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Moral Truth and Constitutional Conservatism

Gerard V. Bradley*

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ABSTRACT

Conservative constitutionalism is committed to “originalism,” that is, to interpreting the Constitution according to its original public understanding. This defining commitment of constitutional interpretation is sound. For decades, however, constitutional conservatives have diluted it with a methodology of restraint, a normative approach to the judicial task marked by an overriding aversion to critical moral reasoning. In any event, the methodology eclipsed originalism and the partnership with moral truth that originalism actually entails. Conservative constitutionalism is presently a mélange of mostly unsound arguments against the worst depredations of Casey’s Mystery Passage.

The reason for the methodological moral reticence is easy to see. It came into being as an understandable strategy to halt the Warren Court’s

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judicial activism. The conservative diagnosis was simple, and largely correct: judicial philosophizing not called for by the constitutional text or by a sound interpretation of it lay at the root of these judicial excesses. The treatment that conservatives prescribed hit the mark they sighted. Where resort to moral reasoning seemed inescapable, conservatives turned to some species of conventional moral belief, usually to what some group thinks, or once thought. Conservative constitutionalists have been committed to an “objectivity” wherein facts about what some believe to be morally sound folded into a regimen of restricted legal reasoning from text, history, structure, and precedent.

This conservative constitutionalism is well-suited to damage control whenever legal elites are in thrall to unsound moral and political philosophies. Conservative constitutionalism can even stymie for a time the introduction of new mistaken premises. But now, more than 50 years into the revolution, contemporary constitutional conservatism is incapable of wresting control of the law back from the regime-changing project of autonomous self-definition. We have passed a tipping point where damage control amounts to no more than a slow-walking surrender.

Conservative constitutionalists need only choose originalism, which will lead them to recognize the necessity for strategic resort to critically justified metaphysical and moral truths, as the Constitution directs. In fact, the contemporary judge can be faithful to the Founders only by sometimes relying on moral and metaphysical truths that lie beyond the Constitution. These truths include, crucially, answers to such foundational questions as: When do persons begin? What is religion? Which propositions about divine matters are answerable by use of unaided human reason? What is the meaning of that “marriage” that Supreme Court cases for over a century have spoken of, when it declares that everyone has a “fundamental right to marry”?

The truth about constitutional law is that, sometimes, the problem with an errant Supreme Court opinion is not that it relies on philosophy, but that it relies upon bad philosophy. Then the conscientious judge is obliged to replace bad philosophy with good philosophy. And the linchpin of that good philosophy is the “liberty,” not of self-creation ex nihilo, but of self-constitution in a morally ordered universe.

INTRODUCTION

“The world has never had a good definition of the word liberty, and the American people, just now, are much in want of one. We all declare
for liberty; but in using the same word we do not all mean the same thing.”

When Abraham Lincoln uttered these words on April 18, 1864, to a Baltimore audience, he contrasted those who meant by “liberty” each person’s proper moral self-government “with others, [for whom] the same word may mean for some men to do as they please with other men, and the product of other men’s labor.” Lincoln declared: “Here are two, not only different, but incompatible things, called by the same name—liberty.”

Our sixteenth president illustrated the point in his characteristically earthy way. “The shepherd drives the wolf from the sheep’s throat, for which the sheep thanks the shepherd as a liberator, while the wolf denounces him for the same act as the destroyer of liberty, especially as the sheep was a black one. Plainly the sheep and the wolf are not agreed upon a definition of the word liberty.”

Lincoln’s was an “Address at a Sanitary Fair,” a fundraiser for the sake of wounded Union soldiers. It lacked the rhetorical melodrama of his justly famous “House Divided” speech in Springfield, Illinois, six years earlier. The circumstances in war-torn Baltimore probably supplied drama enough. Lincoln had declared in 1858, “I do not expect the Union to be dissolved—I do not expect the house to fall—but I do expect it will cease to be divided.” Lincoln well understood how these two “incompatible” concepts of liberty called into being correspondingly opposing cultures, customs, institutions, and laws. He recognized earlier than most that North and South were two different worlds. He saw that they could not long last as one polity. Lincoln predicted in Springfield that the country “will become all one thing, or all the other.”

The American people today use the word “liberty” in not only different but incompatible ways. They consequently straddle uneasily two incompatible social worlds. Many Americans still hold fast to that liberty which has endured throughout our country’s history: each adult person’s independence from the arbitrary authority of another (thus, no

1. Abraham Lincoln, Address at Sanitary Fair, Baltimore, Maryland (Apr. 18, 1864), in 7 COLLECTED WORKS OF ABRAHAM LINCOLN 301 (Roy P. Basler et al. eds., 1953).
2. Id. at 301–02.
3. Id. at 302.
4. Id.
6. Id.
slavery or servitude); the right to direct one’s own life towards genuine human fulfillment by and through free choices; to be (in this way) the author of one’s own life. 7 This liberty does not presuppose that the

7. In the western philosophical and legal traditions, there has been a key distinction between “liberty” and “license.” Even beginning with the story of Adam and Eve in the Garden of Eden with its Tree of the Knowledge of Good and Evil (Genesis Ch. 3), thinkers have identified a difference between (a) the freedom to choose the good (liberty) versus (b) the mere permission to pursue whatever one wills (license). In a modern context, Norman L. Rosenberg notes that concerning freedom of the press, for example, “Joseph Story complained to a colleague at Harvard Law School, ‘it seems to be forgotten that the same instrument that can preserve, may be employed to destroy.’” Norman L. Rosenberg, Thomas M. Cooley, Liberal Jurisprudence, and the Law of Libel, 1868-1884, 4 U. PUGET SOUND L. REV. 49, 53 (1980) (quoting Letter from J. Story to J. Ashmun (Feb. 13, 1831), in 2 LIFE AND LETTERS OF JOSEPH STORY 50 (W.W. Story ed. 1851)).

Some evidence of the distinction’s meaning and prevalence at the time of the Founding is found in M. Peterson, “The New Right Renews Americanism”: One of the central arguments for the passage of the Constitution was to promote this form of liberty consonant with classical and Christian virtues over and against licentiousness. As Noah Webster defined it in the first American dictionary in 1806, “Licentiousness” referred to the “contempt of just restraint,” i.e., freedom unrestrained by, and therefore in, opposition to justice.

This distinction was embedded deep in American political thought from the start. Even as the Constitution of the State of New York protected “the free exercise and enjoyment of religious profession and worship, without discrimination or preference,” in 1777, for instance, it qualified this freedom, “[p]rovided that the liberty of conscience hereby granted, shall not be so construed, as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.” . . .

When George Washington argued that stronger governmental unity between the states was needed in his Circular to the States in 1783, he warned that “arbitrary power is most easily established on the ruins of liberty abused to licentiousness.” The sentiment ultimately became part and parcel of the argument for the adoption of the Constitution of the United States. Benjamin Rush echoed the rest of the Federalists in 1787 when he said:

In our opposition to monarchy, we forgot that the temple of tyranny has two doors. We bolted one of them by proper restraints; but we left the other open, by neglecting to guard against the effects of our own
individual is an asocial, atomistic being. Nor is it rooted in moral skepticism. On the contrary, this liberty has long been nested among abiding societal convictions that there are basic aspects of human well-being which are good for everyone, and moral norms which are true for everyone. These universal aspects of human flourishing were the anchor points of a genuinely common good, which public authority had an inalienable duty to promote in appropriately limited ways for the sake of everyone’s flourishing. A greater-than-human source of meaning and value created, and sustained, this morally ordered world.


8. The most important example of “appropriately limited” promotion of true human well-being pertains to religion. As long ago as 1786, James Madison made the essential point, in his “Memorial and Remonstrance” against a Virginia state tax to support teachers of religion:

Because we hold it for a fundamental and undeniable truth, ‘that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.’ The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.

In other words: assuming that governments should promote religion among the people for the sake of their flourishing (on the further assumption that getting into a right relationship with the transcendent source of meaning and value is good for persons), the “appropriate” way for government to do so is, basically, by protecting everyone’s right to religious freedom. As Madison indicates, if government tried to force religiosity upon persons or even to promote it in a heavy-handed way, it would undermine the true value of religion, which value depends upon (as Madison says) persons voluntarily performing their religious duties. Government could and should promote the religious life of the people, but in suitably non-coercive ways by, for example, mandating that employers not interfere with employees’ Sabbath observances.

Madison’s “Memorial and Remonstrance” appears as an Appendix to the opinion of Justice Rutledge in the Court’s foundational Establishment Clause case, Everson v. Board of Education of the Township of Ewing, 330 U.S. 1, 63–74 (1947).

9. This is not to suggest that it is impossible to hold fast to the conception of liberty described in the text without also holding fast to the existence of God. In fact, many people hold this conception of liberty on what might be called naturalistic grounds. The most important scholarly work affirming this liberty
When a plurality of the Supreme Court declared on June 29, 1992, in Planned Parenthood v. Casey that “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,” they substituted an altogether “different but incompatible” sort of liberty. In the Justices’ construal of human well-being in Casey, what a person chooses is not the criterion of moral value. What counts is that whatever one chooses is, in some hypothesized sense, really one’s own choice—and so constitutive of one’s singular “identity.” Yet, even this description overborrows from the traditional worldview. For the value theory of the Mystery Passage supposes that “choice” is not so much the agent’s sober deliberation about intelligible options, and the deliberate uncoerced selection of one of those options in light of moral truth. On that theory, “choice” is more the unimpeded expression of some perceived inner emotion, psychological complex, or imagined “self”—the actualization of a “real” me, or you.

There is no further objectivity of value behind the new liberty of self-definition epitomized in Casey. Each person is the source of meaning and value for himself or herself. No greater-than-human source of meaning and value supervenes upon the expressing person’s idea of what is real and worthwhile. A genuinely common good then becomes difficult to imagine: if there are no objective goods, then any allegedly “common good” can only appear to the persons living in their own mental universes as a contingent consensus, as a more or less stable agreement on an agenda, as something external and arbitrary.

without reference to the question of God is John Finnis, Natural Law and Natural Rights (Oxford 1980). In that work Finnis (who is himself a believer) describes, explains, and defends through the first 12 chapters an account of self-constitution through free choice directed towards the actualization of true human goods. In the thirteenth chapter he turns to the question of God. Another formidable scholarly explication of such liberty without reference to the question of God and religion is that of Joseph Raz, The Morality of Freedom (Oxford 1986).

10. 505 U.S. 833, 851 (1992). Hereafter I shall refer to this sentence as the “Mystery Passage.”

11. See Lincoln, supra note 1, at 302.

If the Mystery Passage were a one-off rhetorical extravagance, this Article would not be written. But the Justices said in 1992 that they were synthesizing a generation of prior Court holdings on subjects as important as religion in public life, religious liberty, marriage and family, having and raising children, education, and sexual morality. “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”

Another generation has passed since *Casey*. Three Republican appointees authored the Mystery Passage. It has since been ratified by Supreme Court majorities several times. Its effects are on full display in the Court’s repeated affirmations of abortion rights, the sphere in which the Passage originated. We also see its effects in the Court’s anointing of same-sex marriage in *Obergefell v. Hodges*, surrounding the collapse of any tenable conception of a critically justified public morality in its jurisprudence, and elsewhere in constitutional law. Now a generation past 1992, Americans have nearly exhausted the moral capital that the adherents to biblical religions who came before them stored up, stores which for a time muffled the effects of the new world heralded by *Casey*. The Greatest Generation is now nearly gone. Their Boomer offspring who rebelled against their elders’ world are retiring. The United States is run now largely by persons who did not know the world before 1968.

Read just by itself, the Mystery Passage might seem to pertain only to an invisible sphere of mind, where each person could silently star in his or

15. See, e.g., *Whole Women’s Health*, 136 S. Ct. 2292.
17. See infra Part III.
18. See infra Part V (discussing the state of constitutional jurisprudence in the arena of religious liberty).
19. See Don C. Brunell, *The Greatest Generation Is Quickly Slipping into History*, COURIER-HERALD (Nov. 11, 2019), https://www.courierherald.com/business/the-greatest-generation-is-quickly-slipping-into-history-don-brunell/ [https://perma.cc/GS47-DAGY] (“According to the U.S. Dept. of Veterans Affairs, the men and women who fought and won World War II are now in their late 80s and 90s. They are dying quickly (400 per day) and the last estimate is fewer than 389,000 of the 16 million Americans who served are alive.”).
her own superhero cosmic narrative. But the Supreme Court has now weaponized this solipsist.21 Whatever a person’s imagination conceives, he or she today is by dint of constitutional law entitled to openly express, and then to publicly actualize in and through his or her “identity” and behavior. The corollaries of Casey now include a communal duty to affirm the imagined world of others out of respect for the person whose world it is. To instead criticize another’s “identity” is harmful, and to act in derogation of it invites social ostracism and sometimes legal penalty.22

The Mystery Passage has called into being corresponding vocabularies, concepts, meanings, customs, and cultures. It has redefined basic social forms such as marriage, family, and religion. Even biology and metaphysics are meat in its maws: not even male or female are we created any more.23 These bold aggressions are in due course, for this “liberty” was born of a redefinition of one metaphysical reality, namely, what constitutes morally significant free choice, and in the rejection of another, namely, that there are a host of objective human goods which constitute the true flourishing of every human person there is and ever was. After a half-century’s march through our law and culture, we can see what it is like to ride bareback across the open range of human egotism, desire, and fantasy—the “heart of liberty”—unconstrained by the Decalogue and by the God who delivered it to Moses.

In both Springfield and Baltimore, Lincoln emphasized the practical difficulty of living in a foreign world, of living according to one concept of liberty where the surrounding social structure is determined by the other. Two radically different social worlds now occupy the same territory. Each requires a culture and law suited to it. America’s house is divided, and it cannot long persist in that condition. Save for the probably enduring possibility of living incompatibly within one’s own mind or within an

22. See, e.g., Obergefell, 576 U.S. at 675 (“Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.”). A brief history of how this suffering solipsist has assumed this commanding position in our constitutional civil liberties is Paul R. McHugh & Gerard V. Bradley, Therapeutic Jurisprudence, FIRST THINGS 29–33 (Dec. 2020), available at https://www.firstthings.com/article/2020/12/therapeutic-jurisprudence [https://perma.cc/G4HL-V486].
23. See infra Part IV.
insular community willing to separate to live according to the recessive “liberty” gene, our country “will become all one thing or all the other.”

This Article is not another lamentation about the mischiefs of identity politics, or the wages of culture wars. The argument here is rather one for reclaiming constitutional jurisprudence for a liberty “different but incompatible” with that of the Mystery Passage. It is a project for which today’s conservative constitutionalism is, unfortunately, inadequate.

Conservative constitutionalism is defined by a stated commitment 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. This defining commitment of constitutional interpretation is sound. For decades, however, constitutional conservatives have also defined their project by a methodology of judicial restraint, a normative approach to the judicial task marked by an allergy to critical moral reasoning and to resting their constitutional opinions upon value judgments and moral norms which the constitutional conservatives on the Court affirm precisely as true.

Perhaps, hypothetically, these defining commitments could be maintained in harmony. But, as a matter of fact, our Constitution often requires for its sound interpretation—according to its original public meaning—frank resort to truths of morality and, sometimes, to a sound metaphysics. This requirement is not satisfied by judicial recourse to an alleged moral consensus at some particular historical moment or to the Founders’ opinions about what is morally the case. This requirement is satisfied only by the constitutional interpreter’s reliance upon the critically justified truth of the matter. In any event, methodology has eclipsed originalism.

An abiding aversion to critical moral thinking has come to define constitutional conservatism in derogation of originalism. Inoculating judicial interpretation of the Constitution against infection by judges’ moralizing—what Justice Scalia described as the brethren’s “predilections”—has become the overriding desideratum. It is now all but axiomatic: philosophical abstinence is the proposition on which the

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24. See Lincoln, supra note 5.
25. See Lincoln, supra note 1, at 302.
26. This is the central burden of this entire Article. Nonetheless, see especially infra notes 190–216 and accompanying text.
27. Antonin Scalia, Originalism: The Lesser Evil, 57 U. CINN. L. REV. 849, 863 (1989) (“Now the main danger in judicial interpretation of the Constitution—or, for that matter, in judicial interpretation of any law—is that the judges will mistake their own predilections for the law.”).
structure of constitutional conservatism is built. Interpreting the Constitution according to the original public understanding of it is secondary to this end. This whole development is captured in the image of Supreme Court Justices settling the meaning of the Constitution as if they were umpires calling balls and strikes.

The chief reason for conservatives’ moral reticence is easy enough to identify. Conservatives’ judicial restraint came into being as an understandable strategy to halt the Warren (and, to some extent, the Burger) Court’s judicial activism. The conservative diagnosis was simple and substantially correct: judicial philosophizing not called for by the constitutional text or a sound interpretation of it underlay many of these judicial excesses. The treatment that conservatives prescribed hit the mark. Their remedy was a strict moral-philosophical abstinence. Where resort to critical moral reasoning seemed to conservatives to be inescapable in answering a question about constitutional meaning, they turned to some sector of conventional moral belief, usually to what some group of lawmakers, or a popular majority, thinks or once thought. Conservatives most often cited “majoritarian morality” past or present—and, frankly, without consideration of whether it was true or false—to plug this gap in their arguments. “Majoritarian morality” is, however, a fact about what people think (or thought). It is not itself a moral norm. It cannot supply a “rational basis” for any law.

Constitutional conservatives have rightly tried to lower the moral temperature and the raw social significance of civil-liberties cases by extricating the law from the philosophical mistakes of the Warren and Burger Courts. But, to twist a Freudianism, sometimes a mistake is just a mistake. The solution to bad philosophy is sometimes better philosophy,

28. The judicial bête noire of the conservatives is, most recently, Anthony Kennedy, and his opinions for the Court in Lawrence and then Obergefell, as well as his participation in the Casey joint opinion in which the Mystery Passage appeared for the first time. In an earlier era, Justice Brennan would have hayed the villain’s role. The most prominent scholarly exponent of judges’ frankly relying upon moral philosophy is surely Ronald Dworkin. His Taking Rights Seriously (Harvard 1977) is a most formidable defense of, in effect, the “liberal” philosophizing from the bench so lamented by constitutional conservatives.

29. See, e.g., Roberts: ‘My Job Is to Call Balls and Strikes and Not to Pitch or Bat’, CNN (Sept. 12, 2005, 4:58 PM), https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/ [https://perma.cc/52NS-AF5U] (reproducing Chief Justice Roberts’ opening statement during his confirmation hearing for his seat as Chief Justice that it is a judge’s job “to call balls and strikes and not to pitch or bat”).

30. See infra Parts I–V.

31. See infra Part III.

32. See infra Parts I–IV.
not no philosophy at all. The truth about the Constitution is that sound moral reasoning has less to do with its proper interpretation than liberals typically assumed. Moral truth nonetheless has more to do with constitutional law than conservatives have been willing to recognize.

Conservative constitutionalism is well-suited to damage control whenever legal elites, including, most prominently, “progressives” on the Supreme Court, are in thrall to unsound moral and political philosophies. Conservative constitutionalism can stymie for a time the introduction of catastrophic innovations in constitutional law, like abortion or same-sex marriage. More than 50 years into the Supreme Court’s Age of Aquarius, however, constitutional conservatism is incapable of wresting control of the law back from the regime-changing project of autonomous self-definition.

Our nation has passed a “tipping point” where damage control is not enough; it is tantamount to a slow-walking surrender. The liberated self’s signal breakthroughs (such as Roe and Obergefell) are in the rear-view mirror. Going forward, activist judges need only consolidate their gains,33 gradually erase vestiges of the rival “liberty,” and before long our polity “will become all one thing.” It is time for constitutional conservatives to change course and partner with moral and metaphysical truth in a way which they have so far denied to themselves by adopting their characteristic vow of moral abstinence.

Of course, not all constitutional conservatives are upholders of a morality recognizably congruent with that which was held as philosophically (and religiously) true down to the 1960s.34 Many constitutional conservatives do, however, hold opinions of the kind that can be captured sufficiently accurately, though ultimately misleadingly, by the term “social conservative.”

Conservatives would be in a pickle if they faced a choice between what they judge to be the right way to interpret the Constitution and the only way to salvage a decent society. Fortunately, they face no such


34. Robert Bork defended constitutional “originalism” largely by appealing to, if not relying upon, moral skepticism in The Tempting of America (Free Press 1990). While Antonin Scalia no doubt affirmed traditional moral and metaphysical truths (and could therefore be described as a “social conservative”), his jurisprudence also depended upon an appeal to moral skepticism; that is, to the practical fact that, although moral truth might be accessible in principle to humankind, judges can be counted on to mistake what are in fact their own “predilections” (Scalia’s word) for true moral norms. See infra Part VI.
choice. Conservative constitutionalists need only choose originalism, which choice will lead them to recognize the necessity for strategic resort, as the Constitution directs, to critically justified metaphysical and moral truths. The contemporary judge can be faithful to the Founders only by relying upon moral and metaphysical truths that lie beyond the Constitution. Sometimes the judge must replace bad philosophy with good philosophy.

In these pages, I first undertake to show that this is so by looking at five foundational aspects of the common good of our polity. Part I examines the meaning of “persons” as used in the Fourteenth Amendment, particularly in the context of abortion. Part II concerns the meaning of marriage and the family in our constitutional jurisprudence. Public morality generally is the subject of Part III. In Part IV, I address questions raised by the courts’ approach to issues concerning biological sex and gender identity, issues raised by the transgender challenge to sex-segregated intimate facilities in public schools. Part V focuses on the nature of religion and religious liberty according to the First Amendment’s Religion Clauses. In each instance, the perennial “liberty” of personal self-direction within a morally ordered universe can recover lost territory, and claim its rightful primacy in constitutional law, only by resort to the frankly philosophical readings that the key constitutional provisions, as a matter of historical faith and sound legal reasoning, so clearly call for.

In Part VI, I take up the formidable constitutional conservatism of the movement’s leading light over the last half-century, Antonin Scalia. Scalia is the best Justice of the Supreme Court during that time. He reached the right result in constitutional cases more often than any other Justice. His approach nonetheless exhibits the characteristic weaknesses of constitutional conservatism.

I. PERSONS

Abortion is the most important civil-liberties issue of our time because it uniquely presses the foundational question about justice that every legal system faces: whom is the law for? That question is prior and paramount to the question, what should the law be? Jurists as far back as Justinian in the 6th century saw clearly that law is for persons, not the other way around. Persons are the point of law. Law is their servant. The whole

35. See John Finnis, The Priority of Persons Revisited, 58 AM. J. JURIS. 45, 46 (2013) (discussing “cases where the judges professed themselves helpless in the face of a just, law-based argument by or on behalf of real human beings” and concluding that in each of those cases “the court should have thought, like the Romans, that law is for the sake of persons”).
complex of materials, mores, and manners that constitute a political community’s common good is for the sake of persons, and for their efforts to perfect themselves through freely chosen, morally significant actions. Anyone can see that even an exquisitely balanced account of legal rights and duties is worth dust if the strong can manipulate the prior question about who counts as a person with impunity.

Neither capital punishment nor euthanasia nor police use of deadly force (to cite some other important legal questions pertaining to intentional killing) raises this foundational question. All parties to those debates agree that they are talking about persons with a right not to be unjustifiably killed. They disagree about the requisite justification. Besides, the total number of persons killed annually in all three of those scenarios combined is, depending on how accurately one guesses at the prevalence of euthanasia, smaller, and perhaps far smaller, than those killed by abortion. It is certain that 25 people were executed by public authorities in America in 2018. The police killed approximately a thousand people that year. Approximately 860,000 abortions were reported to public health officials the year before. How many more unreported abortions occurred is unknown. This massive hemorrhage might be justified if, in truth, persons do not begin until birth. Even someone who believes that persons truly begin at fertilization, might be somewhat consoled if today’s abortion liberty had its origins in a good-faith effort to discern the truth about when persons begin. At least then, better information and more disciplined reasoning could perhaps restore justice. But the Roe Court said that it would not consider the “difficult question of when life begins” at all.

Now, any society keen to be a just one must establish in its fundamental law, whether that be a constitution or other foundational...


document, an unconditional legal respect for the lives of every person within it. No one in American history understood this principle of justice better than did Abraham Lincoln. In the wake of a Civil War during which he commanded the armed forces that ended slavery, the American people enshrined in their Constitution the requisite root principle of justice: “No state”—and by implication, not the federal government, either—“shall deny to any person within its jurisdiction the equal protection of the laws,” including, most importantly, those against homicide.

The text of the Fourteenth Amendment alone strongly suggests that the term “person” is an unqualified reference to some natural kind or class of beings. After all, it says: “any person” (semantically equivalent to “all persons,” or “every person”). Anyone concerned about justice within the human community who reads those words would presume that its meaning incorporates a moral reality, namely, all those who truly are human persons. The structure of the amendment reinforces this reading-at-a-glance. The plain inference drawn from the whole Fourteenth Amendment would be that, because Americans were concerned to forestall anything like the chattel slavery that they had just so violently slain, they were amending the Constitution to block any future treatment of powerless individuals (such as had been African Americans) as sub- or non-persons, with only those rights and immunities that the master class found it acceptable to recognize. The non-negotiable demands of genuine human rights went out of the picture.

The historical record confirms the expansive reference that these textual and structural considerations indicate. Ohio Representative John Bingham sponsored the Fourteenth Amendment in the House of Representatives. During debate over what is now Section One—the “any person” guarantees of due process and equal protection—Bingham

40. U.S. CONST. amend. XIV, § 1. The full text of Section 1 reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

41. Id. (emphasis added).

42. The historical materials touched on in this and the following paragraph are covered in greater detail in Gerard V. Bradley, Constitutional and Other Persons, in REASON, MORALITY, AND LAW: THE PHILOSOPHY OF JOHN FINNIS 247 (John Keown & Robert P. George eds., 2013).
described its coverage as “universal.”\textsuperscript{43} It applied, he said, to “any human being.”\textsuperscript{44} Bingham’s counterpart in the Senate, Senator Jacob Howard, emphasized that the amendment applied to every member of the human family.\textsuperscript{45} Addressing a large crowd on July 18, 1866, Indiana Governor Oliver Morton declared that Section One “intended to throw the equal personal and proprietary protection of the law around every person who may be within the jurisdiction of the state.”\textsuperscript{46} Senator Howard stated that “[i]t establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty.”\textsuperscript{47} He told the Senate that Section One did “away with the injustice of subjecting one caste of persons to a code not applicable to others.”\textsuperscript{48}

Newspaper coverage of the debate over the Amendment included such paraphrases for the reference to “person” in Section One as “all men” and “all men as equals before the law of God and man.”\textsuperscript{49} The \textit{New York Times} opined that the “equal protection of the laws is guaranteed to all, without any exception.”\textsuperscript{50} This prevailing spirit of inclusion is succinctly captured in an Iowa judicial opinion handed down in 1868, the year the Fourteenth Amendment was ratified. The state supreme court said that the common law is “to be commended, for its all-embracing and salutary solicitude for the sacredness of human life and the personal safety of every human being.”\textsuperscript{51} The court wrote that “[t]his protecting, paternal care, envelop[s] every individual like the air he breathes,” and it “not only extends to persons actually born, but, for some purposes, to infants \textit{en ventre sa mère} [in a mother’s womb].”\textsuperscript{52}

This historical evidence could be multiplied.\textsuperscript{53}

\begin{itemize}
\item 43. \textit{Id.} at 264.
\item 44. \textit{Id.}
\item 45. \textit{See id.}
\item 46. \textit{Id.} at 265.
\item 47. \textit{Id.} at 264.
\item 48. \textit{Id.}
\item 49. \textit{Id.} at 265.
\item 50. \textit{Id.}
\item 52. \textit{Id.}
\end{itemize}
This whole project would be subverted if “any person” was limitable to those admitted to membership in the protected class, just as it suited the people in charge, some master class whose asserted control over the fates of putatively sub- or non-persons was, for some reason, regarded as controlling. This was essentially Ronald Dworkin’s argument in his book Life’s Dominion.54 Treating “personhood” as an intra-systemic riddle, to be solved by a feat of technical legal reasoning—as if the law were as impervious to the reality of persons as Chancery was to justice in Jarndyce v. Jarndyce—would be just as calamitous.55

In light of the historical evidence about the expansive reference of the term “person,” lawyers for Texas naturally argued in Roe v. Wade that the word in the Fourteenth Amendment included the unborn because they are, in truth, persons.56 The Court readily acknowledged this to be the decisive question. Justice Blackmun wrote for the Roe majority: Texas “argue[s] that the fetus is a ‘person’ within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established,” he wrote, the abortion-rights case “of course, collapses, for the fetus’ right to life would then be guaranteed specifically by the Amendment,” a “collapse” that (Blackmun noted) even the lawyers for Jane Roe conceded.57

The Roe Court met Texas’ dispositive claim with the zeal of a clerk and the compassion of a highwayman. To resolve Texas’ challenge, Blackmun turned the Court’s gaze, not outward toward a moral claim about persons, but inward to the conventional meaning of a legal term of art. Blackmun catalogued in Roe the 22 or so usages of the word “person” in the entire Constitution. (These included, for example, stipulations about the minimum age for various political offices and about runaway convicts and fugitive slaves.) Blackmun then wrote for the Court that, “in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible prenatal application.”58

55. See generally CHARLES DICKENS, BLEAK HOUSE (1853).
58. Id. at 157 (emphasis added). Blackmun added that “throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today.” Id. at 158. He said that his conclusion in Roe against the Fourteenth Amendment “personhood” of the unborn “is in accord with the results
Those 20-odd usages do indeed have no such “applications.” Fetuses do not, for example, run for president, and the Constitution says that they may not. But that exclusion does not render them non-persons, any more than it renders anyone who is foreign-born, or who is not yet 35 years old, or who has not lived in America for 14 years, a non-person. Nor does the fact that fetuses cannot be extradited: neither an unborn child nor any other child can commit a crime. No youth can therefore become an interstate fugitive, and so be liable to extradition. Yet, the reality that the Constitution’s extradition clause does not apply to, say, an eight-year-old does not mean that the child is not a “person.” Blackmun’s other “applications” similarly have no tendency to define “person” or to establish when any “person” begins. Besides, the question in Roe was limited to when “persons” begin when it comes to the equal protection of state laws against homicide. And Blackmun’s opinion for the Court surely recognized that that had potential “application” prenatally. The crucial question in Roe was whether it in fact does have “application” before birth, a question that the Justices “answered” by compiling a constitutional index of “person.”

