantees of "just compensation" for government takings and a "fair trial."[33] It extends to the meaning of such key constitutional terms as "religion," "speech," "liberty," "search and seizure," and "compelled" "confession" especially because—following Aristotle—the meaning of these terms is most re-

28 "Judges are seldom content merely to annul the particular solution before them. . . . On the contrary they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute it to a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision." Learned Hand, The Bill of Rights 70 (1958).

29 "No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. Const. art. I, § 10.

30 "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

31 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

32 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

33 "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

34 *See* Aristotle, The Nicomachean Ethics 1 (Davis Ross trans., 2009). "[T]he most universal and effectual way of discovering the true meaning of a law . . . is by considering the *reason* and *spirit* of it." 1 William Blackstone, Commentaries *61. "[O]riginalism must be committed to the Constitution's original spirit as well—the functions, purposes, goals, or aims implicit in its . . . design. We term this spirit-centered implementation 'good-faith constitutional construction.'" Barnett & Bernick, *supra* note 5, at 3.

liably gained by grasping the point, the purpose, the good that a constitutional provision is wont to do.[34] Want to know what the "free exercise of religion" at least presumptively meant to the founders? Consider what they thought religion is and what it is good for.[35]

The roster includes some provisions that bear less overt moral normative content. Chief among these is the Court's 2022 rendering of the Second Amendment right "to keep and bear arms."[36] Against more than a century of precedent just then recently abandoned, the Court then held that the Amendment "codified" a pre-existing natural right of armed self-defense in case of confrontation outside the home.[37]

Down-slope from the interpretive task lies the construction site of judicial doctrine. In Thomist terms, this is *determinatio*—creating law by adopting by choice a proposed standard, rule, or test in preference to an already available standard, rule, or test.[38] There are countless examples in the US Reports of such judicial lawmaking. Here is a tiny sampler: the four-part *O'Brien* test for content-neutral regulations of expressive conduct;[39] the prevailing *Smith* "neutrality" and "general applicability" tests under the Free Exercise Clause;[40] the "important government interest"/"substantial relationship" test for unconstitutional sex discrimination;[41] and the "compelling state interest"/"least restrictive means" test for content-based speech regulations.[42]

The "actual malice" test for defamation of public figures in *New York Times Co. v. Sullivan* is a particularly strong example.[43] Sixty years ago, the Court derived that demanding standard for defaming plaintiffs from value judgments about the need for a robust press in our democracy compared to the value of reputation and privacy for anyone who comes under the heading of "public figure."[44] Should the Court reconsider the holding (as Justice Thomas suggests),[45] it would very likely take a deep dive into early constitutional history. But the Court will also have to consider—as it should and does in overruling any case—whether there are "reliance" interests in the wake of *Sullivan* that it would be unjust to upset.[46]

Since Miranda warnings were established in the namesake 1966 case,[47] the Supreme Court has repeatedly revisited the question of whether the warnings are part of the Constitution or

35 *See* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245 (1991).

36 "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

37 *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 34 (2022).

38 *See, e.g.*, Gary Lawson, Evidence of the Law: Proving Legal Claims 75 (2017) ("[A] legal proposition is deemed correct if it is better, meaning more plausible, than its available alternatives.").

39 *United States v. O'Brien,* 391 U.S. 367 (1968). The four-part test, if you're curious, is whether the government's regulation 1) is within the scope of their authority, 2) promotes a substantial governmental interest that, 3) is unrelated to suppressing expression, and 4) is necessary to achieve that interest. *Id.* at 377.

40 Essentially, if a law's direct objective is to hinder religious exercise, it is analyzed with strict scrutiny. Otherwise, if the law is read broadly to be neutrally applicable and thus the burden on religion is merely incidental, it receives only rational basis. *Employment Div. v. Smith*, 494 U.S. 872, 878-79 (1990).

41 "To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976).

42 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) (ruling that any regulation that "stifles speech on the account of its message" contravenes the First Amendment and therefore, the regulation is subject to strict scrutiny analysis); *see also Texas v. Johnson*, 491 U.S. 397 (1989).

43 *New York Times Co. v Sullivan,* 376 U.S. 254 (1964).

44 *Id.* at 279–80 (requiring actual malice as a requisite for a defamation claim made by a public official and defining actual malice as "knowledge that [the speech] was false or reckless disregard of whether it was false or not").