Roe v. Wade has raged like a firestorm through American constitutional law ever since the Court handed it down in 1973. No decision of the Court since Dred Scott v. Sandford has been so bitterly criticized. None—with the possible exception of Brown v. 59. U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”).

60. Id. art. IV, § 2. (“A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.”).

61. 60 U.S. 393 (1857).

62. The tone of criticism was set by Justice White in his Roe/Doe dissent (joined by Justice Rehnquist): I find nothing in the language or history of the Constitution to support the Court’s judgments. . . . As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

410 U.S. 179, 221–22 (1973). The most important of the early scholarly criticisms was no doubt that of John Hart Ely, then perhaps the leading academic
Board of Education—has so shaped American political life in its wake. Yet no constitutional conservative on the Court has disputed the Roe Court’s conclusion that the unborn do not count as “persons” guaranteed the equal protection of the laws. None has ever engaged in judicial writings with the overwhelming evidence of text, structure, and history that “person” refers to a moral reality. This is not to say that conservatives have asked about that reality and come away with the wrong answer. It is that conservatives hold exactly what Harry Blackmun held: the truth of the matter about when persons begin is irrelevant to the meaning of the constitutional guarantee of equal legal protection against being killed.

No conservative on the Court, including several whom it could be safely supposed hold pro-life convictions, has pointed out the elementary errors of legal reasoning in Blackmun’s method. These errors include the decisive one, which is that his constitutional index of “person” has no tendency whatsoever to settle when people begin. “Applications” are not “definitions.” Stipulations about what some “persons” may or may not do imply nothing about when persons begin. The term “person” in Blackmun’s catalogue is almost always qualified by constitutional lawyer in the country and one who described himself as, politically, pro-choice. Ely nonetheless wrote in the Yale Law Journal that Roe is not constitutional law and gave no indication that it was trying to be. John Hard Ely, The Wages of Crying Wolf, A Comment on Roe v. Wade, 82 Yale L. J. 920, (1973).


some attribute, status, or achievement, such as being “free” (not enslaved) or as “holding an office,” or having arrived at a certain age. Only in the Due Process and Equal Protection Clauses does the term “person” appear in its full extension. In every other instance examined by Blackmun, “person” is accompanied by an adjectival or adverbial predicate. None is used in Section One; there it is: “person” simpliciter.65 No accomplishment or exercisable capacity or adjective or adverb is needed for any person to be a beneficiary of a right not to be unjustifiably killed. Roe nowhere referenced the Court’s own confident conclusion five years earlier that “illegitimate children are not “nonpersons” because “[t]hey are humans, live, and have their being,” and so “are clearly ‘persons’ within the meaning of the Equal Protection Clause of the Fourteenth Amendment.”66 According to these criteria in light of uncontroversial biological data67 about the distinct individuality of the embryo from the moment of its inception, the unborn are just as surely “persons.”

Constitutional conservatives have taken up none of these criticisms. They have instead taken on board Blackmun’s fatally mistaken methodology. The standard conservative critique of Roe is that the majority Justices imagined themselves to be Platonic Guardians who would rule the people wisely, in disregard of the plebeian task of legal interpretation of the Constitution. The basis for this charge, however, is scarcely evident from an opinion that is so attentive to text, history, and precedent. The Roe opinion’s aversion to philosophy (Platonic or otherwise) is plainly visible. Justice Blackmun wrote: “When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus [about when people begin], the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.”68 The Justices therefore would “not resolve the difficult question of when life begins.”69 This is exactly what constitutional conservatives maintain.

Justices White (nominated by John Kennedy) and Rehnquist (a Nixon appointee) dissented in Roe. But neither resisted the Court’s indifference to who really is a “person.” All the other Republican appointees sitting

65. See U.S. CONST. amend. XIV.
67. For a compelling argument that persons begin at fertilization, see ROBERT P. GEORGE & CHRISTOPHER TOLLEFSEN, EMBRYO: A DEFENSE OF HUMAN LIFE (2008).
69. Id.
in 1973 joined the Blackmun opinion in *Roe*.\(^{70}\) Conservative constitutionalists since have lambasted *Roe*, not for its cadaverous refusal to face the reality of when persons begin, but rather for the creativity with which Blackmun and the Court discovered, within an already suspect constitutional right of privacy, a heretofore undetected right to abortion.

The *Roe* court did not find a right to abortion, however, in any speculative exploration of privacy in any of its senses. Blackmun found abortion in the commonplace trials of parenting. The Court listed some of these “detriment[s]” (the Court’s word) in the opinion.\(^{71}\) Against these challenges of (chiefly) being a mother (though not, for the most part, of pregnancy or childbirth) stood, as some Justices described the alternative in their internal correspondence, an abstract, speculative possibility, some concept of “potential” or inchoate life about which there was assertedly no truth available to human reason, and about which there was no consensus of opinion in society.\(^{72}\)

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\(^{70}\) Besides Justice Blackmun, Republican-appointed Justices joining the majority opinion in *Roe* included Justices Burger, Brennan, Stewart, and Powell.  

\(^{71}\) *Roe*, 410 U.S. at 153. 
Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.  

*Id.*  

\(^{72}\) While *Roe* was being considered, Brennan wrote in a memorandum to Douglas that “moral predilections must not be allowed to influence our minds in setting legal distinctions,” here quoting Tom Clark, who quoted Oliver Wendell Holmes. “The law deals in reality not obscurity—the known rather than the unknown. The law does not deal in speculation.” See Bradley, *supra* note 42, at 253 n.17. The *Roe* Court concluded that the state may not “by adopting one theory of life . . . override the rights of the pregnant women that are at stake.” *Roe*, 410 U.S. at 162.  

John Jeffries clerked for Justice Lewis Powell the term after *Roe*, and describes in his excellent biography of that Justice how the idea that a fertilized embryo was a fully recognized human life would always seem to [Powell] unacceptably remote from ordinary experience. That this belief was closely associated with the Catholic Church only made it easier for him to dismiss. No argument would have persuaded Powell that the disturbing realities of unwanted
There are sound bases for criticizing the Roe Court here, not least that Blackmun established not so much a right to abortion as a parental license for infanticide. Excessive philosophizing is not one of them. In fact, constitutional conservatives have steadily maintained that the Constitution throws its weight behind neither the abortion-seeking pregnant woman nor her unborn child. The matter is left entirely to the states: if California wants to have abortion-on-demand, Californians are at liberty to have it. If Alabamans want to have no legal abortion, so be it. “Reversing” Roe for constitutional conservatives since 1973 means no more, though no less, than that.

Justice Blackmun got one thing right in his opinion for the Roe Court. He wrote that “the Constitution does not define ‘persons’ in so many words.” The Constitution does not define “persons” in any words at all. The Fourteenth Amendment, considered without reference to some extra-constitutional, independently established grounds for delimiting the class of persons, would not provide equal protection of the laws to anyone.

Many constitutional conservatives disagree. They think that the first words of the Fourteenth Amendment (“All persons born or naturalized in the United States . . . .”) at least stipulate (even if they “define” nothing) that all humans are “persons” once they are born. Justice Potter Stewart at one point during the Roe oral argument flatly declared that the Fourteenth pregnancy and back-alley abortion should be subordinated to religious dogma.

73. Some courts have even established abortion-on-demand as a metaphysical criterion. They reason that any entity which might be killed without justification—such as the unborn child by its mother, per the Court’s holding in Roe—must not be a “person”; otherwise, the holding in Roe would be barbaric. This inversion of priorities—(misguided) ethics over metaphysical realities—explains why so many evidently pro-choice people oppose feticide statutes, which invariably include a carve-out for Roe and so do not impede abortion access at all. But feticide laws characteristically treat the unborn as persons with the same right not-to-be-killed as anyone else, except for lawful abortion. The same people oppose laws requiring humane disposal of fetal remains for the reason that the requirement implies, or at least strongly suggests, that the unborn are like everyone else. See, e.g., Box v. Planned Parenthood of Ind. & Ky., 139 S. Ct. 1780 (2019).


75. Roe, 410 U.S. at 157.
Amendment “defines ‘person’ as somebody who’s born.” But it does no such thing. Neither there nor elsewhere in the Constitution is there anything resembling a definition of “person.” Section One of the Amendment does stipulate that a “citizen” is a “person born or naturalized in the United States.” But this does not supply any definition of “person.” A law that said that “all persons who step foot on Ellis Island are thereby citizens of the United States” would not imply that human individuals swimming nearby are not “persons.” A constitutional clause conferring “citizen” status according to the location of a “person’s” birth does not imply that babies born overseas are not persons. Nor does it imply that babies carried in the wombs of women living in the United States are not yet “persons.” Those opening words of the Amendment are, moreover, most naturally read to implicitly recognize that birth is an event during a “person’s” life, and not the date of its beginning.

Neither text nor history nor structure nor even ordinary canons of sound reasoning explain conservatives’ refusal to consider whether the unborn are constitutional “persons.” The root of their refusal is instead their methodological commitment to philosophical abstinence. That commitment is, at least in the case of abortion, wistful. It does not effectively shield conservatives from the truth about when persons begin. For it is one thing to deny a specifically judicial competence to engage in moral-philosophical reasoning. It is another thing entirely to impoverish the Constitution itself with a similar disability. Even if the root of conservative hesitation is a visceral concurrence in Blackmun’s agnosticism—since the Constitution does not “define” person, “the judiciary . . . is not in a position to speculate as to the answer”—nothing follows about the meaning of the Constitution. The hesitation establishes only a specific judicial incompetence. It does not, save upon a radically unsound equation of constitutional meaning with the institutional competence of judges, settle anything about the constitutional meaning or reference of the word “person.” All that follows from the conservatives’ intuitive agreement with Blackmun is, not that the unborn fail to launch as “constitutional persons,” but that the primary authority to hold states to the last full measure of equal protection resides elsewhere in the constitutional

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77. U.S. CONST. amend. XIV.
78. Roe, 410 U.S. at 159.
system. That residence would be in Congress, as both the text of the Amendment (Section Five) and the history of its adoption shows.79

Conservatives’ aversion is wistful also because the truth of the matter is embedded in ordinary canons of judicial review that neither conservatives nor their liberal activist brethren question. Any state law permitting, say, post-viability abortions must—as all laws must in our constitutional order—satisfy courts that it has a “rational basis.” What could be the basis in reason for according a newborn exactly the same legal protection against being killed as that accorded to the newborn’s parents, but for according it no legal protection at all just one instant earlier? Is it rational to suppose that any natural class of beings springs into existence at birth like that, as if ex nihilo? Could any legislature rationally conclude that a “person” with the full panoply of constitutional rights comes to be so suddenly, from what was just inches and seconds earlier some sort of wholly non-personal predecessor with no rights at all?

Any permissive abortion law must pass this elementary rational basis level of constitutional scrutiny. About any abortion-permissive law, a court must ask itself: is it rational to judge that there is a substantial change in the metaphysical status of the unborn, somewhere between the formation of what biology indisputably establishes is a unique human individual at the moment of fertilization, and the delivery of that individual months later? Is it rational to so judge, as the truth about when persons begin has become more evident and therefore less reasonably deniable since 1973? Prenatal research, sonograms, and DNA evidence of how the embryo carries within it all the information needed to direct the tiny person’s growth throughout life show conclusively the existential continuity of everyone from fertilization to death. These biological and other scientific facts very strongly indicate, if they do not simply show, that each one of us began as a person in a moral sense when our bodies began. Because our bodies began at conception, then so did we.80

79. U.S. CONST. amend. XIV, § 5 (“The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.”); see also WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 110–11 (1988) (explaining that “[t]he Fourteenth Amendment was understood less as a legal instrument to be elaborated in the courts than as a peace treaty to be administered by Congress in order to secure the fruits” of victory in the Civil War).

80. For a compelling argument along these lines, see GEORGE & TOLLEFSEN, supra note 67. The question of minimum constitutional rationality is all the more compelling in light of the burgeoning number of convictions in both state and federal courts of (almost always) young men for killing (usually) their unborn children, very often for reasons included on Roe’s list of parental “detriments”
Many constitutional conservatives might still think it is too audacious to go all the way to full “personhood” for the unborn. It is nonetheless too late for the standard conservative alternative in constitutional law. Returning the matter of abortion to the states has become cliché. The combined weight of conservative respect for precedent, concern for institutional prestige, worry about social stability, and preference for distinguishing rather than overruling prior decisions, have by now swung like a pendulum to some no-man’s land between the sides in our country’s culture war over abortion. All these costs of “reversing” Roe are increasing with every passing day. The question now is whether these costs will seem to conservative constitutionalists to be worth paying, if the point of doing so is to correct, not a catastrophic injustice, but a jurisdictional mistake. Or worth the freight to conform the constitutional law of abortion, not to what those who ratified the Fourteenth Amendment enacted, but to a judicial methodology conceived as a counter-activist strategy nearly five decades ago.

Constitutional conservatives can see just as easily as anyone else that, even after a hypothetical “reversal” of Roe, the vast majority of Americans would still live in states recognizing abortion rights (because such populous states as California, New York, and Illinois would remain as “pro-choice” as ever). Conservatives can see the strong possibility that all Americans would live in such states if the Biden Administration and sufficient to make a mother’s identical choice a matter of constitutional right. Although every such “feticide” conviction has been affirmed on appeal, no appellate court has answered the challenge of a few of these convicted defendants that it violates the Equal Protection Clause for any state’s laws about justified homicide to apply fully to him, and not at all to her. See generally Bradley, supra note 42. Blackmun wrote in Roe that Texas could not constitutionally deny a pregnant woman the choice to abort by its adoption of a “theory of life.” But no one is sentenced to prison for denying a theory. These men have been imprisoned for killing someone not yet born, someone who nonetheless has evidently the same right to life as the reader, or the writer, of this Article.

The urgency of the issue was heightened by the 2018 Alabama Supreme Court affirmation of the first capital murder conviction in the United States for feticide. The opening sentences of that opinion:

Jessie Livell Phillips was convicted in the Marshall Circuit Court of the capital offense of murder of ‘two or more persons’ for the intentional killing of his wife, Erica Phillips, and their unborn child (“Baby Doe”) “by one act or pursuant to one scheme or course of conduct.” The jury unanimously recommended that he be sentenced to death. Following a sentencing hearing, the trial court accepted the jury’s recommendation and sentenced Phillips to death.

See Ex parte Phillips, 287 So. 3d 1179, 1185 (Ala. 2018) (citations omitted).
Democrats in Congress make good on signals that they will “codify” Roe in federal statutes. This very real prospect raises an awkward question for constitutional conservatives: what if, after 50 years of protracted political struggle to change the courts, the Supreme Court finally “reversed” Roe—and it did not matter?

II. MARRIAGE AND FAMILY

No Supreme Court case since Roe v. Wade has been more bitterly criticized by constitutional conservatives than has the 2015 same-sex marriage decision, Obergefell v. Hodges. Justice White wrote in his Roe dissent that the Court’s decision there was an “exercise of raw judicial power.” He added that there is “nothing in the language or history of the Constitution to support the Court’s judgment. The Court simply fashions and announces a new constitutional right . . . with scarcely any reason or authority for its action.” In Obergefell, Justice Scalia wrote in dissent that the Court’s decision was a “judicial Putsch,” a “naked judicial claim to legislative—indeed, super-legislative—power,” one that lacked “even a thin veneer of law.”

81. For an example of such a proposed codification, see the Women’s Health Protection Act of 2019 (S. 1645), which aims to “protect a woman’s ability to determine whether and when to bear a child or end a pregnancy, and to protect a health care provider’s ability to provide reproductive health care services, including abortion services.”


83. Roe, 410 U.S. at 222 (White, J. dissenting).

84. Id. at 221–22 (White, J., dissenting).

85. Obergefell, 576 U.S. at 716–18 (Scalia, J., dissenting). Justice Scalia’s dissent (joined by Justice Thomas) was especially caustic. Scalia wrote that the majority “opinion is couched in a style that is as pretentious as its content is egotistic. It is one thing for separate concurring or dissenting opinions to contain extravagances, even silly extravagances, of thought and expression; it is something else for the official opinion of the Court to do so.” Id. at 719. In the appended note 22, the Justice added:

If, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity,” I would hide my head in a bag. The Supreme Court of the United States has descended from the disciplined legal reasoning of John Marshall and Joseph Story to the mystical aphorisms of the fortune cookie.
It is Chief Justice Roberts’ dissent, however, that articulates in pure form the conservative constitutionalist critique of Obergefell. “The majority’s decision is an act of will, not legal judgment,” Roberts, joined by Justices Scalia and Thomas, wrote. “The right it announces has no basis in the Constitution or this Court’s precedent.” 86 Roberts claimed that the Court’s decision “rests on nothing more than the majority’s own conviction that same-sex couples should be allowed to marry.” 87

So far, the Chief Justice’s criticisms sound like those of Justices White and Scalia. Roberts then deployed, however, the mightiest weapon in the canons of constitutional criticism, save perhaps for the Dred Scott decision that ignited the Civil War. “[O]nly one precedent offers any support for the majority’s methodology: Lochner v. New York.” 88 He declared that “[w]hatever force that belief [of the majority that same-sex couples should be allowed to marry] may have as a matter of moral philosophy, it has no more basis in the Constitution than did the naked policy preferences adopted in Lochner.” 89 The Chief Justice nailed his Lochner indictment by likening Obergefell’s sin precisely to that which Justice Holmes cited in his dissent for the ages in Lochner. Roberts wrote: “As Justice Holmes memorably put it, ‘The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics,’ a leading work on the philosophy of Social Darwinism.” 90 Chief Justice Roberts added, “[O]ur Constitution does not enact any one theory of marriage.” 91

The conservative Justices’ criticism of Obergefell was strictly methodological. It is the same criticism they have long leveled at Roe v. Wade. Just as it was in Roe, the majority’s mistake in Obergefell was not that it got the substance of a foundational moral or metaphysical matter wrong. About that question the conservatives were as agnostic in Obergefell as they were in, and since, Roe. In this view, the Constitution knows no more about marriage than it does about when people begin. Neither a “theory” of life nor a “theory” of marriage is to be found in our fundamental charter. These matters are all state prerogatives. Chief Justice Roberts wrote that the “Constitution itself says nothing about marriage,

Id. 86. Id. at 687 (Roberts, C.J., dissenting).
87. Id. at 703 (Roberts, C.J., dissenting).
88. Id. (Roberts, C.J., dissenting).
89. Id. (Roberts, C.J., dissenting). “[T]he majority’s approach has no basis in principle or tradition, except for the unprincipled tradition of judicial policymaking that characterized discredited decisions such as Lochner v. New York.” Id. at 694 (Roberts, C.J., dissenting).
90. Id. at 696 (Roberts, C.J., dissenting).
91. Id. at 686 (Roberts, C.J., dissenting).
and the Framers thereby entrusted the States with ‘[t]he whole subject of
the domestic relations of husband and wife.’” 92

The conservatives focused their fire instead on the majority’s
designation of purely companionate monogamy as the Constitution’s
“theory” of marriage. Their criticisms committed them, however, to
rejecting judicial identification of any “theory” of marriage as the
Constitution’s theory, or even as the subject of what every Justice
conceded was a line of unimpeachable precedents recognizing a
“fundamental right to marry.” For these dissenters in Obergefell, neither
procreative marriage nor the majority’s companionate alternative (nor, for
that matter, polygamy) 93 was part of constitutional law. On the

92. Id. at 690 (Roberts, C.J., dissenting) (internal citation omitted). The Chief
Justice and Justices Thomas, Alito, and Scalia nonetheless affirmed a plenary,
independent federal government authority to define marriage as the that
government sees fit, notwithstanding any state definition to the contrary, in their

93. Chief Justice Roberts’ reductio criticism of the majority’s reasoning
therefore missed its mark. He wrote:

Although the majority randomly inserts the adjective ‘two’ in various
places, it offers no reason at all why the two-person element of the core
definition of marriage may be preserved while the man-woman element
may not. . . . It is striking how much of the majority’s reasoning would
apply with equal force to the claim of a fundamental right to plural
marriage. If “[t]here is dignity in the bond between two men or two
women who seek to marry and in their autonomy to make such profound
choices,” why would there be any less dignity in the bond between three
people who, in exercising their autonomy, seek to make the profound
choice to marry?

Id. at 704 (Roberts, C.J., dissenting).

Roberts charged that Obergefell would make it difficult for the Court in
the future to coherently deny a polygamist’s claim to constitutional protection.
But the majority repeatedly stressed the dyadic quality of the plaintiffs’ same-sex
relationships. The Court held, in other words, that the Constitution knows
marriage and knows that it is monogamous. Although the majority said little
specifically in support of its favorable judgment about monogamy, in fact there
are obvious principled grounds upon which to distinguish polygamy from
monogamy, to the great disadvantage of the former, namely, the impossibility of
mutuality, equality, and reciprocity in plural marriages. In polygamy, for example,
each of a man’s multiple wives has just the one husband, while the one husband
has multiple wives. Each wife’s relationship with the other wives introduces an
additional asymmetry in the “family,” for the wives form a cohort of sorts. The
husband is a solo practitioner. What emerges from Roberts’ reductio is not that
the Obergefell majority would be defenseless against, say, some persons’
conscientious claims that polygamy is essential to their concept of existence. This
conservative view, if all American jurisdictions adopted same-sex marriage, there would be nothing constitutionally objectionable about it.94 So, too, evidently, polygamy.95

Any conservative “reversal” of Obergefell would therefore look like a conservative “reversal” of Roe. The Chief Justice wrote: “The people of a State are free to expand marriage to include same-sex couples, or to retain the historic definition.”96 Justice Scalia, joined by Justice Thomas, added in his own dissent that 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.”97 He continued, “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.”98 Justice Alito, writing for himself and for

is surely the money line in his reductio, and it reflects the dissenting conservatives’ exaggeration of the role that the Mystery Passage plays in Obergefell’s reasoning. It is rather clearer that the dissenters, precisely because of their inveterate philosophical abstinence, would be unable to find a constitutional infirmity in state laws sanctioning polygamy.

94. Chief Justice Roberts (joined by Justices Scalia and Thomas) included several favorable comments about same-sex marriage in the dissent. “Petitioners make strong arguments rooted in social policy and considerations of fairness. . . . Th[eir] position has undeniable appeal . . . .” Id. at 686 (Roberts, C.J., dissenting). “[T]he policy arguments for extending marriage to same-sex couples may be compelling.” Id. “Many people will rejoice at [today’s] decision, and I begrudge none their celebration.” Id.

If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today’s decision. Celebrate the achievement of a desired goal. Celebrate the opportunity for a new expression of commitment to a partner. Celebrate the availability of new benefits. But do not celebrate the Constitution. It had nothing to do with it. Id. at 713 (Roberts, C.J., dissenting).

95. In his dissent (joined by Justice Thomas) in the 2013 case where the Court invalidated the federal Defense of Marriage Act’s limitation of “marriage” in all federal usages of the term to the male-female couple, Justice Scalia wrote: “It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.” See Windsor, 570 U.S. at 795 (Scalia, J., dissenting).

97. Id. at 713 (Scalia, J., dissenting).
98. Id. Justice Scalia added, also (I think) gratuitously:
Justices Scalia and Thomas, added, “The question in these cases, however, is not what States should do about same-sex marriage but whether the Constitution answers that question for them. It does not. The Constitution leaves that question to be decided by the people of each State.”

The premise underlying all these criticisms—that the Constitution does not know marriage—is obviously of a piece with the conservative constitutionalists’ characteristic aversion to philosophizing. That philosophical abstinence led the Obergefell dissenters, unfortunately, into a series of grave mistakes and therefore to miss opportunities for cogent criticism of Kennedy’s majority opinion. The dissenters’ reticence also caused them to misunderstand the majority’s reliance on the Mystery Passage. The conservatives’ reticence obscured from their view the dispositive argument made by the Court, upon which the conservatives did not lay a glove. The conservatives also made several unsound counterarguments, some of them radically mistaken. They missed their opportunity to make one argument that would have dramatically reduced the scope of the majority’s adoption of same-sex marriage, and another which would have been decisive against it.

That is a pretty long list of conservative miscues. Herewith a bill of particulars.

First. Although the word “marriage” does not appear in it, the Constitution certainly requires federal public authorities, including judges, to reach outside the four corners of it to identify, ratify, and promote real marriage. The Chief Justice’s summation of the baseline conservative claim—the “Constitution itself says nothing about marriage, and the Framers thereby entrusted the States with ‘[t]he whole subject of the domestic relations of husband and wife’” suffers from a certain constitutional illogic. The Constitution’s literal silence is not decisive. The word “slavery” is famously absent from the Constitution, yet the concept and reality of human bondage is surely there. Nowhere does the word

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[It is not of special importance to me what the law says about marriage. It is of overwhelming importance, however, who it is that rules me. Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.]

Id.

99. Id. at 736 (Alito, J., dissenting).
100. Id. at 662–63.
101. Id. at 690 (Roberts, C.J., dissenting) (internal citation omitted).
“church” appear in the First Amendment. Yet one can make no sense of that provision’s origins or meaning without knowing what a “church” is.102

Besides, what is “entrusted” to the states is not “thereby” entirely foreign to the national government. Congress and, in subordinate ways, the federal courts and the national executive, have plenary charge of domestic relations in the capital district,103 within the military,104 and over the vast territories that from 1789 have been parts of our nation.105 In all these contexts the Constitution requires the national government to not only know what marriage is. Across the whole range of federal powers—from the “marriage” penalty in the Internal Revenue Code, to the implicit proviso in the Mann Act prohibition on transporting a female across state lines for “immoral” purposes, to various anti-nepotism provisions pertaining to one’s “spouse”—a proper exercise of national authority depends upon an independent federal understanding of marriage. Our fundamental law requires federal authorities to identify the nature, meaning, and value of marriage, and to develop appropriate public policies toward it in light of that independent account.106

By the late 19th century, the Supreme Court had developed several doctrines about marriage that penetrated the shell of state sovereignty. The 1894 Act that enabled Utah to enter the Union included the provision that “polygamous or plural marriages are forever prohibited.”107 This commitment to monogamy built upon decades of conflict with Mormons

102. Part V of this Article explores in considerable detail the original understanding of the Religion Clauses. Here it is worth noting that, although the word “religion” appears in the text of the Constitution, the Supreme Court long ago recognized that it is “not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted.” Reynolds v. United States, 98 U.S. 145, 162 (1878). Any such excursion must sensibly seek to identify a definition of religion that fits within, and makes sense of, the non-establishment and free exercise norms themselves. Those norms make no sense whatsoever if “religion” is defined as it is under the aegis of the Mystery Passage: each one’s tailor-made worldview or spiritual brand. Those norms only make sense when “religion” is understood to be about organized bodies of religious believers with doctrines, modes of worship, communal disciplinary rules, and a governing structure. Those norms make sense, in other words, only if the concept of churches is understood to be as much a part of the Constitution as the words of the document themselves are parts.

104. See id.
105. See id. art. IV, § 3.
106. See also infra note 111.
over plural marriage, struggles that brought out the strategic constitutional dialectic between our political institutions (a free people living under a republican government) and marriage. In 1878, the Supreme Court declared that “it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity.”108 Marriage, while from its very nature a sacred obligation, is nevertheless a civil contract and usually regulated by law. “Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal.”109 The Court concluded that “according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests.”110

Even the Obergefell Court paid homage to this vital dialectic between the legally sanctioned family and our constitutional form of government. The majority quoted from the 1888 Supreme Court decision in Maynard v. Hill,111 where the Court explained that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.”112 Marriage, the Maynard Court said, has long been “a great public institution, giving character to our whole civil polity.”113 All testimony of this sort is unintelligible on the contemporary conservative contention that the Constitution is a stranger to marriage.

For more than 50 years this constitutional definition of marriage has been sharpened, extended, and emphasized. In Loving v. Virginia, the Constitution acknowledged that marriage is not the kind of thing that has any essential racial component; it presupposed that it is simply the union of two persons, male and female.114 The Constitution also “knows” that

108. Reynolds, 98 U.S. at 165. In Windsor Justice Scalia wrote (for himself and for Justice Thomas) of

the Federal Government’s long history of making pronouncements regarding marriage—for example, conditioning Utah’s entry into the Union upon its prohibition of polygamy. See Act of July 16, 1894, ch. 138, §3, 28 Stat. 108 (“The constitution [of Utah]” must provide “perfect toleration of religious sentiment,” “Provided, That polygamous or plural marriages are forever prohibited”).


109. Reynolds, 98 U.S. at 165.

110. Id. at 165–66.


112. Id. at 211.

113. Id. at 213 (internal quotation marks omitted) (quoting Noel v. Ewing, 9 Ind. 37, 50 (1857)) (emphasis added).

114. 388 U.S. 1 (1967).
marriage is potentially procreative, insofar as *Griswold* established the married couple’s prerogative to decide about pregnancy by accessing contraceptives without state interference.115 Again, it is scarcely intelligible to say, as the conservatives effectively do, that the Constitution includes a “fundamental right to marry,” where “marry” means nothing in itself and could be anything a state says it is.116

*Second.* The conservatives focused their fire on the majority’s use of the Mystery Passage. The *Obergefell* Court said that there were “four principles and traditions” that are “the reasons marriage is fundamental under the Constitution.”117 After surveying them, these Justices said through Justice Kennedy that these reasons “apply with equal force to same-sex couples.”118 Three of the “principles” were pure Mystery

115. 381 U.S. 479 (1965).

116. The near unintelligibility of the dissenters’ view that the Constitution does not know what marriage is, is palpably evident if one tries to make sense of the *Obergefell* majority’s unexceptional recitation of settled law, circa 2015, by inserting a Rorschach inkblot whenever the word “marriage” appears in key passages from those cases. Consider the following thought experiment, in other words, bringing to the mind’s eye a total white-out each time the word “marry” (or cognates) appears. “Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals.” Zablocki v. Redhail, 434 U.S. 374, 384 (1978). Long ago, in *Maynard v. Hill*, the Court characterized marriage as “the most important relation in life,” and as “the foundation of the family and of society, without which there would be neither civilization nor progress.” *Maynard*, 125 U.S. at 205, 211. In *Meyer v. Nebraska*, the Court recognized that the right “to marry, establish a home and bring up children” is a central part of the liberty protected by the Due Process Clause. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). And in *Skinner v. Oklahoma ex rel. Williamson*, marriage was described as “fundamental to the very existence and survival of the race.” 316 U.S. 535, 541 (1942). More recent decisions have established that the right to marry is part of the fundamental “right of privacy” implicit in the Fourteenth Amendment’s Due Process Clause. In *Griswold v. Connecticut*, the Court observed:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. *Marriage* is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.


118. *Id.*
Passage. (The fourth included the just-mentioned citation to *Maynard v. Hill*; we shall return to this “principle” later.) The first three were stair-step transformations of the meaning and value of marriage wrought by the *Casey* “heart of liberty.” The first was about individual liberty: “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”[119] The second was about the couples’ liberty: the “right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”[120] The third was about that liberty of the family: “Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”[121]

In *Obergefell*, the Court utterly transposed marriage into categories of the heart or, more accurately, suffused it with the vocabulary and meanings associated with the fragile psyche, and brittle self-esteem, of persons inventing their own social world. It was a creative performance indeed. But this part of *Obergefell* is not the brazen Lochnerizing that the dissenters say it is. Kennedy’s claims here do not appeal to any putative truth about marriage, or “theory” of it assertedly preferred by the majority, and then muscled into the Constitution by them. These “principles” instead rely upon the Court’s own recent precedents, on which the majority performed an elementary logical operation. The cogency of the majority’s argument depends, in other words, not upon their conviction that same-sex couples should be allowed to marry, but upon what they say the prior cases show. They were not right about these cases, but they were not entirely wrong, for the full-orbed expression of the Mystery-Passage version of marriage had been a half-century in the making. By 2015, the majority’s first three “principles” could claim that much respectable pedigree. And the logical operation—that, given these reasons for constitutionally treating marriage as fundamental, same-sex couples could benefit by marrying as much as could anyone else—is sound.

Most simply put: *Obergefell* did not depend upon the majority Justices’ philosophical *putsch*. Their work was innovative, to be sure. But their invention was not a definition of marriage from speculative whole-cloth. The majority’s reliance upon the first three of the “four reasons” already canvassed was straightforward, and honest, in its way. The conclusion they drew—namely, that there is nothing essentially procreative and therefore heterosexual about marriage—followed well enough from decades of overhauling our constitutional conception of

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119. *Id.*
120. *Id.* at 666.
121. *Id.* at 668.
liberty itself according to the solipsism implicit in the Mystery Passage. The judicial conservatives’ quarrel is, then, not with _Lochner_ or with any _philosophe_. It is with nearly 50 years of their own precedents—a generation or so before, and a generation or so after—_Planned Parenthood v. Casey_.

_Third_. The conservatives’ main counterargument whiffed. Chief Justice Roberts asserted that “the marriage laws at issue here do not violate the Equal Protection Clause, because distinguishing between opposite-sex and same-sex couples is rationally related to the States’ ‘legitimate state interest’ in ‘preserving the traditional institution of marriage.’”122 The dissenters’ whole argument centered upon what Roberts called, quite precisely, “the historic definition” of marriage;123 its qualifications for being so featured consisted, then, of the fact that it _had long been_ what the states had chosen to do with their (assertedly, per the conservatives) unfettered constitutional authority over domestic relations.

The majority’s position, though, was that, although “[t]he limitation of marriage to opposite-sex couples may long have seemed natural and just,” its “inconsistency with the central meaning of the fundamental right to marry is now manifest.”124 And this “fundamental right to marry” was, circa 2015, little more than the Mystery Passage at large. Here the majority could have bluntly confronted the Holmes of _Lochner_ with the Holmes of _The Path of the Law_. The latter Holmes declared that it “is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”125 As far as it goes, this criticism is sound: that

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122. _Id_. at 707 (Roberts, C.J., dissenting).
123. _Id_. at 687 (Roberts, C.J., dissenting).
124. _Id_. at 670–71 (emphasis added).
125. Oliver Wendell Holmes, Jr., _The Path of the Law_, 10 HARV. L. REV. 457, 469 (1897). Other dissenting arguments more specifically reliant upon the historical circumstances surrounding ratification of the Fourteenth Amendment fare no better. They hanker to be originalist criticisms of the Court’s creative work. But they founder upon unsound uses of history. Justice Scalia, for example, wrote that “[w]hen the Fourteenth Amendment was ratified in 1868, every State limited marriage to one man and one woman, and no one doubted the constitutionality of doing so. That resolves these cases.” _Obergefell_, 576 U.S. at 615 (Scalia, J., dissenting). It is hard to see how this works as a criticism of the _Obergefell_ Court’s reasoning. The Constitution is not interpreted rightly by imagining its contemporary meaning to be the contents of a snapshot of moments frozen in time, especially where it seems that the dominant claim is, as it is here with Justice Scalia, that the Fourteenth Amendment was not meant to even address “domestic relations.” It is just as certain that when the Fourteenth Amendment
a law is *old* is not itself any reason at all to think that it is either just, or compatible with an evolving Constitution.

In any event, the conservatives should have rebutted the majority’s “four principles” strategy more boldly than they did. The right answer to Kennedy would have been that, while the Court’s identity-reinforcing account of marriage had gained steam over the last few decades (just as the Mystery Passage consolidated its hold on “liberty”), that movement undermines the case for why civil law singles out marriage and makes it such a focal point for favored treatment and manifold benefits, compared to non-marital sexual, and other non-sexual relationships. The *Obergefell* Court succeeded in reducing marriage’s importance to public order, not in re-founding it. This response would have cleared the way for the conservatives to label the majority’s strategy for what it was, namely, a classic bait-and-switch: the Court blithely transferred the dividends of Americans’ investment over the centuries in procreative marriage to the

was ratified *almost* every state banned interracial marriage. Few doubted that the Constitution permitted such bans. Still, *Loving v. Virginia* was rightly decided in 1967, and it held such laws to be unconstitutional. The *Obergefell* majority also makes a convincing case that marriage today is the predicate of thousands of government benefits so that its role in personal affairs and social life has dramatically changed since 1868. The majority could thus reasonably say in response to Scalia that what might have been tolerable in the legal circumstances of marriage in 1868 is no longer tolerable. Similar reasoning about public education allowed the Court in 1954 to hold that segregated public schools violated the Equal Protection Clause, notwithstanding that, by the *Brown* Court’s own admission, the evidence of Fourteenth Amendment framers’ and ratifiers’ intent was inconclusive on desegregated schools.

Justice Thomas in his *Obergefell* dissent observed:

> Laws defining marriage as between one man and one woman . . . arose . . . out of a desire “to increase the likelihood that children will be born and raised in stable and enduring family units by both the mothers and the fathers who brought them into this world.”

*Id.* at 730 n.5 (Thomas, J., dissenting). This is a historical origins story, however, and has no natural tendency to serve as a contemporary justification for limiting marriage to the man-woman union. In any event, “laws defining marriage as between one man and one woman” no doubt instead “arose” from the stable conviction that it was the truth about marriage, and not from any calculation about “family units.” Besides, and as the majority said:

> If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians.

*Id.* at 671.
Justices’ new Mystery-Passage account of civil marriage. *Obergefell* terminated that marriage, which had truly been the keystone of the nation’s social order,\(^{126}\) and substituted a counterfeit in its place. *Maynard v. Hill* is witness to the crucial societal importance of marriage. Alas, the Court replaced that marriage with something quite different in 2015.

*Fourth.* The “four principles” passages form one of two independent grounds for the holding in *Obergefell*. The other is sufficient to support the result. It smacks nothing of *Lochner* or of the Mystery Passage. The dissenters do not lay a glove on it.

In this alternative rationale, the *Obergefell* majority takes the states’ marital legal regimes just as the states’ public authorities made them with their constitutional power to do as they please about domestic relations, per the conservative view. The majority Justices then examined critically the internal logic of those nests of state laws. Their key observation was that the states do not, as a matter of fact, maintain marriage as a procreative union. Justice Kennedy wrote for the majority:

> An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.\(^{127}\)

So, “the right to marry is [no] less meaningful for those who do not or cannot have children.”\(^{128}\) The majority easily drew the desired conclusion: “There is no difference between same- and opposite-sex couples with respect to this principle.”\(^{129}\)

The majority is right. Excluding same-sex couples from state marital regimes so described is arbitrary. That exclusion indeed lacks the “rational basis” that is the minimum predicate of constitutionality for any state law, including those governing “domestic relations.” On any understanding of marriage that strips it of an essential orientation toward procreation, there is no non-arbitrary basis upon which to say that no same-sex couple may marry. This is surely the lesson of experience, as what we could call

\(^{126}\) Maynard v. Hill, 125 U.S. 190, 211 (1888).

\(^{127}\) *Obergefell*, 576 U.S. at 669.

\(^{128}\) Id. at 646.

\(^{129}\) Id.
“activist” court after court over the last 25 years or so held. These courts all saw that, once the procreative nature of marriage is tossed aside, limiting marriage to opposite-sex couples lacks a “rational basis.”

The conservatives had no answer for this alternative justification for the majority’s holding. The strongest statement of their only line of response was probably this carefully constructed statement by Justice Alito in an opinion that Justices Scalia and Thomas joined: “For millennia, marriage was inextricably linked to the one thing that only an opposite-sex couple can do: procreate.” So it was. But this historical claim is also made by the majority. The dissenters fail to dent the majority’s assertion that state marriage law has in fact moved beyond this early stage of its development.

Fifth. Finally, here is what appears to be the conservatives’ argument against the no-rational-basis position. Alito wrote: “Adherents to different schools of philosophy use different terms to explain why society should formalize marriage and attach special benefits and obligations to persons who marry.” This could have been the opening move in a critical engagement with the truth about marriage as procreative. It could have served as a ventilator to vivify a tradition alleged by the majority to be moribund, superseded. It was not. For then Alito slipped back into the customary conservative philosophical abstinence: “Here, the States defending their adherence to the traditional understanding of marriage have explained their position using the pragmatic vocabulary that characterizes most American political discourse.” He continued, “Their basic argument is that States formalize and promote marriage, unlike other fulfilling human relationships, in order to encourage potentially procreative conduct to take place within a lasting unit that has long been thought to provide the best atmosphere for raising children.” Alito here attributes to the states a legitimate interest in promoting a stand-alone state of affairs—the circumstances most conducive to successfully rearing children—and then the conclusion that a particular arrangement is the “best” way to do that.

In this counterargument, male-female marriage is not an alternative philosophical account of what marriage is. It is not a critically justified conception of a basic social institution. It is not an argument about basic

132. Id. at 667–68.
133. Id. at 739 (Alito, J., dissenting).
134. Id. (emphasis added).
135. Id.
human goods grasped as distinct aspects of human fulfillment. When Alito says “pragmatic,” he falls into line with the majority’s methodology: the nature and importance of civil marriage are dependent on extrinsic considerations. Alito infers from what one could call the “best interests” of children that states may, not must, limit civil marriage to the union of a man and a woman.

In Obergefell, Alito was joined by Scalia and Thomas. Their position goes back at least to 2003. In Lawrence v. Texas, Justice Scalia wrote in a dissent joined by Thomas and Chief Justice Rehnquist: “[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘the liberty protected by the Constitution’? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.” No one on the Obergefell Court suggested otherwise. Neither the truth that marriage is essentially a procreative relationship, nor any other putative truth about marriage, is in the picture. The conservatives would characteristically detour around that taboo ground and defend marriage on what Alito described as these

136. Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Scalia, J., dissenting). The Justice answered his own question about as well as he could, given the premise which he took on board (that marriage must not be promoted by law for its procreative orientation). Scalia opined that the “people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly.” Id. at 604. He added that “‘preserving the traditional institution of marriage’ is just a kinder way of describing the State’s moral disapproval of same-sex couples.” Id. at 601. This answer presupposes that legal access to marriage is within the gift of “the people,” a privilege which might be rightly withheld or granted according to criteria extrinsic to marriage itself.

But this is a radically unsustainable understanding of the relationship between marriage and the civil law. Marriage is a natural institution that the political community is bound to recognize and promote, not to give and take as it pleases, according to some external criteria of “disapproval.” Besides, the Justice’s answer kicks the can of rational justification down the road to a no-man’s-land of opaque disapproval: upon what reasoned basis would that originating “disapprobation” rest? Surely not marriage itself as the critical principle of a true sexual morality which naturally excludes sodomy. For on the view proffered by Scalia, homosexuals’ and lesbians’ marital disqualification follows from the “disapprobation.” Is this “disapprobation” based on feelings of disgust? A deep-seated animus against certain people? On entirely theological premises? If so, then in our constitutional system, limiting marriage to the male-female couple really does lack a “rational basis.”
“pragmatic” and “reasonable secular grounds for restricting marriage to opposite-sex couples.”

This “best atmosphere for kids” rationale is a misstep of the gravisest sort. One reason is that it is not an argument against same-sex marriage at all. All that it tends to show—and that, clumsily—is that same-sex couples should not be raising children. That has nothing itself to do with lawful marriage between persons who are, after all, incapable of procreation. Besides, Alito’s “best atmosphere” argument centers on social scientific comparisons of kids in homes headed by same-sex couples compared to mother-and-father homes. Friends of traditional marriage in the long run-up to Obergefell promoted studies that tended to show that there was a difference in favor of opposite-sex households. They argued correctly that the “no-difference” or “just-as-good” studies of same-sex households up to Obergefell were so limited in their sample size, or so flawed in other ways, as to be social-scientifically useless. They pointed rightly to a small number of reliable studies—most notably by University of Texas scholar

137. Obergefell, 576 U.S. at 739 (Alito, J., dissenting) (emphasis added). The emphasis is added to the text to highlight two deeper flaws flowing from conservatives’ aversion to philosophical thinking. One is the grim prospect that the conservative Justices think that the only satisfactory bases for defining marriage as the procreative union of a man and a woman are religious, which are—because they are religious—ineligible in proper constitutional argument, at least according to certain understandings of the First Amendment’s Religion Clauses. But that ignores the fact that marriage can be and long has been identified as the male-female union oriented towards having children across cultures and by religious and non-religious peoples alike. Unaided human reason affirms that it is a unique and invaluable relationship, the true form of marriage. Another possibility suggested by Alito’s conclusion is the equation of “secular” (understood as permissible, non-religious grounds for lawmaking in our constitutional order) with the “pragmatic,” that is, with social-scientific statistical reasoning. But there is no good reason to exclude from the proper grounds for lawmaking under our Constitution the philosophical truth about what marriage is, and the moral truth that it is the normative context for having sex and for having kids.

138. See, e.g., Ryan T. Anderson, In Defense of Marriage, THE HERITAGE FOUNDATION (Mar. 20, 2013), https://www.heritage.org/marriage-and-family/commentary/defense-marriage [https://perma.cc/82ZF-S7J9] (“Marriage exists to bring a man and a woman together as husband and wife to be father and mother to any children their union produces. Marriage is based on the biological fact that reproduction depends on a man and a woman, and on the social reality that children need a mother and a father. And as ample social science has shown, children tend to do best when reared by their mother and father.”).
Mark Regnerus—which were probative as social science, and which indicated better such results in more traditional households.139

The “best atmosphere” argument focuses on sundry indicia of nonmoral competence and well-being, such as academic achievement, truancy rates, reported self-esteem, and ability to make friends. These are good things. They are not, however, measures of human flourishing in any morally significant sense. The class valedictorian could be a rotten kid. Troubled students are often very good people. The most popular girl in the high school can be the worst brat—and so on. Many children undeniably do better in same-sex households than do many children raised by their married, biological mother and father. Many of the former are simply better parents than many of the latter, measured by such metrics as truancy, self-esteem, and so on. The precise takeaway from the “best atmosphere” argument then would be, not that no gay or lesbian couples may marry, but that some should not be raising children—just as some opposite-sex couples should not be raising children. Yet no one seriously suggests that certain opposite-sex cohorts, say, couples without any college attendance or where one has a criminal conviction or where each is a child of divorced or alcoholic parents, not be permitted to marry because statistically such couples turn out more maladjusted kids than, for example, an educated same-sex couple. Why should the state vet only same-sex couples, one by one?

The truth is that, if two men or two women can really marry, then the state would act unjustly if it prohibited them from doing so, even if some cohort of which they are members bears a slight statistical deficit according to certain metrics of psychological or emotional well-being for any children who come to the union. On the other hand, if two men or two women cannot really marry, that is why the law should not permit them to do so. For permitting them to marry would not be a more or less harmless, numerically minor addition to the roster of legally married couples. It would instead be an unprecedented redefinition of marriage for everyone. That new understanding of “marriage” would be as the companionate relationship of two adults who might (or might not) decide to have or acquire children. The psychosocial prospects for children—whatever they are—play no role in a sound approach to what the state should understand marriage to be.140


140. The Obergefell majority stated an objection to its position that was in the neighborhood of sound arguments against recognizing same-sex marriage. But neither the majority nor the dissenters provided the philosophical ballast needed
Sixth. It is of course true that, according to American law, the sterile and the elderly are allowed to marry. They always have been, even in polities and institutions, such as the Catholic Church, that have unwaveringly held that marriage is a procreative union of man and woman. This fact should probably have made the conservative Justices pause. So, too, their generally modest requirements of coherence in legislation. It is easy to imagine Justice Scalia, for example, observing that marital access for the sterile owes to counterpressures upon a procreative definition of marriage exerted by concern for bodily and medical data privacy—and that access for the elderly owes to lobbying by the AARP.

Justice Scalia, among others, nonetheless evidently supposed that linking marriage to procreation implies or entails that infertile or elderly opposite-sex couples need be barred from legal marriage, on pain of a constitutionally fatal contradiction between the stated aim of the marriage law (to promote it as a procreative union) and its operational coverage. This practically perfect fit between legislative purpose and the practical coverage of a law is not required in any area of our constitutional law. Nothing like it is required with regard to any other essential features of marriage. Those who would define marriage as the lasting, intimate, loving, mutual commitment of any two partners—as the Supreme Court did in Obergefell—never suggest that public authority must interrogate engaged couples to be certain that they really love each other, truly will to make this objection cogent. “The respondents also argue allowing same-sex couples to wed will harm marriage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licensing same-sex marriage severs the connection between natural procreation and marriage.” Obergefell, 576 U.S. at 679. Of course, the working premise of the Court’s thinking in Obergefell was that the “connection” had been already “severed.” The force of the “harm” evidently in view depended upon circling back to the contested question about “best atmosphere”: if children do as well in same-sex households, how would expanding marriage to include those domiciles “harm” children? The Court had an additional reply: “[W]ith respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.” Id. The real “harm” of requiring equal treatment of same-sex and opposite-sex relationships as “marriages,” however, is that it falsely teaches that marriage is, as such, a sterile relationship. To see the “harm” here, though, requires allowing the truth about marriage to surface in legal arguments.

provide mutual support, genuinely intend to stay together permanently, or ever intend to have sex with each other. Why should it be so very different when it comes to procreation?

In any event: how would the law identify couples as fit for the procreative aspect of marriage, other than by requiring them to be one male and one female? Should engaged men and women have to submit to the medical tests necessary to ascertain, to a reasonable degree of scientific certainty, that each is in good working order? Should couples be required to affirm under penalty of perjury that they intend to procreate? If so, is there to be a date certain for the happy event, after which their marriage license is revoked? Is revocation required, too, for married couples who try to have kids, but cannot do so because of infertility arising or discovered after their wedding? What about an engaged couple who says that they are “uncertain” about kids? Or that they “would like” to have some? May they marry, or not? As the Minnesota court in Baker v Nelson (the 1972 decision affirmed summarily by the U.S. Supreme Court, but overruled in Obergefell) wrote, any such regimen is bound to be both “unrealistic” and “offensive,” and would likely invade couples’ constitutionally protected privacy.143

Another entrance requirement for marriage on almost any account of it is that the persons marrying possess the maturity and character needed to consent to a lasting, life-defining commitment. But no state apparatchik in America demands that an engaged couple prove that they possess the requisite maturity. Civil authorities instead presume that men and women over a certain age are up to the task. In truth, getting a marriage license is no more complicated than registering a car. In each case you just need to be 18, willing, and have a few dollars to spend.

Common sense and justice thus exclude any state-instigated, case-by-case sorting of opposite-sex couples from the banns of matrimony. The Baker court rightly said that “the classification is no more than theoretically imperfect. . . . ‘[A]bstract symmetry’ is not demanded by the Fourteenth Amendment.”144 When all is said and done, it is plainly the case that conscientious legislators who believe that marriage is essentially oriented to procreation would do exactly what our laws have always done, namely, limit it to consenting men and women.

Seventh, and last. If the conservatives had not conceded as early as 2003 the point fatal to their position, they could instead in 2015 have built upon it a more cogent version of the “best atmosphere” argument. This second meaning of “best atmosphere” is morally normative.

144. Id.
It is how Justice John Harlan in 1961, for example, described marriage and its strategic place in the law, in his *Poe v. Ullman* dissent:

[The very inclusion of the category of morality among state concerns indicates that society is not limited in its objects only to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. . . . The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any constitutional doctrine in this area must build upon that basis.](#)

Harlan rightly observed that marriage had long been—and still was, in the mid-20th century—the morally normative context for having children and for having sex. The law recognized and enforced this understanding of marriage as morally sound, and promoted it for the sake, too, of the political community’s flourishing—the keystone in the arch of our social order.

Justice Alito could have built well upon Harlan’s foundation—itself no more than the distillation of Americans’ belief and practice of marriage over the centuries—and said that each child has a profound interest in, and natural right to, being conceived and nurtured by a man and a woman whose causative intercourse expressed their commitment to cooperate as father and mother in his or her gestation, nurture, care, and education through to adulthood. Marriage is the social institution that is systematically set up to give effect to that profound interest and right. For when the spouses’ marital acts bear the fruit of children, these children are perceptively called in the law “issue of the marriage.”

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145. 367 U.S. 497, 545–46 (1961) (Harlan, J., dissenting). Chief Justice Roberts in his *Obergefell* dissent tellingly replaced the references to “adultery, fornication and homosexual practices” with ellipses. *Obergefell*, 576 U.S. at 702 (Roberts, C.J., dissenting) (“Justice Harlan explained that ‘laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up . . . form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.’”).

146. See, e.g., *Barnes v. Jeudewine*, 718 N.W.2d 311, 314 (Mich. 2006) (“We recently reemphasized that ‘[t]he presumption that children born or conceived during a marriage are the issue of that marriage is deeply rooted in our statutes...”’).
been a term of art in legal accounts of the family, especially when it concerns inheritances and wills. This term signals the truth that children embody or actualize their parents’ marriage. Just as the married couple is two-in-one-flesh, so too each child is the two-of-them-in-the-one-flesh. The child comes to be as their marriage. He or she is their union. Each of their offspring is the marriage of its mother and father—extended into time and space, and thus into human history and into the human community.147

Children come to be not only on terms of equal dignity with their parents. They come to be on similar terms with each other as well. Because all the married couple’s children come to be in and through the same act—the marital act—separated only by time, all the children are equally and wholly the image (the embodiment, the expression) of their parents’ unique union. The siblings’ family identity is just that: a matter of identity. All the children are equally and wholly the offspring of the same parents; mother and father are equally and wholly parents of each child, in whom they see (literally) so many unique, yet related and, in a sense, identical expressions of their own union. For each child is their flesh, their marriage. Each child is them.