45 *See Coral Ridge v. Amazon.com, Inc.*, 6 F.4th 1247 (July 28, 2021), *cert. denied*, 142 S. Ct. 2453, 2455 (June 27, 2022) (Thomas, J., dissenting) (expressing his desire to grant certiorari in this case to "revisit the 'actual malice' standard in *Sullivan*").

46 Stare decisis protects interests of those who have acted in reliance of past decisions. A factor to consider when overruling settled case law is upsetting those reliance interests. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 263, 287-91 (2022).

47 *Miranda v. Arizona*, 384 U.S. 436, 479 (1966).

whether they instead amount to a judge-made "prophylaxis." Either way, no one thinks that *Miranda* is derivable from the text of the Constitution or from its original public meaning without mediation by a value-laden judicial choice. *Miranda* was an act of creative judicial lawmaking rooted in 1) some behavioral premises about psychological pressures in the stationhouse,[48] and, more importantly, 2) a strong reflection of the doctrine that it is better for ten guilty men to escape justice and wreak future havoc than that one innocent man be convicted.[49] That is, *Miranda* was a value-laden choice to sacrifice probative evidence and some accurate convictions for the sake of protecting more effectively against the risk of coercion. This is likewise true of the Court's Fourth Amendment "exclusionary rule,"[50] which no one thinks is in any straightforward way part of or derivable from the Constitution.[51] It is a judicially created remedy/sanction to deter police misconduct.

The Court has consistently stood by the *Miranda* Court's choice to protect values of individual autonomy over the asserted requirements of effective law enforcement ever since. The exclusionary rule is now, practically speaking, beyond recall because of the "force of precedent" and because, although its provenance as an original matter in or around the Fourth Amendment remains debatable, its adoption by the Court as constitutionally required (first, in 1949 pertaining to the federal government[52] and then in 1961[53] with regard to the states) is not an "egregious" error demanding reversal, as was *Roe v. Wade* for the *Dobbs* Court.[54]

The Court adopted a structurally similar line of value-balancing in its right-to-counsel cases. In *Scott v. Illinois*, the Court established that the Constitution does not permit any indigent person to be sentenced to a term of "actual imprisonment," save where the person was afforded the opportunity to be represented by appointed counsel.[55] The Court had earlier judged in *Gideon v. Wainwright* that, although some indigent persons could represent themselves well enough to carry off a genuinely "adversary" proceeding, the "average" defendant could not do so.[56] To guard against the risk that some (many? most?) "average" persons would be denied a fair trial if the matter of adequacy were litigated one case at a time *post hoc*, as was the case before *Gideon*, as it was with "involuntary" confessions before *Miranda*,[57] the Court adopted a prophylactic rule: *every* indigent defendant in a non-petty criminal case must be offered the services of a public defender.[58]

What of defendants in cases where a jail term is not in the offing? These many defendants are *not* constitutionally entitled to counsel as a matter of course.[59] They must receive a public defender only where "circumstances" "special" to their cases make it apparent that justice will not be served without the assistance of counsel. This line between jail or no-jail originated in and has

48 *Id.* at 450.

49 4 William Blackstone, Commentaries *352. The phrase is actually "than that one innocent person suffer," but you get my drift.

50 *See Mapp v. Ohio*, 367 U.S. 643 (1961).

51 Gerard v. Bradley, *Present at the Creation? A Critical Guide to* Weeks v. United States *and its Progeny*, 30 St. Louis U. L.J. 1031 (1986).

52 *Wolf v. Colorado*, 338 U.S. 25 (1949).

53 *Mapp v. Ohio*, 367 U.S. 643 (1961).

54 *Dobbs*, 597 U.S. at 321.

55 *Scott v. Illinois*, 440 U.S. 367 (1979).

56 *Gideon v. Wainwright*, 372 U.S. 335 (1963). "Reason and reflection require us to recognize that in our adversary system . . . any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided[.]" *Id.* at 344.

57 That is to say, the Court in *Miranda* abandoned their prior practice of reviewing on appeal or cert the facts of a given case to decide whether or not a particular confession was "voluntary." They adopted the *Miranda* prophylaxis to "assure" that confessions passing that muster and only those would be admitted in evidence and that the warnings were a practical guarantee of "voluntariness."