This web of familial equality, mutuality, and common identity is the wellspring of the love, duty, and loyalty that we see, and that we expect to find, among siblings. It is vital to emphasize here the complex matrix of connectedness, where biological unity yields a metaphysical oneness for the parents, whose two-in-one-flesh communion opens up to the gift of children, whose identities and status cement the sublime unity of that family. This unity includes the various moral duties that each family member owes to the others. It also includes something else that even shirkers can never escape, namely, their identity as son or daughter of this mother and this father, and as sister or brother to these siblings with whom one shares relatives, memories, a life. My brothers and sisters are like me in a way in which no other human person could be like me. My siblings are more than close friends with whom I have shared many experiences.

147. For a development and further defense of the position articulated in the text, see, for example, SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE (2012); John Finnis, Marriage: A Basic and Exigent Good, 91 THE MONIST 388 (2008).
They are part of me. We are each one of us imprints (actualizations) of the same unique marriage.148

This radical equality, mutuality, and identity shared by family members is not mysterious or dreamily metaphysical. These are not metaphors. They are not symbolic ways of indicating the presence of emotional ties. The family matrix is as real as anything social scientists could measure, and much more sublime. The lifelong and unbreakable cords of fealty and identity that family members possess for each other, and which even distance and alienation never quite erase, depend on this biological matrix.149


149. Someone might object that so much “idealism” about marriage and the family would “stigmatize” so many ad hoc family units in our society. The reply is in several parts. First, due respect for and, in a certain sense of the term, affirmation of everyone is morally required in public deliberations about family matters, as it is required throughout political life. But it is gravely mistaken to install (as those propagating the Mystery Passage would) what many mean by “equal respect” and “affirmation” for each person as the principle of the authoritative meaning of marriage and family, namely, endorsing whatever one imagines marriage (for example) to be by dint of respect for the person doing the imagining. Second, no one seriously maintains that such “equality” of esteem is more than notional, or that it is a desirable ideal—as anyone who believes in polygamy, arranged marriages, or child brides in our country today would report. In other words, “equal affirmation” would abolish all normativity in legal regulation of domestic relations, an entailment which no one embraces. Lastly, any serious legal account of the family is limited (so to speak), and for that reason must accept, as a foreseeable collateral consequence, that it (the account) excludes and “stigmatizes.”

No normative account of marriage and family could possibly establish a wholly conforming population. Every such account must include a sensitive—yet frank—moral evaluation of all those who care for children not born to their marital union. Step-parents, adoptive parents, aunts, uncles, grandparents, foster parents, neighbors, institutional workers—all these persons (and more) are characteristically dedicated and loving. They often provide loving and heroic service under difficult circumstances. They should be regarded accordingly. There is compelling reason, nonetheless, to express the regard due to these good people without implicitly denying that these arrangements, though invaluable, welcome and needed, are less than ideal.
III. PUBLIC MORALITY

In his Lawrence dissent, Justice Scalia identified the ominous implications of the majority’s reliance in that case on the Mystery Passage. Joined by Justices Thomas and Rehnquist, he wrote:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of . . . laws based on moral choices. Every single one of these laws is called into question by today’s decision; the Court makes no effort to cabin the scope of its decision to exclude them from its holding.150

Scalia explained how the Court’s reasoning in Lawrence was so forbidding. “The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable.’”151 Scalia noted correctly that 17 years earlier, in Bowers v. Hardwick, the Court held that this was a “legitimate” state interest.152 The Court in Lawrence reached the opposite conclusion. The majority Justices wrote that the Texas anti-sodomy law “furthers no legitimate state interest which can justify its intrusion into the individual’s personal and private life.”153 Scalia asserted that the Court “embrace[d] . . . Justice Stevens’ declaration in his Bowers dissent, that ‘the fact that the 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.”154

Scalia worried that this embrace “effectively decrees the end of all morals legislation.”155

151. Id. at 599 (internal citation omitted).
152. Id.
153. Id. at 560.
154. Id. at 599 (Scalia, J., dissenting).
155. Id. Justice O’Connor wrote a concurring opinion in Lawrence in which she said:

[W]e have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons. Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be “drawn for the purpose of disadvantaging the group burdened by the law.” Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize
The Lawrence Court placed a bullseye on the laws Scalia listed. By its own force, Lawrence invalidated not only the anti-sodomy law implicated there, but also anti-fornication laws and, possibly, laws against adultery as well. That case also proved to be a crucial premise in the run-up to Obergefell, just as Scalia (against the majority’s denials) said it would be. Justice Scalia saw that Lawrence raised the question of whether the Constitution permits (as the Court there phrased it) “punishing consenting adults for private acts.” The Court asked “whether the majority may use the power of the State to enforce [its moral convictions] on the whole society through operation of the criminal law.”

Lawrence answered the question forthrightly: the answer in our constitutional order is no. For support, the Court relied strategically upon the Mystery Passage, which in Lawrence it recited in full. These Justices noted “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” Lawrence installed consent as the principle of constitutional sexual morality, finally replacing (in constitutional law) marriage as that principle.

homosexual sodomy. But the Equal Protection Clause prevents a State from creating “a classification of persons undertaken for its own sake.” Id. at 582–83 (O’Connor, J., concurring).

156. The complicating factor is that adultery is not only a “victimless” sexual immorality, indicating conduct that, even if it is supposed to be genuinely immoral, involves harm to the character only of those adults who freely consent to engage in it. Adultery is different. It also involves breach of trust between the spouses and misfortune to any children in the home.

157. The majority wrote that its holding “d[id] not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.” Lawrence, 539 U.S. at 578. Justice Scalia repeated this passage in dissent. Then he warned, “Do not believe it.” Id. at 604 (Scalia, J., dissenting). It was sound advice.

158. Id. at 570.

159. Id. at 571.

160. Id. at 574.

161. Id. at 572.

162. In no case prior to Lawrence had the Court held that non- or extra-marital sexual relations enjoyed constitutional protection. Even in liberalizing cases such as Griswold and Eisenstadt, the Court had expressly affirmed that fornication and adultery (and by implication homosexual sodomy) were “evils” that the states were empowered under the Constitution to treat as crimes. These cases remained, in other words, securely in orbit around Justice Harlan’s account of the whole tradition in Poe v. Ullman.
Of course, many indisputably sound laws—including those against treason, trespass, and theft—are based on moral choices. Every lawmaking act is a moral choice: a choice because there are always reasonable alternatives in front of the lawmaker (to enact a different law or none at all) on offer, and a moral choice because the lawmaker’s selection is governed by what is good for the people. Many laws are laden with mind-numbing detail, data analysis, and technical refinements. These acts of lawmaking include much merely instrumental reasoning and some nonmoral evaluative decisions. But even the lawmaker’s selection of this set of technical prescriptions rather than that set is guided by moral criteria. All lawmaking is finally justified by considerations of the polity’s common good, a complex but nonetheless fundamentally moral reality comprised most importantly of persons’ genuine flourishing.

Scalia did not exaggerate in Lawrence. The Court’s arguments there threatened to knock down all laws prohibiting immoral conduct that does no apparent harm to anyone save to the character of those who choose to engage in the immoral activity, as if they were dominos. This is the problem often described as legal regulation of “self-regarding” or “victimless” immoralities. Sexual immoralities have long been the central case of these laws, and the subject-matter of most debates about them. Justice Scalia’s list was comprised entirely of them.

It is easy to see how the Lawrence Court could deploy the Mystery Passage as an existential threat to these laws. It is not exactly that the Mystery-Passage-guided Justices promulgated a new morality of sex or of anything else. It is that the Mystery Passage’s Copernican turn, in which the self-defining person elbows objective morality from center stage, effectively hollows out the “morals” in morals laws. All that is left then is the choosing, acting individual, fortified by a morality of consent.

Before the Court distilled that breathtaking liberty in 1992, homosexual sexual conduct and pornography trafficking had been the key focal points of not only academic debate, but of concrete political contest over morals laws for decades. The Supreme Court’s first modern “obscenity” opinion, Roth v United States, came down in 1957, the same year that Britain’s Wolfenden Commission famously recommended that “homosexual behaviour between consenting adults in private should no

longer be a criminal offence.’’\textsuperscript{165} For many years thereafter it was generally assumed, even by those favoring decriminalization of homosexual behavior, that the question was about the scope of legal tolerance for what was (again) generally taken to be a real immorality, albeit arguably a “victimless” one. Protracted arguments in and out of court about pornography were about how to define the contraband matter, and so about whether a particular work (say, a nudist colony brochure or the Beat poem “Howl”) was or was not legally actionable “obscenity.” Almost no one doubted, though, that “obscenity” enjoyed no First Amendment protection and could be prosecuted.

The arguments adduced across those mid-century years in favor of decriminalizing “victimless” sexual immoralities were, as a matter of fact, mostly second-order, political-moral considerations, such as the limits of criminal law and its enforcement, doctrines about government anti-paternalism, and the perils to a free society of government censorship. To these concerns, liberationist writers added social-scientific worries about the undesirable side effects of enforcing morality through law. In constitutional law affecting pornography, moreover, Supreme Court Justices confronted intractable challenges defining “obscenity.”\textsuperscript{166} The upshot of these arguments was not that sodomy or masturbating to pornography was a good thing to do. The takeaway was that these were regrettable, and probably immoral, actions.\textsuperscript{167}

The conclusion to these arguments was not that anyone had a right to do a moral wrong. No one said that anyone should define himself or herself in relation to, say, pornography, or by having homosexual sexual relations. Much less did anyone maintain that society owed errant souls who nonetheless dared to engage in these acts a positive endorsement. The

\begin{thebibliography}{99}
\bibitem{165} COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, REPORT, 1957, at 25 (UK).
\bibitem{166} See, e.g., Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (acknowledging that defining hard-core pornography is difficult but offering that “I know it when I see it”).
\bibitem{167} Herald Price Fahringer was a prominent, self-described First Amendment “absolutist” who enjoyed considerable success in the 1970s and 1980s defending pornographers against criminal prosecutions, largely in and around New York City (where he faced no scarcity of potential clients). He voiced a common, and quite naïve, prediction among progressive elites of those years when he wrote in the \textit{N.Y.U. Review of Law and Social Change} that “[o]bscenity breeds and multiplies in the dark crevices of a frightened society preoccupied with a sense of self-censorship. Once pornography is exposed to the strong sunlight of a completely free and uninhibited people, its appeal will surely diminish.” Herald Price Fahringer, \textit{If the Trumpet Sounds an Uncertain Note . . .}, 8 \textit{N.Y.U. Rev. L. \& Soc. Change} 251, 253 (1978).
\end{thebibliography}
issue in these debates was whether the political community should leave certain misbehaving people alone.\textsuperscript{168} It was at least tacitly accepted by

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168. Important to any history of the Court’s sustained campaign against morals laws is the fact that the liberal Justices most keen to do away with morals laws were, in their own minds, anti-elitist—and much less racist—than were the promoters of morals laws. Justice Tom Clark wrote, “We are in the midst of a worldwide movement to make ‘the pill’ and abortion available in the slums as well as on Fifth Avenue.” Tom C. Clark, \textit{Religion, Morality, and Abortion: A Constitutional Appraisal}, 2 \textit{LOY. L.A. L. REV.} 1, 6 (1969). Clark highlighted a recurring Warren Court theme that scholars have neglected: “morals laws” were one means by which the hypocrites on Fifth Avenue kept poor folks down. This was thought to be true of gambling prohibitions (elites wagered among themselves at their posh clubs or traded with respectable bookies, while ghetto numbers-runners got busted, or had to pay off crooked cops to avoid arrest), some sex offenses, and vagrancy laws. In the 1968 \textit{Levy v. Louisiana} Court decision, which established “illegitimacy” as a quasi-suspect class, dissenting Justice John Harlan sympathized with some state efforts to promote marriage and stable family life by requiring, for example, that a biological father acknowledge and thus “legitimate” a “bastard” child to trigger certain inheritance rules. The majority Justices brusquely denounced these laws as nonetheless punishing innocent babies for the “sins” of their parents. See generally Gerard V. Bradley, \textit{Roe v. Wade} at 40, 3 \textit{CLAREMONT REV. OF BOOKS} (Fall 2013), https://claremontreviewofbooks.com/roe-v-wade-at-40/ [https://perma.cc/C7AN-QY5F].

Anti-elitism was the sources of the liberals’ (White, Blackmun, Stevens, Marshall) dissent in the 1991 \textit{Barnes v. Glen Theaters} case, where the Court upheld Indiana’s ban on public nudity, as applied to “erotic” dancers at South Bend’s Kitty Kat Lounge. The dissenters said that:

\begin{quote}
While the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who . . . wants some “entertainment” with his beer or shot of rye.
\end{quote}


Even the pseudo-scientific-sounding key term in \textit{Roe v. Wade} sprang forth from similar class considerations. As Clarke Forsyth shows in his superb history of the decision (\textit{Abuse of Discretion: The Inside Story of Roe v. Wade}), the Justices early in their consideration of \textit{Roe} (which was first argued on December 13, 1971, and reargued on October 11, 1972) quickly concluded that abortion should be legal during the first three months of pregnancy, so as to equalize access to it for those folks who lacked the resources of the uptown gentry. The Court was moved to go beyond three months, Forsythe shows, when the Justices came to believe that a more educated, well-off woman would typically understand that she was pregnant, take stock of her situation, and decide for or against abortion, all within 90 days. Poorer, less-schooled women with limited
nearly all public disputants that marriage was the constitutional principle of sexual morality. The opinions in the contraception cases (Griswold and Eisenstadt) are remarkable for the care with which the Justices avoided even implicit derogation from that principle. Indeed, the Supreme Court did not hold that anyone had a constitutionally protected right to engage in sexual intercourse outside of marriage until 2003, in Lawrence v. Texas.

The point is that, even as the Justices through the mid-20th century liberalized the morals-law regime they inherited, the reasons they publicly offered for change were often not frankly moral. These Justices often detoured around the first-order moral questions, such as: is contraception truly immoral?, and rested their opinions on sideways considerations of class and racial equality, as well as broad structural considerations of what a free and democratic society looks like. In Griswold, for example, the Court’s conclusion in favor of access to contraception steered clear of morally judging that practice. The Court finally depended for judgment instead upon its observation that a criminal law against using contraceptives invited police intrusion into the marital bedroom, which would potentially harm marital life more than would tolerating married access to good medical advice, the jurists further thought, would often need more time. And so “viability”—the term Roe made famous but which before 1973 had almost no standing in either law or medicine—became the criterion determining the legal status of abortion. “Viability” became a cause célèbre in American constitutional law, but it was never the result of careful biological or medical investigation. It simply was a convenient way to say that six months was enough time for any woman to make up her mind about getting an abortion. See generally Bradley, supra note 42.

This social-class and racial component to the Supreme Court’s anti-morals laws campaign was no doubt sincerely motivated, and not entirely without foundation in fact. But it was no doubt most powerfully promoted by the ebbing conviction on the part of some Justices about the genuine immorality of “victimless” sex acts or about the social importance of legal concern with them, or both. Even so, it is crucial to bear in mind that not until 2003 did the Court establish consent as the constitutional principle of any “morals laws” regime. In both Griswold and Eisenstadt, for example, the Court explicitly affirmed that both fornication and adultery were “evils” that government could make criminal. Sodomy, of course, was potentially criminal under the Constitution up to Lawrence. Thus, marriage remained the principle of constitutional sexual morality until then; states were free up to 2003 to make all non- and extra-marital sexual activity crimes.

couples’ use of contraceptives. The Court extended this access to unmarried persons in 1972 in *Eisenstadt v. Baird*. It did so, however, without affirming anything more—morally speaking—about contraception than did *Griswold*. *Eisenstadt* was an equality case: whatever access to contraceptives the Constitution protected for married couples had to extend to those who are unmarried. The Court affirmed *Roe* in 1992, moreover, precisely upon a basis rooted in women’s equality, that is, upon their ability to participate equally in the nation’s economic and social life, so long as abortion was legally available in cases where contraception failed.

Shards of this older type of arguments persist today. Widely expressed fear of “censoring” the internet for pornography is perhaps the most prominent of the survivors. They have all been eclipsed, though, by the Mystery Passage. The beating heart of today’s liberty denies to the community any authority to settle what is genuinely immoral, at least when it comes to sexual matters where there is no obvious injustice done to a non-consenting party. The Mystery Passage instead distributes authority over such judgments to the self-defining individual. Sexual “identity” and sexual “health” have lately emerged as assertedly vital aspects of human well-being. Each person now apparently requires ready access to a menu of exploratory sexual options as he develops his own healthy “sexuality.” What used to be a matter of prudent tolerance within a morally ordered culture is now all about rights essential to everyone’s basic well-being, in a culture bereft of an overarching account of what is good. One is tempted to say that what used to be immunities of sorts for self-regarding immoral conduct has become instead a straightforward constitutional right to do a moral wrong. Except that the concepts of “moral right” and “moral wrong” have lost all traction on the question.

171. 405 U.S. 438 (1972). The relevant part of the opinion was this:

If, under Griswold the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in Griswold the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

*Id.* at 453.

Constitutional conservatives seem to instinctively sense the contribution of laws enforcing traditional moral norms pertaining to sex to the overall common good of our political community. It is a bit of a puzzle why they do. Constitutional conservatives do not say that they value them as aids to the upright self-constitution of persons, by and through their free choices of what is genuinely morally worthwhile. At least as constitutionalists, their methodology blocks the foundational prerequisite of this possible defense, namely, that the prohibited acts truly are destructive of moral character. Conservatives do not rely upon the conservatism famously championed by Lord Patrick Devlin in his debates with H.L.A. Hart over the legal enforcement of morality. In those exchanges, Devlin relied upon the social cohesion that, he maintained, was incidental to legal enactment of a people’s moral beliefs about private sexual activity, whether or not those beliefs were true or false. Although some of them may in fact hold Devlin’s opinions, America’s constitutional conservatives have not advanced publicly any such theory of community.

The conservatives’ case for morals laws is strictly constitutional. It is really their aversion to critical moral reasoning in constitutional cases, in two steps. The first move is to charge liberal majorities such as that in Lawrence with inserting their preferred theory of sexual morality into the Constitution—where, properly interpreted, there is none. Second, conservatives say that the Constitution leaves legislative majorities free to judge putatively immoral sexual conduct as they wish and prohibit it as they please, unless there is a plain constitutional impediment to their doing so.

173. See George, supra note 163, at 48–71.
174. In his 1991 concurring opinion in Barnes v. Glen Theater, Justice Scalia anticipated his 2003 position in Lawrence, and in both places stated the basic conservative position succinctly:

Our society prohibits, and all human societies have prohibited, certain activities not because they harm others but because they are considered, in the traditional phrase, “contra bonos mores,” i.e., immoral. In American society, such prohibitions have included, for example, sadomasochism, cockfighting, bestiality, suicide, drug use, prostitution, and sodomy. . . . [A]bsent specific constitutional protection for the conduct involved, the Constitution does not prohibit them simply because they regulate “morality.”

501 U.S. 560, 575 (1991) (Scalia, J., concurring) (internal citation omitted). The Justice in that case characterized Bowers v. Hardwick as a case “upholding prohibition of private homosexual sodomy enacted solely on ‘the presumed belief of a majority of the electorate in [the jurisdiction] that homosexual sodomy is immoral and unacceptable.’” Id. In Barnes, he wrote that the “purpose of the Indiana statute, as both its text and the manner of its enforcement demonstrate, is
We have seen in the first two parts of this Article that there is less to the first charge than conservatives maintain. The pathway from the first awakenings of a right to sexual privacy cum autonomy in the *Griswold* case, through *Roe* and *Lawrence* and on to *Obergefell*, is less the Lochner-esque substantive moral coup than conservatives think it is. The more liberationist Justices re-founded these cases along the way upon an interpretation of the constitutional term “liberty” in *Casey*. That bold move involved the judgment that what counts as moral value in anyone’s conduct is not so much the values of the ends sought or in the means chosen. It is rather the authenticity, and thus self-definition, involved in the acting itself.

As a matter of meta-ethical value theory, this move is mistaken. In other words, it is not in fact true that the freedom (or “autonomy” or alleged “authenticity”) exercised or entailed by choosing constitutes the sole or even the decisive value of morally significant choice. It is instead true that, although freedom is essential to self-constitution, freedom is itself a dependent variable when it comes to the moral worth of our choices: the freedom exercised in making a morally bad choice (say, to murder someone) is bad; the freedom exercised in making a morally good choice (say, saving someone’s life) is good. Constitutional conservatives are not built, however, to argue about matters such as abortion and marriage on so lofty a basis. Liberal accounts of constitutional civil liberties are now powerfully supported, too, by philosophical arguments about the equal personal dignity of everyone, regardless (it is asserted) of sex, gender, or gender identity, of a sort generally supported by the Mystery Passage—as these pages show. Refuting these arguments—as these pages also show—requires resort to objective moral accounts of human well-being, of a sort which constitutional conservatives have eschewed.

Besides, the aggrieved protagonists in *Roe*, *Casey*, *Lawrence*, *Obergefell*, and the emergent darling of tomorrow’s constitutional civil liberties—the misunderstood transgender teen we shall meet in this...

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175. For a cogent argument in support of the assertions about the value of freedom in the text, see GEORGE, supra note 163, at 173–82.

176. For example: the only way to refute the *Obergefell*-ian argument that denying them the opportunity to enter civil marriages renders same-sex attracted people second-class citizens begins by showing that it is not that the state would exclude such persons from a valuable opportunity but that, given what marriage is, they are intrinsically unable to marry.
Article’s next section—all make credible claims that the law is visiting substantial harm upon them. From the Roe Court’s catalogue of “detriment” imposed by the state where abortion is unavailable, to the “stigma” and “humiliation” imposed by traditional marriage laws upon same-sex couples, and on (as we shall shortly see) to the suicidal ideation afflicting transgender students denied access to the restroom of their choice: all these suffering plaintiffs ask that the civil law remove its knee from their necks. Neither constitutional conservatives nor anyone else can plausibly deny that these cited challenges are experienced as real, and debilitating.

At the psychological level, there is little prospect of defeating the constitutional arguments built upon these experiences with an alternative body of psychological evidence.

The only promising path for conservatives to take is one lit by moral truth. To the Roe plaintiffs, for example, the reply (at least in significant part) could be: even so, abortion amounts to killing someone, and no one is, all things considered, better off for killing one’s child in utero, just as no one is genuinely better off for killing anyone else without justification: doing so is a morally culpable form of homicide. But this reply is

177. See, for example, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020), where a natal girl presenting in school as male rejected the option of using a unisex single-stall bathroom at school because it caused “suffer[ing] from stigma, from urinary tract infections from bathroom avoidance, and from suicidal thoughts that led to hospitalization.” In the same case, concurring Circuit Judge Wynn wrote that:

it is important to note that the harm arising from the policy’s message—that transgender students like Grimm should exist only at the margins of society, even when it comes to basic necessities like bathrooms—although foreign to the experiences of many, is not hypothetical. Nor does the policy merely engender discomfort or embarrassment for transgender students. Instead, the pain is overwhelming, unceasing, and existential. In an experience all too common for transgender individuals (particularly children), early in his junior year at Gloucester High, Grimm was hospitalized for suicidal thoughts resulting from being in an environment of “unbearable” stress where “every single day, five days a week” he felt “unsafe, anxious, and disrespected.”

Id. at 625.

178. For a cogent argument that abortion amounts to homicide, see CHRISTOPHER KACZOR, THE ETHICS OF ABORTION: WOMEN’S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE (2010). For the best argument available that abortion kills a human person, see PATRICK LEE, ABORTION AND UNBORN HUMAN LIFE (2d ed. 2010).
impossible for conservatives who declare that the Constitution is utterly indifferent to abortion.

In any event, constitutional conservatives have mounted an especially inept case for moral laws. Conservatives have salvaged some for the time being, most notably those against obscene pornography and against public nudity even where it is part of a bar-room erotic dance. But 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. State prosecutions are rare. One reason is likely that there is nothing in any of the Court’s conservative decisions on “obscenity” which shows that there is anything wrong with it. The Court’s affirmation in Barnes of Indiana’s ban on nude go-go dancing owed, moreover, not to anything about the immorality of women dancing naked to get money from sexually aroused male customers. The result in Barnes rested instead upon considerations of public indecency. The law in that case would have banned skinny dipping and breast-feeding in public, neither of which is typically immoral nor meant to be a sexual act at all. Urinating in public is “indecent,” because it is the kind of thing which ought to be done privately. The conservatives in Barnes did not identify anything wrong with nude erotic dancing, save that it, too, involved public display of what ought to be kept private.

Prosecutions for trafficking in and even for private possession of child pornography are numerous. The penalties after conviction are severe.

184. Id.
185. There was a strong investigative and prosecutorial presence against child pornography even in the 2000s as law enforcement recognized the ubiquity of a variety of types of pornography found online. See Melissa Wells et al., Defining Child Pornography: Law Enforcement Dilemmas in Investigations of Internet Child Pornography Possession, 8 POLICE PRAC. & RES. 269, 271 (2007) (“In the USA, law enforcement agencies arrested an estimate 1,713 offenders for Internet-related crimes that involved the possession of child pornography during the 12 months starting July 1, 2000”); see also Elizabeth Williams, Construction and Application of United States Sentencing Guidelines § 2G2.1 et seq., Pertaining to Child Pornography, 145 A.L.R. Fed. 481 (1998); Citizen’s Guide to U.S. Federal
The Court gave these cases the constitutional green light starting in *New York v. Ferber*, though without reliance upon any adverse moral judgment of gazing at erotic images of the pre-pubescent in order to achieve sexual satisfaction. *Ferber* relied exclusively upon the sexual abuse of children involved in the production of child pornography. Suppressing the market for it by arresting even those who consume it downstream in private was constitutionally permissible, as accessory to the child abuse. The gross immorality of pedophiliac sexual appetites had nothing to do with it, as one can easily grasp by taking into account the Supreme Court’s emphatic holding that traffic in computer-generated and “Lolita” pornography—works which are indistinguishable from felonious child pornography and coveted by consumers for that reason, but which in fact rely upon life-like avatars or youthful looking actors over the age of consent—is not child pornography. It thus enjoys First Amendment protection.

Constitutional conservatives like Antonin Scalia have been nonplussed at least by the antinomian, centrifugal forces unleashed by the Mystery Passage. They have surely cleaved more than its devotees to the steadying centripetal forces of public morality. But they have nonetheless failed to make sound arguments for the positions they favor. The central deficit in their arguments is their chronic allergy to relying upon critical moral judgments, even when it comes to such low-hanging fruit as voyeuristic pedophilia. Conservatives evidently think that they can make their case for judicial abstention in favor of legislative choice about morals laws without reliance upon critical morality. They cannot.

Conservative constitutionalists rely instead upon the pluripotency of what they call “majoritarian morality.” They say 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.” It is not.

Let me explain.

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187. See *id*.
Justice O’Connor’s concurring opinion in Lawrence said that “Texas’ invocation of moral disapproval as a legitimate state interest proves nothing more than Texas’ desire to criminalize homosexual sodomy. But the Equal Protection Clause prevents a State from creating ‘a classification of persons undertaken for its own sake.’”\textsuperscript{191} Note the assertion that morals laws are simply expressive; that is, their alpha and omega point is the same “moral disapproval” of, for example, sodomy or consuming pornography: “disapproval” “for its own sake.” This introduces nothing of critical moral evaluation into the argument. Instead, the sociological fact of some effective political force—almost invariably described as a “majority”—becomes the weight-bearing premise.

Conservatives have accepted battle on these terms. They have defended in season and out of season the constitutionality of morals laws as expressions of “majority disapproval.” Although conservatives do not always say it, they almost invariably mean that a majority morally disapproves; that is, a lot of people hold that a particular action (sodomy, prostitution, and so on) is immoral. It is rarely clear, though, whether this asserted disapproval is a feeling (of disgust or repugnance) or a conviction. It is also unclear in this line of conservative constitutional reasoning whether, if the people hold a conviction, it is a conviction held as self-evidently true or on religious grounds or on the basis of reasons accessible to anyone. In any event, this report or claim of “majority (moral) disapproval” comes to the courtroom in an opaque condition. It is a fact to some people, a brute conclusion. It is never transparent for the antecedent reasons, if there are or were any, for why these people hold what they do.

Judges and justices who rely upon this “transparency” deficit pivot upon a surely correct judgement: 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.

Indeed, 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.” Many people who say that prostitution, for example, 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

\textsuperscript{191} Id. at 583 (O’Connor, J., concurring).
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 fact that a lot of people hold a negative view of some sexual practice needs to be made transparent for the reasons why those people (a “majority”) disapprove. Otherwise, it cannot begin the work of giving a “rational basis” for a morals law. That is just the first step. Besides a “rational basis” for judging an act to be truly immoral, our constitutional law requires some showing of publicly cognizable “harm,” lest sundry immoralities, such as ignoring one’s obligation to say thank you after receiving a gift, become grist for criminal lawyers. Establishing that anyone’s conduct is genuinely immoral does not, in other words, rebut the charge that it may still be none of the state’s business. It will not do for conservatives to stand with President Nixon’s Attorney General John Mitchell, who opposed relaxation of laws against “obscenity,” without knowing why. He asserted that “pornography should be banned even if it is not harmful.”

Now, there is a place in constitutional reasoning by judges for deference to popular lawmaking bodies. There is an important sense in which the “will of the legislator” is the reason of the law. But neither of these adages can overcome the impotence of simply declaring “majority disapproval” a sufficient reasonable basis for any law’s constitutionality. The truth is that such unadorned appeals to conventional (or “majoritarian”) morality are inert. Asserting the content of any such alleged consensus without more, in order to justify the community’s decision to punish one of its members, does not do the job. The critically justified conclusion that distributing pornography to willing customers (for example) is immoral is a necessary condition for legally prohibiting it.

The limitations of conservatives’ defenses of morals laws are most vividly illustrated in their keystone pornography opinion, Paris Adult Theater v. Slaton. A companion case to the Miller case in which the Court promulgated the still settled three-part test for identifying

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193. Even laws against distributing obscenity do, for the constitutional test in Miller merely identifies it; that test does not supply any account about why it should be suppressed. Miller v. California, 413 U.S. 15 (1973). Thus, there needs to be a “rational” basis for judging that the prohibited conduct actually is immoral.

“obscenity,” the conservative majority in *Slaton* meant it to be a full-orbed apologia for the legal regulation of morals. With the look and feel of a scholarly essay more than that of a legal opinion, *Slaton* sought to establish the distinctively public harm of pornography, that is, what justifies criminal laws about pornography, other than what the Justices believed to be an anti-constitutional, paternalistic state effort to “control[] a person’s private thoughts,” as the Court once put it.\(^{196}\)

The companion *Miller* opinion needed the assistance. Its criteria for distinguishing “obscene” pornography from unpleasant but constitutionally protected smut was evaluative, to be sure. But it was not morally evaluative. The *Miller* test explicated a concept—“obscenity”—that history, not critical moral judgment, persuaded the Supreme Court to place outside First Amendment protections.\(^{197}\) The *Miller* three-part test remains to this minute the constitutional metric for identifying unprotected “obscenity.” It traffics in negative-sounding descriptors, such as “prurient interest,” “patently offensive,” and “lacks serious artistic” value.\(^{198}\) But

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196. *Stanley* v. Georgia, 394 U.S. 557, 566 (1969). There was no recorded dissent from the majority’s assertion of the proposition in the text, but three Justices concurred in *Stanley* on entirely Fourth Amendment grounds. The majority further explained its (again, uncontradicted) account of the public interests served by anti-obscenity laws in footnote 8:

> Communities believe, and act on the belief, that obscenity is immoral, is wrong for the individual, and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the “consumer.” Obscenity, at bottom, is not crime. Obscenity is sin.

*Id.* at 565 n.8 (citing L. Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COL. L. REV. 391, 395 (1963)). *Stanley* held that, even assuming that the materials were “obscene” and thus unprotected by the First Amendment, a state could not make private possession of it in one’s home a crime. In the course of a rambling opinion for the Court, Justice Marshall refuted the purpose that he attributed to Georgia (to “control the moral content of a person’s thought”), saying that:

> “This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. . . . And, in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.”

*Id.* at 566.
none of these is a moral judgment. The test for “obscenity” overall has no built-in tendency to identify the intelligible harm pornography does. Applying it successfully to a given work marks the work as “obscene.” Applying it successfully nonetheless implies no more than that it is, well, trashy. Whether it is the kind of thing that is immoral to produce or to consume is entirely beside the exercise.

Pornographers and libertarian lawyers have largely accepted this designation. They often describe works without apology as harmless amusement, neither edifying nor destructive. The morality they put on offer is based upon consent, and the derivative policy is about preference satisfaction. They say that pornography is about taste and is thus not for everybody. Those who do not like it should avoid it, and just laws make doing that possible. But those who are repulsed by pornography have no right to deny effective access to it to those so desiring. The Constitution blocks any legally operational judgment that pornography is morally bad, simpliciter.

A great deal was riding on Slaton. The issue joined there was precisely whether there was any public interest in regulating pornography other than to adjudicate satisfaction of the preferences of equal citizens. The pornographers’ first move was predictable: “[P]etitioners argue that conduct which directly involves ‘consenting adults’ only has, for that sole reason, a special claim to constitutional protection.”199 The Slaton Court dealt brusquely with this objection in a footnote, appealing as Scalia later would in dissent to an ambient moral sensibility: “[S]tate statute books are replete with constitutionally unchallenged laws against prostitution, suicide, voluntary self-mutilation, brutalizing ‘bare fist’ prize fights, and duels, although these crimes may only directly involve ‘consenting adults.’ Statutes making bigamy a crime surely cut into an individual’s freedom to associate.”200 The Slaton Court was confident that this picture of falling dominoes would resonate. “[F]ew today seriously claim such statutes violate the First Amendment or any other constitutional provision.”201 Tomorrow it would be a different story.

Then the Court got down to business. “Although we have often pointedly recognized the high importance of the state interest in regulating the exposure of obscene materials to juveniles [deemed incapable of governing themselves in the matter] and unconsenting adults, this Court has never declared these to be the only legitimate state interests permitting

199. Paris Adult Theatre I, 413 U.S. at 68.
200. Id. at 68 n.15.
201. Id.
regulation of obscene material.” 202 The Court added that “states have a long-recognized legitimate interest in regulating the use of obscene material in local commerce and in all places of public accommodation.” 203 The Court identified this public interest with the feel of public spaces. “In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity.” 204 The relevant sphere of interest was “local commerce and in all places of public accommodation.” 205 Those “interests” were said to be “‘the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself’—all on the view that there is an ‘arguable correlation between obscene material and crime.’” 206 These concerns are worthy and even important. But they do not pertain in any direct way to the “moral soundness” of the people. They rather attempt to manage common spaces with a decent regard for the aesthetic and moral sensibility of everybody. This management so far described is consistent with the pornographers’ anthem: consent is the norm.

The Slaton Court then turned to what it described as “one problem of large proportions aptly described by Professor Bickel: . . . ‘the tone of the society, the mode, or . . . the style and quality of life.’” 207 But even Professor Bickel located the sphere of regulation in the “market” and “public places.” 208 This too was about cleaning up Times Square (and other “combat zones” and “red-light districts”), so that these municipal amenities could be welcoming to modest citizens. Of course, anyone can see how the invisible transmission of pornography through the atmosphere from laptop to laptop batters this already wobbly defense of anti-pornography initiatives.

What explained and justified that “legitimate interest”? Here the Slaton Court sputtered. “The issue in this context goes beyond whether someone, or even the majority, considers the conduct depicted as ‘wrong’ or ‘sinful.’” 209 By “beyond,” did the Justices mean “in addition to,” or did they mean “instead of”? It would seem to be the latter.

202. Id. at 57 (internal citations omitted) (emphasis added). The Court clearly intended to do more than just call balls and strikes between groups of competing preferences.
203. Id.
204. Id.
205. Id.
206. Id. at 58.
207. Id. at 59 (internal citation omitted).
208. Id.
209. Id. at 69.
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.”

The Court’s scare quotes around “wrong” and “sinful” signal their intent to keep the critical moral viewpoint at arm’s length. So, too, the almost unfathomable claim of moral neutrality, when asserting that there has been a communal injury or a danger to public safety.

_Slaton_’s “legitimate” “public” interests were contingent, secondary, and unrelated to sexual morality. The Court conceded that “there is no conclusive proof of a connection between antisocial behavior and obscene material.” The Constitution did not prohibit Georgia (or any other state) from acting on what the Court recurrently described as “unprovable assumptions” about the connection. The Court adduced several examples of legislation founded upon such “unprovable assumptions,” including “imponderable aesthetic assumptions” presupposed by environmental regulations to preserve national parks and the “unprovable assumption that a complete education requires the reading of certain books.” Clearly the Court is not supposing that there is anything wrong with obscenity itself. This is where then Attorney General John Mitchell ended up: pornography may be banned even if there is nothing wrong with it, and even if it cannot be shown to cause any harm at all!

The Supreme Court has not since 1973 advanced anything like the all-out effort in _Slaton_ to describe a trans-consensual basis for anti-pornography laws. Later Courts have from time to time recited that case’s vague generalizations about the relevant state interests. Chief Justice Rehnquist wrote for the majority in the nude dancing case in 1991, for example, that the state’s interest “in order and morality” sufficed. Even before that, however, the Court had abandoned its tentative steps it took in 1973. In 1982, a Court comprised of Chief Justice Burger and Justices Powell, Rehnquist, White, and O’Connor conceded the pornographers’ point in _Slaton_. In this first confrontation with child pornography, the Court read the Constitution to permit states to prosecute images and works

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210. _Id._ (internal citation omitted) (emphasis added).
211. _Id._ at 60–61.
212. _See id._ at 61.
213. _Id._ at 62–63.
which would not be “obscene” according to the three-part Miller test. They wrote that the “Miller standard, like its predecessors, was an accommodation between the State’s interests in protecting the ‘sensibilities of unwilling recipients’ from exposure to pornographic material and the dangers of censorship inherent in unabashedly content-based laws.”

The conservative case for controlling obscene pornography remains stuck in the quick-sands of contending private sexual appetites and emotional aversions, with the law sent into the thicket to neutrally—morally speaking, that is—arbitrate fairly among all the clashing sentiments. No adverse moral judgment of pornography or of masturbating to it is in view. Or welcome. Or, given the commitments of constitutional conservatism, possible.

American law and culture have abandoned in considerable part the tradition Justice Harlan affirmed, the tradition grounded in marriage as the constitutional principle of sexual morality in Poe v. Ullman. It is nonetheless a bit surprising that constitutional conservatives seem to have forgotten it as long ago as 1973. Experience of the last half-century strongly suggests, moreover, that there is no practically stable or morally coherent middle-ground between marriage, on the one hand, and consent on the other as the constitutionally cognizable principle of sexual morality. Experience of the last quarter-century shows that consent has married itself to an ethic of self-definition and identity. Experience of the last decade or so with defining sexual harassment to include “unwelcome” attention or contact, for example, suggests that this “consent” is fragile, and may be unable to do the work that our society presently assigns to it. That work is chiefly to somehow arbitrate and govern sexual negotiations between consenting adults who are not expected to recognize any truth about the morality of sexual acts, save that of some hypothesized “consent” to them. A strategic opportunity to promote the genuine “moral soundness” of the people is at hand, if only constitutional conservatives could be made bold enough to seize it.

IV. GENDER IDENTITY

A federal trial judge in early 2019 described the harrowing experience of some Illinois high-school students. Judge Jorge Alonso wrote in Parents for Privacy v. High School District 211 that several high-school

216. Id. at 756.
girls were “startled, shocked, embarrassed and frightened by the presence of a male in the girls’ restroom,” most especially when a female student was “exposed to Student A’s penis.”

This naked man was no streaker. He was a fellow student. The school did nothing to discipline him. In fact, school authorities welcomed him to the bathroom, under what the court called a “compelled affirmation policy” governing transgender students’ access to intimate school facilities—bathrooms, locker rooms, showers.

The Ninth Circuit in early 2020 described the plight of several high-school boys in Dallas, Oregon. They experienced “embarrassment, humiliation, anxiety, intimidation, fear, apprehension, and stress,” because they had to change clothes for their gym class in the presence of a female student, albeit one who identified as a transgender boy. These worried boys were compelled to endure the indignity. The court noted that physical education was “a mandatory course for two or more years of school, and students must change into and out of clothing appropriate for PE class at the beginning and end of each PE class.”

The Ninth Circuit described in terms typical of the cases what was at stake for the transgender student. “Compelled affirmation” would create “a safe, non-discriminatory school environment for transgender students that avoids the detrimental physical and mental health effects that have been shown to result from transgender students’ exclusion from privacy facilities that match their gender identities.”

218. Students & Parents for Priv. v. Sch. Dirs. of Township High Sch. Dist. 211, 377 F. Supp. 3d 891, 894–95 (N.D. Ill. 2019). “Student A,” in the court’s schema, is the male student who was granted access to the girls’ locker room.

219. See id. at 895.

220. See Parents for Priv. v. Barr, 949 F.3d 1210, 1218–19 (9th Cir. 2020).

221. Id. at 1218 n.4.

222. Id. at 1219.

223. Id. at 1217.
not led by the authorities to the “safety” of restrooms that correspond to the student’s transgender identity.224

Over and against this threat to some teens’ psychological and physical well-being, attorneys for objecting students have mustered some repugnant feelings and naked preferences. Complaining “offended” students, we are told, do not want to “see or be seen by someone of the opposite biological sex while either are [sic] undressing or performing bodily functions in a restroom, shower, or locker room.”225 Their objection was all about “cisgender boys’ fear of exposing themselves to [transgender] Student A.”226

Attorneys for these offended students say that there is a constitutional right “to be free from government-enforced, unconsented risk of exposure to the opposite sex when they or members of the opposite sex are partially or fully unclothed.”227 This is true enough, as far as it goes. The problem begins with their sputtering answers to the question: why. The conservatives claim that there is a constitutional right to be free of the

224. An Idaho federal court observed in 2020 that “[t]ransgender individuals may experience ‘gender dysphoria,’ which is ‘characterized by significant and substantial distress as result of their birth-determined sex being different from their gender identity.’” Hecox v. Little, 479 F. Supp. 3d 930, 945 (D. Idaho 2020). According to the Eleventh Circuit, a transgender youth felt “‘alienated and humiliated’ every time he ‘walk[ed] past the boys’ restroom on his way to a gender-neutral bathroom, knowing every other boy is permitted to use it but him.’” He believed the bathroom policy sent “a message to other students who saw [him] use a ‘special bathroom’ that he is different.” Adams v. Sch. Bd. of St. Johns Cnty., 968 F.3d 1286, 1295 (11th Cir. 2020).

These psychological traumas functionally weaponize the transgender plaintiff just as similar feelings (of being different and lesser, of being “stigmatized” and “demeaned”) weaponized same-sex couples in Obergefell. Ironically, the diagnosis which gave rise to the conservative counter-strategy of originalism was that liberals (Warren, Brennan, and their successors) were guilty of importing a philosophy of progressive idealism into constitutional law, the antidote to which would be a methodology nearly allergic to critical moral reasoning. It is not so; the fertile disciplines external to law is not so much philosophy or political theory. They are more social science and especially psychology. What counts as “idealism” is principally that individual psychic well-being is the sumnum bonum. Adverse moral judgment is the tactical enemy; strategically, it is the resulting psychic and emotional effects of those judgments that counts.


226. Parents for Priv., 949 F.3d at 1218.

opposite-sex in the locker room because of felt discomfort and “privacy” concerns. But “privacy” is no totem or alchemist’s dream. It has many meanings. None of them is self-evident, or of such weight as to sweep away contrary interests without breaking a sweat. The meaning, value, and weight of “privacy” must be tested in the transgender cases against the professionally verified threats to the health, and even the life, of a suffering transgender student who wants “privacy,” too. After all, he or she wants to use the restroom stall with a certain self-respect (one might say), and in peace.

The Ninth Circuit said that the school district faced “the difficult task of navigating varying student (and parent) beliefs and interests in order to foster a safe and productive learning environment, free from discrimination, that accommodates the needs of all students.”

The counterarguments against transgender bathroom access so far advanced have failed; that is, in none of the cases discussed in this section did those who complained in court about the presence of a “transgender” student in the bathroom or other intimate facility, prevail. That is not surprising. They lack necessary components that only a resort to critical moral truth can supply. The needed amendments are not exogenous to a properly legal argument, as if they would be abstract speculations alien to real lawyering. The truths that must be added simply answer the decisive legal question that the courts are already asking: what is the “harm” to those girls “alarmed” by the naked boy in their locker room?

Complaining parents of the witnesses in the Ninth Circuit case asserted that:

the privacy protections afforded by the Fourteenth Amendment’s Due Process Clause also encompass a “fundamental right to bodily privacy” that includes “a right to privacy of one’s fully or partially unclothed body and the right to be free from State-compelled risk of intimate exposure of oneself to the opposite sex.”

But what is the precise harm in doing so? They further asserted that “[f]reedom from the risk of compelled intimate exposure to the opposite sex, especially for minors, is a fundamental right deeply rooted in this nation’s history and tradition and is also implicit in the concept of ordered liberty.” Perhaps so. But what is the live and lively present basis for affirming that tradition as more than a relic of a benighted past? The

228. Parents for Priv., 949 F.3d at 1217.
229. Id. at 1222.
230. Id.
complaining parents also urged that the district’s Student Safety Plan infringed these rights by “requir[ing] Student Plaintiffs to risk being intimately exposed to those of the opposite biological sex . . . without any compelling justification.”231 This is just to re-state the question.

The best effort of this sort so far is probably the recent dissent from the Fourth Circuit’s ruling in favor of transgender male Gavin Grimm by Circuit Judge Niemeyer.232 Niemeyer rightly set the basic structure of that argument: the reasons why Title IX (and common sense and equal protection principles, until very recently) makes explicit provision for separate restrooms and other intimate facilities according to “sex” are the same reasons why Gavin Grimm is rightly regarded as a biological female (notwithstanding a male gender identity), when it comes to restrooms. In addition to a sensible reliance upon common usage of the term “sex,” when Title IX was enacted, as a matter of being biologically male or female, Niemeyer wrote that the “privacy concerns” behind sex-segregated intimate spaces require treating Grimm as a female.233

But what are these “privacy concerns”? Niemeyer wrote: “An individual has a legitimate and important interest in bodily privacy that is implicated when his or her nude or partially nude body is exposed to others. And this privacy interest is significantly heightened when persons of the opposite biological sex are present, as courts have long recognized.”234 Niemeyer further stated that “these privacy interests are broader than the risks of actual bodily exposure. They include the intrusion created by mere presence. In short, we want to be alone — to have our privacy — when we ‘shit, shower, shave, shampoo, and shine.’”235

Indeed. But, again, what is that “privacy interest”? Niemeyer, again:

[A]ll individuals possess a privacy interest when using restrooms or other spaces in which they remove clothes and engage in

231. Id.

Plaintiffs do not allege that transgender students are making inappropriate comments, threatening them, deliberately flaunting nudity, or physically touching them. Rather, Plaintiffs allegedly feel harassed by the mere presence of transgender students in locker and bathroom facilities. This cannot be enough. The use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender.

Id. at 1228–29.


233. Id. at 633–34.

234. Id. at 633.

235. Id. at 634.
personal hygiene, and this privacy interest is heightened when persons of the opposite sex are present. Indeed, this privacy interest is heightened yet further when children use communal restrooms and similar spaces, because children, as the School Board notes, “are still developing, both emotionally and physically.”

Just so. But, now for the last time, what is this “privacy” interest?

Niemeyer is as capable as anyone now sitting on the federal appellate bench. So, when he succeeds only in kicking the can down the road to a terminal point in the argument without getting anywhere, one reasonably asks: why is there no there, there? Is it that there is a hole in conservative constitutionalism?

Judicial descriptions of cisgender students’ resistance to sharing locker rooms with persons of the opposite sex center upon adverse emotional reactions, in terms typical of what the law generally calls “emotional distress.” These feelings of repugnance are not legally inert; one can successfully recover damages for the unjustified infliction of “emotional distress” in some circumstances, usually involving what is by any standard of decorum or decency someone else’s outrageous conduct. But the key to recovery for “emotional distress” is that the person who caused it acted wrongly, that is, unjustifiably, without

236. Id. at 636.
237. Though there are slight regional variations in semantics, the overall logical progression of the tort of intentional infliction of emotional distress (IIED) is fairly consistent. In Illinois, for instance, a plaintiff must prove the following three elements to succeed in her IIED claim:

(1) that the defendant's conduct was truly extreme and outrageous, (2) that the defendant either intended that his conduct would cause severe emotional distress or knew that there was a high probability that his conduct would do so, and (3) that the defendant's conduct did in fact cause severe emotional distress.

Taliani v. Resurreccion, 115 N.E.3d 1245, 1254 (Ill. App. Ct. 2018) (citing McGrath v. Fahey, 533 N.E.2d 806, 809 (Ill. 1988)). If the plaintiff proves each of the three elements, then she may be entitled to a remedy, typically money damages (which for emotional distress are notoriously difficult to calculate accurately and consistently). Daniel Givelber also notes that IIED as a tort “differs from traditional intentional torts in an important respect: it provides no clear definition of the prohibited conduct.” Daniel Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 COLUM. L. REV. 42, 51 (1982). This particular feature of the tort renders it susceptible to malleable standards (if not outright subjectivism) not often seen in the law to this degree.
adequate reason. This is the weakness of conservative constitutionalism at work in these cases. In the transgender student scenario, the conflict is between the transient unpleasant, if not intolerant, feelings of some teens over and against the psychological and emotional well-being and, possibly, the survival of a classmate. Who is unjustifiably causing distress to whom?

The complaining students’ reactions could be described exactly the same way if, say, they walked in and saw a naked classmate of the same sex, washing his or her hair in the bathroom sink. These witnesses would then be startled, and maybe shocked. Their reaction might be the same as it was to the opposite-sex intrusion if a same-sex classmate were instead openly doing something (urinating in a sink, for example) that is properly done in a stall. In these cases, the offender would be guilty of a simple indiscretion. He or she would be rude and unfeeling, perhaps, but guilty of no greater wrong. This impolitic behavior could well be justified: perhaps the water has been turned off at home, and there is no place else to wash, or all the stalls are occupied, and someone really had to go. No aspect of the basic well-being of any offended student would be in play.\footnote{238}

The Oregon plaintiffs made a Free Exercise claim that pushed the ball forward a bit.

\footnote{238. \textit{It is a bit impish to put it this way, but the teenagers’ reactions upon which the conservative arguments depend (“startled, shocked, embarrassed”) would fit just as well if instead some “cisgender” students walked into the bathroom at school, and there they saw a naked zebra, sitting there in the middle of the floor. Whether the zebra is male or female does not affect my point, which is that feeling offended has no necessary connection to anyone else’s moral fault, or to immorality at all. And the genuine harm of being offended is shallow, and transitory.}}

[M]any Student Plaintiffs and some Parent Plaintiffs “have the sincere religious belief” that children “must not undress, or use the restroom, in the presence of a member of the opposite biological sex, and also that they must not be in the presence of the opposite biological sex while the opposite biological sex is undressing or using the restroom.” Because the Student Safety Plan permits transgender students who were assigned the opposite biological sex at birth into their locker rooms, the Plan “prevents Student Plaintiffs from practicing the modesty that their faith requires of them, and it further interferes with Parent Plaintiffs teaching their children traditional modesty and insisting that their children practice modesty, as their faith requires.”\footnote{239. \textit{Parents for Priv.}, 949 F.3d at 1234.}
Here, “modesty” is a promising turn. But it, too, is a tease.

The Ninth Circuit rejected all these arguments, saying that “there is no Fourteenth Amendment fundamental privacy right to avoid all risk of intimate exposure to or by a transgender person who was assigned the opposite biological sex at birth.”240 The court also held that the “potential threat that a high school student might see or be seen by someone of the opposite biological sex while either are undressing or performing bodily functions in a restroom, shower, or locker room does not give rise to a constitutional violation.”241 So far described, these holdings are not

240. Id. at 1217.
241. Id. at 1223. The Ninth Circuit disposed of the plaintiffs’ Title IX sexual harassment claim on unconvincing grounds. The court wrote that the plaintiffs:

argue that the Ninth Circuit in York, 324 F.2d at 455, recognized the right to bodily privacy when it commented that “[t]he desire to shield one’s unclothed figure from views of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.” The problem with this argument is that York addressed an egregious privacy violation by police and recognized a much more specific and limited Due Process privacy right than Plaintiffs claim here. As noted, York involved a male police officer who coerced a female assault victim to allow him to take unnecessary nude photographs of her, which he later distributed to other officers.

Id.

The court’s attempt to distinguish York failed. “York did not recognize a more general right to be free from alleged privacy intrusions by other non-government persons, or a privacy right to avoid any risk of being exposed briefly to opposite-sex nudity by sharing locker facilities with transgender students in public schools.” Id. at 1224. There is no reason whatsoever for suggesting that being forced to strip by a police officer is categorically distinct from being forced to strip by the school principal. Nor is there any reason to suppose that brevity is the distinguishing criterion, or to assert that regularly stripping just to change for gym class is necessarily brief.

The Ninth Circuit also said:

Plaintiffs do not allege that transgender students are making inappropriate comments, threatening them, deliberately flaunting nudity, or physically touching them. Rather, Plaintiffs allegedly feel harassed by the mere presence of transgender students in locker and bathroom facilities. This cannot be enough. The use of facilities for their intended purpose, without more, does not constitute an act of harassment simply because a person is transgender.

Id. at 1228–29. But this is to say that because the transgender student is not guilty of sexual assault there is no sexual harassment—and that is false. Lastly, the court notes, “Plaintiffs do not allege that transgender students are taking nude photographs of them or purposefully taking overt steps to invade their privacy for
obviously mistaken. The court rejected the Free Exercise claim on doctrinal grounds supplied by Oregon v. Smith. This too might be correct.

The whole “privacy” argument is indeterminate. It needs to be spelled out in relation to some intelligible (non-emotional) aspect of the cisgender students’ well-being.

The argument made so far against transgender bathroom access needs major surgery. That needed revision includes an intelligible, compelling moral basis for the cisgender students’ shock and fear. The better argument displaces repugnant feelings entirely. It identifies the grave moral wrong done to these girls and boys regardless of their bad feelings. According to the amended argument, a girl who was nonplussed by, or a boy who welcomed, a naked person of the opposite-sex to the locker room would be harmed just the same as anyone who was uncomfortable at the sight.

Why should young people whose sexual urgings are yet to be fully comprehended and mastered not be forced by public authorities to strip naked with strangers of the opposite sex? This is to ask why we have sex-segregated intimate facilities in the first place. It is not mistaken to say that the reason is privacy. But it is not enough to say “privacy.” The reason for closing restrooms (and lockers and showers) to members of the opposite sex is that it is wrong to make anyone, and young people in particular, the objects of others’ sexual arousal, and to tempt them into sexual arousal. Doing that is unfair to all the students because it impedes their attempts to develop chaste habits. Doing so would be morally akin to requiring high-school students to sit together and watch stag movies every week. Even adults who have resigned themselves to a certain prevalence of sexual activity among teens would not facilitate co-ed porn viewing. The increased vividness accompanying real-time exposure in school makes the locker-room exposure more corrupting than the movie date, because students in these cases face the additional complication of having continuing, regular contact with those of the opposite sex whom one has seen—and by whom one has been seen—naked.