58 *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

59 *Nichols v. United States*, 511 U.S. 738, 746 (1994).

been sustained partly ever since by a calculus of evaluative, though not-quite-overtly moral judgments, about trials, the "average" person's abilities, and the meaning of "adversariness." Above all, however, it has always depended upon the Court's moral judgment that the risks of inadequate defenses and thus of unfair (because not really adversarial) trials are worth running, only where the consequences of miscarriage—no "actual imprisonment"—are tolerably unjust.

Farther down the vertical arc lie more prosaic, judicially created rules, tests, and standards, sufficiently concrete to resolve cases at hand. Even these very practical metrics are often stubbornly morally normative. The standing definition of Fourth Amendment "*probable* cause" is, notwithstanding its arithmetic ring, a fluid, normative standard of justice: "*fair* probability."[60] In one case, a scant likelihood of apprehending, say, a murderer by detaining hundreds of concert goers might be just, whereas the same detention would be unjust to arrest a shoplifter. In other words, it is settled Fourth Amendment law that, say, five percent "probable cause" is enough in some cases but not in others, depending upon a judicial balance of values such as freedom from restraint and the importance of solving the more serious crimes.

The threshold question in *any* Fourth Amendment case, moreover, is whether public authority has engaged in what could be called "Fourth Amendment activity." This was established in the 1967 case of *Katz v. United States*.[61] The initial question is whether state action abridged a person's subjective expectation of privacy in the place searched or the matter seized and that this expectation was "reasonable."[62] In our digital world, this question has become a vexed one as well as one impossible to answer without resort to balances of the values of privacy against the government's rightful authority to obtain evidence of wrongdoing.[63]

The Court's conservative justices have acted upon their wariness of moral judgments in several recent high-profile cases. In a single 2022 Term, the Court abandoned value-laden doctrines under the Establishment Clause,[64] in Second Amendment cases,[65] and substantive rights determinations under due process.[66] In each instance, the conservative justices substituted a "history and tradition" test of constitutionality for a morally normative doctrinal test.

Even so, the following year, the chief justice wrote for himself, as well as for Justices Alito, Kavanaugh, and Jackson, about the inevitability of judicial lawmaking based upon choices among "values" in a case involving the "balancing" of interests in "dormant" commerce clause cases.[67] In a concurrence, the chief justice acknowledged that Justice Gorsuch (who spoke for Justices Thomas and Barrett, too) "objects that balancing competing interests under *Pike* is simply an impossible judicial task. I certainly appreciate the concern, but sometimes there is no avoiding the need to weigh seemingly incommensurable values."[68]

Roberts proffered a short list of such unavoidable occasions.[69] These include weighing "'the purpose to keep the streets clean and of good appearance' against 'the constitutional pro-

60 *Illinois v. Gates*, 462 U.S. 213 (1983).

61 *Katz v. United States*, 389 U.S. 347 (1967).

62 *Id.*

63 *See, e.g., Riley v. California*, 573 U.S. 373 (2014) (ruling that cell phones are subject to Fourth Amendment protections). "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (determining that a thermal scanner used to detect the interior temperature of a home for incriminating purposes was an invasion of privacy).

64 *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022).

65 *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

66 *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

67 *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 394 (2023) (Roberts, C.J., concurring).

68 *Id.* at 396. Roberts was referring to the Court's seminal dormant commerce clause case. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

69 *Pork Producers*, 598 U.S. at 394.

tection of the freedom of speech and press;"[70] society's interests in "surgical intrusions beneath the skin" against a person's Fourth Amendment privacy interests;[71] and the state's interest in "committing the emotionally disturbed" against an individual's liberty interest in "not being involuntarily confined indefinitely."[72] Roberts concluded that "[h]ere too, a majority of the Court agrees that it is possible [and, evidently, that it is also *appropriate*] to balance benefits and burdens under the approach set forth in *Pike*."[73]

The Court's Value-Avoidance Story

The Supreme Court habitually makes law in constitutional cases based on the justices' choices between and among relevant moral values. Why so many members of the Court maintain that they do no such thing is an important question, not so much of law as of history, biography, and political science. I leave that whole matter aside for now. I should like to focus instead, in the remaining parts of this essay, on some of the collateral damage done by propagating and trying or professing to be guided by the justices' apocryphal story about value-avoidance.