Now, at least one judge who backed school administrators’ “compelled affirmation” policies, or who have required them where schools demurred, makes a de minimis, arithmetic argument. They assert that transgender students are rare. They ask what the big deal is

no legitimate reason.” Id. at 1224. Again, to say that “compelled affirmation” involves no “upskirting” or the production of child pornography is not to say that it is not and cannot be sexual harassment.

242. Id. at 1233–39.
about just one child being accommodated. Everyone needs to relax a bit and show some compassion, they effectively argue.  

It is not just one student. It is true that the lawsuits involve just one gender-dysphoric party. But plausible estimates of the number of self-identified transgender students in high schools across the country range up to two percent. It is also reasonable to expect that, as “compelled affirmation” policies and the wider elite-cultural promotion of transgender identity proliferate, so too will the number of gender-dysphoric high-school students. Copy-cat sexual identity “questioning” is already a documented phenomenon.

The arithmetic does not matter. The harms visited upon students by this enforced nakedness are not arithmetical. The good end that stands behind and explains sensible sex-segregation policies consists of the serenity and security born of the presence of a no-exceptions, categorical rule, backed up by earnest enforcement: no boys in the girls’ restroom. This good is defeated where it is the case instead that, at the door to the girls’ showers, the sign says: “Ordinarily there are only girls present inside, and there are never a lot of boys. You can be sure that you will see, and be seen by, no more than a couple of naked men. Have a good day.”

Would anyone seriously say it is fine if only boys who promised not to stay long were admitted to the girls’ showers? Or that boys are generally not permitted in the girls’ lockers, save for the captain of the football team and his best friend? Or that the boys’ basketball team shares changing rooms with the girls’ team, but only during home games?

The foregoing argument based upon true sexual morality and correlative virtues does not depend for its cogency upon a diagnosis of gender dysphoria, its proper treatment, or anything else about the psychology of a transgender student. The argument’s force comes from the fact that a high-school student, “Angela,” born male and still possessed of an anatomically male body, looks just like any other boy does when he

244. See, e.g., id. at 397 (noting that plaintiffs could point to only a single instance in which they viewed a transgender student in a locker room or bathroom and concluding that “[b]ased on their testimony, none of these plaintiffs were subjected to pervasive sexual harassment in regard to their actual interaction with transgender students in the privacy facilities at [their school]”).


246. See Lisa Litman, Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria, 13(8) PLOS ONE, https://doi.org/10.1371/journal.pone.0202330 [https://perma.cc/AP5A-EMLZ].
(she) is naked. That this male, unlike the boys whom he resembles unclothed, fervently believes himself to be a girl trapped in a male body does not affect the wrongfulness of forcing sexual gazing, objectification, and occasion for arousal upon a student population.

Conservatives so far have tried unsuccessfully to refute “affirming” policies without reliance upon truths about sexual morality and modesty. In none of them, moreover, has any conservative constitutionalist (at bench or bar) explicitly refuted the implication in many of the pro-transgender access arguments, namely, that one’s body and one’s self can be divided—that some people are indeed “trapped in the wrong body.”

The Eleventh Circuit, for example, wrote in 2020:

Drew Adams is a young man and recent graduate of Nease High School in Florida’s St. Johns County School District. Mr. Adams is transgender, meaning when he was born, doctors assessed his sex and wrote ‘female’ on his birth certificate, but today Mr. Adams knows with every fiber of [his] being’ that he is a boy.247

Even where the assertion is not so explicitly made as this, the claim that persons such as Adams are much more male than female and that they would therefore benefit enormously by being treated as if she were a boy is central to the appeal of all transgender plaintiffs. It is why judges seem intuitively to side with the transgender youth; at least the courts in the cases discussed in this section all found in favor of the transgender party.

Is it true that someone can be “trapped in the wrong body”? This is neither a psychological nor a legal question. It is a metaphysical query, and it deserves a suitably metaphysical answer. The truth is no boy is trapped in a girl’s body, and no girl is trapped in a boy’s body.248 Each one of us is our body. Sex is innate.249 It is also immutable: being male or

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248. “The hypothesis that gender identity is an innate, fixed property of human beings that is independent of biological sex—that a person might be ‘a man trapped in a woman’s body’ or ‘a woman trapped in a man’s body’—is not supported by scientific evidence.” Lawrence S. Mayer & Paul R. McHugh, Sexuality and Gender: Findings from the Biological, Psychological, and Social Sciences, 50 NEW ATLANTIS 1, 8 (2016).
249. “The existence of two sexes is nearly universal in the animal kingdom,” a realm which includes us, the species homo sapiens. See Bronwyn C. Morrish & Andrew H. Sinclair, Vertebrate Sex Determination: Many Means to an End, 124 REPRODUCTION 447–57 (2002). In the biological sciences as well as in medical research and practice, the term “sex” refers precisely to the two halves of any species, male and female. The two halves result from the binary division of all
female is an indelible sexual identity inscribed in every one of the billions of cells in each of our bodies. Surgical intervention can somewhat alter members, according to whether any individual is suited to play one, or the other, of the two roles in reproduction. “The essential purpose of sexual differentiation, the development of any male- or female-specific physical or behavioral characteristic, is to equip organisms with the necessary anatomy and physiology to allow sexual reproduction to occur.” Dagmar Wilhelm et al., Sex Determination and Gonadal Development in Mammals, 87 PHYSIOLOGICAL REVs. 1 (2008). This structural difference for the purpose of reproduction is the only “widely accepted” way of classifying the two sexes.

This definition of sex is clear and stable. It does not require any arbitrary measurable or quantifiable physical characteristics or behaviors to apply. It requires instead a basic understanding of the reproductive system and the reproduction process. The division of human beings into male and female according to reproductive function possesses the solidity and transparency needed to serve as an explanatory variable in rigorous scientific experimentation and medical research.

Human beings are either male or female. This characteristic is innate. “[I]n mammals the sexual fate of the organism is cast at fertilization . . . .” Id. at 1. The decisive event is the contribution by the father of an “x” or a “y” chromosome: an “X-carrying sperm produces a female (XX) embryo, and a Y-carrying sperm produces a male (XY) embryo. Therefore, the chromosomal sex of the embryo is determined at fertilization.” T.W. SADLER, LANGMAN’S MEDICAL EMBRYOLOGY 40 (2004). This sexual dimorphism is typically not apparent to observation until approximately 12 to 14 weeks of pregnancy. The development of the human beings as specifically male or female nonetheless begins at the onset of life. Even though the very young embryo carries within it the primitive structure of both reproductive systems, male embryos secrete testosterone, which leads to the development of the male reproductive system. Embryonic and thereafter fetal development as male or female is directed from within, according to genetic information present in the zygote from the moment of fertilization.

The ubiquity of sonograms during pregnancy means that now almost everyone recognizes that the sex of a child can be ascertained before birth. As a matter of scientific fact, however, sex could be ascertained at fertilization. See Keith L. Moore & T.V.N. Persaud, THE DEVELOPING HUMAN: CLINICALLY ORIENTED EMBRYOLOGY 307 (7th ed., 2003) (“[T]he type of sex chromosome complex established at fertilization determines the type of gonad that differentiates from the indifferent gonad. The type of gonads present then determines the type of sexual differentiation that occurs in the genital ducts and external genitalia.”).

250. The innate biological differences between male and female go far beyond external genitalia. In fact, they inhabit every one of the human body’s billions of nucleated cells. Each cell in our body has a sex—the same sex—male or female. Sex is in this most profound way indelibly imprinted upon every part of our
bodies. That sex is binary, innate, and immutable is a complex fundamental reality that anyone doing basic or applied research in the biological sciences (or who teaches them), and anyone who practices medicine, including psychiatry (or who teaches it), presupposes, recognizes, uses, and applies. Keeping up a robust and uncompromised awareness of sex as binary, innate, and immutable is essential to successful work in all these areas. Forgetfulness of it is a recipe for failure—as scientists and doctors.

The reason why this clarity about sex is crucial can be simply stated: each person’s indelible reality as male or female *pervades* the body throughout the life of the individual. Until recently, the role of the chromosomes that determine sex had been thought to be strictly limited to the development of reproductive tissues and organs.

Previously consigned to the development of reproductive tissues, the sex chromosomes were thought to exert any systemic effects solely through the generation of sex hormones, and all differences between males and females resulted exclusively from exposure to these hormones. The growing evidence attests to the fact that sex chromosomes exert their influence in every cell of the body, and every cell has a sex. The impact of sex chromosome genes on physiology and human pathophysiology will only become increasingly important in the future.


Now we know better. Each and every cell of a woman’s body is *female*. Each and every cell of a man’s body is *male*. While the commonalities and similarities of men and women still far outweigh the differences, keeping in mind the differences is essential to sound research and competent clinical practice.

[I]t is becoming increasing apparent that the effects of sex chromosomes on cellular physiology can be independent of exposure to gonadal hormones. Thus, cultured female or male cells, even those derived from embryos prior to sexual differentiation, differ in gene expression and such differences persist in primary culture, arguing that the differences are intrinsic to the cells and not dependent upon external hormone exposure. Since all cells, whether male or female, express sex chromosomes it should not be too surprising that expressed genes of sex chromosomes have the potential to influence cellular biochemical pathways, cellular physiology, and responses to drugs.

*Id.* at 271.

In an important 2017 journal article, Tracy Madsen and her colleagues wrote:

The completion of the human genome project in 2003 also influenced our understanding of the effects of sex on human biology and disease through the sequencing of all human genes, including those located on sex chromosomes. Understanding the location and function of genes located on sex chromosomes throughout the body’s cells, not just in
the appearances of some parts of the human body, including that of the sex organs. But medicine can give no one the *functioning* sex organs of the reproductive organs, was critical to understanding that biologic sex not only affects human health and disease via sex steroids and reproductive organs but also affects cells in all organ systems. Tracy Madsen et al., Sex- and Gender-Based Medicine: The Need for Precise Terminology, 1 GENDER & GENOME 122, 123 (2017).

Epidemiologists now understand that “[s]ex differences are present across most disease states and organ systems.” *Id.* “Important features of an illness, . . . may display meaningful differences across the biological sexes. In this way, the actual causes of disease can be more effectively targeted on an individual level.” Nathan Huey, *Treating Men and Women Differently: Sex Differences in the Basis of Disease*, HARVARD UNIV. GRADUATE SCH. OF ARTS & SCI. (Oct. 30, 2018), http://sitn.hms.harvard.edu/flash/2018/treating-men-and-women-differently-sex-differences-in-the-basis-of-disease/ [https://perma.cc/KQ6Q-XSMZ]. “Today, the importance of accounting for the variability between male and female biology in research is widely recognized. There exists a clear contribution of biological sex to health outcomes across a wide spectrum of conditions.” *Id.*
other sex. Medicine cannot make a man into a woman.\textsuperscript{251} It is impossible to “change” one’s sex.\textsuperscript{252}

\textsuperscript{251} Ineradicable sex differences pervade human beings in ways that go beyond the biology and chemistry of our bodies. Research in and the practice of psychiatry and psychology depend upon undiminished clarity about the identity of a patient or a research subject as male or female, unchanged from the moment of conception. Clarity and consistency about sex is crucial in psychiatry and psychology for two connected reasons. First, each person’s indelible reality as male or female \emph{pervades} the psyche, as well as the body, throughout the life of the individual. Second, there is overwhelming scientific evidence that men and women are markedly different across a whole range of cognitive and personality traits, elements of emotional make-up, and aspects of psychological well-being.

These many differences include but go well beyond the obvious facts that women are more relational than men, and that men are more reluctant to share their feelings—such as they are—than women. Many other of these differences are manifest for all to see. Researchers, most prominently including David P. Schmitt, have shown that there are significant differences according to sex in other areas, including sexual arousal patterns, attitudes, and behaviors, among many others. See, e.g., David P. Schmitt, \emph{The Evolution of Culturally-Variable Sex Differences: Men and Women Are Not Always Different, but when They Are. . .It Appears Not to Result from Patriarchy or Sex Role Socialization}, in \textit{THE EVOLUTION OF SEXUALITY} 221, 222 (Todd K. Shackelford & Ranald D. Hansen eds., 2015). Schmitt references, for example, one comprehensive review essay, which identified 63 “psychological sex differences discussed that have been replicated across cultures.” \emph{Id.} at 221 (citing Lee Ellis, \emph{Identifying and Explaining Apparent Universal Sex Differences in Cognition and Behavior}, 51 \textit{PERSONALITY & INDIVIDUAL DIFFERENCES} 552 (2011). Of course, cultural patterns and social expectations partly explain some of these differences. But Schmitt convincingly shows that these many differences cannot be satisfactorily explained by a patriarchal (or any other) cultural pattern. “In fact,” Schmitt writes, “most psychological sex differences . . . are conspicuously \emph{larger} in cultures with more egalitarian sex role socialization and greater sociopolitical gender equity.” \emph{Id.} at 222.

Among the most salient of these sex differences are those pertaining to sex. The social scientific evidence about frequency of masturbation and pornography use, \textit{see} \textit{MARK REGNERUS, CHEAP SEX: THE TRANSFORMATION OF MEN, MARRIAGE, AND MONOGAMY} 140 (2017), the number of sexual partners, \textit{see}, e.g., Norman R. Brown & Robert C. Sinclair, \emph{Estimating Number of Lifetime Partners: Men and Women Do It Differently}, 36 J. \textit{SEX RES.} 292, 292 (1999), \url{http://dx.doi.org/10.1080/00224499909551999} [https://perma.cc/33HX-NXDF] (analyzing why men tend to report more sexual activity than women), as well as more qualitative research into the nature of male and female sex drive and their preferred place of sex within the overall pattern of the relationship, \textit{see} \textit{REGNERUS, supra} at 22–23, confirms that nature, and not just nurture or socialization, explains the differences between men and women that almost anyone who dated observed from the get-go. That the paraphilias listed in the
Courts should not hesitate to affirm that each of us is an embodied rational spirit, that each of us is our body, and that therefore no one is “trapped” in the wrong one. These are truths no more recondite than the truth that each of us began when we came to be as a conceptus. In fact, they are different articulations of the same metaphysical reality. Courts as well as other lawmakers should therefore reject a premise supporting the “affirming” apparatus—that 16-year-old Peter, say, could be and is really a girl. Doing so would practically dispose of cases like Drew Adams’, where courts appear to have bought the proffered metaphysical mistake. Doing so would greatly affect all other cases too. A judge or other public authority could still hold that decent manners and a concern to relieve psychic distress combine to make “affirming” policies the best way to go. But affirming the truth of body-self identity would nonetheless deflate the transgender plaintiffs’ intuitive appeal even in these cases. Affirmation would also make much more plausible the truth that the better way to treat the gender dysphoric is to help them align mind to body, as we treat

DSM 5 are, with the partial exception of sadomasochism, almost entirely male phenomena, is further evidence. See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 685–705 (5th ed. 2013). It is perhaps most striking that pedophiles are almost all men.

These sex differences about sex largely explain the fact commonly encountered by mental health professionals who treat, say, a transgender person who has had surgeries and hormone treatments and who currently identifies as a woman, for sexual behavioral or relationship problems. Unsurprisingly, these are usually those of a man—because they are.

252. Transgender is not a third or intermediate sex as some advocates contend. Based on “the neurobiological and genetic research on the origins of gender identity, there is little evidence that the phenomenon of transgender identity has a biological basis.” Mayer & McHugh, supra note 248, at 106. There could be some biologically based influences which, when they interact with particular environmental conditions, might predispose an individual to develop an “identity” that is discordant with his or her sex. But this does not mean that anyone is transgender; that is, a boy trapped in a girls’ body or vice versa.

[T]here are no studies that demonstrate that any of the biological differences being examined have predictive power, and so all interpretations, usually in popular outlets, claiming or suggesting that a statistically significant difference between the brains of people who are transgender and those who are not is the cause of being transgendered or not—that is to say, that the biological differences determine the differences in gender identity—are unwarranted.

In short, the current studies on associations between brain structure and transgender identity are small, methodologically limited, inconclusive, and sometimes contradictory.

Id. at 104.
persons suffering from other delusions about their bodies, such as anorexia nervosa: we do not “affirm” the delusion that of a slender person that he or she is in fact overweight. Instead, we seek to bring the anorexic’s mind into touch with the reality of his or her body and, usually, we try to help them to gain weight.\textsuperscript{253}

Affirming the truth would also make clearer the harm done to every student attending a school with mandatory “affirming” policies. Again, the number of transgender students is immaterial. Everyone in the school is dramatically affected by “affirming” policies—not just Peter and the handful of students who encounter him in the girls’ restroom. Wherever school officials enact a “compelled affirmation” policy, every student’s understanding of himself or herself as an embodied soul, as male or female in body and mind, is threatened. Where the school promotes “affirmation,” each student’s self-understanding as an integrated body-spirit unity is contradicted. If anyone is trapped in the wrong body, everyone could be: whether anyone is cisgender or transgender would be wholly a contingent matter of fact. If Peter could really be a girl trapped in a boy’s body, then

“affirming” policies ratify and propagate—that is, teach—a false metaphysical proposition\(^{254}\) about the human person.\(^{255}\)

254. It is of course true that, alongside the universal current appreciation of the role of \textit{sex} in understanding the human body and diseases, some say that “gender” plays a comparable role. Madsen and her co-authors are among those who would elevate the role of “gender” in science and medicine. Even so, these authors emphasize that the terms “sex” and “gender” should \textit{never} be confused with, or treated as anything but, different names for different realities that can, in different ways, each be relevant to medical research and practice.

But there is little scientific evidence for the proposition that “gender” or “gender identity” is or can be a significant variable in research in biology or other life sciences or in the clinical practice of medicine. Exaggerating the role of “gender” (or “gender identity”) in science and medicine—and worse, likening its importance to that of sex—deprecates the vastly more important role of sex as a variable. It also produces harmful confusion within, and about, science and medicine, in several ways:

\textit{First}, “gender” can never be a significant factor in biology and medicine for the simple reason that it has no biological basis, in the sense that (in the present state of research), someone may claim to be a woman who has all the biological and psychic characteristics of a man.

\textit{Second}, “gender” could never be the factor in scientific research that \textit{sex} is because “gender” is multiple and mutable; that is, there are more than two genders and many persons change their “gender identity” as they go through life. “Gender” is therefore incapable of supplying the basis for rigorous multivariable scientific analysis.

\textit{Third}, “gender” is fluid where \textit{sex} is not. That is, almost everyone is male or female from top to bottom, and in every cell of his or her body. “Gender,” on the other hand, is a malleable and fluctuating social construct which cleaves to some proto- if not stereotypical conception of how a given culture defines \textit{masculine} and \textit{feminine}. It is likely that, in any given social milieu, most men will have some “feminine” traits, and most women will have some “masculine” traits. Some persons will have substantial amounts of both. A few persons may be—in the relevant sense of the term “gender”—equally male and female. To which “gender” would they belong?

\textit{Fourth}, “gender” is a social construct limited to human beings. The rest of the animal kingdom lacks the rational apparatus to conjure “gender” and “gender identity.” In fact, the rest of the animal kingdom lacks the wherewithal to do more than instinctively distinguish male from female. Human beings alone possess the cognitive and conceptual capacities to do all things, including to classify the rest of the animal kingdom as male or female and to perform scientific experiments upon them. The limited but still indispensable and substantial role of research using non-human subjects in projects designed for the sake of human patients therefore has no place in it for “gender” specific experiments.

In light of these differences between the two terms and the very limited utility of “gender” in life sciences research and in medical practice, we question
whether the increasing prominence of “gender” and “gender identity” alongside sex specific research and treatments is itself a product of ideology, and not of science.

255. On June 15, 2020, the Supreme Court decided three statutory employment discrimination cases, collectively styled Bostock v. Clayton County. Bostock v. Clayton Cnty, 140 S. Ct. 1731 (2020). One of them involved claims by an adult transgender female—that is, someone biologically male—who was fired by the Harris Funeral Home after informing the employer that “she” would be presenting henceforth at work as a woman. The decision below in favor of the employee is EEOC v. Harris Funeral Home, 884 F. 3d 560 (6th Cir. 2018). Aimee Stephens intervened.

Because Harris is a statutory case that was decided according to an assertedly strict textual analysis of Title VII’s ban on “sex” discrimination, its salience in this discussion of constitutional conservatism as it bears upon transgender persons is limited. The arguments addressed in the context of this Article, moreover, pertain to a different transgender context: that of public intimate facilities and students.

Even so, courts since Bostock have already exported its reasoning to Title IX, as if Bostock resolved that statutory question as well as the one concerning Title VII. See, for example, the Hecox, Adams, and Grimm cases discussed supra.

Because the Equal Protection Clause presumptively also makes “sex” discrimination unconstitutional, Bostock is likely to soon start figuring in transgender constitutional analyses as well. Besides, the inclusion of the Chief Justice as well as Justice Gorsuch in the Bostock majority makes that opinion worth considering with some care here. Gorsuch wrote that opinion.

The Bostock Court did not take the metaphysical leap, if you will, that the Eleventh Circuit did in Adams. The Supreme Court did consistently refer to the male plaintiff by his preferred name, “Aimee” Stephens. Sometimes Bostock seemed to treat predications of male or female as entirely volitional, as if it is all about “identifying” and “presenting,” and never about any biological fact of the matter. In running a hypothetical argument, for example, Gorsuch wrote: “take an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth . . . .” Bostock, 140 S. Ct. at 1741. The Bostock Court also flirted with the apocalyptic alternative (a “trans woman” like Stephens really is a woman) when Gorsuch wrote, “When she got the job, Ms. Stephens presented as a male”—as if Stephens was truly a woman, albeit one who earlier in life had other ideas. Id. at 1738.

The Supreme Court passed briskly, though without comment, over “Aimee” Stephens’ psychiatric journey, saying only that “two years into her service with the company, she began treatment for despair and loneliness. Ultimately, clinicians diagnosed her with gender dysphoria and recommended that she begin living as a woman.” Id. That is all.

The Bostock Court never consummated its flirtation with the metaphysical apocalypse. Instead, through a skein of sophistical reasoning, the
In other words, then: conservative reliance upon both the moral and the metaphysical truth in the transgender bathroom cases explodes the status quo in the courts: the benefits to the transgender of “affirming” policies would be exposed as, at most, quite modest. And the harm to the whole student body would be revealed to be enormous.

V. RELIGION AND RELIGIOUS LIBERTY

On June 20, 2019, the Supreme Court finally surrendered. After nearly five decades of fitful combat with its own Establishment Clause doctrine, the Justices waved the white flag. The “Bladensburg Cross” case was decided by a badly splintered Court—there was a total of seven opinions. A majority of the Justices agreed, nonetheless, with the substance of this part of Justice Alito’s plurality opinion: “Lemon [v. Kurtzman] ambitiously attempted to distill from the Court’s existing case law a test that would bring order and predictability to Establishment Clause decisionmaking.” Alito understated the verdict: the expectation of a ready framework “has not been met,” and “[i]n many cases, this Court has either expressly declined to apply the test or simply ignored it.”

The truth is less flattering. In American Legion, the Court mercifully put down Lemon for all challenges to religious monuments and displays. Beyond that, the reigning chaos continues. In his concurrence, Justice

majority mistakenly concluded that one could not discriminate against a transgender person without discriminating “on the basis of sex.” The basic thought seems to be this: you cannot judge that someone is transgender, and be minded to “discriminate” against him or her, without thinking about their sex and acting on that thought—which Title VII forbids. This is defective legal reasoning, to be sure, and Congress never entertained such a thought. But the basic thought, though quite erroneous, does not touch metaphysics, or whatever one should call that sector of knowledge that affirms that every person is indelibly male or female from the moment each comes to be at fertilization.


257. Id. at 2080. In Lemon, the Court declared that, to pass Establishment Clause muster, a state act “must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” Lemon v. Kurtzman, 403 U.S. 602, 612–613 (1971) (internal citation omitted) (quoting Walz v. Tax Comm’n, 397 U.S. 664, 674 (1970)). Applications of the test later in the 1970s (which had to do, as did Lemon, with state aid to religious schools, the vast majority of which were Catholic), often dropped the middle-term modifier: any effect that advanced religion sufficed to establish unconstitutionality.

258. American Legion, 139 S. Ct. at 2080.
Kavanaugh said that the Alito opinion “identifies five relevant categories of Establishment Clause cases,” which Kavanaugh dutifully listed.\textsuperscript{259} He then asserted that the “Lemon test does not explain the Court’s decisions in any of those five categories.”\textsuperscript{260}

This bleak assessment is too generous. Lemon is one of the most frequently, and most colorfully, derided Supreme Court cases that has never been overruled (thus sparing Lemon competition with Plessy and Lochner). The American Legion Court itself cited a huge critical chorus comprised of scholars and lower-court judges alike.\textsuperscript{261} Supreme Court Justices have often chimed in.\textsuperscript{262} As long ago as 1993, Justice Scalia lampooned Lemon: “Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys.”\textsuperscript{263} It is so bad now that one can get a laugh from professional audiences by posing the question: is the infamous three-part test named “Lemon” due to one party’s name—or because it works so poorly?

There is no longer anything that one could honestly call “Establishment Clause doctrine.” There is a history of the relevant Supreme Court Establishment Clause decisions, to be sure. But that is

\textsuperscript{259} Id. at 2092 (Kavanaugh, J., concurring). Those categories are: “(1) religious symbols on government property and religious speech at government events; (2) religious accommodations and exemptions from generally applicable laws; (3) government benefits and tax exemptions for religious organizations; (4) religious expression in public schools; and (5) regulation of private religious speech in public forums.” Id.

\textsuperscript{260} Id.

\textsuperscript{261} See id. at 2081 (“The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars.”) (internal citations omitted).

\textsuperscript{262} See, for example, Justice Alito’s criticism in American Legion. Id. at 2080 (“If the Lemon Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met. In many cases, this Court has either expressly declined to apply the test or has simply ignored it. This pattern is a testament to the Lemon test’s shortcomings.”) (internal citations omitted). In the same case Justice Thomas took over Justice Scalia’s earlier (2005) criticism of the Lemon test: “‘[S]ince its inception,’” it has “‘been manipulated to fit whatever result the Court aimed to achieve.’” Id. at 2098 (quoting McCreary County v. ACLU of Ky., 545 U.S. 844, 900 (2005) (Scalia, J., dissenting)). Justice Thomas announced in American Legion that he “would take the logical next step and overrule the Lemon test in all contexts.” Id. at 2097 (Thomas, J., concurring).

genealogy, not law. Alito described the prevailing approach in strikingly non-doctrinal terms: the Court has “taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance.”

That history-guided focus on case-specific facts has produced results no more coherent than the shambolic doctrine it would supplant. Helpful generalization in American Legion got no further than a self-styled “taxonomy” of Establishment Clause scenarios. Justice Kavanaugh’s attempt to articulate a new synthesis of Establishment Clause doctrine is nearly heroic; the reader may judge how closely the heroism resembles that of the Light Brigade. It rather looks to me like one more analytical vivisection of a distended corpus.

The American Legion Court’s mea culpas might lead readers to think that they are attending Lemon’s funeral. In one of the first post-American Legion monument decisions, the Eleventh Circuit pronounced that “Lemon is dead.”

“Well, sort of,” that court wrote in Kondrat’yev v. City of Pensacola. “It’s dead, that is, at least with respect to cases involving religious displays and monuments—including crosses.”