One tranche of justifications for that story is comprised of descriptions of what making law in light of genuine values looks like. It is not a pretty picture. The main intended effect of the justices' unflattering portrayal of lawmaking seemingly is to depict a project so foreign to legal analysis, while sounding so practical and reasoned that no one could sanely expect courts to go near it. The justices say or imply that such dirty work is properly for the people and their elected representatives.[74]

The main effect of this rhetorical takedown of lawmaking in our democracy is rather exhibiting that the justices do not possess the sufficient reflective understanding of practical (including moral) reasoning to carry off their stated project. Put differently, even the improbable project of *trying* to decide constitutional cases without resort to "value judgments" requires more philosophical sophistication than the justices typically display or, given their aversion to critical moral reasoning, are inclined to cultivate. A secondary effect is to present lawmaking as shambolic and irrational, so much so that no decent person would engage in it and no concerned citizen would tolerate it.

Consider first the chief justice's 2019 concurring opinion in the abortion regulation case, *June Medical Services v. Russo*.[75] Because I refer to the following excerpt as illustrative of a pervasive problem and not as a statement of authoritative law, the fact that the holding in *June Medical* has been superseded by *Dobbs* is no matter.

Here is Chief Justice Roberts taking the measure of a Louisiana law that stipulated that any doctor who performs abortions must have "active admitting privileges at a hospital . . . located not further than thirty miles from the location at which the abortion is performed or induced"[76] and defined "active admitting privileges" as being "a member in good standing" of the hospital's "medical staff . . . with the ability to admit a patient and to provide diagnostic and surgical services to such patient."[77] Abortion regulations were then generally evaluated by the Court according to a complex, judge-made "balancing" test for constitutionality:

> Courts applying a balancing test would be asked in essence to weigh the State's interests in "protecting the potentiality of human life" and the health of the woman, on the one hand, against the woman's liberty interest in defining her "own concept of existence, of meaning, of the universe, and of the mystery of human life" on the other. There is no plausible sense

70 *Schneider v. State*, 308 U.S. 147, 162 (1939).

71 *Winston v. Lee*, 470 U.S. 753, 760 (1985).

72 *Addington v. Texas*, 441 U.S. 418, 425 (1979).

73 *Pork Producers*, 598 U.S. at 397.

74 *See, e.g., Dobbs*, 597 U.S. at 232 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 979 (1992) (Scalia, J., dissenting)).

75 *June Med. Servs. v. Russo*, 140 S. Ct. 2103 (2020), *abrogated by Dobbs*, 597 U.S. 215 (2022).

76 La. Stat. Ann. § 40:1061.10(A)(2)(a) (2022), *invalidated by June Med. Servs.*, 140 S. Ct. 2103.

77 *Id.; June Med. Servs.*, 140 S. Ct. at 2113.

> in which anyone, let alone this Court, could objectively assign weight to such imponderable values and no meaningful way to compare them if there were. Attempting to do so would be like "judging whether a particular line is longer than a particular rock is heavy." Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an "unanalyzed exercise of judicial will" in the guise of a "neutral utilitarian calculus."[78]

Which "values" does the chief justice see? Take one he seems to treat as intelligible and relevant: protecting potential human lives. What sense can we make of it? There is no such thing as "potential life." Harry Blackmun invented that term in *Roe* to make his decision there seem less barbaric than it would if he frankly admitted the truth that even on a bare-bones biological account, abortions kill living, individual human beings. (Whether every such creature is a rights-bearing subject—a "person"—is a deeper philosophical question.) What the state's interest is in "protecting" the notional entity "potential life" is anyone's guess.

"Women's health" as described in *Roe* is a commodious legal term of art that refers to all aspects of her well-being—*as she understands it*.[79] It is just another way of saying that a pregnant woman gets to make the abortion decision unilaterally, for any or for no reason. There need be nothing of "value" there to evaluate: her word is law. The *Casey* Mystery Passage[80] does not identify any particular moral value either. It is rather the universal solvent; the diversity of true, objective goods that constitute human flourishing disappears into the maws of raw subjectivity: *all value* resides in the act of choosing, of a decision being really, *really* mine. *What* I choose is a matter of value indifference. Why should moral truth get in the way of my desires? What the heart wants, the heart wants.

Chief Justice Roberts evidently holds, moreover, that any judicial decision trying to make the required "balance" about abortion would be an act of brute will, presented to others (for some reason) as a "neutral utilitarian calculus." But there is nothing "neutral" about utilitarianism. And there are workable ways to compare real, albeit incommensurable, goods such as the emotional health of one person—call her, "Mom"—and the life of another person, whom some would call her "baby." We do it all the time when we punish a distraught mother for smothering a colicky infant. Our law about the justified use of deadly force—only to prevent death or serious bodily injury to another—is not an act of "will." It is rather a norm of justice identifiable by the Golden Rule of fairness.

There is no need to eschew (disclaim, disavow, go without) critical moral reasoning in constitutional cases if Roberts's *June Medical* opinion is an illustration of it in action. Sound critical moral reasoning has disappeared in a swamp of confusion. Even Socrates would get stuck in this muck.

Speaking of "Incommensurability"

The Supreme Court decided *National Pork Producers Council v. Ross*, a "dormant" commerce clause case, in May 2023.[81] Dormant commerce clause cases generally involve "protectionist" state laws that improperly "discriminate" against out-of-state commerce and are therefore deemed to be invalid because such laws trespass on or usurp the power of Congress to regulate interstate commerce, whether or not Congress has actually exercised its power in relation to the matter in question.[82] More specifically, and in the words of Justice Gorsuch, courts in such

78 *June Med. Servs.*, 140 S. Ct. at 2136 (first quoting *Casey*, 505 U.S. at 851; then quoting *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888, 891 (1988) (Scalia, J., concurring); and then quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., concurring in part and dissenting in part)).

79 *Roe v. Wade*, 410 U.S. 113 (1973).

80 "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Casey*, 505 U.S at 851.

81 *Pork Producers*, 598 U.S. at 356.

82 *See id.* at 369. "By encouraging economic isolationism, prohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent." *Camps Newfound/Owatonna, Inc., v. Town of Harrison*, 520 U.S. 564, 578 (1997).

cases are sometimes called upon to assess "the burden imposed on interstate commerce by a state law and prevent its enforcement if the law's burdens are clearly excessive in relation to the putative local benefits."[83]

There was no opinion of the Court in *Pork Producers*. Justice Gorsuch announced the Court's judgment and, in a portion of his opinion joined by Justices Barrett and Thomas, asked:

> How is a court supposed to compare or weigh economic costs (to some) against noneconomic benefits (to others)? No neutral legal rule guides the way. The competing goods before us are insusceptible to resolution by reference to any juridical principle. Really, the task is like being asked to decide "whether a particular line is longer than a particular rock is heavy."[84]

Maybe so. But should one hold, as Gorsuch evidently does, that where judges cannot resolve a case by "neutral legal rule" or "juridical principle," they have emptied the cache of properly judicial tools and so should punt the matter over to the legislature?

Justice Gorsuch then doubled down on the radical unsuitability of judges choosing between or among "incommensurable" goods:

> So even accepting everything petitioners say, we remain left with a task no court is equipped to undertake. . . . Some might reasonably find one set of concerns more compelling. Others might fairly disagree. How should we settle that dispute? The competing goods are incommensurable. Your guess is as good as ours. More accurately, your guess is better than ours. In a functioning democracy, policy choices like these usually belong to the people and their elected representatives.[85]

I harbor no opinion about *Pike* or "dormant" Commerce Clause jurisprudence generally. I do not know what the right answer to *Pork Producers* is or how many "right"—i.e., not-wrong—answers there are. I do know, however, that courts routinely decide cases involving "incommensurable" values, as the brief recitation from the chief justice's aforementioned opinion, along with my own sampling of other examples, demonstrates. Justice Gorsuch is surely right to raise as a question whether the Constitution and the tradition of its interpretation to date have committed the authoritative resolution of this particular open-ended choice among values to another branch of the federal government or to the states and not to the judiciary. But he is surely mistaken in suggesting that there is a straight-line inference from the presence of indeterminacy to the lack of judicial competence.

In *Pork Producers,* Justice Kagan joined a brief concurrence by Justice Sotomayor, who wrote that Justice Gorsuch spoke only for a *plurality* of justices. She and Kagan aligned themselves with Roberts's view that "courts generally are able to weigh disparate burdens and benefits against each other, and that they are called on to do so in other areas of the law with some frequency."[86] Sotomayor added that the "means-ends tailoring analysis that *Pike* incorporates is likewise familiar to courts and does not raise the asserted incommensurability problems that trouble."[87]

My aim here is not to pile on proof that, notwithstanding laments such as that of Justice Gorsuch, courts routinely "balance" competing values or goods of different sorts and decide cases on that basis. That they surely do. My point is rather to highlight the inadequacies of Gorsuch's *philosophical* analysis of the situation. No doubt there are incommensurable basic goods in the world, even though many in and out of law dispute that claim. Many who call themselves utilitarians, for example, hold that appearances of incommensurability disappear when a universal

---

83 *Pork Producers*, 598 U.S. at 377 (quoting *Pike*, 397 U.S. at 137); *see also Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (establishing the balancing test for dormant commerce clause cases).