264. Am. Legion, 139 S. Ct. at 2087.
265. See id. at 2081 n.16.
266. Kavanaugh wrote:

[E]ach category of Establishment Clause cases has its own principles based on history, tradition, and precedent. And the cases together lead to an overarching set of principles: If the challenged government practice is not coercive and if it (i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from a generally applicable law, then there ordinarily is no Establishment Clause violation.

Id. at 2093 (Kavanaugh, J., concurring). “That is not to say that challenged government actions outside that safe harbor are unconstitutional. Any such cases must be analyzed under the relevant Establishment Clause principles and precedents.” Id. at 2093 n.*.

268. Id. Proof of life includes the district court decision in an (in part) Establishment Clause challenge to the University of Notre Dame’s decision to charge students a co-pay for their contraceptives, in formal disregard of the HHS mandate binding upon most secular employers to do otherwise. In Irish 4 Reproductive Health v. United States, Judge Simon wrote:

The test under the Establishment Clause, as first articulated in Lemon v. Kurtzman, requires that government actions (1) have a “secular legislative purpose,” (2) have a “principal or primary effect” that “neither
The *American Legion* Court refused to kill this *Lemon*.

It is not that *Lemon* is no longer worth overruling, as if it is so hemmed in now by later decisions that there is scarcely a lively precedent left to jettison. *Lemon*’s doctrine—its infamous three-part test—is battered. But the case’s *principle* stands tall; that is, although the *Lemon* test is battered, it survived a near-death experience in *American Legion*. It also stands for a principle that is a supremely important norm of American public life, one that has considerable downstream effects upon the way that critical morality informs constitutional law and ordinary lawmaking. *Lemon* made secularism the master principle of Establishment Clause law.

advances nor inhibits religion,” and (3) do not “foster an excessive government entanglement with religion.” If the governmental action fails any of the three parts of this test, it violates the Establishment Clause. Although the *Lemon* test has been much criticized, the Seventh Circuit continues to faithfully apply it.

I think the allegations are sufficient at this juncture to allege that the [federal government exemption] Rules and [the United States’] Settlement Agreement [with religious employers, including Notre Dame] both impermissibly advance religion. “The secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.” While a secular purpose may have been to settle litigation, I’m not so sure these measures do not also have a principal effect of advancing religion. Plaintiffs claim the Settlement Agreement and Rules “have the primary purpose and principal effect of promoting, advancing, and endorsing religion” . . . .


269. See, for example, how secularism is an overriding theme of President Biden’s 2021 Inaugural Address, in Gerard V. Bradley, *President Joe Biden’s Blue America*, NATIONAL CATHOLIC REGISTER (Feb. 1, 2021), https://www.ncregister.com/commentaries/president-joe-biden-s-blue-america [https://perma.cc/S98S-C6TG].

270. Among these downstream effects is not only the privatization of religion (discussed further *infra*) but also the health of civil society. Especially as the Mystery Passage takes deeper hold of that “morality” that public authorities—large and small—are permitted by the Constitution to presuppose or endorse, the eligibility of religious and religiously inspired educational, health, and social service agencies to partner with government for the common good is seriously compromised. Pending before the Court in early 2021 is one such case, which involves Philadelphia’s termination of contractual relations with the Catholic Archdiocese’s foster care service because of the Church’s refusal to service same-sex couples in ways identical to married opposite-sex couples. See Fulton v. City of Philadelphia, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (Feb. 24, 2020) (No. 19-123).
Lemon decreed that all public authorities—from the U.S. Congress down to the humblest rural school board—must be neutral, not just among religions, but about religion; that is, between religion and what the Court often calls “irreligion”271 but which Justices sometimes refer to as “non-religion.”272 This “neutral” ground is a secularized public realm, which implies the privatization of religion. So, Chief Justice Burger wrote for seven members of the Lemon Court that “the Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.”273

This bold, privatizing imperative is encoded in Lemon’s twin requirements that every public act have a “secular” purpose and that no such act have the (primary or principal or just the) effect of “advancing” religion.274 Lemon established—and the Court has since held—that government efforts to promote religion, even where there is no coercion or favoritism among the religions, lacks the requisite “secular” purpose.275 The Lemon Court presumed that government efforts to promote religion even in the private sphere (say, by funding, without discrimination, denominational schools) lacked the required “secular” purpose.276

The Supreme Court has not abandoned its Lemon-esque secularist commitments, even though it is almost 30 years since the Court’s more religion-friendly Justices began walking back some of Lemon’s privatizing

271. See, for example, Bd. of Ed. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994), where the majority stated that “government should not prefer one religion to another, or religion to irreligion.” Id. at 703.

272. In Lee v. Weisman, Justice Souter wrote that “the State may not favor or endorse either religion generally over nonreligion or one religion over others.” 505 U.S. 577, 627 (1992) (Souter, J, concurring). The most recent in a string of high-court declarations to the same effect is by Justice Kagan, writing for Justices Breyer and Sotomayor as well, in the February 5, 2021 decision in South Bay United Pentecostal Church v Newsom. 141 S. Ct. 716, 720 (2021) (Kagan, J, dissenting) (“We have held time and again that the First Amendment demands ‘neutrality’ in actions affecting religion. A government cannot put limits on religious conduct if it ‘fail[s] to prohibit nonreligious conduct that endangers’ the government’s interest ‘in a similar or greater degree.’”) (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 543 (1993)).


274. Id. at 612–13.

275. See supra notes 270–74 and infra notes 276–80 and accompanying text, which illustrate precisely how the Court has creatively detoured around precisely that constraining norm, in order to uphold against constitutional challenge various sorts of government favor towards religion.

276. Lemon, 403 U.S. at 602.
effects. These results are welcome. The route to them was unfortunately circuitous, detouring around Lemon’s secularist master principle rather than rejecting it. The hodge-podge results are splayed across the pages of American Legion.

In 1993, in Lamb’s Chapel, the Court first turned to free speech doctrine to protect believers’ access to (in that case) public-school meeting spaces. The key constitutional norm was a ban on discrimination between religious speech and non-religious speech, at least with respect to “viewpoints” on the same “subject.” Rosenberger two years later continued this initiative by requiring a public university to treat a religious student newspaper the same as its “secular” counterparts were treated, at least when it came to funding. The Court has since sustained more overt governmental religiosity, such as legislative prayer, Ten Commandments plaques and crosses on public land, over strenuous objection by Justices keen to scrub government spaces of religion. But religion-friendly (or, as you please, less secularist) Justices bled religion out of these practices in order to save them. Religious monuments and the like survived because conservatives adopted secular characterizations of them, or by attributing to government an interest in some welcome secular effects of religion. Legislative prayer was said to “solemnize the occasion” or settle people down to serious business by a verbal formula which most would associate with a sober frame of mind. The Court upheld inanimate monuments by associating them, not with anything divine, but with our country’s formerly more religious character, or by saying that their surface religious connotations have been lost in the long march of secularism through American history.

278. See Lamb’s Chapel, 508 U.S. 384.
279. Id. at 393–94.
284. Town of Greece, 572 U.S. at 583.
285. See, e.g., Van Orden, 545 U.S. at 690 (“Of course, the Ten Commandments are religious—they were so viewed at their inception and so remain . . . But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate.”).
This is precisely the path to *American Legion*. Justice Alito wrote:

Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment. As our society becomes more and more religiously diverse, a community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage.\(^{286}\)

Alito approvingly cited Justice Brennan’s opinion in *Schempp*: “[The] government may originally have decreed a Sunday day of rest for the impermissible purpose of supporting religion but abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends.”\(^{287}\) Alito added that, with “sufficient time, religiously expressive monuments, symbols, and practices can become embedded features of a community’s landscape and identity. The community may come to value them without necessarily embracing their religious roots.”\(^{288}\)

To say that there is an Establishment Clause *crisis* would understate the matter. A Court majority now needs only to breathe heavily on this rotten door of doctrine to crash it in. The only way back to the Constitution’s original public meaning is an unequivocal rejection, not just of the *Lemon* test, but of the secularist principle which that test operationalizes. That is a step that constitutional conservatives have been unwilling to take.\(^{289}\)

The *American Legion* Court refused to apply *Lemon* because doing so would have put the Court at odds with the whole pre-1970 constitutional tradition.\(^{290}\) The Court came face to face in *American Legion* with the truth that *Lemon*’s secularizing impetus was ill-suited to the governance of (as Justice Douglas once wrote) a “religious people whose institutions

\(^{286}\) *Am. Legion*, 139 S. Ct. at 2083.


\(^{288}\) *Am. Legion*, 139 S. Ct. at 2084.

\(^{289}\) In *American Legion*, only Justice Thomas would have (in his words) “take[n] the logical next step and overrule[d] the *Lemon* test in all contexts.” *Id.* at 2097 (Thomas, J., concurring in the judgment). Justice Gorsuch seemed poised to do so; he described the “now shelved” *Lemon* test as a “misadventure” and said that the plurality had rightly repudiated it. *Id.* at 2101–02 (Gorsuch, J., concurring in the judgment).

\(^{290}\) *Id.* at 2081
presuppose a Supreme Being.”291 The Lemon test’s “shortcomings,” the Court wrote, could be traced to the:

great array of laws and practices [that] came to the Court, [as] it became more and more apparent that the Lemon test could not resolve them. It could not “explain the Establishment Clause’s tolerance, for example, of the prayers that open legislative meetings . . . certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving.”292

The Court’s conservatives in American Legion saw plainly what they had noted elsewhere when the Court upheld public religiosity (such as legislative prayer, Ten Commandments displays, and the like).293 Religion in America and in American constitutional law has long been an irreplaceable public as well as private good.294 The Founding is unfathomable without taking on board this commitment of those who wrote and those who later ratified the Constitution. Lemon is incompatible with our political and constitutional history. Anyone who is even a lukewarm originalist cannot subscribe to Lemon.

As a matter of historical fact, public religion was strategically essential to the Constitution’s successful operation. Public religion was comprised of two main interlocking and mutually reinforcing components. Neither was what might later be called a “civil religion,” that is, a synthesis of history, extant religious references, and hagiographic pictures of key political institutions, all meant to provide the polity with a sacred patina.295 James Madison expressed one of American public religion’s components succinctly in Federalist 55.296 “[T]here is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence.”297 America’s republican form

295. See infra text accompanying notes 296–311.
296. The Federalist No. 55 (James Madison).
297. Id.
of government “presupposes the existence of these qualities in a higher degree than any other form.” But, if free government depends upon an especially virtuous citizenry for its survival, how would the citizens—consistent with their eschewal of the chains of despotism—be made and kept virtuous?

According to John Adams, “religion and virtue” were the only foundations, not only of republicanism, “but of Social Felicity under all Governments and in all the Combinations of human Society.” Our first President said that of “all the dispositions and habits which lead to political prosperity, Religion and Morality are indispensable supports.” Washington added, in his Farewell Address: “And let us with caution indulge the supposition, that morality can be maintained without Religion. Whatever may be conceded of the influence of refined education on minds of peculiar structure; reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.”

Reverend Isaac Backus was perhaps the most influential member of the Protestant clergy during the Founding years. He opined that religion keeps alive the best sense of moral obligation . . . The fear and reverence of God and the terrors of eternity are the most powerful restraints upon the mind of men. And hence it is of special importance in a free government, the spirit of which being always friendly to the sacred rights of conscience; it will hold up the Gospel as the great rule of faith and practice.

Even the Founding era’s most prominent skeptic of revealed religion saw it as an essential asset to the polity. Thomas Jefferson said in 1781 that American liberty depended on a popular perception that it was the gift of God, and he thought it politically beneficial if Americans privately decided that there was “only one God, and he all perfect” and that there was a future state of rewards and punishments.

Probably the most perspicuous statement in early American history of this complex of ideas is in the Northwest Ordinance, a territorial

298.  Id.
300.  35 WRITINGS OF WASHINGTON 229 (United States George Washington Bicentennial Commission ed. 1940).
301.  Id.
302.  ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 353 (W.G. McLoughlin ed. 1968).
organizing act passed first by the transitional Confederation legislature and reiterated by Congress several times thereafter.\footnote{304} “Religion, Morality, knowledge, being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged.”\footnote{305} In other words, they \textit{are} necessary to both the public and personal flourishing.\footnote{306} Private virtue is essential to public well-being.\footnote{307} This organic act of territorial governance was not guilty of idle opining. To put its resources behind its thoughts, the national government reserved

\footnote{R.L. Moore and Isaac Kramnick, \textit{Godless Citizens in a Godly Republic}. Moore and Kramnick wrote:}

[Religious Americans] argue that they are uniquely equipped to bring moral principles to America’s public square. It’s a claim with a lineage stretching back to the country’s founders. Our forebears believed that the novel experiment of a democratic republic could not function without a consensus around moral principles rooted in theistic religion. Whatever their disagreements about the content of religion, they were united in their conviction that a heavenly Creator had laid down a plan for virtuous living which democratic citizens could discover by reason, or faith, or a combination of the two. Given this historically grounded belief—and it amounts to far more than a ceremonial deism, a phrase that would have meant nothing to our founders—it’s worth dwelling on the question of what exactly people who dismiss the idea of a heavenly Creator can offer a democratic society.


\footnote{307} The ubiquity of this conviction that personal piety and rectitude were necessary to the commonweal is demonstrated by a glance at the first constitutions of the thirteen original states. They are replete with unequivocal statements of the commitment. \textit{See I Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States} (Poore 2nd ed. 1972). This vital connection was buttressed by the widespread but not nearly ubiquitous belief that God’s Providence was such that the Almighty might punish the entire political community for the backsliding of many, or even just some—as the Israelites were often reminded. \textit{See Gerard V. Bradley, The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself, 37 Case W. Res. L. Rev. 674, 685 (1987).}
real estate in township then and thereafter being platted for settlement to schools and to churches.\textsuperscript{308}

Why, then, are conservatives unwilling to act boldly to take back this part of church-state constitutional law from judicial activists? Why do the Court’s conservatives evidently prefer a soft (or porous) secularism to originalism? Why do they not reject outright the latter-day privatization of religion?

There is a second vein of evidence running through American history that compounds this mysterious conservative reticence. In the beginning, American governments—federal, state, territorial—forthrightly affirmed the truths of natural religion: the “Laws of Nature and of Nature’s God” emboldened the revolutionaries in Philadelphia, as did their belief that everyone was “endowed by their Creator with certain unalienable Rights.”\textsuperscript{309} Before and after the Founding, civil governments in America affirmed truths such as God’s eternal existence and creation of all there is; God’s providential care for humankind, including promulgation of moral law for guidance of human affairs; and some form of afterlife in which the guilty suffered and the virtuous prospered, or what was often called, compactly, a “future state of rewards and punishments.”\textsuperscript{310}

Owen Anderson aptly wrote: “The United States was founded on natural religion.”\textsuperscript{311} In the Declaration of Independence, our Founders declared: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty, and the pursuit of happiness.”\textsuperscript{312} Nearly two centuries later, in \textit{School District of Abington Township v. Schempp}, the Supreme Court said that the “fact that the Founding Fathers believed devotedly that there was a God and the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself.”\textsuperscript{313}

\begin{footnotes}
\footnotetext[308]{1 Stat. 52 (1789).}
\footnotetext[309]{THE DECLARATION OF INDEPENDENCE (U.S. 1776).}
\footnotetext[311]{Owen Anderson, \textit{The First Amendment and Natural Religion, in The Cambridge Companion to the First Amendment and Religious Liberty} 15, 16 (Breidenbach & Anderson eds., 2020).}
\footnotetext[312]{Id.}
\footnotetext[313]{School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 213 (1963). Attorney General William Barr delivered a speech at the Notre Dame Law School on October 11, 2019, in which he gave voice to the perennial American tradition}
\end{footnotes}
Where public authority affirms that there is a God, as in the National Motto, the Pledge of Allegiance, and as Lincoln did in his Second Inaugural, lawmakers did not abandon a proper concern for the common good for evangelization or religious opining. If anyone today asserted that these affirmations lack a “secular” purpose, the Founders would be puzzled. They did not use the term “secular” when they talked about religion and the polity. For them, governmental care for the common good included care for religion as part of that common good, even as the distinctive beliefs and practices of the sundry particular churches and sects were considered (in our parlance more than theirs) to be “private.” If the Founders were pressed further to articulate this arrangement, they likely would have said that, while religion was undeniably a distinct and incommensurate part of human experience which could be distinguished from other human goods (such as life itself, knowledge, and morality), the common good of the political community included religion, which public authority had a limited but still important duty to foster. 314

Public hosannas did not drift away into the mists of American history with the Founders’ passing. The 1950s were as a matter of fact a time of profound ressourcement, a return to the religious sources of the republic evidenced chiefly by the resurgence of government affirmation of truths about divine matters accessible to, and affirmable on the basis of, unaided human reason. Notable examples of that revival included Congress’s addition in 1954 of “under God” to the Pledge of Allegiance and of thought about religion and our free republic, a tightly bound nest of convictions into which any originalist account of constitutional doctrine must coherently and comfortably fit. In a characteristic excerpt, Barr said:

From the Founding Era onward, there was strong consensus about the centrality of religious liberty in the United States. The imperative of protecting religious freedom was not just a nod in the direction of piety. It reflects the Framers’ belief that religion was indispensable to sustaining our free system of government . . . In short, in the Framers’ view, free government was only suitable and sustainable for a religious people – a people who recognized that there was a transcendent moral order antecedent to both the state and man-made law and who had the discipline to control themselves according to those enduring principles. As John Adams put it, “We have no government armed with the power which is capable of contending with human passions unbridled by morality and religion. Our Constitution was made only for a moral and religious people. It is wholly inadequate for the government of any other.”

William Barr, Attorney General, Remarks to the Law School and de Nicola Center for Ethics and Culture at the University of Notre Dame (Oct. 11, 2019).

314. See BRADLEY, supra note 294, at 7–21.
establishment of our national motto (“In God We Trust”) in 1956.315 These actions faithfully reflected the Founders’ worldview, with the important qualification that by the 1950s a broad Judeo-Christian ethic had supplanted the Founders’ more frankly Christian foundation. President-elect Dwight Eisenhower said, at the Waldorf Astoria hotel on December 22, 1952, that “our form of government . . . has no sense unless it is founded in a deeply felt religious faith, and I don’t care what it is. With us of course it is the Judeo-Christian concept but it must be a religion that all men are created equal.”316 Here Eisenhower echoed the Supreme Court declaration earlier that year that “[w]e are a religious people whose institutions presuppose a Supreme Being.”317

All these principles of natural religion were sharply contrasted by the Founders, and by generations following them, to the particularities of the various “sects.”318 Before and after the Founding, anyone could see that the various churches and religious groups were distinguished one from the other mainly by what each added to natural religion. Some of these additions were matters believed to be revealed. Others were humanly established conventions and rules, accoutrements of religious living, both solo and in community. One could and the Founders did contrast, therefore, “natural religion” with “revealed” and “positive” religion. The latter matters were vitally important to believers (including leading national political figures). Denominations often bitterly split over finer points of doctrine or worship, for instance.319

The Founders wisely judged that their polity could flourish without enforced unanimity about, or a top-down settlement of, these questions. The common good did not require, for example, government favor towards a particular form of liturgy. Nor did it necessitate authoritative adoption of any one church’s creed. Theologians might contend over the details of faith and worship. To the statesman, they could nevertheless be matters of opinion. The lawmaker labored under an authoritatively stipulated incompetence when it came to matters of religious doctrine, church discipline, modes of worship, and manner of a religious community’s internal governance. The truth or falsity of these matters, even recognizing

that they were the kinds of things that could be true or false, was strictly beyond the ken of public authority.

This was non-establishment.\textsuperscript{320} It is the meaning of the justly famous (because thematic of our constitutional settlement) \textit{Watson v. Jones} anthem: “The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”\textsuperscript{321} This mandate that government be neutral about doctrine, discipline, worship, and polity—and, in that manner, that it maintain a strict neutrality among the religions, thereby treating them equally—has not atrophied with time or evaporated with the proliferation of religious beliefs. It is still the cornerstone of church-state constitutional law, including the Establishment Clause.\textsuperscript{322}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{320} See \textsc{Gerard V. Bradley}, \textsc{Church-State Relationships in America} (1987); \textsc{Robert L. Cord}, \textsc{Separation of Church and State: Historical Fact and Current Fiction} (1988).
\item \textsuperscript{321} 80 U.S. 679, 728 (1871) (emphasis added). This passage indicates that the state’s incompetence is limited to matters or revealed and positive religion.
\item \textsuperscript{322} The line of successor cases to \textit{Watson v. Jones}, which is the line of “church autonomy” decisions (mostly about intra-communal property disputes), culminates in the Court’s most recent, \textit{Jones v. Wolf}, 443 U.S. 595 (1979). It is also the heart of Free Exercise doctrine. In \textit{Employment Division v. Smith}, the Supreme Court wrote that:

\begin{quote}
It would be true, we think (though no case of ours has involved the point), that a state would be “prohibiting the free exercise [of religion]” if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

It would doubtless be unconstitutional, for example, to ban the casting of “statues that are to be used for worship purposes,” or to prohibit bowing down before a golden calf.
\end{quote}

\textit{Smith}, 494 U.S. 872, 878–79 (1990). The \textit{Smith} Court did not use the original vocabulary—of doctrine, discipline, worship, church polity. Its holding nonetheless tracked closely the Founders’ stipulated incompetence. \textit{Smith} stands for the proposition that, where a government action is judged to depend upon—presuppose, imply—the lawmaker’s disapproval or opposition to a church’s manner of worship (to use the Court’s example), the lawmaker has violated the Free Exercise Clause. In none of these categories of church-state cases, however, does the constitutional abstinence necessarily breach the \textit{Lemon} secularist command that religion be private. Much of the impetus of the “church autonomy” holdings has been to keep courts (and other public authorities) from picking winners and losers within churches on any ground touching religion itself. Where states or the federal government have accepted the Court’s invitation in \textit{Smith} to exempt believers from burdens imposed by general laws, the rationale is that the excusing government entity is \textit{removing} some burden \textit{it} imposed on believers and thus re-introducing the “neutral” attitude proper to government, \textit{or} it is
\end{itemize}
\end{footnotesize}
No sitting Justice but one is on record as disagreeing with the Court’s declaration in 1947 that the “‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion . . . or prefer one religion over another.”\textsuperscript{323}

Several Supreme Court decisions have rested upon this core understanding of the Establishment Clause. \textit{Larson v Valente} is probably the most prominent of them.\textsuperscript{324} It held that the “clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”\textsuperscript{325} This norm of no-preference among the religions is often the basis of dissents by separationist stalwarts on the Court. Justice Kagan’s opinion in \textit{Town of Greece v. Galloway} is one recent example.\textsuperscript{326}

All of the present Justices hold, however, that there is \textit{more} to the doctrine of the Establishment Clause. For all of them, it is the original and still foundational neutrality about doctrine, discipline, worship and polity—\textit{plus}! All of them still hold that the “plus” includes a principled commitment to secularism, as the ellipsis in the \textit{Everson} quotation, which was filled with the words “aid all religions,” indicated.\textsuperscript{327}

\begin{quote}
controversial, arguably a violation precisely of the \textit{Lemon} requirement that government be “neutral” between religion and non-religion.
\end{quote}

\textsuperscript{323} Everson v. Bd. of Ed. of Ewing Township, 330 U.S. 1, 15 (1947). Justice Thomas joined opinions by Justice Scalia in which Scalia asserted that the Establishment Clause permits the government to promote religion over non-religion, and even to promote and prefer monotheism to non-monotheistic religions. \textit{See}, e.g., Lamb’s Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 401 (1993) (Scalia, J., concurring in the judgment) (religion in general); McCreary County v. ACLU of Kentucky, 545 U.S. 844, 899–900 (2005) (Scalia, J., dissenting) (monotheism). To my knowledge, Justice Thomas has not reasserted this position since 2005, despite a manifest willingness to write separately in defense of his view of the Establishment Clause. Whether he stands by the views Scalia asserted in these opinions the latest of which was penned 15 years ago is not entirely clear. In the remainder of my treatment of the sitting Justices, therefore, I qualifiedly include Justice Thomas among those who do not challenge \textit{Everson}’s master principle of secularism.

\textsuperscript{324} 456 U.S. 228 (1982).

\textsuperscript{325} \textit{Id.} at 244.

\textsuperscript{326} \textit{See} 572 U.S. 565 (2014).

\textsuperscript{327} Thus, the full quote: “The ‘establishment of religion’ clause of the First Amendment means at least this: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.” \textit{Everson}, 330 U.S. at 15 (1947).
This does not mean that there are no important differences among the Justices. In the last 50 years, however, only three Justices plainly called for a return to the original meaning: then Chief Justice Rehnquist in *Wallace v. Jaffree*,\(^{328}\) and Justices Scalia and Thomas in *Lamb’s Chapel* and *McCreary County*.\(^{329}\) Only Thomas remains on the Court. He has not revisited that declaration of support since 2005, notwithstanding his willingness to defy Establishment Clause conventions in his bold call to undo the “incorporation” effected by judicial fiat of the Court in the 1947 *Everson* case.\(^{330}\)

Thomas most recently has championed an “actual coercion” test as the sect-equality plus factor. Justice Thomas wrote in the Bladensburg Cross case that the sort of “coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty,” citing a dissenting opinion by Justice Scalia in *Lee v. Weisman*, from 1992.\(^{331}\)

In the face of powerful historical evidence of the Establishment Clause’s original public meaning, and in light of the whole Court’s embrace of that original meaning, why has not so much felt dissatisfaction with the status quo led at least five Justices to simply abandon *Lemon*? Why do the Court’s constitutional conservatives cling to the “plus,” especially when they cannot agree on what the “plus” factor is, and can scarcely conceal their contempt for the results the “plus” hath wrought?

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328. 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (“The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion.”).

329. See *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring in the judgment); see also supra note 323.

330. See, e.g., *Town of Greece*, 572 U.S. at 604. (Thomas, J., concurring in part and concurring in the judgment) (explaining that the text and history of the Establishment Clause resist incorporation against the states). There is a case to be made for disincorporation, along the lines indicated by Justice Thomas. It is nonetheless a position destined to attract no additional support.

331. *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2096 (2019) (Thomas, J., concurring in the judgment). Thomas’s position is mistaken. A legal arrangement in which, say, only the Anglican Church could legally incorporate and where its marriages were automatically registered as public acts, and where its vestrymen served by dint of ecclesial office as local distributors of aid to the poor, would surely be an “establishment,” though its privileged position would be “coercive” in only the very attenuated sense that any legal arrangement does a certain amount of line-drawing (inclusion and exclusion), which in turn is backed finally by coercive sanctions. Such an arrangement need not involve any “coercion” of belief or of financial support of anyone disinclined to give it.
The distinction between natural and revealed religion that underwrites the original understanding is scarcely a challenge to grasp, even for an unbeliever. It is the difference between those propositions about divine realities that can be affirmed by unaided human reason, and those that can be affirmed only by aid of revelation, including the information transmitted in texts regarded by believers as divinely inspired. Incorporating the distinction into a working judicial repertoire, however, is an additional task, a job that runs against the grain of contemporary constitutional conservatism. For doing so depends upon a robust willingness to not only reject secularism. It depends, too, upon an embrace of critical reason, along with a willingness to declare that unaided human reason can affirm as true certain propositions about divine realities. But conservatives seem no more willing to reintroduce, and then to rely upon, this crucial distinction than are even the most secular-minded members of the Court.

Why not? One reason is likely that these Justices have been ill-served by scholarship about religion, the Founding, and the First Amendment. Most of the many historical essays offered by members of the Court, starting in *Everson* in 1947, have peddled an imagined past suited to current secularist preoccupations. Much Establishment Clause scholarship bears the same defect. There are many examples of sound judicial essays, however, most notably including Justice Rehnquist’s dissenting opinion in *Wallace v. Jaffree*. The historical fictions produced by Justices Black, Rutledge, and Frankfurter in *Everson* were powerfully rebutted within a year by a learned historical brief filed for the religion-permissive school district, in the *McCollum* case. Much equally sound scholarship on religion and the Founding has long been available, too. Any Justice who clings to a secularized narrative about the Establishment Clause does so in the face of compelling contrary evidence.