84 *Pork Producers*, 598 U.S. at 381 (quoting *Bendix*, 486 U.S. at 897 (Scalia, J., concurring)).

85 *Id.* at 382.

86 *Id.* at 392.

87 *Id.* at 393.

metric, such as pain or pleasure or preferences, is introduced into the picture. Others who call themselves economic analysts of law hold that markets in instrumental goods such as money provide all the "commensuration" a just society needs.

Justice Gorsuch is nonetheless right to say that comparisons of goods in many situations cannot be made according to a common metric, as if a kind of arithmetic solution, one rationally compelled by logic, should be expected in cases such as *Pork Producers.* But that does not mean that it is all guesswork. For one thing, justices rarely face an entirely *novel* question that presents in naked form (if you will) an unfettered choice among incommensurable values. For most often, the range of appropriate judicial options is already limited by precedent, tradition, social custom, and settled legal standards in analogous areas of law.

More fundamentally, Gorsuch does not take up the prospect that, where incommensurable goods are in play for decision, *choice guided but not determined by reason* is the way that persons and their communities resolve ("balance") incommensurable goods ("values"). Just as an individual, when faced with live options to either go to graduate school for the sake of vocational possibilities or instead to stay home with his elderly parents or to stop everything and enlist in his nation's military, *settles* the matter not by some objectively verifiably correct calculation but by self-determining free choice, so too do public authorities *settle* that a nation is to be more and not less globally engaged, or devoted to industry and not to agriculture, or accepting of free press at the expense of personal privacy or fair trials. Again, these are all *choices,* not "guesses." One might well inquire: a "guess" as to what? Some hypothesized but presently unknown objectively certain, value-neutral answer? None exists in the situations described above.

"In a functioning democracy, policy choices like these usually belong to the people and their elected representatives."[88] It rather seems *that* is the constitutional question, not its answer. To which branch of the national government has the Constitution assigned this authoritative *choice*? Or does our fundamental law commit the authority to the states? Gorsuch wants to resolve this textured question by dint of a categorical philosophical claim: certain questions about what to do as a community are "guesses," and "guesses" are just the kind of things that legislators do and judges don't do.

Internal and External Views of Morals Legislation

In our constitutional world, every act of public authority must have a "rational basis." This universal minimum means that judges must adopt the *internal point of view* of the legislative, executive, or administrative lawmaker.[89] What is the train of reasoning that resulted in—lies behind, makes sense of, justifies—the norm(s) found in the legal text at issue? Somewhere along this way one would have to find at least one morally normative premise, a lawmaker's judgment that this or that behavior is simply wrong, unjust, anti-social, destructive of the common good.

In the all-important area of public morals laws (against, for example, selling obscene pornography, parading naked in the park or, before the Court began striking down such laws, strictures against non-marital sexual relations including homosexual sodomy), conservative constitutionalists have characteristically refused to consider, still less to evaluate, the lawmakers' train of thought. They have scorned the internal

88 *Id.* at 382.

89 Rational basis is a test used when a law is challenged for being unconstitutional. It, like other, less government-friendly analyses (intermediate and strict scrutiny), requires the Court to identify a "legitimate government interest" that justifies the challenged law. Though rational basis is almost a guaranteed loss for the challenger, it still requires the Court to posit a sound explanation for the law's existence, sometimes just the general diffuse (and malleable) "police power." *See, e.g., Romer v. Evans*, 517 U.S. 620 (1996) (declaring a Colorado law unconstitutional because they could not find a legitimate purpose); *cf. id.* at 636 (arguing that Colorado voters made a permissible moral judgment) (Scalia, J., dissenting). Courts use rational basis to assert that they do not want to insert the judiciary into the democratic process. *See e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (declaring that unless a statue is "inherently invidious" or it "impinges on fundamental rights, areas in which the *judiciary has a duty to intervene* in the democratic process" it would rather leave the elected body to review its laws) (emphasis added).

point of view and decided these cases on *external* grounds.

How so? For more than a generation, conservatives have been confused (to outward appearances) by the normative justification for morals laws. They have consequently relied upon the pluripotency of what they call "majoritarian morality." They say in so many words that "the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is . . . a sufficient reason for upholding a law prohibiting the practice."[90]

It is not. No lawmaking authority's *conclusion* that, say, prostitution should be a crime, supplies the needed "rational basis" because it is precisely that conclusion the Court is called upon to interrogate, to see if it is indeed based in reason, as opposed to bias or prejudice or simply animus. And the fact that anyone or everyone holds a particular moral view—say, that using pornography is bad for persons—is not yet a reason for action, apart from the reasons why one holds the view to be true. That a lot of people (a majority) hold a negative view of some sexual practice needs to be made transparent for the reasons why those people disapprove. Otherwise, it cannot begin the work of giving a "rational basis" for a morals law.

Almost no one says, "I am opposing this practice because it is my view that I am opposing this practice." People say instead, "I am opposed because it is wrong in the following way, and that is my moral conclusion." For example, many people who say that prostitution is wrong mean that it is wrong for everyone, that it is objectively and categorically immoral. This view could be false. If it is, its falsity is sufficient reason to discard the judgment and everything it might entail. Saying that a negative judgment about sodomy is "just your view and it would be unfair to impose your view upon someone who does not share it would be wrong" evades the matter asserted: sodomy is wrong simpliciter, for you and me and everybody. Saying "it's just your view" is also self-refuting, for the judgment that imposing one's view on others is "wrong" is, one could just as well say, merely your view of justice—and it would be wrong for you to impose it on me.

The Court's treatment of "obscenity" illustrates the morass into which externalist accounts of "rational basis" leads.[91] A couple of semesters ago, I examined my constitutional law students on this question: what is the "rational basis" for laws punishing transmission of obscene webcam performances? The answer is surely not in the 1973 three-part *Miller* test for *identifying* obscenity.[92] That test does not tell you what if anything is wrong with obscenity. It just tells you what counts as "obscene."

The same day that the Court established the *Miller* test, which is still considered good law, Chief Justice Burger tried to answer my exam question. Here is the climax of his argument:

> The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as "wrong" or "sinful." The States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society."[93]

The Court's scare-quotes could possibly have been a clumsy way of signaling the sound dis-

90 "The Court embraces [the] declaration that . . . 'the fact that a governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.' This effectively decrees the end of all morals legislation. If, as the Court asserts, the promotion of majoritarian sexual morality is not even a *legitimate* state interest, none of the above-mentioned laws can survive rational-basis review." *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (*overruled by Lawrence v. Texas*, 539 U.S. 558 (2003)).

91 *See generally* Gerard V. Bradley, *Prolegomenon on Pornography*, 41 Harv. J.L. & Pub. Pol'y 447 (2018) (analyzing how to morally evaluate the new age of computerized porn).

92 All too briefly: an average person applying contemporary (state) community standards would find the work as a whole lacks serious artistic value, appeals to prurient interest in sex, and is explicit in a patently offensive way. *Miller v. California*, 413 U.S. 15, 24 (1973).

93 *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973).

tinction, made by writers as different as Thomas Aquinas and John Stuart Mill, between acts of private immorality, which public authority either prudentially should judge it better to leave alone or which might be beyond, as a matter of principle, the just reach of the state's coercive authority. Much more likely, though, "wrong" and "sinful" signal the Court's intent to keep the critical moral viewpoint at arm's length. So too, at first glance, is the highly implausible claim of moral neutrality when asserting that there is a communal injury or a danger to public safety. Not coincidentally, prosecutions for obscenity have gone the way of the Dodo bird. The last federal indictment for trafficking adult-actor "obscenity" was originally handed down in 2007, against Ira Isaacs, in the Central District of California.[94] State prosecutions are rare.

The Value-Avoidance Fallout

The most compelling evidence of the collateral damage caused by the justices' polemics about avoiding "value" judgments lies in the catastrophic mistakes these justices made on the two most important questions in recent constitutional law: abortion and same-sex marriage, as well as a crucial one they flubbed in a statutory case—transgenderism in the *Bostock* decision.[95] Many factors have contributed to the present state of the law in these sectors, and I do not mean to suggest that the *Dobbs* ruling is less than a momentous leap forward in constitutional law, even if it is not the complete truth about what the Fourteenth Amendment has to say about the legal protection of unborn human beings. But in each area, the Court's conservatives have miscategorized the decisive question as a value judgment beyond judicial ken.