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334. See 472 U.S. at 91 (Rehnquist, J., dissenting).


336. See, e.g., BRADLEY, supra note 320; CORD, supra note 320.

337. Indeed, the Court’s June 30, 2020 opinion in *Espinoza v. Montana*, where a majority comprised of the Chief Justice and Justices Thomas, Alito, Gorsuch,
and Kavanaugh invalidated the operation of Montana’s “Blaine Amendment,” indicates ignorance of this indispensable distinction. The Chief Justice wrote in the opening paragraph of the Court’s opinion that the Montana constitutional provision barred public aid to any school “controlled . . . by any ‘church, sect, or denomination’” (emphasis added). Neither the word “religion” nor cognates (such as “religious”) appear anywhere in the text of the state law. The Court and each of the Justices who wrote separately nonetheless treated the text as if it said “religion”, instead of “church, sect, or denomination.” “Religion” and “denomination” evidently are synonyms, as far as the Court is concerned. In fact, they are not. And they surely were not used as synonyms by those 19th century public figures whose actions the various Justices examined at length in their Espinoza opinions.

In general (and here quoting from historian Elwyn Smith’s fine work, Religious Liberty in the United States), “sect” was then predominantly used with respect to the various divisions within Christianity. It referred to “the spirit of quarrelsomeness and schism, precianism in theology, and refusal to collaborate in common evangelical enterprises.” “Sect” was almost synonymous with “denomination,” and it indicated the differences between, say, Presbyterians and Methodists. Any doubt that Catholicism was included within language like Montana’s—doubt arising from, among other sources, that Church’s refusal to consider itself a “sect” or a “denomination”—was removed by including the word “church.”

Saying that a school controlled” by a “sect,” “denomination,” or “church” was ineligible for state aid did not, therefore, amount to saying—as the Espinoza Justices assumed that it did—that “religious” or “religiously-affiliated” schools were ineligible. Indeed, one intended effect of “Blaine Amendments” such as Montana’s was to stymie aid to Catholic schools (which were indeed “controlled” by that “church”) while permitting it to “non-denominational” (that is: Protestant) private schools “controlled” by a board of directors which probably included a few ministers and some others among the “best men” of the locale. The non-denominationally Protestant public schools carried on unmolested by Blaine Amendments, too.

A glance at the proposed Blaine Amendment to the national Constitution confirms all this. The original version introduced by Congressman James G. Blaine in the House in December 1875 stated that “no money raised by taxation in any state for the support of any public schools or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect.” [Emphasis added here, and hereafter.] The version passed in the House of Representatives (by a 180–7 margin, with 98 abstentions) stated in relevant part: “under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught”. The final sentence of this version stipulated, however, that “[t]his article shall not be construed to prohibit the reading of the bible in any school or institution.”
Another part of any answer to that question lies in conventional legal reasoning as generally practiced by the Court’s conservatives. This defining commitment makes them averse to a large-caliber about-face in an area so important as that concerning church and state. The conservatives’ indifference to the question of constitutional personhood for the unborn is another example of this same reticence. So is the fact that there is no appetite among the Court’s conservatives to revisit the basic holding in Obergefell, notwithstanding their loud protests in that case that the majority’s decision altogether lacked the indicia of constitutional law.

Still another part of an answer to the mystery of conservative reluctance to embrace originalism and the Establishment Clause is that applying the original meaning cuts a certain equality among religions. Among the matters that distinguish the various religious groups are their claims about natural religion. The religions differ in sometimes dramatic ways about what humans can reasonably affirm about God by dint of reason, and what can only be known through revelation. Religious skeptics and atheists fall outside the margins. “Skeptics” characteristically hold that no putative truth about divine things can confidently be asserted. The latter typically hold that we can know that there is no God. This pluralism blocks judicial resort to a least common denominator or a hypothesized Esperanto as the measure of constitutionally required “neutrality” among the religions. For anyone can see that the only way to avoid contradicting one or more of these viewpoints is to say nothing at all about divine things. Hence, the religiously bare public square.

The constitutionally required “neutrality” is a rather critical kind. It involves critical reasoning about which propositions about religious matters human persons can affirm without the aid of revelation or authoritative religious texts, and which propositions can only be affirmed

A different version barely failed to attract the necessary two-thirds votes in the Senate. (The tally was 28–16 in favor.) New Jersey Senator Freylinghuysen explained how the distinction which the Court missed was central to the whole enterprise:

Institutions supported by the money of all persuasions...are not to be made schools for teaching presbyterianism, or catholicism, Unitarianism, or Methodism, or infidelity, or atheism, and this article says so. But this article goes no further. There is nothing in it that prohibits religion as distinguished from the particular creeds or tenants of religious and anti-religious sects and denominations being taught anywhere.

A broad national movement against “sectarianism” in education was accompanied by a re-emphasis upon the essential role that religion played in any sound educational program.
(or denied) based upon access to revelation. There is no evident interest in this exercise among the courts’ constitutional conservatives.

There is one more possible basis for conservatives’ reluctance to overthrow Lemon’s privatization project. It is the thought that, notwithstanding the carnivalesque results which that project so often produces, it might be sound: religion is and ought to be private. The main supposition here would be that religion is really a matter of individual and group “identity.” The Supreme Court began installing this thought in our fundamental law more than a half-century ago. It found anthem-like expression in the Mystery Passage. Now religious liberty is in peril of collapsing into an aspect of the single constitutional liberty to define oneself and one’s universe. The question is whether constitutional conservatives will stymie its progress before our culture is “all one thing.” Originalism, in partnership with critical reasoning about divine realities, provides the tools needed to do so.338

VI. JUSTICE SCALIA’S PREDILECTIONS

Constitutional conservatism was conceived under duress of what was diagnosed as Warren- and early Burger-era activism.339 Originalism is part of that reaction. But it is quite distinct from conservatism’s characteristic moral abstinence. The two have long existed in tension. The abstinence lately eclipsed the originalism. It is time to consider the judicial approach of the last half-century’s greatest Supreme Court Justice. Antonin Scalia maintained a distinctive and immensely influential version of contemporary constitutional conservatism. This Part of the Article takes a critical look at it.

338. It is true that religions include subjective experiences, as well as stories and prescriptions that are historical and contingent. But religions are more. They are more or less reasonable accounts of reality in all of its breadth, including its furthest reaches, visible and invisible. The indispensable criterion of a religion’s value is whether it is true. The central value of religious liberty is the protection it offers to those who seek the truth about the cosmos and who resolve to live their lives in accord with what they believe to be the truth about all that there is. Sever it from this fountainhead in the search for the truth about all that there is, and religious liberty simply becomes something radically different than it was for the Founders, and for the many generations of Americans thereafter who held the faith of the fathers.

“I take the need for theoretical legitimacy seriously,” Scalia wrote in a 1989 law review article, explaining why he approached constitutional law the way that he did. The “main danger in judicial interpretation of the Constitution,” he asserted, is “that the judges will mistake their own predilections for the law.” We have no reason to consider Scalia’s usage to be anything but standard: “predilection” means predisposition, what the Oxford-English Dictionary defines as “a preference or liking for something; a proclivity; the fact of having such a liking or preference.” It is either close to or the same thing that Holmes famously described as a man’s “can’t helps.” Note that “predilections” so understood make no claim to be true, or to be sound or valid in any useful sense of those evaluative terms. They are rather facts about certain people; in this instance, about judges. We have no reason to doubt, though, that what Scalia personally held about value and morality, he held to be true. When presented to the mind of Scalia, the Article III judge in a constitutional case, however, even those truths would count for him as suspect biases— as his “predilections”—against which the strictures of his constitutional conservatism equally applied.

In the same essay, Justice Scalia expressed another worry about the legitimacy of judicial review. This one he described as “central.” It was “the perception that the Constitution, though it has an effect superior to other laws, is in its nature the sort of ‘law’ that is the business of the courts—an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.” This second worry leads straightaway to judicial interpretation of the Constitution by and through conventional legal reasoning. To highlight the peculiar temptations of judging in constitutional cases, Scalia wrote that “the main danger in judicial interpretation of the Constitution—or, for that matter, in

340. Scalia, supra note 27, at 862.
341. Id. at 863.
344. Scalia, supra note 27, at 854.
judicial interpretation of any law—is that the judges will mistake their own predilections for the law.”

Scalia’s “main” worry comes into clearer view when it is silhouetted against an appeal to evolving societal notions of morality. Scalia asserted that “nonoriginalism” like Brennan’s is “incompatib[le] with the very principle that legitimizes judicial review of constitutionality.”

“[E]ven if one assumes (as many nonoriginalists do not even bother to do) that the Constitution was originally meant to expound evolving rather than permanent values,” Scalia added, “I see no basis for believing that supervision of the evolution would have been committed to the courts.”

Scalia offered two reasons to welcome the absence of a basis. One is that elected legislatures are better able to enact “current values” into law than are judges. The other reason is that it forestalls judicial assumption of an always-fraught task. “It is very difficult for a person to discern a difference between those political values that he personally thinks most important, and those political values that are ‘fundamental to our society,’” he wrote, referring to one badge of judicial activism, namely, judges’ identification, not of their own, but of the system’s “fundamental” values. Justice Scalia emphasized that “[a]voiding this error is the

345. Id. at 863 (emphasis added). Robert Bork expressed a very similar worry in a 1982 National Review essay: “The truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else.” The precise meaning intended by Bork could be debated. But his comments provoke wonder about whether only judges are so prone to this crude skepticism (even solipsism), or whether other lawmakers—if not everyone—are as well. Is genuine moral knowledge (as opposed to “can’t helps”) possible for anyone? The central position of constitutional conservatives seems to be that, as an axiom of constitutional if not of all legal reasoning, one should presume that skepticism is inescapably the case. To finish off their point about “legitimacy,” conservatives then typically rely upon a crude theory of democracy under our Constitution: popular and legislative majorities have plenary authority to do something which judges should never do, namely, enact their “can’t helps” into law and impose them upon everybody else, save where the Constitution’s plain meaning denies them that authority.


347. Scalia, supra note 27, at 854.

348. Id. at 862.

349. Id.

350. Id. at 863. “If the Constitution were not that sort of a ‘law,’ but a novel invitation to apply current societal values, what reason would there be to believe
hardest part of being a conscientious judge.”351 He cautioned that “[n]onoriginalism, which under one or another formulation invokes ‘fundamental values’ as the touchstone of constitutionality, plays precisely to this weakness.”352

Justice Scalia’s contrast between what he calls “permanent” and “evolving” values invites a close look. The words he used could by themselves bear a reading which aligns his thought closely with the theses of this Article, namely, that critically justified moral and metaphysical truths (permanent values?) are part of the Constitution, and these vital elements are not to be confused with “evolving” or “current” values (which are in any event facts about social consensus or convention). On this view, Scalia might be saying that, although the engagement may invariably be perilous and must always be done with exquisite care, judges are sometimes obliged to engage critically with the normative world outside the Constitution, if they are to faithfully apply the Constitution at all. In other words, Scalia might be saying what this Article maintains, which is that the right legal answer to a constitutional question sometimes depends upon the right philosophical answer to a question raised but not resolved by the constitutional text or structure or the history of its adoption. The first five parts of this Article supply examples of this recurring challenge.

In fact, this is not what Justice Scalia is saying. His positions on the examples explored in the first five parts of this Article show that it is not. It is apparent, too, from the context of his remarks in “Lesser Evil” that he is referring to a different dyad. He has in mind the contrast between those value judgments which were included in the Constitution and, for that reason, count as “permanent,” and those which are not in the Constitution but which have made their way into people’s minds today. It is evident, too, that the “evolution” Scalia pictures pertains to popular understandings of certain values, notions that may be reflected in legislation so long as they do not transgress the “permanent”—that is, fixed, settled, established minimum—meaning of them in the Constitution.353
This usage is confirmed by how Scalia wrote in 1989 about one of the most contentious sites of “evolving” constitutional jurisprudence. He wrote that one could say “it was originally intended that the cruel and unusual punishment clause would have an evolving content—that ‘cruel and unusual’ originally meant ‘cruel and unusual for the age in question.’”\(^{354}\) Scalia contrasted this reference to conventional moral convictions today, to “cruel and unusual in 1791,” another reference to convention or consensus, this time to what the ratifying generation as a matter of fact held.\(^{355}\)

Justice Scalia’s “originalism” is secondary to his worry about “predilections” mistaken by judges for the law. His originalism is the best suited among available imperfect options to avoid “aggravat[ing] the most significant weakness of the system of judicial review.”\(^{356}\) This judicial temptation to import the judge’s predilections into constitutional adjudication is so strong and pervasive, and threatens constitutional wounds so serious, that protecting against it is the great desideratum of any protocol for doing judicial review.\(^{357}\) The heart of Scalia’s constitutional conservatism is thus a via negativa. It is somehow

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354. Scalia, supra note 27, at 861.
355. Id. Scalia opined further that “one must not only say this but demonstrate it to be so on the basis of some textual or historical evidence.” Id. at 862. His judgment: “I know of no historical evidence for that meaning.” Id. He concluded his argument with a reductio, the force of which depends upon the correctness of the value-free judicial methodology the reductio is meant to support: if one is “willing simply to posit such an intent for the ‘cruel and unusual punishment’ clause, why not for the due process clause, the equal protection clause, the privileges and immunity clause, etc.?” Id. I do not know whether the reductio is circular, but it is on its face unpersuasive, given the presence of the term “unusual” in the Eighth Amendment.
356. Id. at 863.
357. I do not pursue here deeper potential sources of the Justice’s constitutional conservatism in, for example, his occasional remarks on democratic theory, see, e.g., Antonin Scalia, Of Democracy, Morality and the Majority, Address at Gregorian University (May 2, 1996), in 26 ORIGINS 82 (1996), or in the “Legal Process” thought that was prevalent at Harvard Law School when he studied there.
inoculating judicial review against the “inevitable tendency of judges to think that the law is what they would like it to be.” 358 The possibility that the Constitution depends for its faithful interpretation upon the willingness of the interpreter to identify moral and metaphysical truths not contained within it is excluded, it seems, by an overwhelming commitment to protecting against this mortal sin.

The architecture of Scalia’s constitutional project is designed to avoid violating this prime directive prohibiting resort to critical truth for fear that permission will smuggle in the judge’s predilections. Judicial review is conventional legal reasoning made impermeable, so far as it is humanly possible to do, to moral and metaphysical truth. Constitutional conservatives would erect a series of concentric hardened barricades—reinforcing prophylaxis, if you will—between judges’ “predilections” and their legal decisions, to make the cardinal error to which judicial review is susceptible practically impossible to commit.

One obvious problem with this way of thinking is that it protects so single-mindedly against getting the Constitution wrong that the possibility of getting it right disappears from view. Another problem is that the actual Constitution is not even in the picture. Scalia’s arguments about judging and judges’ temptations have no tendency to establish what the Constitution says, or even how it ought to be interpreted. They pertain to what a judge who deploys lawyerly skills, and who steers a wide berth around his or her “predilections” (including what the judge holds critically to be true about justice and morality), can within these limitations then say about what the Constitution means. But this opens up a gap, and possibly a very large one, between what the Constitution rightly interpreted means and what the judiciary can say that it means.

Justice Scalia from time to time lamented, often pungently but no less correctly, the baneful role that the progressive ideology embedded in elite legal opinion plays today by dint of judicial Lochnerizing. He was right about the effect, if not entirely about the extent, of the Lochnerizing. Were the Constitution being written today, that fact about elite lawyers’ values and assumptions would rightly feature in any discussion of how much authority to assign to the judiciary—just as it is impossible to understand the debates in Philadelphia about forming our Constitution, for instance, or its critical exposition and defense in The Federalist, without considering the Founders’ frank estimations of the character, motives, and opinions of various cohorts in their society as prospective sharers in political authority. But Scalia’s often sound criticisms of judicial activism today do not affect what the document actually, “originally” says and meant.

358. Scalia, supra note 27, at 864.
There is some historical evidence that the Bill of Rights was originally conceived to be a statement of principles to anchor a political culture and to rally a populace, as much or more than it was expected to be a legal instrument in court. There it might prove in any event to be a “parchment barrier.” William Nelson, America’s foremost historian of the Fourteenth Amendment’s adoption, wrote that Congress and not the Courts would possess primary jurisdiction to enforce that amendment. He explained that “[t]he Fourteenth Amendment was understood less as a legal instrument to be elaborated in the courts than as a peace treaty to be administered by Congress in order to secure the fruits” of victory in the Civil War.359 Indeed, all three Civil War amendments expressly confer the power to enforce them upon Congress.360 Unsurprisingly, then, it is a late-20th century innovation to select Supreme Court Justices predominantly from lower courts, based upon an apparent (or claimed) prowess as an impartial legal analyst, one who just calls balls and strikes. Before then, it seems, a grounding in broader constitutional principles and a career in public life outside the courts was the most desirable set of qualifications for Justices. Of the five men who were appointed Chief Justice of the United States in the 20th century before 1970, for example, only one—Harlan Fisk Stone—was more or less a career jurist. The others were all public men who had held a variety of elected and appointed political offices. One (Taft) had been President. Another (Hughes) ran for that office. A third (Warren) unsuccessfully ran for Vice-President.

Justice Scalia maintained that judges’ supreme prerogative over constitutional interpretation depended upon their lawyerly skills, and that the Constitution’s meaning is (must be?) ascertainable by conventional legal reasoning. (After all, he described “predilections” as great temptation in “judicial interpretation of any law.”)361 But this is to put the cart before the horse. The more apt entailment of Justice Scalia’s worries about judges’ predilections is not that constitutional law be made impervious to true value but that, if the judiciary is ill-suited to partner with moral and metaphysical truth, then interpreting the Constitution is a job which requires judges to partner with institutions that are. To reason as Scalia did is to amputate parts of the Constitution, supposing them to be potential sites of future infection by judicial predilections, before getting down to the business of what the Constitution actually means.

360. U.S. Const. amend. XIII, XIV, XV.
361. Scalia, supra note 27, at 863 (emphasis added).
Scalia’s concerns are themselves contingent, time-bound. Where constitution-writers and jurists inhabited a unified moral and religious culture which they regarded as aligned with moral and metaphysical truth, it is scarcely possible to imagine them keeping every man’s “predilections” quarantined from constitutional law. Indeed, the “predilections” worry seems to be rooted in the mid-20th century worries about moral skepticism, or the onset of moral pluralism, or both. Contemporary constitutional conservatism might be an artifact of the late-1960s social revolution, a needed course correction but not an enduring interpretive philosophy. It is easy to reconstruct the strategic thinking likely at work then: if constitutional law were opened up to competition for dominance by the various moral philosophies round and about, the winning one would surely be that affirmed by those who gave constitutional law Roe v. Wade. The only available way to stymie further advances of that sort would be to found judicial review on distinctively, and relentlessly, non-moral grounds. The argument here is that, even if this conservative strategy worked for a while, it no longer does. Or can.

The Founders could scarcely have imagined the constitutional law and the judiciary that we now have. No one can say with confidence what the Founders would have written into the Constitution if they had anticipated not only 21st century lawyers’ cosmopolitan values but, more fundamentally, the incorporation of the Bill of Rights and the judicial supremacy doctrines ratified in Cooper v. Aaron. It is nonetheless a kind of judicial activism to read the Constitution today as if it was written with William Brennan or Harry Blackmun in mind. When a longer view of the Court and its constitutional handiwork becomes possible, it would be no surprise if contemporary constitutional conservatism were judged to be an honest, and substantially effective, response to the depredations of activist judges in the last third of the 20th century. No less, but no more, than that.

CONCLUSION

The Mystery Passage is not yet the “all one thing” of Americans’ constitutional liberty. Its progress towards hegemony has nonetheless been breathtaking, as the story recounted here reveals. The tactical maneuvers by which the new conception of freedom has taken hold of our civil liberties corpus vary. Looking at that question strategically, though, shows how the subjectivism of the Mystery Passage insinuated itself like a Trojan Horse into the nested concepts and accumulated authorities defining

362. 358 U.S. 1, 18 (1958) (declaring “the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution”).
important civil rights and liberties. Once inserted, the foreign body of thought colonized, and then finally redefined its traditional adversary. The effect was Copernican: authoritative texts took on a revolutionary meaning, once the individual’s psyche displaced “nature and nature’s God” at the center of the universe. This has been the Mystery Passage’s *modus operandi* especially with matters concerning marriage and the family, with religion, and with the religious liberty entailed by the absorption of religion into the contemporary identity project.

The protagonist of American constitutional law on civil liberties from World War II up to and through the 1960s was the non-conformist, the lonely dissenter, the oddball. This cast of characters started with Jehovah’s Witnesses, when they conscientiously refused to salute our nation’s flag.363 It included thereafter risqué literati, sundry bohemians, communists, avant-garde movie directors, atheists, pornographers, libertines—square pegs all, discomfited by a rigid society’s set menu of round holes. Even so: the prevailing narrative in civil liberties constitutional law contained fixed moral reference points. The dominant theme was probably a “marketplace of ideas,” prized as the best path to identifying the truth.364 The discontented protagonists often secured a little more space to be themselves. There was no question of redesigning the world to fit their peculiarities.

William Brennan was probably this motley crew’s greatest champion on the Supreme Court.365 It is one of the era’s greater ironies that these alleged outcasts captured the “heart of liberty” when three Justices appointed by Republican presidents authored the Mystery Passage in 1992.366


Now the tables are turned. The great dissenters from public orthodoxy lately are Christian workers such as Jack Phillips of Masterpiece Cakeshop, and high-school girls who do not want to shower in the company of members of the opposite sex. They do not fit into society’s newest molds. Their recalcitrance is not labelled subversive or perverted, as was the non-conformity of the beats and strippers. It is rather that they are intolerant, bigots. They create spaces which are unsafe. These persons’ evident moral disagreement with another’s choices stigmatizes and demeans not only themselves (as hateful), but the other as well: those who choose what until just a short time ago was a legally prohibited immorality, or assert as an existential inevitability what was until yesterday an unthinkable metaphysical impossibility. Laws which embody that moral disapproval (like those failing to civilly recognize same-sex “marriages”), “put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied,” according to the Obergefell Court.

The Mystery Passage promises a beguiling individual autonomy and authenticity. It eliminates transcendent sources of human meaning and value. The only remaining source of meaning and value is the solitary self, at least in America where there is no real chance that the nation or the Volk or some other collective could become an idol. What makes any worldview a valuable exercise of the new “liberty” is precisely that it is really (deeply, truly) mine, or yours. Here, the lonely soul stands before the cosmos, seeking meaning in it. Or, more exactly, ascribing meaning to it.

Except that the cosmos can be stubborn. The real world can mercilessly contradict one’s imagined alternative to it. Sometimes, it blocks effective access to the “identity” one “presents.” One variable that can be controlled and harnessed to the project of sovereign self-definition, though, is the outward behavior and manifest attitudes of other people. They might adversely judge, and maybe even “stigmatize,” the “meaning” one distills from sundry “experiences.” They might even balk at treating Anthony Stephens as if he is really Aimee Stephens.

In Obergefell v Hodges, the Supreme Court fully weaponized the anxious solipsist’s distress against the pervasive threat of being made to “feel different”; that is, to feel bad or insecure about one’s “identity.” In an opinion whose justificatory passages were Mystery Passage all the way

367. Justice Alito (joined by Justices Scalia and Thomas) wrote in his Obergefell dissent that the majority’s decision would “be used to vilify Americans who are unwilling to assent to the new orthodoxy.” Obergefell v. Hodges, 576 U.S., 644, 741 (2015) (Alito, J., dissenting).
368. Id. at 672.
down, the Supreme Court prescribed marriage as salve for the sores of self-definition by dead reckoning. “Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.”

Then the Justices conscripted the community and its law to reassure the “fear[ful]” couple. “The necessary consequence” of traditional marriage laws, the Court alleged, “is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied.” These laws also “harm and humiliate the children of same-sex couples.” “Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser.”

This way of thinking about civil liberties, moral reality, cultural norms, and personal well-being had roots going back decades. There were several Supreme Court opinions during the 1960s which anticipated the subjectivist turn, though nowhere did the Court crisply articulate it. The Court began early in that decade to quite consciously recast religion as a personal spiritual brand or anthem of communal identity, or both. That religions are actually more or less adequate accounts of all that there is, in its furthest reaches, visible and invisible, was by then as far from the Court’s minds as Pluto is from Washington, D.C. Instead, the Court came to think of religion as a kind of existentialist longing for depth of experience, as the closest thing to “truth” humankind could expect to attain. Morality was already non-cognitive (a matter of preference and revulsion or offense), and thus subjective. The difference between an individual’s “can’t helps” and a social majority’s “moral disapproval” was just in the numbers: all this “morality” amounted rather to reports about emotion, feeling, intuition, writ large or writ small.

It is anyone’s guess whether, according to some hypothesized metric of freedom as the legal liberty to do as one chooses, Americans now are freer than they were in, say, 1959. After all, the demands of conforming one’s own conduct and manifest attitudes to the sundry “identities” of others are more than considerable. Whether Americans today are truly better off depends entirely on what one thinks is the truth about being better; that is, more good. If the truth is that morality is subjective and that human well-being is a matter of actualizing some real “me” deep down

369. Id. at 667.
370. Id. at 672.
371. Id. at 646.
372. See Bradley, supra note 318, at 443–50.
inside, then the Mystery Passage’s ascendency could be good news indeed. But what if instead the alluring “liberty” of self-creation is just a path down into a rabbit hole of inscrutable psychological and emotional detritus?

What if it the truth is that the constitutive elements of human flourishing are objective goods, including life, friendship, marriage, religion, and that there are moral norms which are true for everyone? Then the other “liberty” described in the Introduction to this Article—genuine human fulfillment by and through free choices, settling one’s character as good or bad according to what is chosen—is indispensable to personal well-being.

That liberty is also essential to social cooperation for the common good. Where personal liberty is conceptualized in light of true human goods, a genuine polity-wide common good is easily understood and practically attainable. Law in this understanding of moral reality is the ligament of solidarity. It supplies the pathways toward free cooperation for everyone’s true good. Where human goods are objective, anyone’s fair pursuit of the good naturally extends to helping others to pursue that same (true) good (for them). Then it really is the case, as the Founders saw clearly, that private virtue and public good are intertwined, and mutually supportive.

The Mystery Passage entails a gross opposition between private well-being and public prosperity. Because no society affords persons an unlimited liberty to do as they wish, the Mystery Passage puts individual fulfillment on a crash course with legally specified cooperation for common benefit. What is obviously missing from the Mystery Passage, in other words, is a morally satisfying illumination of the forbearance, restraint, and conformity that constitute responsible living in society. Where fulfillment is deemed to be a matter of individuality, what is the answer to this compelling question: How is it good for me to forgo my own preferred course of action for the sake of others? Where the good just is the liberty to inhabit a world of one’s choosing, what meaning and value can any “common good” possess?

In the Mystery Passage’s Hobbesian world, legal constraints cannot be linked to, or considered to be continuous with, private virtue, for the simple reason that persons’ conceptions of well-being are many and random. The demands of living together in political society are singular and unified. These demands are likely to be experienced, then, not as the reasonable requirements of free and fair cooperation among persons for the common good. They are instead destined to be felt as brute limitation. Legal constraints in the Court’s current Hobbesian social world have no internal guidance to avoid being understood, received, and experienced as
shackles, fetters, and gross imposition. In this way, we are all liable to feel in public life like round pegs being hammered into square holes.

Two radically different social worlds now occupy the same territory. Each requires a culture and law suited to it. Americans’ house is divided, and it cannot long persist in that condition. Save for the possibility of living incompatibly within one’s own mind, or within an insular community willing to live apart, our country will become all one thing or all the other.