First, when do "persons" come to be and have a Fourteenth Amendment right to the "equal protection" of state laws against homicide? A masterful *amicus* brief by John Finnis and Robert George in *Dobbs* persuasively showed that, even on strictly historical grounds, the original public understanding of that clause included the unborn.[96] The *Dobbs* Court said nothing about that brief's argument or the originalist argument about unborn personhood. Right now, the Court seems stuck in the groove cut by Justice Scalia decades ago, when he asserted that when people come to be is a "value judgment" that simply cannot be resolved by legal reasoning.[97] Alas, the *Dobbs* majority stated repeatedly that abortion presented a clash of moral values that (for that reason, seemingly) must be consigned to the vicissitudes of the democratic process.[98] "Abortion presents a profound moral issue on which Americans hold sharply conflicting views."[99] "The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[100] "That is what the Constitution and the rule of law demand."[101] Most surprisingly, then, did Justice Alito show convincingly in his *Dobbs* opinion for the Court that the straight-on truth of when people with a right not-to-be-killed begin is a matter of coherent philosophical thinking that does *not* depend upon an ethical or "value" judgment at all. It is a matter of metaphysical reality.

Since the 2015 *Obergefell* decision,[102] there has been no sense in denying that lawmakers have stipulated that civil "marriage" includes same-sex pairs. However misguided these stipulations may be, they nonetheless are intra-systemically valid, though morally defective. But that there is a *truth* about marriage, that it truly is the conjugal union

94 *United States v. Isaacs*, No. 13-50036 (9th Cir. Mar. 25, 2014).

95 *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020).

96 John Finnis & Robert P. George, *Equal Protection and the Unborn Child: A* Dobbs *Brief*, 45 Harv. J.L. & Pub. Pol'y 927 (2022) (expanding their original amicus brief with supplementary historical analysis).

97 *Stenberg v. Carhart*, 530 U.S. 914, 954 (2000) (Scalia, J., dissenting).

98 *Dobbs*, 597 U.S. at 215.

99 *Id.* at 223.

100 *Casey*, 505 U.S. at 979 (Scalia, J., dissenting) (quoted in *Dobbs*, 597 U.S. at 232).

101 *Dobbs*, 597 U.S. at 232.

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

of man and woman, and that this truth is one of metaphysics and not of moral "value," are realities which no lawmaker can alter.

The caustic *Obergefell* dissents of Chief Justice Roberts and Justices Scalia, Thomas, and Alito nonetheless scrupulously avoided the truth about marriage, even as they denounced the majority's adoption of same-sex "marriage." Justice Scalia's blistering dissent opened with these words:

> The substance of today's decree is not of immense personal importance to me. The law can recognize as marriage whatever sexual attachments and living arrangements it wishes, and can accord them favorable civil consequences, from tax treatment to rights of inheritance. Those civil consequences—and the public approval that conferring the name of marriage evidences—can perhaps have adverse social effects, but no more adverse than the effects of many other controversial laws. So it is not of special importance to me what the law says about marriage.[103]

Finally, the question at the heart of the burgeoning "transgender" cluster of issues involves no ethical or "value" judgment. The decisive proposition here too is a metaphysical conclusion informed by biology and associated fields of knowledge, all based in logic: one's sex is innate, binary, and immutable. No one, therefore, is "born in the wrong body;" indeed, that is scarcely an intelligible proposition, akin to the lament that one was "born to the wrong parents." There simply is no me (or you or him or her) but *this* male or female embodied rational being. That no one is better off repudiating his or her natal sex and adopting instead the delusion that one is "in the wrong body" *is* a moral judgment. But it follows almost ineluctably from the metaphysical truth that our bodies are our selves, whether we like it or not.

Conclusion

One strong and utterly respectable impetus behind the Court's story of moral neutrality is a healthy respect for the constitutional separation of powers. The justices, after all, are charged with exercising only "judicial power." This essay shows how keenly they loathe the prospect of exercising properly legislative power. The point is well-taken: a robust, solidly grounded account of how proper judicial lawmaking differs from that fit for legislative lawmakers is desirable, even necessary for the right working of judicial review. But that important project is dumbfounded by judges who say that they never make law at all, further undermined by them saying they do nothing that depends upon their own judgments of what natural law and natural justice require and blown up by the grotesque caricatures of popular lawmaking that the justices have so often promoted.

103 *Id.* at 714 (Scalia, J., dissenting).